UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MCP No. 165., Occupational Safety and Health Administration Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402	No. 21-7000
United Food and Commercial Workers International Union, AFL/CIO-CLC; American Federation of Labor-Congress of Industrial Organizations, Petitioners, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4094
Massachusetts Building Trades Council, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4084
Local 32bJ, Service Employees International Union, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4095

American Federation of Teachers Pennsylvania, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4099
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4089
National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4087
Media Guild of the West, The News Guild-Communications Workers of America, AFL-CIO, Local 39213 Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4103

Union of American Physicians and Dentists, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents.	No. 21-4085

STATEMENT IN SUPPORT OF RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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INTRODUCTION

On January 31, 2020, the U.S. Department of Health and Human Services declared the novel SARS-CoV-2 virus outbreak ("coronavirus") a public health emergency. The Union Petitioners[1] together represent millions of workers in all industries across the Country, who, since the pandemic began, have repeatedly urged the Occupational Safety & Health Administration ("OSHA") to adopt mandatory rules to protect them from the grave danger COVID-19, the disease caused by the coronavirus, poses at their workplaces. The Union Petitioners' complaint is *not* that OSHA lacks authority to issue the emergency temporary standard ("ETS"), but instead that OSHA has not taken all the steps necessary to address this grave danger.[2] The Union Petitioners therefore strongly support OSHA's emergency motion to dissolve the stay imposed by the Fifth Circuit pending judicial review on the merits, as the deficits to which the Union Petitioners

[1] The Unions that have petitioned for review and join this statement are listed in Appendix A and are referred to collectively as "the Union Petitioners." The petitioners opposing the ETS are referred to collectively as "the Opponents."

[2] For example, since it petitioned OSHA to issue an ETS in March 2020, the AFL-CIO has argued an ETS must require every employer to adopt an infection control plan that assesses the risks in its own workplace and to adopt a layered set of protections, including social distancing and quarantining of infected employees. *See* Occupational Exposure to Covid-19: Emergency Temporary Standard, 86 Fed. Reg. 32376, 32419 (June 21, 2021) (Healthcare ETS) ("effective infection control programs use a suite of overlapping controls in a layered approach. . .").

object can be met by leaving the ETS in effect, while ordering OSHA to expand the standard to ensure covered employees greater protection.

The Occupational Safety and Health Act ("OSH Act" or "the Act") grants OSHA authority to issue an ETS when necessary to protect against a grave danger. 29 U.S.C. § 655(c)(1). The COVID-19 global pandemic has produced exactly the type of workplace catastrophe that Congress intended an ETS to address. OSHA has ample authority to regulate workplace exposure to infectious diseases. The ETS at issue here is a modest, interim step in protecting workers.

While the numbers increase daily, as of this writing, more than 47 million people in the United States have tested positive for COVID-19, and more than 770,000 people in the United States have died from the disease. Centers for Disease Control and Prevention ("CDC"), https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Nov. 24, 2021). Many more are likely to have been infected, but reporting, particularly workplace reporting, is incomplete. Many others who likely died of the disease have not been counted. A significant portion of those infected and dying from COVID-19 are classified as "essential" workers who have had to confront the disease on a daily basis since its inception — teachers, child -care workers, bus drivers and other transit workers, fire fighters and other first responders, grocery store and retail workers, and employees in meatpacking plants and corrections facilities and on construction sites. But

workers across all industries face risks from repeated exposure to coworkers, customers, and members of the public who may be infected. For example, in just the past week, Michigan reported 162 COVID-19 outbreaks, 157 of which were in work environments.[3] *See* § II(C) *infra* (citing more examples of recent workplace outbreaks).

Reported cases are recently trending upward, despite wide availability of vaccines, and infection rates are expected to worsen over the winter. The Union Petitioners firmly believe that, in the face of this unprecedented occupational health emergency, OSHA has ample authority to protect workers and that the agency's limited efforts to do so must not be on hold while the COVID-19 pandemic continues to kill workers. The coronavirus is a "harmful physical agent" that is a "new hazard" in the workplace, and neither OSHA – nor, we submit, anyone else – can reasonably claim "that the COVID-19 pandemic is anything other than a genuine emergency in any intelligible sense of the words." Order Den. Pls.' Appls. Prelim. Inj., *Nat'l Retail Fed'n v. Cal. Dep't of Indus. Relations*, Case No. CGC-20-588367 (Cal. Super. Ct. Feb. 5, 2021). Moreover, the limited

[3] Mich. Dep't of Health and Human Servs., https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173_102057,00.html (last visited Nov. 24, 2021)

measures the ETS requires employers to implement are clearly authorized by the Act, "necessary" to mitigate that danger, and feasible to implement.

The Union Petitioners fully endorse and incorporate by reference the arguments in Respondent's Emergency Motion to Dissolve Stay. We write separately to underscore OSHA's reasonable interpretation of the OSH Act as providing a firm basis for this ETS and to demonstrate why a stay would cause the millions of workers the Union Petitioners represent irreparable harm from continued exposure to the coronavirus in the workplace.

I. REGULATORY BACKGROUND

In March 2020, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") petitioned OSHA to exercise its authority under Section 6(c) of the OSH Act to issue an ETS addressing infectious diseases, including COVID-19. In the face of OSHA's inaction, the AFL-CIO filed a mandamus action in the D.C. Circuit to compel the agency to act. *In re: AFL-CIO*, Case No. 20-1158 (D.C. Cir. May 18, 2020); *see also* Occupational Safety and Health Administration Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402, 61430 (Nov. 5, 2021) (hereinafter "Pmbl-[page]"). While implicitly recognizing the grave danger facing employees in its filings with the court, OSHA argued that an ETS was unnecessary at that time because it believed existing OSHA standards, voluntary guidance, and enforcement under the OSH Act's

general duty clause[4] would adequately protect workers. The D.C. Circuit refused to order OSHA to issue an ETS, finding "OSHA reasonably determined that an ETS is not necessary *at this time*." Order Den. Pet. at 1, *In re: AFL-CIO*, *supra* (emphasis added).

In the absence of federal action, Virginia, Oregon, California, Michigan and Washington each adopted their own ETS. Healthcare ETS, 86 Fed. Reg. 32376, 32413 (June 21, 2021).

In June 2021, OSHA issued an ETS regulating exposure to COVID-19 among health care workers, who OSHA believed faced the greatest risk. Healthcare ETS, 86 Fed. Reg. 32376. In issuing the healthcare ETS, OSHA concluded that a grave danger exists in a workplace unless all workers are vaccinated. At the time, all workers were not, and vaccines were not widely available. *See* Pmbl-61430 (there is insufficient evidence to support a grave danger finding for non-healthcare workplaces . . . where all employees are vaccinated). The AFL-CIO and the United Food & Commercial Workers filed a petition for review challenging OSHA's failure to extend the ETS to all workers facing grave danger. *UFCW v. OSHA*, Case No. 21-1143 (D.C. Cir. June 24,

[4] The "general duty clause," 29 U.S.C. § 654(a)(1), requires employers, in the absence of a standard, to provide employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

2021). That challenge to the healthcare ETS is still pending, but briefing has been held in abeyance.

Since 2020, when OSHA first refused to issue an ETS regulating exposure to the coronavirus, the science community's understanding of the virus and effective mitigation measures has advanced, and vaccines have become more widely available, but the Delta variant has spread through the country, new variants are emerging and workplace outbreaks have continued to occur. As a result, OSHA concluded that its "nonregulatory enforcement tools" had proven inadequate to ensure "every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b); *see* Pmbl-61440-45. OSHA belatedly recognized that an ETS was necessary to protect workers.

II. ARGUMENT

A. OSHA's Authority to Issue an ETS Passes Constitutional Muster

There can be no doubt that OSHA's authority to issue an ETS is narrowly circumscribed and consistent with the non-delegation doctrine. The Fifth Circuit's suggestion to the contrary lacks merit. The Supreme Court has held that OSHA's authority to issue *permanent* health standards under section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), does not violate the non-delegation doctrine. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (noting that EPA's authority under the Clean Air Act to promulgate rules "requisite to protect public

health" was "strikingly similar" to delegations the Court had previously upheld, including the OSH Act's provisions regarding health standards) (*citing Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) ("*IUD v. API*")). And, the D.C. Circuit has rejected a non-delegation challenge to OSHA's authority to issue *permanent* safety standards under section 6(b). *See UAW v. OSHA*, 37 F.3d 665 (D.C. Cir. 1994).

OSHA's authority to issue either permanent health or safety standards under section 6(b) is far broader than its authority to issue an ETS under section 6(c). All OSHA standards must address a significant risk of material impairment. *See IUD v. API*, 448 U.S. at 614-15. An ETS must also address a risk that poses a "grave danger" during the limited time the ETS remains in effect. 29 U.S.C. § 655(c)(1); *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415, 422 (5th Cir. 1984). A "grave danger" is a heightened risk, something greater than the "significant risk" OSHA must demonstrate before adopting a permanent standard under section 6(b) of the OSH Act. *Int'l Union, UAW v. Donovan*, 590 F. Supp. 747, 755-56 (D.D.C. 1984) *adopted* 756 F.2d 162 (D.C. Cir. 1985). All OSHA standards must be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). An ETS must also be "necessary to protect employees from [the grave] danger" OSHA has identified. 29 U.S.C. § 655(c)(1). In section 6(c), Congress granted OSHA limited, narrowly circumscribed authority

to address urgent occupational health hazards, not an open-ended grant of legislative authority. Contrary to the Fifth Circuit's suggestion, this carefully limited grant of regulatory authority hardly presents an occasion to declare a federal law unconstitutional under *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), for the first time in more than 85 years.

B. The Occupational Safety and Health Act Gives OSHA Authority to Regulate Workplace Exposure to Viruses

Opponents argue that OSHA lacks authority to regulate workplace exposure to viruses. They are wrong.

Section 6(c)(1) grants OSHA authority to issue an ETS when necessary to protect workers from the grave dangers posed by "exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). Opponents seek to narrow the meaning of these phrases by parsing each word and arguing that neither "toxic" nor "agent" includes viruses. As the Supreme Court has cautioned, however, in reading the OSH Act the Court "must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (internal quotation marks and citation omitted). Looking at the OSH Act as a whole makes plain that Congress intended OSHA to protect workers from exposure to communicable diseases.

In Section 20, 29 U.S.C. § 669(a)(5), Congress, using the same terms it employed in both sections 6(b)(5) and 6(c)(1), directed the Secretary of Health and Human Services to develop "information regarding potentially *toxic substances [and] harmful physical agents*," and affirmed OSHA's authority to "authorize or require . . . immunization." *Id.* (emphasis added).[5] According to the CDC, "immunization" is the process through which a person becomes immune to a *communicable disease* through vaccination. CDC, *Immunization: The Basics*, https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm (Sept. 1, 2021) (emphasis added) (last visited Nov. 24, 2021). Since immunizations protect against viral and bacterial infection, section 20 would be meaningless had Congress not intended OSHA to address workplace exposures to viruses and bacteria as among the "toxic

[5] Section 20, 29 USC § 669(a)(5), reads that "[n]othing in this or *any other provision of this chapter* [Chapter 15, 29 U.S.C.] shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." (Emphasis added). A provision that ensures an exemption for religious objectors must be read to confirm OSHA's authority otherwise to "require . . . immunization." That is certainly what the Act's proponents argued. *See Legislative History of the Occupational Safety & Health Act of 1970*, S. 2193 (Committee Print) 92d Cong. 1st Sess. at 424 (statement that although the bill did not have express provisions for medical exams it obviously contemplated them "because an exception is provided for those who object on religious grounds"). Here, OSHA has not mandated immunization, but strongly encouraged employers to do so. And the ETS provides a religious exemption from any vaccination requirements, even though OSHA has found immunization necessary "for the protection of the health . . . of others." *See, e.g.*, Pmbl-61430; 61552.

substances and harmful physical agents" that pose risks to worker health.

