
No. 21-3494

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

STATES OF MISSOURI, ARIZONA, MONTANA, NEBRASKA, ARKANSAS, IOWA, NORTH
DAKOTA, SOUTH DAKOTA, ALASKA, NEW HAMPSHIRE, WYOMING, AAI, INC.,
DOOLITTLE TRAILER MANUFACTURING, INC., CHRISTIAN EMPLOYERS ALLIANCE,
SIOUX FALLS CATHOLIC SCHOOLS D/B/A BISHOP O’GORMAN CATHOLIC SCHOOLS,
AND HOME SCHOOL LEGAL DEFENSE ASSOCIATION, INC.,
Petitioners,

v.

JOSEPH R. BIDEN, JR., *et al.*,
Respondents.

**MOTION FOR EXPEDITED BRIEFING AND CONSIDERATION OF
PETITIONERS’ MOTION FOR STAY OF EMERGENCY TEMPORARY
STANDARD PENDING JUDICIAL REVIEW AND FOR TEMPORARY
ADMINISTRATIVE STAY**

Petitioners, the States of Missouri, Arizona, Montana, Nebraska, Arkansas, Iowa, North Dakota, South Dakota, Alaska, New Hampshire, and Wyoming; and AAI, Inc., Doolittle Trailer Manufacturing, Inc., Christian Employers Alliance, Sioux Falls Catholic Schools d/b/a Bishop O’Gorman Catholic Schools, and Home School Legal Defense Association, Inc., respectfully request that this Court grant expedited briefing and consideration of their Motion for Stay of Temporary Emergency Standard Pending Judicial Review and Motion for Temporary Administrative Stay, filed November 5, 2021. In support, Petitioners state as follows:

PROCEDURAL BACKGROUND

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published its “emergency temporary standard” (ETS) in the Federal Register, 86 Fed. Reg. 61,402 *et seq.*, requiring employers with 100 or more employees to mandate COVID-19 vaccination for all employees or else require intrusive weekly testing, which may be at the employee’s expense. *See id.* By OSHA’s estimate, this order affects “two-thirds of the nation’s private-sector workforce.” 86 Fed. Reg. 61,512.

The same day, November 5, 2021, Petitioners herein filed their Motion for Stay of Emergency Temporary Standard Pending Judicial Review and for Temporary Administrative Stay (“Stay Motion”), requesting this Court to enter a

stay of the ETS pending resolution of this case on the merits, and asking the Court to enter a temporary administrative stay to preserve the status quo while it considers Petitioners' stay motion. *See, e.g.*, 29 U.S.C. § 655(f) (authorizing the Court of Appeals to stay an ETS pending judicial review); *Taylor Diving & Salvage Co. v. U.S. Dep't of Labor*, 537 F.2d 819, 820 n.4 (5th Cir. 1976) (noting that the Court of Appeals had "granted a temporary stay" of an ETS "to permit full consideration" of the motion to stay). In addition, because Petitioners face imminent irreparable injury from the ETS, Petitioners requested that this Court grant "expedit[ed] briefing on the stay motion." Stay Motion, at 23.

Also on November 5, 2021, the undersigned counsel reached out to Respondents' counsel three times at their designated email for service of legal challenges to the ETS, zzSOL-Covid19-ETS@dol.gov, and requested their consent to expedited briefing and consideration of the Stay Motion. To date, the undersigned counsel has received no response to these three inquiries.

ARGUMENT

The Court should grant expedited consideration of Petitioners' Stay Motion, enter a temporary administrative stay, and order expedited briefing to complete briefing on the stay motion by Thursday, November 11, 2021, in order to permit a prompt ruling on the stay motion. Petitioners respectfully propose that the Court order Respondents to file their Response to Petitioner's stay motion by Tuesday,

November 9, 2021, and Respondents to file their Reply by Thursday, November 11, 2021, to permit the Court to rule as soon as possible after completion of briefing.

On November 6, 2021, the Fifth Circuit, facing a parallel motion to stay the ETS filed by private employers on November 5, entered a temporary stay and ordered expedited briefing on the stay motion, with OSHA’s brief responding to the stay motion due on November 8, and Petitioners’ reply due on November 9. *See* Order in No. 21-60845 (5th Cir. Nov. 6, 2021) (attached as Ex. A). Though the Fifth Circuit’s order may be construed to have nationwide effect, it does not make an explicit statement on this point. *See id.* To avoid any confusion and to secure full protection of their rights, Petitioners respectfully request that this Court enter a similar order here. Because Respondents will already be responding to a similar stay motion in the Fifth Circuit today, requesting a response to Petitioners’ stay motion here by tomorrow should impose no prejudice on them.

