IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JAMES RODDEN, et al.,	)	
	)	
	)	
Plaintiffs,	)	Civil Action 3:21-cv-00317
	)	
v.	)	
	)	
DR. ANTHONY FAUCI, et al.,	)	
	)	
Defendants.	)	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO AND PRELIMINARY INJUNCTION

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INTRODUCTION

On November 16, 2021, this Court held a hearing (the "Hearing") on Plaintiff's motion for a TRO and Preliminary Injunction, at which it directed the Defendants to file a written response and also directed Plaintiffs to brief the new Fifth Circuit decision on another vaccine mandate, among other issues. See *BST Holdings LLC v. Occupational Safety and Health*, __ F.4th __, 2021 WL 5279381 (5th Cir. 2021) (hereafter referred to as *BST Holdings*) (granting a stay on enforcement of the OSHA Vaccine Mandate ("OSHA Mandate")). As this memorandum supplements Plaintiffs' moving brief, familiarity with the facts and arguments are presumed. This brief will address the specific questions raised by the Court at the Hearing, including the status of the Class, Plaintiffs' exemption requests, if any, the standard of review, the applicability of the APA, and an opinion in another private vaccine mandate case by Judge Hughs in Houston, to which opposing counsel referred. *Bridges et al. v. Houston Methodist Hospital*, et al. __ F.Supp.3d __ , 2021 WL 2399994 (S.D.Tx., June 12, 2021) *app. docketed*, No. 21—3011 (5th Cir., June 14, 2021) (dismissing Complaint against private, at-will employer for requiring health care workers to receive Covid vaccine or be terminated). Finally, Plaintiffs will address certain miscellaneous arguments that they anticipate Defendants may raise.[1]

[1] The minute order filed after the Hearing contemplates a reply shortly after the Defendants respond. Plaintiffs during the Hearing committed to submitting a brief on Thursday so the Defendants could respond. Given the tight time deadlines they do not contemplate a Reply unless Defendants raise a completely new issue.

FACTS

I. THE REPRESENTATIVE PLAINTIFFS' EXEMPTION REQUESTS

Defendants raised a question during the Hearing regarding the status of Class Plaintiffs and whether they sought religious or other exemptions from the Federal Employee Vaccine Mandate (referred to hereinafter as "Vaccine Mandate") requirements from the agencies by which they are employed and whether that impacted their membership in the Class. Undersigned counsel is unable to obtain declarations given the abbreviated turn-around time for this brief but has ascertained that all Class Plaintiffs except Ms. Mezzacapo have sought exemptions (usually religious). They have not been told when those requests will be adjudicated or upon what standard. They have already been forced to reveal their vaccine status to their employer and in some cases, disclose deeply held, personal religious beliefs. Most have also expressed that the outstanding requests do not alleviate the pressure they are under to give up their right to control their own medical decisions.[2] None of their exemption requests have shielded them from the pressure they are under to give away control of their medical decisions. While the process unfolds, the sword of Damocles hangs over their heads and so the pressure to relinquish their rights remains.

Ms. Mezzacapo has not submitted an exemption nor been informed that any adverse employment action will be delayed or halted. As far as she knows: (1) she is covered by a

[2] One statement that undersigned counsel would submit as a declaration were their time was "I AM in immediate harm. My job IS jeopardized, as I have no approved relief from the threat of 'Shot or Fired.'"

collective bargaining agreement but it provides no protection from discipline, adverse action or the Vaccine Mandate; and (2) the union cannot negotiate with respect to employees' following the Vaccine Mandate or obtaining special benefits regarding it. She reports that her agency has sent emails and engaged in discussions that have informed her of the following:

A. All discipline/adverse actions will include past discipline;

B. Counseling and re-education of employees could begin as soon as November 9th for those who have not received the two doses of Pfizer or Moderna, or the single-dose Johnson and Johnson vaccine;

C. Once the counseling and re-education has been given to the employee, she will possibly have five days to begin the vaccination process (she had not been given final timelines);

D. If employees do not begin the vaccination process within those days, they will be served a Letter of Reprimand and provided a short period to begin the vaccination process (final timelines have not been provided);

E. If employees do not begin the vaccination process within the days allotted, then they will face suspension without pay;

F. Upon their return, if they have not started the vaccination process, they will be proposed termination.

She surmises based on the Agency's past practices that employees will have 10 calendar days to respond to the proposed termination, at which time the Agency is likely to make a final decision and take action accordingly.