Congress confirmed OSHA's authority to regulate infectious diseases when it directed OSHA to issue a standard concerning workplace exposure to bloodborne pathogens. OSHA had proposed a rule in 1989, but by 1991, Congress had become impatient. In a rider to an appropriations bill, Congress ordered OSHA to finalize its rulemaking by a date certain, warning that if it missed the deadline, the proposal would become effective. Dale and Tracy, OCCUPATIONAL SAFETY AND HEALTH LAW 64 (2018) (citing Pub. L. No. 102-170, 105 Stat. 1107 (1991)). Congress reaffirmed OSHA's responsibility to protect workers from exposure to communicable diseases when it passed the Needlestick Safety and Prevention Act in 2000, directing OSHA to strengthen its bloodborne pathogens standard and providing language for the regulatory text. *Id.* at 78 (citing Pub. L. No. 106-430, 114 Stat. 1901 (2000)).[6]

In the ordinary case, Congress' reenactment of a statute without changing its language signifies its confirmation of the agency's interpretation. *Brewster v. Gage*, 280 U.S. 327, 337 (1930) (substantial reenactment of a statutory provision construed by the administrative agency is persuasive evidence of legislative

[6] Against this evidence of Congressional approval, petitioners challenged the standard's application to their workplaces but did not even "contend that there should be no regulation of bloodborne pathogens." *Am. Dental Ass'n v. Martin,* 984 F.2d 823, 826 (7th Cir. 1993).

approval of the regulation); *cf. Standard Oil Co. v. Fitzgerald*, 86 F.2d 799, 802 (6th Cir. 1936) (principle inapplicable where Congress changes statutory language to conform to agency's interpretation). Here, Congress not only left the statutory language intact, but also directed OSHA to exercise its existing authority to regulate a virus. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand). Finally, Congress has specifically endorsed OSHA's authority here, expressly including in the American Recovery Act funds for OSHA to use "to carry out COVID–19 related worker protection activities." Pub. L. No. 117-2, tit. II, § 2101, 135 Stat. 4, 30 (2021).

Even if the statute did not so unambiguously provide OSHA with authority to regulate workplace exposure to infectious diseases, OSHA's reasonable interpretation of the statute, as embodied in the ETS, is entitled to this Court's deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Navistar, Inc. v. Forester*, 767 F.3d 638, 644 (6th Cir. 2014) (if an agency's interpretation is "contained in a regulation or other form intended to have the force of law, it is entitled to substantial deference," citing *Chevron* and *Chao v. Occupational Safety & Health Rev. Comm'n*, 540 F.3d 519, 523 (6th Cir. 2008)). OSHA has long consistently interpreted the OSH Act to protect workers

from infectious diseases, as evidenced through its standards and regulations, enforcement directives, general duty clause citations, and guidance documents.

In 1971 OSHA adopted general industry and construction industry sanitation standards (29 C.F.R. §§ 1910.141, 1926.51) requiring employers to provide adequate toilet and handwashing facilities, among other safeguards. OSHA's field sanitation standard aims to protect workers from harmful pesticides, but also to prevent spread of harmful bacteria and communicable disease. *See* Field Sanitation, 52 Fed. Reg. 16050, 16091 (May 1, 1987). Despite years of litigation to compel OSHA to act more quickly to promulgate the field sanitation standard, neither the district court nor the D.C. Circuit ever questioned OSHA's authority to address what OSHA deemed a standard "necessary to protect the health and safety of agricultural workers." *See, e.g.*, *Nat'l Cong. of Hisp. Am. Citizens v. Marshall*, 626 F.2d 882, 885 (D.C. Cir. 1979) (noting that OSHA had proposed the standard specifically to reduce transmission of infection and disease).[7] In addition to handwashing and toilet facilities, the construction sanitation standard bans the use of common drinking cups, to avoid the risk of contracting communicable diseases. 29 C.F.R. § 1926.51(a)(4); *see MJ Lee Constr. Co*, OSHRC DOCKET NO. 15094,

[7] The D.C. Circuit heard several cases seeking to compel OSHA to issue a field sanitation standard. Its decision in *Farmworker Just. Fund v. Brock*, 811 F.2d 613, 615 (D.C. Cir. 1987), described the history of the litigation and ordered OSHA to promulgate the rule. When OSHA did so, the court vacated its earlier decision as moot. 817 F.2d 890 (D.C. Cir. 1987).

1976 WL 22250 (O.S.H.R.C. A.L.J.D. Sept. 28, 1976). OSHA is moving forward with a plan to promulgate a standard regulating infectious diseases more broadly, listing publication of a notice of proposed rulemaking on its most recent regulatory agenda. Semiannual Agenda of Regulations: U.S. Dep't of Labor, 86 Fed. Reg. 41242, 41245 (July 30, 2021).

The list goes on: OSHA requires employers to post warning signs for "biological hazards," defined as "*infectious agents* presenting a risk or potential risk to the well-being of man." 29 C.F.R. § 1910.145(e)(4) (emphasis added). Its recordkeeping rules contain specific provisions for recording cases in which employees are occupationally exposed to and develop symptoms of tuberculosis. *Id.* § 1904.11. Its rule requiring employers to provide OSHA and employees access to medical and exposure records "pertaining to employees exposed to toxic substances or harmful physical agents" defines those terms as including "biological agent[s] (bacteria, virus, fungus, etc.)" *Id.* § 1910.1020(b)(1), (c)(13). Its respiratory protection standard specifies how employers may use respirators to protect employees from "harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors," *id.* § 1910.134(a)(1), which OSHA has explained applies to airborne contaminants that can cause "infections including colds, viruses, tuberculosis, and Legionnaires Disease," Respiratory Protection, 63 Fed. Reg. 1152, 1159 (Jan. 8, 1998); *see also* Pmbl-61406.

OSHA has also demonstrated that it interprets the Act as protecting against occupational exposure to infectious diseases through its enforcement actions and guidance documents, materials that, although entitled to less deference under *Chevron*, underscore the agency's consistent view. Thus, OSHA has long issued citations for violations of the OSH Act's "general duty clause" to employers for failing to protect their employees from the "recognized danger" of workplace exposure to TB and, before issuing its bloodborne pathogens standard, to HIV/AIDS and Hepatitis B. In fact, it was because OSHA viewed its respirator and hygiene standards as protecting against infectious diseases that, until it issued the ETS, the agency pointed to these standards, among others, along with the general duty clause, as the requirements with which employers were required to comply to protect workers against COVID-19 – a position the Opponents have not questioned. The agency has not retreated from its position that these longstanding rules apply to protect against the coronavirus; only that, without a standard targeted at COVID-19, they have proven inadequate. Pmbl-61411.

C. OSHA Has Authority to Protect Workers from Occupational Risks Posed by Hazards Also Facing the Public

If OSHA has authority to regulate viruses, then the argument that it can only regulate hazards unique to the workplace must also fail, since no virus – not HIV, Hepatitis B, nor tuberculosis – affects only workers. OSHA has historically regulated workplace exposures to a variety of hazards that are present both in the

workplace and in society more generally and courts have upheld its authority to do so. In *Forging Indus. Ass'n v. Sec'y of Labor*, 773 F.2d 1436 (4th Cir. 1985) (*en banc*), the Fourth Circuit rejected an argument, similar to the one advanced here, that "because hearing loss may be sustained as a result of activities which take place outside the workplace . . . OSHA acted beyond its statutory authority by regulating" occupational causes. *Id.* at 1442. And, the Seventh Circuit, in rejecting a challenge to OSHA's standard regulating exposure to bloodborne pathogens which may cause hepatitis B, observed that the "infectious character of HIV and HBV [hepatitis B] warrants even on narrowly economic grounds more regulation than would be necessary in the case of a noncommunicable disease." *Am. Dental Ass'n v. Martin*, 984 F.2d at 826. So long as its standard is aimed at a risk from employment or at a place of employment, OSHA acts within its statutory authority. The fact that non-occupational risks exist alongside occupational risks does not limit OSHA's obligation to protect workers.

Nor does the fact that states have traditionally regulated public health mean that OSHA is precluded from regulating the occupational risk of contracting COVID-19. To the contrary. In enacting the OSH Act, Congress recognized that it was bringing "the Federal Government into a field that traditionally had been occupied by the States," but did so to "establish[] a system of uniform federal occupational health and safety standards." *Gade*, 505 U.S. at 96, 102. Before the

Act was adopted in 1970, most regulation of occupational safety and health occurred at the state level; some states regulated more effectively than others.[8] When OSHA postponed regulation of field sanitation for agricultural workers because it viewed states as better suited to regulate the issue, the D.C. Circuit rejected the argument, holding "[a]lthough the Secretary might prefer that state governments regulate 'public health issues' because they have 'traditionally been a primary concern of state and local officials,' Congress, in adopting the OSH Act, decided that the federal government would take the lead in regulating the field of occupational health." *Farmworker Just. Fund*, 811 F.2d at 625 (citation omitted).

Congress adopted the OSH Act to level the playing field, "subject[ing] employers and employees to only one set of regulations, be it federal or state." *Gade*, 505 U.S. at 991. States that choose to operate their own OSHA-approved plans must adopt standards that are "at least as effective" as OSHA's. 29 U.S.C. § 667. In states that opt not to operate their own safety and health programs, the Act preempts state authority over workplace safety and health issues concerning which OSHA has promulgated a standard. *Id.* OSH Act standards apply only "to employers and employees in workplaces," *Steel Inst. of N.Y. v. City of New York*, 716 F.3d 31, 33 (2d Cir. 2013); they do not preempt non-conflicting state laws "of

[8] Unions have historically bargained for safer working conditions and continue to bargain for protections against COVID-19, but collectively bargained protections do not benefit unrepresented workers.

general applicability" that address "public safety as well as occupational safety concerns." *Gade*, 505 U.S. at 104, 107. Thus, when state or local regulation is not directed at a workplace, but aims to protect public health or safety, does not conflict with an OSHA standard, and applies to workers and nonworkers alike, states retain their traditional authority. Courts have recognized that fire safety, traffic safety, building codes, and other laws may co-exist with OSHA standards. *Id.* at 107; *Steel Inst.*, 716 F.3d at 38. In short, the fact that a state has authority to regulate public health generally has no bearing on OSHA's authority to protect workers from grave dangers that make their employment or places of employment unsafe.

D. The ETS Is Necessary

The Opponents argue that because OSHA waited almost two years to issue the ETS, it must be unnecessary. Because both the virus, our understanding of how to control it, and OSHA's regulatory response have evolved as more information has become available, the agency's delay in issuing the ETS sheds no light on its necessity to address the grave danger that continues to confront our nation's workers.

The Fifth Circuit observed that the ETS was both overinclusive and under inclusive and, therefore, not necessary. Neither observation warrants a stay. OSHA may lean "on the side of overprotection rather than underprotection." *IUD*

v. API, 448 U.S. at 656, and is not required to proceed "workplace by workplace," *Am. Dental Ass'n*, 984 F.2d at 827. *See also UAW v. OSHA*, 37 F.3d at 670 (OSHA is not required to look at industry specific risks where the risk is the same whenever employees face the dangerous condition). Here, OSHA found that unvaccinated workers in workplaces where they encountered other workers or customers faced a grave danger and that – at a minimum – vaccination or testing and masking were necessary to protect those workers from COVID-19. The fact that some workers are at graver risk than others does not detract from OSHA's general finding that all workers face a grave danger.

Nor is the claim that the standard is under-protective grounds for a stay. If the standard is under-protective, then OSHA has not done enough to eliminate the grave danger facing workers. If that is the case, more workplace safeguards, not fewer, are needed. A stay would leave workers with no uniformly required protections against COVID-19. That outcome would be tragic.

E. The Balance of Equities Clearly Favors Allowing the ETS to Remain in Effect

OSHA estimates the ETS will prevent 6,500 deaths and more than 250,000 COVID-related hospitalizations over the next six months. Pmbl-61408. This level of mortality and morbidity is orders of magnitude greater than the 80 asbestos-related deaths in six months the Fifth Circuit had previously found to constitute a grave danger. *Asbestos Info. Inst.*, 727 F.2d at 425. There has not been an

occupational health crisis of this magnitude in our lifetimes. Certainly, the need to protect workers from this tragedy tips the scales in favor of keeping the ETS in effect. The Fifth Circuit did not even mention this harm before deciding to stay the ETS.

COVID-19 has disproportionately affected working age adults (18-64) in this country. According to the CDC, while composing 61.4% of the population, working age adults have experienced 71.9% of all reported COVID-19. CDC, https://covid.cdc.gov/covid-data-tracker/#demographics.html (last visited Nov. 24, 2021). In the preamble to the ETS, OSHA detailed workplace outbreaks that have become commonplace across the country and in all industries. Pmbl-61412-15. These outbreaks continue.

For example, in just the past week, Michigan reported 162 COVID-19 outbreaks, 157 of which were in work environments. *See supra* pp.1-4. Tennessee reported 280 active COVID-19 clusters on November 17, 161 of which were in work settings.[9] In Washington State, 58 of the 65 new outbreaks reported during the first week in November were in workplace settings, including education, assisted living, manufacturing and construction (industrial settings),

[9] TN Dep't of Health, https://www.tn.gov/content/dam/tn/health/documents/cedep/novel-coronavirus/CriticalIndicatorReport.pdf.

childcare/youth programs, health care, jail/prison/detention centers and food industry and retail.[10] While the data do not specify whether the affected individuals were workers, the reporting by workplace makes clear that the employees occupying those workplaces are at high risk of infection.