Expedited consideration is necessary to protect Petitioners from imminent irreparable injury. Though the ETS gives employers until January 4, 2021, to comply with its mandates, *see* 86 Fed. Reg. 61,554, it has immediate practical impact on Petitioners. In particular, four State Petitioners—Iowa, Alaska, Arizona, and Wyoming—are “state plan States” under OSHA’s governing statute. *See* <https://www.osha.gov/stateplans/>. As OSHA explains, “State Plans are OSHA-approved workplace safety and health programs operated by individual states or U.S.

territories.... State Plans are monitored by OSHA and must be *at least as effective as OSHA* in protecting workers and in preventing work-related injuries, illnesses and deaths.” *Id.* (emphasis added); *see also* Stay Motion, Ex. D, ¶¶ 4-8 (Iowa); Ex. E, ¶¶ 2-5 (Wyoming); Ex. G, ¶¶ 3-8 (Alaska). Under the state-plan provisions of the statute, these state plan states must notify OSHA within 15 days of the ETS, *i.e.*, by November 20, 2021, that they will implement a similar standard that is “at least as effective” as the ETS. *See* Ex. D, ¶ 7; Ex. E, ¶ 3, Ex. G, ¶ 7. To meet this fifteen-day deadline, these States must take immediate action in their sovereign capacities to engage in emergency decision making and prepare a state standard that is effectively equivalent to the ETS, or else face termination of their state OSHA plans. *See id.* Termination of state plans would result in cancellation of decades-old state programs and loss of millions of dollars of federal funds. *See, e.g.*, Ex. D, ¶¶ 3, 5; Ex. E, ¶ 2; Ex. G, ¶¶ 3, 5.

Furthermore, the ETS purports to preempt state and local statutes, ordinances, and policies that protect employees from mandatory COVID-19 vaccination. *See* 86 Fed. Reg. 61,437, 61,440, 61,505. Several State Petitioners have such statutes, laws, and policies that the ETS purports to preempt. *See, e.g.*, Ark. Code 20-7-143 (prohibiting public entities from requiring vaccines); 2021 Alaska Sess. Laws ch. 2, § 17 (protecting all Alaskans’ rights to object to COVID-19 vaccines “based on religious, medical, or *other* grounds,” and forbidding any person from “requir[ing]

an individual to provide justification or documentation to support the individual’s decision to decline a COVID-19 vaccine”) (emphasis added); *Huffman v. State*, 204 P.3d 339 (Alaska 2009) (holding that an individual’s freedom to make medical decisions is a fundamental right protected under Article I, Section 22 of the Alaska Constitution); House File 902, 89th Gen. Assemb. § 2 (Iowa 2021) (to be codified at Iowa Code § 94.2) (requiring employers to waive any COVID-19 vaccine mandate if the employee states that “receiving the vaccine would be injurious to the health and well-being of the employee or an individual residing with the employee” or “would conflict with the tenets and practices” of the employee’s religion); Mont. Code Ann. § 49-2-312(1)(b) (prohibiting any employer “to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person’s vaccination status”). The imminent preemption of these state laws inflicts *per se* irreparable injury on the States. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020).

The ETS also has immediate impact on the States *qua* employers, as well as the private employers and employees subject to its terms. In addition to participating in their sovereign capacities, the state-plan States must subject their own workforces

to OSHA standards, including their equivalent versions of the ETS, so they are directly affected in their proprietary capacity *qua* employers. *See* Stay Motion Ex. D, ¶ 4; Ex. E, ¶ 5; Ex. G, ¶ 4. Both state-plan States and private employers, as well as tens of millions of employees covered by the ETS, face immediate practical effects from the ETS.

By delaying the compliance deadline to January 4, 2022, OSHA has attempted to defer the harshest consequences of the ETS—*i.e.*, job loss for potentially millions of affected workers—past the holidays. But, in fact, the practical impact for workers and their employers will be felt much sooner. It takes several weeks to become fully vaccinated using the most common mRNA vaccines, Pfizer and Moderna. OSHA has permitted employees to be treated as fully vaccinated if they receive the second shot by January 4, 2022, *see* 86 Fed. Reg. 61,554, which would require vaccination to commence weeks before the January 4 deadline in the majority of cases. This schedule necessarily entails working families planning for joblessness and economic disruption, cutting back on holiday spending for their children and loved ones, and making other tough, real-world choices that OSHA treats with callous obliviousness—all well *before* the holidays.

The authority OSHA has asserted in this ETS, regulating two-thirds of the U.S. private workforce in a single stroke, is unprecedented in its “sheer scope.” *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021)

(per curiam). There is also no precedent in our system of federalism for a nationwide federal vaccine mandate, which usurps the States' traditional authority as regulators in this area. *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (holding that compulsory-vaccination policies fall within the States' traditional authority to regulate public health, and "[t]hey are matters that do not ordinarily concern the national government"). A policy of this unprecedented nature and scope cannot fail to have immediate impact on the States, the nation's economy, the nation's employers, and millions of hard-working Americans. Thousands of employers and millions of working families will feel its impact immediately. The Court should act swiftly to forestall these illegal and unconstitutional injuries, and it should order expedited briefing and consideration of Petitioners' Stay Motion to do so.

CONCLUSION

For the reasons stated, Petitioners respectfully request that this Court grant expedited briefing and consideration of their Stay Motion, and respectfully propose that the Court enter a temporary administrative stay, and order Respondents to file their Response to the Stay Motion by November 9 and Petitioners to file their Reply by November 11, to permit the Court time to issue a ruling as soon as possible thereafter.

Dated: November 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this motion complies with the typeface and formatting requirements of Fed. R. App. P. 27 and 32, and that it contains 1,647 words as determined by the word-count feature of Microsoft Word.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing, along with the accompanying unsealed appendix, with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. In addition, I have sent a true and correct electronic copy of the foregoing with all Exhibits to: zzSOL-Covid19-ETS@dol.gov.

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