The New Civil Liberties Alliance has been contacted by hundreds of federal employees confronted with the Vaccine Mandate, including people who have not sought exemptions from their employers. Undersigned counsel has communicated with unnamed

class members in New Mexico, Georgia, and Wyoming (and possibly other states) who have not sought any exemptions and presumably face the prospect of adverse employment consequences (counseling) on November 22, 2021, and termination five days thereafter. In fact, at least one such class member received her first letter of non-compliance from her employer on Friday, November 12, 2021. As instructed in the letter, she informed him by Nov. 9, 2021, that she had not been vaccinated. Unsurprisingly, the first stage of the disciplinary process started against her.

II. THE CORONAVIRUS AND NATURAL IMMUNITY

The Court addressed the balance of harms during the Hearing. There is no evidence that those with naturally acquired immunity pose a heightened threat to anyone. The CDC's rules for entry into the United States from abroad via air travel in fact recognizes such immunity, which Plaintiffs all possess. It states:

> If you recently recovered from COVID-19, you may instead travel with documentation of recovery from COVID-19 (i.e., your positive COVID-19 viral test result on a sample taken no more than 90 days before the flight's departure from a foreign country and a letter from a licensed healthcare provider or a public health official stating that you were cleared to travel). https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html (last visited November 16, 2021).

Put otherwise, those who have acquired immunity the hard way, as the Class Plaintiffs have, may board an airplane where they remain in close quarters with hundreds of other people on flights from places like Hong Kong, India, Australia, all of which can exceed 17 hours. They are not usually in close proximity to their co-workers that long in a day.

III. STATEMENTS BY DEFENDANTS UNDERMINING THE VACCINE MANDATE

Statements by key Government decision-makers in the recent past expose the fact that these mandates are the product of a political calculus and have nothing to do with best public health practices. Indeed, the first named defendant in this action, Dr. Anthony Fauci, has stated on numerous occasions that mandates such as these are unwise, unnecessary or unlawful. During a talk at George Washington University on August 18th, 2020, Dr. Fauci stated: "You don't want to mandate and try and force anyone to take a vaccine. We've never done that." Likewise, he has remarked that "You can mandate for certain groups of people like health workers, but for the general population you can't." *See* "COVID-19 vaccine won't be mandatory in US, says Fauci," (August 19, 2020), *available at* bit.ly/3x2sgHf (last visited November 17, 2021). Addressing the prospect of such mandates, he has deemed them "unenforceable and not appropriate." *Id.*

ARGUMENT

I. *BST HOLDINGS LLC V. OSHA* INFORMS MOST ISSUES BEFORE THE COURT

The Fifth Circuit last week issued a landmark decision on injunctions in the context of COVID-19 vaccine mandates. *BST Holdings v. Osha, supra.* The initial decision as well as the expanded written order were released after Plaintiffs filed their motion for a Preliminary Injunction but is dispositive on many issues before the Court here. First, the Fifth Circuit recognized natural immunity, as the CDC does for foreign travelers: "Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus." *Id.* at *6. But the Defendants refuse to do so here.

True, *BST Holdings* involved a different vaccine mandate (the "OSHA Mandate"), specifically the Biden Administration's commandeering OSHA to compel private employers of one hundred or more workers to mandate COVID-19 vaccines. While Plaintiffs acknowledge that Defendants possess greater authority over their own employees than they do over private-sector employees, many of *BST Holdings* pivotal determinations apply to the issues presented here.