California has reported 1,190 outbreaks, broken down by industry sector, in the last three months alone.[11] In Oregon, 47 active workplace outbreaks were reported in the 3-week ending November 14, excluding senior assisted living, child care and K-12 education.[12] New Mexico requires employers to report when one or more of their employees tests positive for COVID-19, which the state posts on its "rapid response watch list." As of November 22, there were 584 workplaces on the state's watch list.[13] The absence of reporting in other states does not indicate the absence of workplace outbreaks.

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[10] Wash. Dep't of Health, https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/data-tables/StatewideCOVID-19OutbreakReport.pdf

[11] Cal. Health and Human Servs., https://data.chhs.ca.gov/dataset/covid-19-outbreak-data/resource/a266496d-7a23-4426-b521-d7a19c659106 (last visited Nov. 24, 2021).

[12] Or. Health Auth., https://www.oregon.gov/oha/covid19/Documents/DataReports/Weekly-Outbreak-COVID-19-Report-2021-11-17-FINAL.pdf

[13] N.M. Env't Dep't, https://www.env.nm.gov/rapid-response-data/ (last visited Nov. 24, 2021).

Opponents of the ETS posit that the virus is abating. But if we have learned anything about the coronavirus in the past 2 years, it is that the virus is fickle and unpredictable. In late October, for example, Kentucky was heralding a dip in its infection rates. *See,* State of Kentucky, Emergency Motion for Stay Pending Final Judgment at 57, Case No. 21-4031. But in the last two weeks, Kentucky has seen 35% increase in infections, with the CDC currently classifying the state's transmission rate as high.[14] Nationwide, the rate of infection has risen 27% in the past two weeks. New York Times COVID-19 Interactive Chart, *supra* note 14. As the weather gets colder and people are increasingly spending time indoors, those rates are likely to increase.

The Fifth Circuit based its finding of irreparable harm to Opponents on speculation about the modest economic burden an employer vaccine program or mandatory testing and masking might impose, while completely ignoring both the injury to employees and their families – particularly their unvaccinated children[15] -

[14] New York Times COVID-19 Interactive Chart, https://www.nytimes.com/interactive/2021/us/covid-cases.html (last visited Nov. 24, 2021); CDC, https://covid.cdc.gov/covid-data-tracker/#cases_community (last visited Nov. 24, 2021).

[15] Cases among school-aged children have been high since August, when schools started reopening. The American Academy of Pediatrics reported last week that child COVID-19 cases were above 100,000 for the 15th week in a row. https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/ (last visited Nov. 24, 2021).

- and the significant economic harm to the country, which are far more likely to ensue without the ETS. The pandemic has caused major segments of the economy to shut down. It has put horrific strains on the Union Petitioners' health and welfare funds and the nations' hospitals and healthcare systems, strains that are once again being felt, for example, in Michigan where hospitals are "sound[ing] the alarm over near-record COVID hospitalizations."[16] Travel and hospitality businesses have suffered unprecedented losses. Thousands of workers have lost their jobs because of the economic downturn, and thousands remain hesitant to return to the workforce, fearing COVID infection. These harms – which are serious and real – surely carry more weight than speculation about minimal economic and job loss from the ETS.

CONCLUSION

A decision to continue to stay the ETS, in the face of an ongoing pandemic which OSHA, based on the best available evidence and its scientific expertise, has

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[16] Sarah Rohel, *Michigan hospitals sound alarm over near-record COVID-19 hospitalizations*, Det. News., Nov. 22, 2021 https://www.bakersfield.com/ap/national/michigan-hospitals-sound-alarm-over-near-record-covid-19-hospitalizations/article_2dade75f-2efc-5dea-8009-537fa4054e67.html (last visited Nov. 24, 2021); *see also* New York Times COVID-19 Interactive Chart, *supra* note 14 (showing Michigan with the highest COVID infection and hospitalization rates in the country) (last visited Nov. 24, 2021).

predicted will kill thousands and hospitalize hundreds of thousands in the next six months, would effectively nullify section 6(c) and OSHA's ability to respond to grave dangers. It is the duty of the Court to give effect to all parts of a statute, if possible. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981). The stay should therefore be lifted.

Respectfully submitted,

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Dated: November 30, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing STATEMENT IN SUPPORT OF MOTION TO LIFT STAY complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a). The brief was prepared in 14-point Times New Roman font, and with the exception of the portions excluded by F.R.A.P. 32(f) it contains 5,159 words.

/s/ Randy Rabinowitz
Randy Rabinowitz

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2021, a true and correct copy of the foregoing STATEMENT IN SUPPORT OF MOTION TO LIFT STAY was electronically filed with the Clerk and served electronically upon all counsel of record registered with the Court's CM/ECF system.

/s/ Randy Rabinowitz
Randy Rabinowitz

APPENDIX A

The Union Petitioners

- American Federation of Labor, Congress of Industrial Organizations ("AFL-CIO");
- United Food and Commercial Workers International Union ("UFCW"); Massachusetts Building Trades Council;
- Local 32BJ, Service Employees International Union;
- American Federation of Teachers Pennsylvania;
- United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO;
- National Association of Broadcast Technicians – The Broadcasting & Cable Television Workers Section of the Communications Workers of America, AFL-CIO;
- Media Guild of the West, The News Guild-Communications Workers of America, AFL-CIO, Local 39213;
- Union of American Physicians and Dentists;

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

NATIONAL RETAIL FEDERATION; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; RELLES FLORIST; MAYFIELD EQUIPMENT COMPANY; and ABATE-A-WEED, INC.,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH; OCCUPATIONAL SAFETY & HEALTH STANDARDS BOARD; DOUGLAS PARKER, in his official capacity as Chief of the California Department of Industrial Relations; and DOES 1-50, inclusive,

Defendants.

Case No. CGC-20-588367

ORDER DENYING PLAINTIFFS' APPLICATIONS FOR PRELIMINARY INJUNCTION

WESTERN GROWERS ASSOCIATION, CALIFORNIA FARM BUREA FEDERATION, CALIFORNIA BUSINESS ROUNDTABLE, GROWER-SHIPPER ASSOCIATION OF CENTRAL CALIFORNIA, CALIFORNIA ASSOCIATION OF WINEGRAPE GROWERS, and VENTURA COUNTY AGRICULTURAL ASSOCIATION,

Plaintiffs/Petitioners,

Case No. CPF-21-517344

vs.

CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD; DAVID THOMAS, CHRIS LASZCZ-DAVIS, LAURA STOCK, BARBARA BURGEL, and NOLA J. KENNEDY, in their official capacities as Members of the California Occupational Safety and Health Standards Board; CHRISTINA SHUPE, in her official capacity as Executive Officer of the California Occupational Safety and Health Standards Board; CALIFORNIA DIVISION OF OCCUPATIONAL SAFETY AND HEALTH; and DOUGLAS PARKER, in his official capacity as Chief, California Division of Occupational Safety and Health,

Respondents/Defendants.

INTRODUCTION

On November 30, 2020, as the COVID-19 pandemic surged out of control in California and across the country, the California Occupational Safety and Health Standards Board (the Board) promulgated an Emergency Temporary Standard intended to prevent the spread of COVID-19 in California workplaces (ETS Regulations). (8 Cal. Code Regs., §§ 3205-3205.3). Now, as the United States passes the grim milestone of half a million deaths from the pandemic, Plaintiffs in these related cases—representing the retail and agricultural industries—seek a preliminary injunction restraining the Board from enforcing the ETS Regulations. Plaintiffs contend that the Board should not have adopted the ETS Regulations on an emergency basis, but instead should have circulated them for public comment over a period of months; that the Board lacked authority to adopt the Regulations; and that the Board's action violated their rights to due process. They complain that the Regulations are unnecessary, and that complying with them would be financially burdensome.

For the following reasons, the Court denies Plaintiffs' applications in their entirety. Plaintiffs have not shown a likelihood of prevailing on the merits of their claims. Even if they could do so, the balance of interim harms and the public interest in curbing the spread of COVID-19 and protecting worker and community health weigh heavily in favor of the continued implementation and enforcement of the ETS Regulations. With the single exception of restrictions on attendance at religious services, which present unique constitutional considerations, no federal or state court in the country has blocked emergency public health orders intended to curb the spread of COVID-19, and the illnesses, hospitalizations, and deaths that follow in its wake. (See pg. 38 & fn. 32, *infra*.) This Court will not be the first. Lives are at stake.

FACTUAL BACKGROUND

The ETS Regulations were promulgated in response to the COVID-19 pandemic, which needs no introduction. "In the United States, hundreds of thousands are confirmed dead, including tens of thousands of Californians. Hundreds more Californians die each day. Our hospitals and intensive care units are overwhelmed, threatening even routine medical care. It is the worst

American public health crisis in a century." (*Midway Venture LLC v. County of San Diego* (Jan. 22, 2021), 2021 WL 222006, at *2), *modified* (Feb. 8, 2021); see also *Calvary Chapel San Jose v. Cody* (N.D.Cal. Dec. 18, 2020) 2020 WL 7428322, at *1 ["Every person in the United States is aware of the COVID-19 pandemic, the highly contagious nature of the disease, and the steps public health officers, state, and municipalities across the count[r]y have recommended to slow its deadly and destructive path."].) California's regulatory response to the pandemic dates to early March 2020, when the Governor proclaimed a State of Emergency and, two weeks later, issued a stay-at-home order.[1]

Before the adoption of the ETS Regulations, Cal/OSHA did not have a specific enforcement standard that protected the majority of workers from the hazard of COVID-19 in the workplace. There is an Aerosol Transmissible Diseases (ATD) standard that provided workers with important protections from exposure to pathogens, including COVID-19, but it is limited to specified health care, correctional and other specialized settings including homeless shelters. (See 8 Cal. Code Regs., § 5199(a)(1).) The majority of California workers do not fall within ATD protections. (Administrative Record (AR) Tab IE at 4 ¶ 12; Tab 1K6 at 22 ["Many Non-5199 Workers are affected by major outbreaks of COVID-19 including workers in the following industries: meat and poultry processing, food processing, agriculture, garment manufacturing, warehousing, public transportation, and retail stores."].)

At its September 17, 2020 meeting, the Board considered a petition that had been filed by the Labor and Employment Committee of the National Lawyers Guild and Worksafe on May 20, 2020, requesting it to initiate emergency rulemaking to address the potential harm posed to workers by COVID-19. The petition sought adoption of an emergency standard that would apply to employees in any facility, service category, or operation not covered by ATD, as well as a separate permanent regulation to protect workers from infectious diseases. It expressed the view that the Board's Injury and Illness Prevention Program (IIPP) regulation (8 Cal. Code Regs. § 3203) had not been adequate to protect worker safety, and that a new standard was necessary to provide

[1] The Ninth Circuit's recent decision in *South Bay United Pentecostal Church v. Newsom* (9th Cir. 2021) 985 F.3d 1128, *app. for inj. relief granted in part*, 141 S.Ct. 716 (U.S. Feb. 5, 2021) contains a useful summary of California's response to the COVID-19 pandemic. (See *id.* at 1132-1136.)

"consistent rules as a starting point for our state's workplaces that allow employers some flexibility with respect to individual needs in their places of employment." It took the view that "time is of the essence" to provide "clarity" and safeguard worker safety.

The Division of Occupational Safety and Health, the Department of Industrial Relations' enforcement agency (Cal/OSHA), reviewed the petition and recommended to the Board that it be granted. (See AR Tab 1K6 at 22 (July 30, 2020).) After surveying existing state and federal regulations, Cal/OSHA pointed out that there was "no existing Title 8 regulation that comprehensively addresses an employer's responsibility to protect Non-5199 Workers from infectious diseases." (*Id.*) It reasoned that "Cal/OSHA's enforcement efforts could be streamlined and strengthened through regulatory mandates specific to preventing the spread of infectious diseases." (*Id.*) "Given the unprecedented nature of the COVID-19 pandemic," it concluded, "a new standard that will enhance Cal/OSHA's ability to protect workers is essential to keep workplaces safe. A specific COVID-19 emergency regulation in Title 8 would provide clear instructions to employers and employees on what needs to be done to protect workers from COVID-19, eliminating any confusion and enhancing compliance." (*Id.* at 22-23.) Cal/OSHA recommended that the Board adopt the proposed standard as an emergency regulation, observing that COVID-19 is "an occupational health emergency causing more deaths in less time than any other workplace crisis in the nearly fifty-year existence of Cal/OSHA. The COVID-19 public health crisis is exactly the type of catastrophe that the legislature intended an emergency regulation to address." (*Id.* at 21-22.)

