



THE BUCKEYE INSTITUTE

By **ECF**

Deborah S. Hunt, Clerk of Court
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

November 8, 2021

Re: *Phillips Manufacturing & Tower v. OSHA*, No. 21-4028

Dear Ms. Hunt:

Petitioners submit this letter under Federal Rule of Appellate Procedure 28(j) to notify the Court of a recent decision of the U.S. Court of Appeals for the Fifth Circuit. In *BST Holdings v. OSHA*, the Fifth Circuit granted an emergency stay of the Occupational Safety and Health Administration’s Emergency Temporary Standard (ETS) that Petitioners challenge here. No. 21-60845, Doc. 00516083925 (5th Cir. Nov. 6, 2021). The Fifth Circuit found that there is “cause to believe there are grave statutory and constitutional issues with the Mandate.” *Id.* at 2.

The Fifth Circuit’s stay is in line with unbroken circuit court practice considering petitions for review challenging an OSHA ETS. As explained in Petitioners’ brief, every court to consider a motion to stay an ETS Rule has granted emergency relief staying the ETS’s effective date to allow for full stay briefing. *See Vistrion v. OSHA*, No. 78-3026, 6 OSHC 1483 (6th Cir. Mar. 28, 1978) (“this court promptly on receipt of a motion for stay pending judicial review, signed by petitioners, entered an order staying the emergency temporary standard temporarily ‘until the court receives and considers the response and until this present order is superseded by an order of the court disposing of the motion for stay pending appeal’”); *see also Asbestos Info. Ass’n/N. Am. v. OSHA*, 727 F.2d 415, 418 (5th Cir. 1984); *Indus. Union Dep’t, AFL-CIO v. Bingham*, 570 F.2d 965, 968 (D.C. Cir. 1977); *Taylor Diving & Salvage Co. v. U.S. Dep’t of Lab.*, 537 F.2d 819, 820 (5th Cir. 1976); *Fla. Peach Growers Ass’n v. U.S. Dep’t of Lab.*, 489 F.2d 120, 126 (5th Cir. 1974). In light of the grave constitutional and statutory issues with the ETS, this Court should immediately stay its effective date pending full judicial review.

Respectfully Submitted,

/s/ Robert Alt
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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I caused the foregoing letter to be served via the Court's CM/ECF system on all registered counsel.

/s/ Robert Alt

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 6, 2021

Lyle W. Cayce
Clerk

No. 21-60845

BST HOLDINGS, L.L.C.; RV TROSCLAIR, L.L.C.; TROSCLAIR AIRLINE, L.L.C.; TROSCLAIR ALMONASTER, L.L.C.; TROSCLAIR AND SONS, L.L.C.; TROSCLAIR ; TROSCLAIR, INCORPORATED; TROSCLAIR CARROLLTON, L.L.C.; TROSCLAIR CLAIBORNE, L.L.C.; TROSCLAIR DONALDSONVILLE, L.L.C.; TROSCLAIR HOUMA, L.L.C.; TROSCLAIR JUDGE PEREZ, L.L.C.; TROSCLAIR LAKE FOREST, L.L.C.; TROSCLAIR MORRISON, L.L.C.; TROSCLAIR PARIS, L.L.C.; TROSCLAIR TERRY, L.L.C.; TROSCLAIR WILLIAMS, L.L.C.; RYAN DAILEY; JASAND GAMBLE; CHRISTOPHER L. JONES; DAVID JOHN LOSCHEN; SAMUEL ALBERT REYNA; KIP STOVALL; ANSWERS IN GENESIS, INCORPORATED; AMERICAN FAMILY ASSOCIATION, INCORPORATED; BURNETT SPECIALISTS; CHOICE STAFFING, L.L.C.; STAFF FORCE, INCORPORATED; LEADINGEDGE PERSONNEL, LIMITED; STATE OF TEXAS; HT STAFFING, LIMITED; DOING BUSINESS AS HT GROUP; THE STATE OF LOUISIANA; COX OPERATING, L.L.C.; DIS-TRAN STEEL, L.L.C.; DIS-TRAN PACKAGED SUBSTATIONS, L.L.C.; BETA ENGINEERING, L.L.C. OPTIMAL FIELD SERVICES, L.L.C.; THE STATE OF MISSISSIPPI; GULF COAST RESTAURANT GROUP, INCORPORATED; THE STATE OF SOUTH CAROLINA; THE STATE OF UTAH; WORD OF GOD FELLOWSHIP, INCORPORATED, DOING BUSINES AS DAYSTAR TELEVISION NETWORK,

Petitioners,

versus

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR; UNITED STATES

No. 21-60845

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.

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

Before JONES, DUNCAN, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Before the court is the petitioners'¹ emergency motion to stay enforcement of the Occupational Safety and Health Administration's November 5, 2021 Emergency Temporary Standard² (the "Mandate") pending expedited judicial review.

Because the petitions give cause to believe there are grave statutory and constitutional issues with the Mandate, the Mandate is hereby STAYED pending further action by this court.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

¹ This order addresses only the emergency motion filed by the above-captioned petitioners. Going forward, the Clerk of Court shall ensure that all related motions and petitions in this court be consolidated under this case number, and that all parties—including the Government—make all related filings in this case.

² See COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and 1928).

No. 21-60845

The Government shall respond to the petitioners' motion for a permanent injunction by 5:00 PM on Monday, November 8.

The petitioners shall file any reply by 5:00 PM on Tuesday, November 9.

So ordered.