Crucially, in *BST Holdings*, the Fifth Circuit recognized that being forced to choose between one's employment and the vaccine constitutes irreparable harm in and of itself, warranting an injunction. As the Court eloquently stated, the OSHA Mandate "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *Id.* at * 8. As here, "[f]or the individual petitioners, the loss of constitutional freedoms "for even minimal periods of time ... unquestionably constitutes irreparable injury." *Id.*

Indeed, the irreparable harm here is more severe than that in *BST Holdings*. There, the plaintiffs had to "take their shots, take their tests, or hit the road." *Id.* at *2. By contrast, Plaintiffs here have no recourse to the distasteful option of tests and masks. In sum, *BST Holdings* is dispositive on the question of irreparable harm, and attempts to distinguish it are unavailing. *See also Magliulo v. Edward Vera College of Osteopathic Medicine*, 2021 WL 3679227 * 9 (W.D.La., September 18, 2021) (having to reveal unvaccinated status is an irreparable harm).

When it comes to the balance of equities, *BST Holdings* is likewise dispositive. Just as the stay there would "do OSHA no harm whatsoever," *id.*, here it would do Defendants

even less. The entire class—which is not true of the *BST Holdings* Plaintiffs—possesses naturally acquired immunity and thereby "is presumably at less risk than an unvaccinated worker who has never had the virus." *Id.* at *6. Moreover, naturally immune Plaintiffs present far *less* risk than employees who have been vaccinated with foreign vaccines that are entirely unapproved— not even endowed with Emergency Use Authorization protocol ("EUA") issued by the FDA. As explicated in more detail in the main briefings, Plaintiffs are unquestionably less likely to get infected, become seriously ill, or spread the disease that someone who has received SinoVac. Thus, there is no legitimate concern that they are more likely to become ill and miss work, or infect colleagues, than similarly situated employees who have received these inferior vaccines.

BST Holdings also establishes that the last prong of the analysis—the public interest—requires a finding in Plaintiffs' favor. The Fifth Circuit explained that, for federal workers, the specter of this mandate has contributed to significant "economic uncertainty to workplace strife." *Id.* Of course, "maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials." *Id.* This rationale applies here, as well. The Vaccine Mandate, just like the OSHA Mandate, is causing significant upheaval nationally. It is also in the public interest to stop the apparent strategy, across at least two executive administrations to announce new broad powers over peoples' lives and property and reap the political rewards and change in behavior while delaying the courts from catching up. These mandates follow the

egregious pattern of the Center for Disease Control's eviction moratorium. *See Alabama Assoc. of Realtors et al., v. HHS,* 594 U.S. __, 141 S.Ct. 2485 (2021)(staying the CDC's unlawful eviction moratorium upon second trip to the Supreme Court). It is the public interest to pull the fangs from this lawless approach to administrative law

None of opposing counsel's known arguments change the likelihood of success on the merits, as discussed in the opening brief. At the same time, much in *BST Holdings* supports it. Here, Class Plaintiffs have only moved for an injunction or stay on Counts I, IV and V of the Complaint. Count I is substantively identical to a claim raised in *BST Holdings* because it is based on the exact liberty interests, bodily integrity, and control over one's own medical decisions, derived from the 5th, 9th and 14th amendments to the Constitution. Count IV asserts that under the EUA statute, Plaintiffs possess rights to informed consent that are infringed by the Vaccine Mandate. Put otherwise, EUA vaccines cannot be mandated by employers because the statute clearly places informed consent in the recipient's control, rather than that of the Government or his employer. Count V is a claim that the proposed regulations cannot withstand APA review.

Review under either Count I or Count V demonstrates the Vaccine Mandate is both arbitrary and capricious, unnecessary and not narrowly tailored to its stated purpose. The Vaccine Mandate, like OSHA's, is both over and under inclusive. It makes no effort to determine the differences in circumstances of the vast federal work force. It applies to employees in virtually every federal workplace in America, including those working only remotely, "with little attempt to account for the obvious differences between the risks facing, say a security guard on a lonely night shift" and workers packed close together in

cubicles. *Id. at* * 3. The young and healthy are treated no differently from the old and immunocompromised. In this respect, the Vaccine Mandate is identical to that examined by Fifth Circuit:

> the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees. All else equal, a 28-year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on, but one constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.

Id. at * 6.