In contrast, a Board staff evaluation recommended denial of the petition.[2] It acknowledged that federal OSHA regulations did not specifically address employee protections against COVID-19, and that the scope of the ATD standard was limited to medical offices and certain other specialized facilities. It also acknowledged at least two states, Virginia and Oregon, had adopted or had started the process of adopting emergency regulations mandating compliance with such recommended practices. However, Board staff stated that they were "unable to find evidence that

[2] Occupational Safety and Health Standards Board, Petition File No. 583, Board Staff Evaluation (Aug. 10, 2020).

the vast majority of California workplaces are not already in compliance with COVID-19 requirements and guidelines," and expressed concern that a new regulation would "place additional regulatory burden" on such businesses. While Board staff acknowledged that "[s]ome employers exhibit a lack of regard for Cal/OSHA regulations and continue to do so despite robust efforts on the part of regulatory agencies and employer and labor groups," Board staff expressed the opinion that "Cal/OSHA's limited resources should continue to be focused on enforcement and consultation outreach specifically targeted at employers and sectors of the economy with deficient COVID-19 protections, as this is more likely to be effective at ensuring employee protections." It also suggested that prescribing specific requirements, "without substantial evidence of need," could dilute the effectiveness of the IIPP regulation and cause confusion. In short, Board staff concluded, "[d]eveloping an ETS and a follow-up permanent regulation for the entire state may not be the most effective use of California's limited Cal/OSHA and Board resources."[3]

The Board unanimously voted to grant the petition in part, agreeing with Cal/OSHA that "COVID-19 is a hazard to working people" and that "an emergency regulation would enhance worker safety." (AR Tab 1K5 at 3.) Between February 1, 2020 and September 27, 2020, the Division received nearly 7,000 complaints alleging inadequate protections for and potential exposure to COVID-19 in workplaces. (AR Tab 1E at 5 ¶ 15.) The Board accepted Cal/OSHA's assertion that "an emergency regulation would strengthen, rather than complicate, the Division's enforcement efforts." (AR Tab 1K5 at 4.) Accordingly, the Board directed Cal/OSHA to work with Board staff to expeditiously submit a proposal for an emergency regulation to protect all workers not covered by section 5199 from COVID-19 exposure in the workplace. (*Id.*)

On November 12, 2020, the Board published a Notice of Proposed Emergency Action, which extended to the public the opportunity to comment on the proposal prior to or at the upcoming Board meeting. (AR Tabs 1C, 1H, 1J.) The administrative record reflects that prior to the meeting, the Board received extensive written comment letters on the proposed ETS Regulations from a variety of sources, including public agencies and municipalities, trade and industry associations,

[3] The Court granted Plaintiffs' motion to supplement the record to include both the rulemaking petition and the Board staff evaluation.

private employers, employee organizations, individual legislators, and the Attorney General. (AR Tabs 2A-W.) On November 19, 2020, the Board held a lengthy (day-long) public hearing to discuss the proposed ETS regulations, during which it heard extensive public comments. (AR Tab 5 (transcript).) Following the hearing, the Board adopted the ETS Regulations. (AR Tabs 3A (Board resolution), 3B (Submission of Regulations), 3D (Proposed Text), 3F (Board vote sheet), 3G (agenda), 3I (Economic and Fiscal Impact Statement).) The Board's unanimous resolution adopting the regulations was accompanied by a 57-page Finding of Emergency (AR Tab 3E) that listed dozens of scientific studies, CDC and other agencies' guidance documents, executive orders, government statistical reports, and other documents relied upon by the Board. (AR Tabs 1K1-1K71.) The Board subsequently issued a brief, three-page Addendum to that Finding. (AR Tab 3E1.) The Office of Administrative Law approved the Board's emergency regulatory action, which became effective on November 30, 2020. (AR Tab 4.)

The Board adopted five new emergency regulations. (8 Cal. Code Regs., §§ 3205-3205.4.) They apply to all employees and places of employment, other than places of employment with one employee who does not have contact with other persons; employees working from home; and employees who are covered by section 5199 (i.e., the ATD Standard discussed above). (§ 3205(a).) Among other measures, they provide:

- **COVID-19 Prevention Program.** Employers must establish, implement, and maintain an effective, written COVID-19 Prevention Program, which among other things must address communicating information to employees about COVID-19, identification and evaluation of COVID-19 hazards in the workplace, investigating and responding to COVID-19 cases in the workplace, correcting COVID-19 hazards, providing effective training and instruction to employees on workplace COVID-19 prevention and policies, physical distancing and face coverings, provision of personal protective equipment, recordkeeping requirements for recording or tracking positive COVID-19 cases in the workplace, etc. (§ 3205(c));[4]

[4] The regulation provides that the COVID-19 Prevention Program may be integrated into the employer's existing Injury and Illness Program (§ 3203), or may be maintained in a separate document. (§ 3205(c).)

- **Testing.** Employers must provide COVID-19 testing to employees at no cost and during working hours if the employee is exposed to a COVID-19 case (§ 3205(c)(3)) or has been present in an exposed workplace that has been identified as the location of an outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period (§ 3205.1(b)(1).)
- **Exclusion from Workplace.** Employers must exclude from the workplace all employees who have COVID-19 or have been exposed to COVID-19 for a period of 10 to 14 days, consistent with current public recommendations or orders (§ 3205(c)(10)-(11); Executive Order N-84-20). Employers must continue and maintain workers' earnings, seniority, and all other employee rights and benefits during this exclusion period, unless the COVID-19 illness or exposure is shown to be nonoccupational. (§ 3205(c)(10)(C).)
- **Major COVID-19 Outbreaks.** Employers shall provide twice weekly COVID-19 testing when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period. (§ 3502.2(a), (b).)
- **COVID-19 Prevention in Employer-Provided Housing.** Employers who provide housing to employees shall prioritize housing unit assignments to minimize exposure by housing together, in order, (i) family members and (ii) residents who work in the same crew or at the same worksite; shall ensure the premises are of sufficient size and layout to permit at least six feet of physical distancing between residents, and that beds are spaced at least six feet apart; and shall effectively isolate COVID-19 exposed residents from all other occupants. (§ 3205.3(b), (c), (h).)
- **Employer-Provided Transportation.** Employers who provide employees with motor vehicle transportation to and from work shall prioritize shared transportation assignments to minimize exposure in the same manner as they do shared housing; and shall ensure that the vehicle operator and any passengers are separated by at least three feet during the operation of the vehicle. (§ 3205.4(b), (c).)

PROCEDURAL BACKGROUND

The National Retail Federation (NRF) Plaintiffs filed their action in San Francisco Superior Court on December 16, 2020. The Western Growers Association (WGA) Plaintiffs filed their similar action in Los Angeles County Superior Court on December 31, 2020. On January 19, 2021, the Court entered an order on the parties' stipulation to transfer the latter case and assign it to this Court for decision. On January 28, 2021, after circulating a tentative ruling in the form of a written order, the Court held a hearing on both motions. The parties were granted leave to file supplemental post-hearing briefs. On February 11, 2021, the Court heard the WGA Plaintiffs' motion to complete the administrative record. This order resolves the plaintiffs' applications for a preliminary injunction in both related cases, which raise common (although not identical) issues.[5]

DISCUSSION

The question before the Court is whether Plaintiffs have met their burden to show entitlement to a preliminary injunction, an "extraordinary remedy." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) "As its name suggests, a *preliminary* injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim.* [Citation.] To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) As a general matter, "the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*Id.*) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt*

[5] The Court granted the applications of various interested parties to file *amicus curiae* briefs in support of both parties. However, *amici* may not expand the factual record before the Court nor present issues not raised by the parties. (See *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1046, fn. 12 ["an amicus curiae accepts the case as he finds it and may not launch out upon a juridical expedition of its own unrelated to the actual appellate record" (internal quotations omitted)].) The Court has considered those briefs within those constraints.

v. State of California (1992) 4 Cal.4th 668, 677-678.)

In other words, "the standard for granting injunctive relief involves balancing competing public interests—the harm if an injunction issues versus the harm if the project is allowed to proceed. 'It is well established that when injunctive relief is sought, consideration of public policy is not only permissible but mandatory.'" (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 854.) "The burden is on the party seeking the preliminary injunction to show all of the elements necessary to support issuance of a stay." (*Id.*) Finally, "[w]here, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. [Citations.] This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 14711.) These factors apply with equal force where, as here, a party is seeking a preliminary injunction barring a state agency from enforcing emergency regulations. (See, e.g., *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 303-304 [reversing preliminary injunction barring State of California's enforcement of interim emergency regulations].)

For the following reasons, the Court concludes that Plaintiffs have not shown a likelihood of success on the merits of their claims. (See Part I, *infra*.) Even if they were able to do so, the balance of interim harms weighs heavily in favor of the continued implementation and enforcement of the ETS regulations; thus, injunctive relief is not warranted. (See Part II, *infra*.)

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

Plaintiffs premise their requests for a preliminary injunction on three principal claims. First, they contend that the Board violated the Administrative Procedure Act by adopting the ETS Regulations on an emergency basis, rather than following the usual notice and comment procedure. Second, they contend that certain of the ETS Regulations exceed Cal/OSHA's authority. Third,

they claim that the ETS Regulations violate due process. The Court addresses each claim in turn.

A. The Board's Emergency Finding Is Supported By Substantial Evidence.

Plaintiffs' central challenge is to the Board's adoption of the ETS Regulations on an emergency basis. Plaintiffs assert that the circumstances surrounding the ETS Regulations "did not warrant emergency adoption," and that the Board's Finding of Emergency "failed to meet the requirements to demonstrate the existence of an emergency so immediate and serious that it made allowing notice and meaningful public comment inconsistent with the public interest." (NRF Memo. at 10:9-12; WGA Memo. at 12:18 [contending that "[t]he Board failed to demonstrate a workplace emergency"].) The Court is unpersuaded.

1. The Board Properly Found That The COVID-19 Pandemic Constitutes An Emergency Necessitating Immediate Action.

California's Administrative Procedure Act, Gov. Code § 11340 *et seq.*, generally requires state agencies that seek to adopt regulations to circulate them for public notice and comment, a process that requires "lengthy proceedings." (*Doe v. Wilson*, 57 Cal.App.4th at 306.)[6] However, the APA authorizes a state agency to adopt a regulation as an emergency regulation if it makes a finding that the adoption of the regulation is necessary to address an "emergency." (Gov. Code § 11346.1(b))(1).) "Emergency" is defined as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code § 1132.545.) Any finding of an emergency shall include "a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document if any, upon which the agency relies." (*Id.* § 11346.1(b)(2).) "A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall

[6] Plaintiffs' counsel estimated at the hearing that with the 45-day required notice period (Gov. Code § 11346.4), a full-blown notice and comment process would have consumed approximately four months. (RT (Jan. 28, 2021) at 75:21-76:7; see also *Pulaski v. California Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315, 1323 [referring to "protracted saga of rulemaking, comments and public hearings" leading to Board's promulgation of regulation].)

not be adequate to demonstrate the existence of an emergency." (*Id.*) "If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations . . . , the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations." (*Id.*) The Office of Administrative Law reviews the adopted regulations and may disapprove them if, among other things, "it determines that the situation addressed by the regulations is not an emergency." (*Id.* § 11349.6(b).)

Such a regulation will become effective on an interim basis for a period of up to 180 days. (*Id.* § 11346.11(e).)[7] An emergency regulation may be declared to be invalid "upon the ground that the facts recited in the finding of emergency . . . do not constitute an emergency within the provisions of Section 11346.1." (*Id.* § 11350(a).) In a proceeding under section 11350, a court may only consider the following evidence: (1) the rulemaking file; (2) the finding of emergency; (3) an item that is required to be included in the rulemaking file but is not, for the sole purpose of proving its omission; and (4) any evidence relevant to whether a regulation is required to be adopted. (*Id.* § 11350(d).)

"In the leading case concerning the validity of such emergency regulations, [citation], the court supported the issuance of the emergency regulations and held: 'What constitutes an emergency is primarily a matter for the agency's discretion.'" (*Doe v. Wilson*, 57 Cal.App.4th at 305-306, quoting *Schenley Affiliated Brands v. Kirby* (1971) 21 Cal.App.3d 177, 194-195.) "Under *Schenley*, a court is not necessarily bound by an agency's determination of the existence of an emergency, but the court must accord *substantial deference* to this agency finding, and may only overturn such an emergency finding if it constitutes an abuse of discretion by the agency." (*Id.*) Indeed, as another court has observed, "the term 'emergency' has been given a practical, commonsense meaning in the California case law: '[E]mergency has long been accepted in California as an unforeseen situation calling for immediate action. This is the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman.'" (*Id.*, quoting *Sonoma*

[7]The Governor extended this six-month period by 120 days in Executive Order N-71-20. (AR Tab 1K6 at 2; Tab 1K52 at ¶ 40.)