At the same time, the Vaccine Mandate manages to be *under* inclusive, as foreign, non-FDA approved, relatively ineffective vaccines are acceptable under its guidelines but naturally acquired immunity is not. The Fifth Circuit stated that changes in statements by the government and its officials should be considered in determining the necessity and nature of the regulation. *Id.* at * 5. In addition to the litany of statements by the President and his administration noted in *BST Holdings v. OSHA*, we urge the Court to take note of the statements made by Dr. Fauci listed above. Dr. Fauci's about-face on the issue, while not explicit statements that there will never be a Federal Employee Vaccine Mandate, certainly cast doubt on the propriety, necessity, and efficacy of the current Vaccine Mandate. They cover a broad swath of the American population (likely into the millions), they take no account of individuals' circumstances, and they are not proportional to the

severity of the pandemic. Courts should not turn a "blind eye" to such pronouncements, as the motivations for such regulations should be pertinent to assessing their validity. *Id.*

With respect to the relief sought, Plaintiffs respectfully request a stay for the entire Class against implementation of the Executive Order and the corresponding regulations. That comports with the Fifth Circuit's order in *BST Holdings*:

> For these reasons, the petitioners' motion for a stay pending review is GRANTED. Enforcement of the Occupational Safety and Health Administration's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" remains STAYED pending adequate judicial review of the petitioners' underlying motions for a permanent injunction.
>
> In addition, IT IS FURTHER ORDERED that OSHA take no steps to implement or enforce the Mandate until further court order.

Id. at * 9 (footnotes omitted).

The President's Executive Order and the regulations by each agency issued to implement it traduce constitutional rights and make what is supposed to be optional—EUA products—mandatory. The Defendants in this case have changed that voluntary option into the more sinister motto "Everything not forbidden is compulsory by New Order." T.H. White, The Book of Merlyn, 49 (Shaftsbury Publishing Co) (1977).

II. NO DOCTRINE OF AT-WILL EMPLOYMENT, SOVEREIGN IMMUNITY, OR NON-JUSTICIABILITY SHIELDS DEFENDANTS

At the Hearing, Defendants' counsel cited the recent case of *Bridges et al. v. Houston Methodist Hospital, et al., supra.* That district court case, currently in the appellate process, is distinguishable and non-binding. That case was brought in state court on state law grounds. It involved private employers' right to fire employees for any reason or no reason

at all under the at-will employee doctrine. A private entity cannot violate the APA or act unconstitutionally. The United States and its agencies can. *Bridges* also dealt with the refusal by healthcare workers, who are in the unique position of encountering immunocompromised individuals on a daily basis, to be vaccinated. Nor did *Bridges* base any of its claims on the plaintiffs' naturally acquired immunity, a stark contrast with the fact pattern presented here.

Not only is *Bridges* distinguishable, but it is a lower state court case based on Texas public policy that has no precedential value here. All that aside, *Bridges* was decided before *BST Holdings* and is completely uninformed by the Fifth Circuit's teachings there.

Its only glancing salience to this case is its discussion of the EUA statute which it states is non-actionable against private parties, and also claims being fired for not taking it is not coercive. It bears quoting:

> Although her claims fail as a matter of law, it is also necessary to clarify that Bridges has not been coerced. Bridges says that she is being forced to be injected with a vaccine or be fired. This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.
>
> If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain.

Id. This contrasts strongly with the Fifth Circuit's "jobs or jabs" pronouncements in *BST Holdings.* Plaintiffs in *Bridges* did not seek an injunction and submitted no declarations.

A government employer, unlike a private employer, cannot require unconstitutional conditions on its employees and assert its just part of the job. *See Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 874 (11th Cir. 2013) ("If a search is unreasonable [under the Fourth Amendment], a government employer cannot require that its employees consent to that search as a condition of employment."); *United Tchrs. of New Orleans v. Orleans Par. Sch. Bd. Through Holmes*, 142 F.3d 853, 856 (5th Cir. 1998) ("We reverse and remand with instructions that defendants are to be enjoined from requiring teachers, teachers' aids, and clerical workers to submit urine specimens for testing in post-injury screening [as a condition of employment], absent adequate individualized suspicion of wrongful drug use."); *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987): ("[A] search otherwise unreasonable cannot be redeemed by … exaction of a 'consent' to the search as a condition of employment."); *Garrity v. New Jersey*, 385 U.S. 493, 497–98 (1967) ("The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice.").