County Organization etc. Employees v. County of Sonoma (1991) 1 Cal.App.4th 267, 276-277.) Plaintiffs fail adequately to address this controlling authority.[8]

Plaintiffs do not seriously contend—nor could they—that the COVID-19 pandemic is anything other than a genuine emergency in any intelligible sense of the word. (See *Sonoma County Organization etc. Employees,* 1 Cal.App.4th at 277 ["an emergency may well be evidenced by an imminent and substantial threat to public health or safety"]; WGA Memo. at 12:21-22 [acknowledging that "COVID-19 is unquestionably a public health emergency"].) Rather, Plaintiffs contend that "[t]here is no reason that the regular rulemaking process, which involves public comment . . . , could not have begun in March 2020," which COVID-19 was first recognized in the United States. (NRF Memo. at 10:16-17; WGA Reply at 10:12-13 ["The Governor's emergency declaration should have been impetus enough for the Board to consider taking action back in March."].) That contention is insupportable. As the Board found, in "the early stage of the pandemic," stay-at-home orders had initially "flattened the curve" in California, the existing ATD standard protected employees in healthcare and other workplaces most affected by the pandemic, and the expected extent and length of the pandemic were unclear. However, "cases began to rise precipitously in October and November 2020. [The prior g]uidance is not sufficient to address the present increase in cases and the risk of occupational spread. . . . The present threat of exponential growth in COVID-19 cases demands immediate action." (AR 3E1 at 1-2.) This discussion readily satisfies the statutory requirement that the agency's finding of emergency include "facts explaining the failure to address the situation through nonemergency regulations." (Gov. Code § 11346.1(b)(2).)

Indisputable data readily illustrates the point. According to the California Department of

[8] The WGA Plaintiffs briefly dismiss *Doe v. Wilson* in a footnote as unsupported by "reasoned analysis," and suggest that it is no longer authoritative because the Legislature amended section 11346.1 effective January 1, 2007. However, they cite nothing in the language or legislative history of that amendment which suggests that the Legislature intended to abrogate the substantial evidence standard and direct courts to exercise their "independent judgment," as Plaintiffs contend. To the contrary, the amended language continues to provide that the agency shall demonstrate, "by substantial evidence," the need for the proposed regulation. (Gov. Code § 11346.1(b)(2).) As discussed below, the requirement that courts defer to an agency's finding of an emergency is entirely consistent with the substantial evidence standard that governs judicial review of administrative agencies' findings.

Public Health, on March 4, 2020, when Governor Newsom issued his proclamation of a state of emergency, California had 53 confirmed cases and one reported death—***one***—from COVID-19. On May 20, 2020, when the Board received the petition requesting it to create new temporary emergency standards, there were 84,057 confirmed cases and 3,436 deaths. By November 19, 2020, when the Board issued its Finding of Emergency, those numbers had risen to over ***one million*** confirmed cases (1,059,267) and 18,466 deaths.[9] The same day, the Governor and the State Department of Public Health, noting "an unprecedented, rapid rise in COVID-19 cases across California," issued a stay at home order applicable between 10 PM and 5 AM in counties that were seeing the highest rates of positive cases and hospitalizations in order to slow the surge in transmission of the virus.[10] (See also *South Bay United Pentecostal Church,* 985 F.3d at 1134-1135 ["in late October, case rates began to climb, then to skyrocket exponentially. . . . [¶] From mid-November to mid-December, the number of new cases per day in California jumped from 8,743 to more than 35,000. The number of COVID-19 patients hospitalized statewide grew from 777 on November 15 to 13,645 on December 14. . . . As of January 19, California became the first state to record more than three million cases. On January 21, 2021, the State recorded a record 736 deaths in a single day, bringing the total of Californians who have died from the virus to 35,004." (footnotes omitted)].)

In short, in March 2020, the COVID-19 pandemic was still in its initial, relatively modest wave; a second, larger wave began to rise after the Memorial Day holiday in late May; and by late October, it entered its most deadly phase thus far.[11] As the Board accurately explains, "any passage

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[9] "State Officials Announce Latest COVID-19 Facts," *cdph.ca.gov*. The Court takes judicial notice of these official statistics released by the California Department of Public Health.

[10] "State Issues Limited Stay at Home Order to Slow Spread of COVID-19," *gov.ca.gov*.

[11] See, e.g., "Half of U.S. Coronavirus Deaths Have Come Since Nov. 1," *The New York Times* (Feb. 10, 2021) ["The winter wave has been the pandemic's deadliest period"]; "California, Besieged by Virus for Months, Has Most Deaths in U.S.," *The New York Times* (Feb. 9, 2021); "Covid-19: Virus Hammers California as Deaths and Hospitalizations Surge," *The New York Times* (Feb. 1, 2021). As the Ninth Circuit observed in late January, "The State of California is facing its darkest hour in its fight against the COVID-19 pandemic, with case counts so high that intensive care unit capacity is at 0% in most of Southern California. To slow the surging community spread, California's public health and epidemiological experts have crafted a complex set of regulations that restrict various activities based on their risk of transmitting the disease and the projected toll on the state's healthcare system." (*South Bay United Pentecostal Church,* 985 F.3d at 1131.)

in time from the start of the declared emergency to the effective date of the ETS [Regulations] was indicative of an evolving and worsening health crisis requiring evolving and escalating governmental actions." (See also *Midway Venture LLC*, 2021 WL 222006, at *3 ["These [public health] restrictions shifted as the pandemic ebbed and flowed and as scientists better understood the transmission of the virus."].) Under these circumstances, Plaintiffs' contentions that the Board abused its discretion in finding an emergency and that it should have acted many months earlier are untenable.

The WGA Plaintiffs' reliance on the unpublished federal court decision in *Chamber of Commerce of United States v. U.S. Department of Homeland Security* (N.D. Cal. Dec. 1, 2020), 2020 WL 7043877 is misplaced. There, the court held that two federal agencies' delay in promulgating interim final rules regarding the H-1B visa program did not fall within the good cause exception to the federal APA, which authorizes an agency to excuse the Act's notice and comment requirements "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." (*Id.* at *6, citing 5 U.S.C. § 533(b)(B).) *Chamber of Commerce* is inapposite, for several reasons. First, it held that a court should review *de novo* an agency's decision to invoke the good cause exception, rejecting the agencies' argument that a court should defer to their findings. (*Id.* at *6-*7.) In contrast, under California's APA, there is no "good cause" exception, and courts must defer to an agency's finding of emergency if it is supported by substantial evidence. Second, the court held that the agencies could not justify their delay on the basis of the COVID-19 pandemic, pointing out that the issue of domestic unemployment that the rules sought to address had been on their agenda since 2017, long before the pandemic, and that the rules themselves acknowledged that "corrective measures should have been taken long ago." (*Id.* at *8.) In contrast, the ETS Regulations were promulgated on an emergency basis not to address a longstanding issue that predated the pandemic, but rather precisely to address COVID-19 and its effects on employee safety and health. Third, "Defendants did not suggest in the Rules—or at oral argument—that they are intended to be a temporary solution until the 'emergency situation has been eased by their promulgation.'" (*Id.* at *10.) In contrast, the ETS Regulations are in effect only for a limited period of time.

2. The Board's Finding of Emergency Is Supported By Substantial Evidence.

Plaintiffs also contend that the Board's Finding of Emergency is not supported by substantial evidence. As previously noted, the 57-page Finding of Emergency is supported by literally dozens of citations to documents relied upon by the Board and included in the administrative record, including scientific studies concerning the transmission of COVID-19, guidance from multiple federal and state agencies including the Centers for Disease Control, federal OSHA, and the California Department of Public Health, and studies or reports regarding investigations of the spread of COVID-19 at certain work-related areas throughout the State. (AR, Tab 1E.)

The Board found: (1) "the majority of California workplaces are allowed to engage in on-site work operations despite the spread of COVID-19. Millions of California workers face potential exposure to COVID-19 on the job."; (2) "[c]lusters and outbreaks of COVID-19 have occurred in workplaces throughout California, including in food manufacturing, agricultural operations, and warehouses."; (3) although data for the number of cases of COVID-19 infection and number of deaths attributable to workplace exposure to COVID-19 is not currently available, "the numbers are likely substantial, particularly among essential workers, due to workers' exposure to persons outside of those in one's household, along with the close proximity between persons required in some industries."; (4) "Employees infected with COVID-19 at work can transmit the infection to persons in their homes and communities, resulting in an increase in infection rates." (AR Tab 1E at 4.) Further, the Board found that between February 1, 2020, and September 27, 2020, Cal/OSHA received over 6,937 complaints alleging inadequate protections for and potential exposure to COVID-19 in workplaces. (*Id.* at 5.) Plaintiffs do not squarely address any of this evidence, nor do they discuss the testimony the Board heard at its November 19, 2020 hearing regarding the failures of employers to protect workers from COVID-19 in the workplace and the outbreaks resulting from those failures. As a result, their challenge fails. "It is not the court's function to second-guess the Board's conclusions or resolve conflicting scientific views in an area committed to the discretion of the rulemaking agency." (*Pulaski v. California Occupational Safety and Health*

Standards Board (1999) 75 Cal.App.4th 1315, 1329 [rejecting challengers' claim that Board failed to cite any studies in support of new standard adopted to address repetitive motion injuries or to adequately explain the broad rule that it adopted, observing that "The fact that the Board cited only six documents is not determinative, given that it was not required to cite any," and "the record is replete with articles and reports" supporting the Board's action].)[12]

Plaintiffs acknowledge that the Board's finding discusses the spread of COVID-19 in general, but insist that it "does not establish any nexus, supported by specific facts, between COVID-19 transmission and the workplace to justify emergency rulemaking." (WGA Memo. at 13:5-6.) Plaintiffs assert that the Finding does not cite any studies or other evidence "showing California workplaces have been a vector for spread of COVID," and insist that as a result, the Board's finding of an emergency is based on "speculation." (*Id.* at 13:8-17; see also *id.* at 14:6-7 [contending that Cal/OSHA "failed to provide any evidence California workplaces are vectors for spread of COVID-19"].) It is worth pausing to recognize just how fatuous this argument is. As is now well-known, "Because the primary mode of transmission is person-to-person, any activity that brings individuals together increases the risk of additional infections. The more individuals that gather together, and the longer they spend together, the greater the risk." (*Midway Venture LLC*, 2021 WL 222006, at *3.) In other words, the virus spreads ***any place*** where persons gather and come into contact with one another—whether it happens to be an office building, a meatpacking plant, a wedding reception, a business conference, or an event in the Rose Garden of the White

[12] Plaintiffs protest that the ETS Regulations are unnecessary because they and their members are already doing everything they can to protect employees by following existing standards and regulations. But regulators are not required, Polyanna-like, to assume good faith on the part of all regulated entities; they must act to *prevent* avoidable injuries, even if they are caused by a small minority of employers. In fact, even under the existing ATD, IIDD, and other standards, Cal/OSHA has issued numerous citations for COVID-19 related violations against a wide variety of employers, including employers in the agricultural, construction, manufacturing, and retail (grocery) sectors. (See State of California, Department of Industrial Relations, Cal/OSHA, "Citations for COVID-19 Related Violations," dir.ca.gov.dosh/COVID19citations.html.)

House.[13] Workplaces, where employees often spend eight hours a day or more in close proximity to one another, are no exception, which of course is why the pandemic has emptied innumerable office buildings, stores, shopping centers, restaurants, and bars around the world.[14] The virus is also spread among persons residing together in housing and on buses and other transportation, whether they are private or employer-provided. The Board did not need to wait to adopt emergency regulations until scientific studies were completed to confirm these obvious facts. As it correctly observes, "elevating the evidentiary standard and waiting for researchers to conduct and publish further studies would result in more workplace infections, illnesses, and deaths, exacerbating the emergency and defeating the purpose of the expedited emergency rulemaking process." (Supp. Br. at 5:9-11.)

Plaintiffs do not submit any admissible contrary evidence.[15] But even if they had, the governing substantial evidence standard requires a court to "accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the

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[13] Of course, not all workplaces pose an identical risk of transmission and infection. In the *South Bay Pentecostal Church* case, "California presented evidence that retail and grocery stores pose a lower transmission risk than indoor worship, primarily because those establishments do not involve individuals congregating to participate in a group activity." (985 F.3d at 1144.) Nonetheless, there is no blinking the obvious reality that places of employment where employees come into contact present a risk of transmission of the virus.

[14] Plaintiffs assert that they are not aware of studies specifically documenting the spread of COVID-19 in retail or agricultural workplaces. As one court recently observed in rejecting a similar argument, "Without evidence of the depth of Plaintiffs' 'knowledge' or the extent to which transmissions have been accurately traced, such an argument is meaningless." (*Mitchell*, 2020 WL 7647741, at *5, fn.3.) But even the WGA Plaintiffs acknowledge that the infection positivity rate among farmworkers in employer-provided housing "was initially a problem in certain agricultural locales, such as Ventura County." (WGA Reply at 11, fn. 4.) Moreover, the Board submitted evidence of reports it had received from local health departments of hundreds of COVID-19 outbreaks (3 or more cases within a 14-day period) resulting in thousands of cases in retail trade and agriculture and food manufacturing workplaces. (Heinzerling Decl. ¶ 5.) While that evidence was not before the Board when it adopted the ETS Regulations, the Court considers it in connection with the balance of interim harms.

[15]The NRF Plaintiffs' reliance on "the recent studies and data provided with Plaintiffs' Complaint" (Memo. at 11:8-9) is misplaced. An unverified complaint is not "evidence" that can serve as a basis for a preliminary injunction. (Code Civ. Proc. § 527(a); Cal. R. Ct. 3.1306(a).) In any event, bare citations to studies or other materials on the Internet, without any supporting declarations or expert testimony, are not properly considered by the Court. " '[A]nyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation.'" (*People v. Beckley* (2010) 185 Cal.App.4th 509, 515-516.)

[administrative decision]." (*M.N. v. Morgan Hill Unified School Dist.* (2018) 20 Cal.App.5th 607, 616 (citation omitted).) "Only if no reasonable person could reach the conclusion reached by the administrative agency, based on the entire record before it, will a court conclude that the agency's findings are not supported by substantial evidence." (*Doe v. Regents of Univ. of Cal.* (2016) 5 Cal.App.5th 1055, 1073 (citation omitted).) As the parties challenging the administrative decision, it is Plaintiffs' burden to establish that the Board abused its discretion by rendering a decision not supported by substantial evidence. (*M.N.*, 20 Cal.App.5th at 631.) Plaintiffs have not carried that burden.

3. The Addendum Does Not Undermine The Board's Action.

The WGA Plaintiffs direct a great deal of rhetorical fire at the Addendum to the Finding of Emergency, attacking it as an "after-the-fact justification" for the ETS Regulations that was purportedly adopted in violation of the APA or the Bagley-Keene Open Meeting Act. (WGA Memo. at 17:11-18:8.) Plaintiffs even go so far as to contend that the Board's failure to include the Addendum in its original notice of proposed emergency action, "standing alone," is "sufficient basis to invalidate the ETS," and constitutes an "admission that the [Finding of Emergency] was inadequate." (WGA Reply at 7:27-8:2, 13:3-4.) However, the brief Addendum is a weak reed that cannot possibly support the weight that Plaintiffs would place upon it.

The facts are as follows. After holding a properly-noticed public meeting on November 19, 2020 to discuss the proposed ETS Regulations, the Board voted to adopt those regulations. Board staff then submitted the proposed Regulations, finding of emergency, and other required documents to the Office of Administrative Law (OAL), which is charged with reviewing proposed regulations (Gov. Code § 11349.1), and with approving or disapproving proposed emergency regulations. (Gov. Code § 11349.6(a) ["prior to the adoption of the regulation as an emergency, [OAL] shall approve or disapprove the regulation."].) (Shupe Decl. ¶ 4.) On November 25, 2020, during the course of its review, OAL requested further information be added to the finding of emergency and authorized Board staff to prepare an addendum. (*Id.* ¶ 6; Escobar Decl. ¶ 5.) On November 29, 2020, Board staff submitted the Addendum, which included a short summary of the facts leading

to the emergency rulemaking effort. (*Id.* ¶ 7; AR Tab 3E1.) A revised version of the Addendum was sent to OAL the next day by a Cal/OSHA attorney. (*Id.* ¶ 8.) On November 30, 2020, before approving the emergency regulations and filing them with the Secretary of State, OAL added the addendum to the finding of emergency, and the final regulations, finding and addendum then were posted on the Board's website. (*Id.* ¶¶ 9-11; Escobar Decl. ¶ 7.)

The approach taken by the Board and OAL here is consistent with the procedure dictated by the APA and routinely followed by administrative agencies in California. OAL is to review emergency regulations adopted by an agency within 10 days after their submittal, and must post a notice of the filing of a proposed emergency regulation to allow for five days of public comment "unless the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest." (Gov. Code § 11349.6(b).) An agency may add material to a rulemaking file that has been submitted to OAL for review if addition of the material does not violate other requirements of the APA. (Gov. Code § 11349.2.)

The practice of an administrative agency issuing addenda in response to public comments or queries from OAL, far from a cause for suspicion, is entirely unremarkable. (See, e.g., *California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 293-300 [after issuing notice of emergency rulemaking and holding public hearing, Department of Health Care Services issued notice of consideration of proposed amendments and final statement of reasons, including two addendums addressing comments received, and then provided additional responses to issues raised during OAL's review]; Escobar Decl. ¶ 8 [OAL has approved other emergency rulemakings where the promulgating agency has issued an addendum].)[16]

In any event, even if the Board arguably committed some technical violation of the APA or of the Bagley-Keene Open Meeting Act in issuing the Addendum to its 57-page Finding of

[16] See also *California Practice Guide: Administrative Law* (The Rutter Group Dec. 2020) ¶ 26:173 [describing a hypothetical scenario similar to that involved here, where after "the OAL reviewing attorney has contacted to an agency representative to advise that they will not recommend approval of the agency's proposed emergency adoption because the finding of emergency is inadequate," the agency representative "states over the phone it is imperative OAL approve the emergency regulation, listing a series of recent incidents," and "OAL then quickly approves the adoption after receiving the revised, fact-heavy finding."].

Emergency, any error on this record was inconsequential. The Addendum comprised a total of one page and one-half of text in seven paragraphs, as well as correcting the dates of four of the documents relied upon by the Board. (AR Tab 3E1.) The text briefly summarized the history of the pandemic and the regulatory backdrop to the Board's action. Virtually all of it merely reiterated information found elsewhere in the administrative record or widely known and readily subject to judicial notice. (See also pp. 13-14, *supra*.) Nothing in the Addendum materially alters the Court's analysis of whether the Board's action was supported by substantial evidence.[17] Thus, at a minimum, the Board's action substantially complied with the APA. "Failure to comply with every procedural facet of the APA, however, does not automatically invalidate a regulation." (*Pulaski*, 75 Cal.App.4th at 1328.) A court "may" declare a regulation to be invalid only for "a substantial failure to comply" with the APA. (Gov. Code § 11350(a); see *California Assn. of Medical Products Suppliers*, 199 Cal.App.4th at 303-304, 307.) "Substantial compliance . . . means *actual* compliance in respect to the substance essential to every reasonable objective of the statute. . . . Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. . . . Substance prevails over form." (*Pulaski*, 75 Cal.App.4th at 1328.)[18]

B. **The Board Had Authority to Adopt The Emergency Regulations.**

Plaintiffs' second major claim is that the Board exceeded its authority by promulgating regulations that are outside Cal/OSHA's enforcement authority. The NRF Plaintiffs concede that Cal/OSHA has "broad authority to regulate workplace safety," but insist that its jurisdiction "does

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[17] Plaintiffs take specific issue only with a single sentence of the Addendum, which contains a statement they characterize as "debatable." (WGA Memo. at 6:13.) In the context of explaining the need to supplement existing regulations, that sentence states, "Investigations in the field over the summer, along with rising positivity rates, showed that employers were struggling to address the novel hazards addressed by COVID-19." (AR Tab 3E1, at 1-2.)

[18] The same principle applies to the Bagley-Keene Act. (Gov. Code § 11130.3(b)(3) ["'An action [taken in violation of the Bagley-Keene Act] shall not be determined to be null and void if . . . [t]he action taken was in substantial compliance with Sections 11123 and 11125"].) Here, as in *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, "the [Board's] actions demonstrate a good faith effort to notify interested persons and the public about the date, location, and purpose of the hearing. In doing so, the [Board] acted in a manner that was consistent with the open meeting objectives of the Bagley-Keene Act and thereby substantially complied with the act's notice requirements." (*Id.* at 1433.)

not extend to regulating wages" or requiring employees to take COVID-19 tests "without any evidence that the hazard is work-related." (NRF Memo. at 11:27-12:2.)[19] Similarly, the WGA Plaintiffs contend that the Board lacks authority to regulate employer-provided housing and transportation, among other areas, insisting that those and other provisions of the ETS Regulations "do not regulate occupational safety and health hazards arising from working conditions because they do not address health hazards at the place where work is performed," but rather "regulate conduct occurring outside of the workplace." (WGA Memo. at 19:1-5.) The Court is unpersuaded.

The Board was created by the Legislature as part of the California Occupational Safety and Health Act of 1973, Lab. Code § 6300 *et seq.* "Cal-OSHA was enacted to secure 'safe and healthful working conditions' by 'enforc[ing] effective standards' and 'encouraging employers to maintain safe and healthful working conditions.'" (*Murray Co. v. Occupational Safety & Health Appeals Bd.* (2009) 180 Cal.App.4th 43, 54, citing Lab. Code § 6300.) Labor Code section 142.3 authorizes the Board to adopt, amend or repeal occupational safety and health standards and orders, and provides that the Board "shall be the only agency in the state authorized to adopt occupational safety and health standards." (Lab. Code § 142.3(a)(1); see also *Pulaski,* 75 Cal.App.4th at 1323.)

The Division (Cal/OSHA) enforces those standards, inspecting workplaces and issuing citations for health and safety violations. (Lab. Code § 142.) It is vested with "the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary adequately to enforce and administer all laws and lawful standards or orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment." (Lab. Code § 6307.) This language grants the Division "exceedingly broad authority to enforce regulations to protect the health and safety of employees throughout the state." (*United Air Lines, Inc.*, 32 Cal.3d at 767.) In enforcing occupational safety and health standards, the Division is empowered to "[d]eclare and prescribe what safety devices, safeguards, or other means or methods

[19] In their post-hearing brief, the NRF Plaintiffs attempt to walk back their prior admission that the Board has "broad authority," asserting instead that the Board is "an agency with limited authority" to implement "broad health policy." (Supp. Br. at 5:11.) As discussed in text, Plaintiffs got it right the first time.

of protection are well adapted to render the employees of every employment and place of employment safe as required by law or lawful order," and to "[r]equire the performance of any other act which the protection of the life and safety of the employees in employments and places of employment reasonably demands." (Lab. Code § 6308.)

"Of all the activities undertaken by an administrative agency, quasi-legislative acts are accorded the most deferential level of judicial scrutiny. [Citation.] 'The courts exercised limited review of legislative acts by administrative bodies out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.'" (*Pulaski*, 75 Cal.App.4th at 1331.) In considering whether the ETS Regulations are a valid exercise of the Board's power to adopt standards necessary for the administration of the Occupational Safety and Health Act, and the Division's power to prescribe such safeguards as the protection of employees' life and safety reasonably demands, "the judicial function is limited to determining whether the regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute. Moreover, these issues do not present a matter for the independent judgment of [a court]; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations. And in considering whether the regulation is 'reasonably necessary' under the foregoing standards, the court will defer to the agency's expertise and will not superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1014-1015 (citations and internal quotations omitted); see also *California Assn. of Medical Products Suppliers*, 199 Cal.App.4th at 303 ["In considering the validity of regulations, the courts' 'function is to inquire into the legality of the regulations, not their wisdom.'"].)

Here, the two key provisions to which the NRF Plaintiffs principally object fall comfortably within the Board's and Cal/OSHA's broad statutory mandates. *First*, Plaintiffs object to section 3205(c)(10), which requires the exclusion of exposed employees from the workplace for a limited period of time, and mandates that employers pay their wages and other benefits while the employees

are excluded "and otherwise able and available to work." The Board found that this paid leave provision is "necessary to limit transmission of COVID-19 in the workplace. Toward this end, it is important that employees who are COVID-19 cases or who had exposure to COVID-19 do not come to work. Maintaining employees' earnings and benefits when they are excluded from the workplace is important in ensuring that employees will notify their employers if they test positive for COVID-19 or have an exposure to COVID-19, and stay away from the workplace during the high-risk exposure period when they may be infectious." (AR Tab 1E at 19-20.) Thus, the challenged regulation is reasonably necessary to protect workplace safety and employees' health. As it also "encourages employers to give due attention to enforcement matters," it "promotes the legislative purposes. Accordingly, it is neither 'clearly erroneous [n]or unauthorized.'" (*Murray Co.*, 184 Cal.App.4th at 54; see *Pulaski*, 75 Cal.App.4th at 1336 [health and safety statutes such as Cal-OSHA "are designed to *prevent* [work-related] illnesses or injuries from occurring."].)