The Court also asked whether the APA applies here. It certainly does. Carrying out the Executive Order constitutes final agency action, permitting judicial review under the APA. *See* 5 U.S.C. § 702 through 706. Specifically, Plaintiffs are suffering legal wrong because of agency action that adversely affects and aggrieves them. *See* 5 U.S.C. § 702. The form of proceeding here encompasses actions for declaratory judgment and actions for prohibitory or mandatory injunctions. *See* 5 U.S.C. § 703. The Vaccine Mandate is final agency action that involves actions for which there is no adequate remedy. *See* 5 U.S.C. § 704. This Court possesses the power to postpone the effective date of the Task Force's

actions taken under the rubric of the Vaccine Mandate or to preserve the *status quo* and rights of Plaintiffs pending conclusion of judicial review. *See* 5 U.S.C. § 705.

The Executive Order itself is reviewable under the doctrine of non-statutory review. This Court's equitable powers permit it to issue "non-statutory" injunctions to protect Plaintiff against wayward government actors engaged in unconstitutional conduct. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (no waiver of sovereign immunity is needed when federal officers "take action in the sovereign's name" that is "claimed to be unconstitutional," which is precisely what Plaintiffs here are claiming. *Id.* at 690. Because the President's Executive Order 14,043 is *ultra vires* and unconstitutional, Plaintiffs' claims fit within *Larson* and sovereign immunity does not shield the Order from review. The same is true of the Task Force Guidance and the Vaccine Mandate. Likewise, Plaintiffs are entitled to injunctive relief pursuant to *Larson's* non-statutory equitable right of action. *See, e.g., Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (invalidating Executive Order 12,954 through the doctrine of non-statutory review action, meaning that "sovereign immunity does not bar [such] a suit," and specifically holding that a federal statute overrode that Executive Order). In *Reich*, the plaintiffs had only sued to prevent the Executive Order from taking effect; they had not sued under the APA to stop the regulations issued to implement it. Here, by contrast, Plaintiffs have done both.

III. THE THREAT IS IMMINENT AND SUFFERED BY CLASS REPRESENTATIVES

That some of the Class Plaintiffs have pending requests for exemptions does not make Defendants' actions any less imminent. In fact, the Supreme Court issued an injunction in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) because the Covid-19 status of the affected churches neighborhoods *could* change: injunctive relief was "called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." *Id.* The imminence of the harm to these plaintiffs is far more obvious than that the Supreme Court required to be enjoined in that case.

Similarly, Defendants maintain complete control of the timing of any adverse actions they take in obeisance to the Executive Order and the Task Force. The stated date for receiving any vaccine regimen, November 9th, has already passed. Warning letters have been out now all over the federal government. In any event, the very action of filing for an exemption and waiting for the outcome is debilitating and unnecessary and thereby harms the Plaintiffs. Defendants have indicated that they will assert that, because all named Plaintiffs are not in danger, no stay or injunction need issue. Assuming *arguendo* that is the case, Ms. Mezzacapo and other unnamed class members have not sought exemptions, so an injunction is warranted. Furthermore, the named Plaintiffs who have asked for exemptions are in danger because those exemptions could be denied at any time, triggering adverse employment actions. Finally, Plaintiffs respectfully submit that Defendants ought not be rewarded for an opaque timing regime under which they have imposed their unlawful mandate.

In any event, the focus in cases involving a 23(b)(2) class remains on the Defendants' unlawful actions against the entire class. Individual members' characteristics are irrelevant. *In re Rodriguez,* 695 F.3d 360, 365 (5th Cir., 2012). Here, the Executive Order and the Task Force's directions along with the pressure to be vaccinated applies to all Plaintiffs. It is imminent and it should be forestalled.

Respectfully submitted,

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