Significantly, there is nothing novel about the requirement that employers maintain workers' pay and benefits while they are on medical leave. As Plaintiffs concede (NRF Memo. at 12 fn. 5), Cal/OSHA for decades has enforced similar regulations requiring employers to maintain employees' earnings, seniority, rights, and benefits if they are removed from work due to exposure to lead, other toxic substances, or an airborne infectious disease. (E.g., 8 Cal. Code Regs. §§ 1532.1, 5199(h)(8)(B); see also AR Tab 5 at 287 ["Medical removal and protection of pay have been implemented by federal OSHA and Cal/OSHA since the 1970s in the lead standards and many, many other health regulations."].)[20] Cal/OSHA's longstanding administrative interpretation of its authority to implement its governing statute is entitled to great weight. (*Western States Petroleum Ass'n v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1006 ["An administrative agency's construction of the authority vested in the agency to carry out a statutory provision is

[20] The recent federal OSHA guidance (see pg. 26 & fn. 22, *infra*) recommends that in order to minimize the negative impact of quarantine and isolation on workers, employers should "consider implementing paid leave policies to reduce risk for everyone at the workplace," and explains that the Families First Coronavirus Response Act "provides certain employers 100% reimbursement through tax credits to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19 through March 31, 2021." It similarly warns, "Policies that encourage workers to come to work sick or when they have been exposed to COVID-19 are disfavored."

entitled to great weight and will be followed unless it is clearly erroneous or unauthorized."]; see also *Moore,* 2 Cal.4th at 1017-1018 ["a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it"].)

Second, Plaintiffs challenge the Board's regulatory requirement that employees who are exposed to COVID-19 when there is an outbreak in the workplace be tested to avoid spreading the virus to other employees. (§ 3205.1(b).) This is also an eminently proper exercise of its statutory authority.[21] Contrary to Plaintiffs' argument, the Board's authority to act is not limited to situations where it can definitively prove that a given employee's illness or exposure occurred in the workplace—rather than at home, in a restaurant, on public transportation, or somewhere else. Even assuming that such proof were feasible (Plaintiffs elsewhere insist it is not), the virus is just as contagious and the risk to other employees *in the workplace* is the same. "California's experts cited studies published by the Centers of Disease Control that estimate, on average, one individual infected with COVID-19 goes on to infect an additional 2.5 people, and each of those persons infects 2.5 more. Thus, the risk of community spread grows exponentially with each additional infected person." (*South Bay United Pentecostal Church*, 985 F.3d at 1148.)

The NRF Plaintiffs, asserting that the ETS Regulations are more extensive and stringent than emergency regulations adopted by occupational and health agencies in several other states, complain that they are unnecessarily burdensome, asserting that Cal/OSHA could have differentiated among different industries and exposure risk levels, and could have implemented the testing and other requirements more flexibly. In fact, the ETS Regulations substantially parallel

[21] Again, recent federal OSHA guidance is to similar effect, stating that employers should "[f]ollow state or local guidance and priorities for screening and viral testing in workplaces. Testing in the workplace may be arranged through a company's occupational health provider or in consultation with the local or state health department."

guidance that federal OSHA adopted two months later, on January 29, 2021.[22] While the new federal guidance is comprised of both advisory recommendations and mandatory safety and health standards, it is well established that a state has "sovereign powers over occupational safety and health" and may establish "more stringent standards than those developed by Fed/OSHA [citation] or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by Fed/OSHA." (*United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 772-773; see also *Solus Industrial Innovations, LLC v. Superior Court* (2018) 4 Cal.5th 316, 340 ["Federal OSHA's provisions related to the enforcement of state plans are concerned with ensuring enforcement that is at least as effective as the federal standards; nothing in the federal act suggests a concern with enforcement that exceeds federal requirements."].) That the federal government or other states may have taken different approaches does not establish that the Board acted arbitrarily and capriciously in adopting the ETS Regulations. Just as in *Pulaski*, a "rational basis" for the challenged regulations is "readily apparent from the record," and this Court cannot conclude that they are irrational, arbitrary, or in excess of the Board's rulemaking authority. (75 Cal.App.4th at 1331-1336 [regulation adopting standards for ergonomics in the workplace designed to minimize the instances of injury from repetitive motion was within Board's rulemaking authority]; *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 755-757 [Cal/OSHA had authority to adopt regulations governing employers and contractors engaging in asbestos-related work].)[23]

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[22] U.S. Department of Labor, Occupational Safety and Health Administration, "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," https://www.osha.gov/coronavirus/safework.) Significantly, on January 21, 2021, President Biden issued Executive Order 13999, which directed the Secretary of Labor, among other things, to issue revised guidance to employers on workplace safety during the COVID-19 pandemic, and to consider whether any emergency temporary standards on COVID-1`9 are necessary and, if so, to issue them by March 15, 2021. ("Protecting Worker Health and Safety," 86 Fed. Reg. 7211 (Jan. 26, 2021).)

[23] Plaintiffs point to a general statement of legislative intent in the APA declaring that "agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome . . . ." (Gov. Code § 11340.1.) However, Plaintiffs omit to quote the very next sentence: "It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations." (*Id.*) Section 11340.1 adds little or nothing of substance to the analysis.

The WGA Plaintiffs level a distinct attack at Cal/OSHA's authority to enforce the ETS Regulations under Labor Code section 6303. That statute broadly defines the "place of employment" over which Cal/OSHA exercises jurisdiction, but excludes "a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division." (Lab. Code § 6303(a).) Arguing that other state agencies have authority to regulate paid leave, transportation, housing, and public health procedures such as isolation and quarantine, Plaintiffs contend that those agencies' exercise of authority over those areas divests Cal/OSHA of authority to regulate them, and that the provisions of the ETS Regulations bearing on these areas exceed the Board's authority. (WGA Memo. at 19:7-19, 21:1-22:20.) The Court disagrees.

The California Supreme Court has squarely held that the "limited exemption" found in Labor Code section 6303(a) "does not comply into play simply because there is another agency that has the power or discretion to enact some regulations affecting employee health or safety. Instead, the exemption applies only in much narrower circumstances, where the other agency in the picture—like the division itself—has been *specifically mandated* to regulate the working environment within its aegis for the protection of the employees' health and safety." (*United Air Lines,* 32 Cal.3d at 767, 770.) The statutory exemption "simply reflects a legislative assumption that the division's jurisdiction is not necessary when the exemption applies because the safety of the place of employment will be adequately protected by another agency." (*Id.*) "[T]he Labor Code is to be liberally interpreted to achieve a safe work environment and . . . the allocation of health and safety jurisdiction between different agencies should be construed in a manner that minimizes any potential gap in coverage. To allow the mere mention of safety in another agency's enabling legislation to displace [Cal/OSHA] would be totally out of step with this approach." (*Id.* at 771.) The exemption is to be given a "narrow interpretation," which "furthers the broad remedial purposes of the legislation." (*Id.*)

Thus, in *United Air Lines*, the Court held that although the Federal Aviation Authority had promulgated a regulation requiring airlines to develop maintenance manuals including the subject of worker safety and had approved such manuals, because the FAA was not statutorily mandated

to protect the health and safety of workers at an airline's ground maintenance facility, it was not "vested by law" with the "health and safety jurisdiction" over a place of employment within the meaning of section 6303(a) so as to oust Cal/OSHA of jurisdiction. (*Id.*; see also, e.g., *Davis v. Pine Mountain Lumber Co.* (1969) 273 Cal.App.2d 218, 226 [California Highway Patrol's jurisdiction over safety on public highways does not displace Safety Board's regulations with respect to employment condition on highway].)[24]

Here, the WGA Plaintiffs point to a number of different federal, state and county agencies that have some jurisdiction over a subject matter covered by the ETS Regulations to which they object, including the Division of Labor Standards Enforcement (employee wages), the Department of Housing and Community Development (employee housing), the U.S. Department of Labor (housing of H-2A visa workers), the California Highway Patrol and the Public Utilities Commission (farm labor vehicles), and state and county public health officers (testing, isolation, and quarantine). However, like the FAA, none of those agencies is "*specifically mandated* to regulate the working environment within its aegis for the protection of the employees' health and safety." (*United Air Lines, Inc.*, 32 Cal.3d at 770.)[25] Under *United Air Lines*, the mere fact that they have some regulatory responsibility in those areas does not divest Cal/OSHA of jurisdiction. (See also *Solus Industrial Innovations, LLC,* 4 Cal.5th at 330 [noting that "Cal/OSHA provisions also recognize some concurrent local entity jurisdiction"].) Notably, moreover, Plaintiffs do not question Cal/OSHA's authority to enforce the Board's ATD and IIPP regulations, although they cover some of the same subject matters, as Plaintiffs themselves emphasize.

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[24] A recent Cal/OSHA action provides another illustration. On February 1, 2021, Cal/OSHA cited the State Department of Corrections and Rehabilitation (CDCR) and penalized it in the amount of $396,070 for a number of COVID-19-related violations at the San Quentin State Prison, including failing to report to the Division that employees at the Prison had been hospitalized with COVID-19; failing to establish an effective plan to minimize exposure of staff to COVID-19; transferring suspect and confirmed cases between housing units; and failing to isolate inmates with suspected or confirmed COVID-19 cases. (https://www.dir.ca.gov/dosh/Coronavirus/Citations/02.01.2021-San-Quentin-State-Prison_1480866.pdf) While CDCR itself undoubtedly has and exercises authority to regulate how the prisons are run, including the practices to be followed by prison staff, does not oust Cal/OSHA of jurisdiction to regulate these occupational safety and health violations.

[25] For example, while the CHP and the PUC oversee the safe operation of farm labor vehicles, their jurisdiction extends to such matters as the structural safety of the vehicles, the size of seats, and the installation of seatbelts, not to distancing passengers to avoid the spread of communicable diseases such as COVID-19. (See 13 Cal. Code Regs. § 1270.3.)

Finally, having found that Plaintiffs have not established a likelihood of prevailing on their challenge to the ETS Regulations, the Court is also unpersuaded by Plaintiffs' fallback argument that it should sever and enjoin only those regulations to which they object. As the Board points out, those provisions—requiring the testing of exposed workers, paid leave for workers in isolation or quarantine, and the adoption of key safety measures in employer-provided housing and transportation—are at the heart of its attempt to curb the spread of COVID-19. This Court will not gut the ETS Regulations on a piecemeal basis.

C. Plaintiffs Have Not Shown A Likelihood Of Prevailing On Their Due Process Claim.

The NRF Plaintiffs devote a total of about one page in their moving papers to their argument that the ETS Regulations violate procedural and substantive due process, and they abandon the argument altogether in their reply brief. To the extent that this argument merely repeats Plaintiffs' challenge to the Board's emergency findings, it adds nothing to the APA argument.[26] In any event, Plaintiffs' perfunctory discussion, which is devoid of citation to a single federal or state case, falls far short of meeting Plaintiffs' burden to show a likelihood of success.

The WGA Plaintiffs' due process argument is no more persuasive. They argue briefly that the ETS Regulations violate due process on their face because they do not provide employers with any mechanism to obtain relief from the regulations' potential effects on their businesses. (WGA Memo. at 25:24-27:13.) Plaintiffs are wrong: the Board and Cal/OSHA provide just such a

[26] While Plaintiffs complain in passing of purported "puzzling ambiguities" in the regulations (NRF Memo. at 15:5), they make no attempt to show that the regulations are so unclear as to render them unconstitutionally vague. "A court may only sustain a facial challenge to a regulation when it is 'arbitrary, capricious or without rational basis.'" (*Pulaski*, 75 Cal.App.4th at 1332 [trial court abused its discretion when it struck a provision in a regulation as "unnecessary surplusage and ambiguous"]; see also *California Assn. of Medical Products Suppliers,* 199 Cal.App.4th at 319 [argument that emergency regulations lacked the minimum level of clarity required by the APA and had resulted in "confusion" did not provide a legal basis for a court to invalidate the regulations].)

mechanism: temporary and permanent variances.[27] Plaintiffs' facial attack on the Regulations therefore fails. Plaintiffs' factually unsupported assertion in their reply brief that such variances "usually take several months before approval" (WGA Memo. at 16:18-19) is entitled to no weight. In any event, Plaintiffs' challenge is not ripe, as they do not show they have applied for such variances. (See *1041 20th Street, LLC v. Santa Monica Rent Control Bd.* (2019) 38 Cal.App.5th 27, 46 ["'a basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy'"].)

Finally, the WGA Plaintiffs object to the presumption created by the ETS Regulations that COVID-19 cases and exposures are work-related, which it characterizes as "a de facto irrebuttable presumption." (WGA Memo. at 24:22-25:23.) Although the ETS Regulations contain a specific exception "where the employer demonstrates that the COPVID-19 exposure is not work related" (8 Cal. Code Regs. § 3205(c)(10)(C), EXCEPTION 2), Plaintiffs protest that this exception is "illusory" and is inconsistent with the Labor Code. (*Id.*) Plaintiffs are wrong. In fact, SB 1159, which became effective as urgency legislation on September 17, 2020, codified a closely similar COVID-19 presumption created by the Governor's Executive Order N-62-20. (AR Tab 1K4.) Specifically, for workers' compensation purposes, that legislation creates a presumption that an employee's illness or death resulting from COVID-19 arises out of and is in the course of employment if the employee tested positive for or was diagnosed with COVID-19 within 14 days after the employee performed labor or services at the employee's place of employment at the employer's direction. (Lab. Code § 3212.86(b), (e).) The same presumption applies to employees who test positive during an outbreak at the employee's specific place of employment, where the employer has five or more employees. (Lab. Code § 3212.88(a), (b), (e).) In each case, as under the ETS Regulations, the presumption is disputable (i.e., rebuttable) and may be controverted by

[27] An employer may be able to obtain a permanent variance from the Board upon a showing that it has an alternate program "which will provide equal or superior safety for employees" (Lab. Code § 143(a)); a temporary variance from Cal/OSHA if it is unable to comply with the standard and is "taking all available steps to safeguard his employees against the hazards covered by the standard" and has an effective program for coming into compliance with the standard as quickly as practicable (Lab. Code §§ 6450, 6451); or permission from Cal/OSHA to allow isolated or quarantined employees to return to work on the basis that their continued removal would create undue risk to a community's health and safety. (§ 3205(c)(11)(E).)

other evidence. (*Id.* § 3212.86(e), 3212.88(e).) In particular, the latter statute states that evidence relevant to controverting the presumption "may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection." (*Id.* § 3212.88(e)(2).)

The rebuttable presumption created by the ETS Regulations is entirely consistent with these legislative provisions, and is well within the Board's authority. (See *Pulaski*, 75 Cal.App.4th at 1335-1337 [in light of "the problematic nature of identifying repetitive motion injuries as work-related," upholding Board regulation requiring employers to institute a program designed to minimize RMIs in the workplace whenever two or more employees performing repetitive tasks had reported such injuries within a twelve-month time span and the RMIs were predominantly caused by work-related tasks].) Like the objections to the predominant cause provision of the RMI regulation in *Pulaski*, Plaintiffs' prediction that "[i]t would be impossible for an employer to prove COVID-19 could not have been contracted in the workplace" (WGA Memo. at 25:-23) "is made without citation to the record and rests on pure speculation." (*Pulaski*, 75 Cal.App.4th at 1337.)

II. THE BALANCE OF INTERIM HARMS AND THE PUBLIC INTEREST WEIGH HEAVILY IN FAVOR OF CONTINUED IMPLEMENTATION AND ENFORCEMENT OF THE EMERGENCY REGULATIONS.

Even if Plaintiffs were able to establish some likelihood of prevailing on one or more of their claims, the Court concludes that preliminary injunctive relief would not be warranted because both the balance of interim harms and the public interest weigh heavily in favor of continued implementation and enforcement of the ETS regulations. (See *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 289 ["Even if the trial court had found for appellants on the 'likelihood of success on the merits' factor, it nevertheless could have refused to issue a preliminary injunction if it found that the interim harm to appellants did not outweigh the interim harm to respondents."]; *Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 651, 657-663 (emphasis added) [affirming denial of preliminary injunction where, although taxpayer presented unrebutted evidence which suggested he would prevail on the merits of his challenge to city's redevelopment plan, he presented no evidence an injunction was necessary to prevent irreparable harm pending a trial on the merits of his claims].)

A. **Plaintiffs Have Failed To Demonstrate Irreparable Harm.**

"An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence . . . ." (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084; see also *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136-1137 [issues of fact underlying a preliminary injunction are subject to review under the substantial evidence standard].) Here, the Court finds that Plaintiffs' showing of irreparable harm is weak at best, and speculative and conjectural at worst.

At the outset, the Court discounts Plaintiffs' claim of irreparable harm in light of several considerations. First, Plaintiffs repeatedly complain that many of the ETS Regulations are unnecessary because they "needlessly duplicate safety protocols that were already in place." (NRF Memo. at 1:26, 4:8-9 & fn. 2 ["large portions of the emergency regulations are overlapping and/or duplicative"]; WGA Memo. at 14, fn. 7 ["Except to the extent it exceeds the Board's authority, the ETS duplicates existing enforceable guidance and regulations."].)[28] To the extent that the ETS Regulations merely reiterate or clarify existing regulations to which Plaintiffs are already subject, Plaintiffs cannot credibly contend that complying with them poses a threat of irreparable harm.

Second, the ETS Regulations as adopted by the Board are in effect only through the end of September 2021.[29] With any luck, as the vaccination effort picks up steam and the numbers of new cases, hospitalizations, and deaths continue to drop, California will be out of the woods by that time and the emergency regulations will no longer be needed, at least in their current form. The limited duration of the current regulations further undermines Plaintiffs' claim of irreparable harm.

Third, Plaintiffs overstate the obligations imposed on employers by the ETS Regulations. For example, at the hearing, the NRF Plaintiffs argued that under the paid leave provision, an employer "literally would be required to exclude somebody who is just near somebody with

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[28] The NRF Plaintiffs can't seem to make up their mind, since at the same time as they insist that the ETS Regulations are duplicative, they contend that they "impose largely unprecedented and significant new requirements in relation to COVID-19." (Memo. at 7:4-5.)

[29] The APA provides that no emergency regulation shall remain in effect more than 180 days unless the adopting agency has complied with the normal notice and comment requirements. (Gov. Code § 11346.1(e).) The Governor's Executive Orders extended that expiration period by 60 days and an additional 60 days. (Exec. Orders N-71-20 and N-40-20.)

COVID for an indefinite period of time, potentially" while paying the exposed employee his or her full wages and benefits, even if the employee were hospitalized for 90 days. (RT at 23:25-24:1, 29:11-14, 29:28-30:12.) As the Board pointed out, however, the ETS Regulations impose no such "indefinite" obligation on employers. Rather, employers are required to exclude employees with COVID-19 exposure from the workplace only for 14 days after the last known exposure to a COVID-19 case. (§ 3205(c)(10)(B).) Further, the requirement that employers continue to pay exposed employees applies only to employees excluded from work for this reason "and otherwise able and available to work." (§ 3205(c)(10)(C).) Thus, contrary to Plaintiffs' contention, the regulation would *not* require an employer to continue to pay benefits to an employee hospitalized for a lengthy period of time. As the regulation itself explains, this provision "does not apply to any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission." (*Id.*, EXCEPTION: 1.) Moreover, the regulation provides that "[e]mployers may use employer-provided sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation." (§ 3205(c)(10)(C).) In other words, employers may offset payments by the amount employees receive in other benefit payments (e.g., state disability insurance, unemployment insurance, or workers' compensation).

Plaintiffs' emphasis on the cost to employers of mandatory testing of employees suffers from similar exaggeration. The regulations state that where a place of employment has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period, the employer "shall provide COVID-19 testing to all employees at the exposed workplace except for employees who were not present" during the outbreak or the relevant 14-day period, and that "COVID-19 testing shall be provided at no cost to employees during employees' working hours." (§ 3205.1(b)(1).) The regulation does not state that employers must bear the cost of such testing, and indeed the Board has since posted guidance clarifying that employers can comply with this requirement by taking advantage of free testing available to the public. As the Board shows, its

posted Frequently Asked Questions (FAQs) and detailed online industry guidance address a number of implementation issues that employers have raised, and state that through February 1, 2021, Cal/OSHA exercised its enforcement discretion not to assess monetary penalties for violations of the newly-adopted ETS Regulations.[30] The Board's and Cal/OSHA's regulatory approach is entirely reasonable in the context of a fast-moving public health crisis with frequent new developments—of which the recent emergence of new, highly contagious variants of the virus is only one example.

The NRF Plaintiffs' claim of irreparable harm is principally based on the contention that compliance with the ETS Regulations would be "financially burdensome." Plaintiffs assert that if their businesses suffer an outbreak of COVID-19, they may be required to exclude employees from their places of employment for a considerable period of time and to shoulder the cost of testing multiple employees, which may subject them to significant financial harm and even the risk of being forced out of business. Plaintiffs do not show, however, that even a single retailer has suffered significant costs as a result of complying with these requirements in the more than 60 days that the ETS Regulations have been in effect.[31]

The WGA Plaintiffs attempt a more ambitious showing of irreparable harm. They not only complain about the costs of complying with the ETS Regulations, but raise the spectre that if they are required to do, it could result in labor shortages and loss or destruction of crops, and thereby potentially jeopardize the State's food supply chain. (WGA Memo. at 9:19-20, 30:16-31:22.) As with the NRF Plaintiffs' showing, however, the WGA Plaintiffs do not show that the ETS Regulations have caused such serious effects since they went into effect on November 30, 2020, much less that any such injury is imminent or certain. (See *East Bay Municipal Utility Dist. v. Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1126 ["An injunction properly issues only where the right to be protected is clear, injury is impending and so immediately as only

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[30] See "COVID-19 Emergency Temporary Standards Frequently Asked Questions," https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html; "Industry guidance to reduce risk," https://covid19.ca.gov/industry-guidance/.

[31] Much of the NRF Plaintiffs' showing is comprised of inadmissible hearsay. The Court sustains the Board's evidentiary objections on that and other grounds to portions of the Harned Declaration (¶¶ 9-11, 17-20) and the Martz Declaration (¶¶ 10, 12, 15, 19-21).

to be avoided by issuance of the injunction."].) Moreover, that the WGA Plaintiffs are engaged in essential services does not negate their employees' right to effective workplace safety protections to safeguard their health and lives and those of their co-workers and families. And employers may apply for temporary variances and variances to ensure continuity of operations, and may mitigate their economic losses by seeking government support and loans.

To be sure, the Court does not for a moment minimize the economic and other harm caused by the pandemic and doubtless suffered by Plaintiffs and their member businesses, among scores of other businesses and individuals throughout the State and around the world. As the Court of Appeal recently observed,

> Restrictions imposed to combat the spread of COVID-19 have caused great personal and economic suffering as well. Individuals cannot travel or meet with friends and loved ones. Businesses have closed or drastically curtailed their operations. Employees have lost their jobs and their livelihoods. State and local governments face declining revenues even as demands for their services increase.

(*Midway Venture LLC*, 2021 WL 222006, at *2.) But these widely experienced effects are those that flow from the pandemic and the stay-at-home orders and other restrictions, not specifically from the ETS Regulations in particular. Plaintiffs have not persuasively shown that they would be irreparably harmed by complying with those regulations. In any event, even if some individual retail and agricultural businesses would incur substantial financial costs in order to comply with the ETS Regulations in the event of a workplace outbreak, or even were forced out of business as a result, those pecuniary burdens, in the Court's view, cannot outweigh the potential public health risks posed by an injunction enjoining the Board from taking effective action to address the serious public health threat posed by COVID-19.

B. Enjoining Enforcement Of The Emergency Regulations Would Jeopardize Workers And The Public Health.

On the other side of the balance, an order enjoining the Board from enforcing the emergency regulations threatens to seriously jeopardize worker safety and the public health. As the Board observes, "if this Court grants Plaintiffs' requested injunction, numerous workers in California would suffer severe and irreparable harm given that the spread of COVID-19 continues to increase

at a record pace and workplaces are not immune from this serious illness or its heightened spread. Many workers depend on their employers for their safety during their shifts . . . , and should they become ill, their family, friends, and other members of the public they encounter face the risk of infection. Thus, failure to adequately protect workers not only impacts them but could have far reaching permanent repercussions for the public at large." Those risks outweigh Plaintiffs' concerns about the potential financial and other costs of complying with the ETS Regulations. (See *Barenfeld v. City of Los Angeles* (1984) 162 Cal.App.3d 1035, 1042 ["a choice between potential financial loss on the part of the Plaintiffs versus potential loss of life on the part of the public" warrants denial of an injunction].)

Two considerations are paramount here. *First*, "[s]temming the spread of COVID-19 is unquestionably a compelling interest." (*Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, 67 (per curiam); accord, *Bayley's Campground, Inc. v. Mills* (1st Cir. Jan. 19, 2021), 2021 WL 164973, at *4 ["the interests in 'protecting [state's] population from further spread of the COVID-19 virus and preventing [state's] health care system from being overwhelmed' by those infected with it are 'compelling state interests.'"].)

Second, judges "are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area." (*Roman Catholic Diocese,* 141 S.Ct. at 68; see also *id.* at 73 ["the COVID-19 pandemic remains extraordinarily serious and deadly. . . . courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic." (Kavanaugh, J., concurring)].) The judicial deference to which a state agency is normally entitled is, if anything, heightened in the current circumstances of the response to an extraordinary and rapidly changing health crisis. As Chief Justice Roberts observed in his separate opinion in *South Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613,

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and health of the people" to the politically accountable officials of the States "to guard and protect." When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should

> not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.
>
> That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground.

(Id. at 1613-1614 (citations omitted).)

Significantly, the foregoing quotations are drawn from cases in which churches and other houses of worship challenged orders imposing restrictions on attendance at religious services. As such, they implicated the Free Exercise Clause of the First Amendment, triggering the strict scrutiny test, which requires restrictions to be narrowly tailored to serve a compelling state interest. (See *Roman Catholic Diocese*, 141 S.Ct. at 67-68 ["The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."]; *Calvary Chapel Dayton Valley v. Sisolak* (9th Cir. 2020) 982 F.3d 1228, 1232-1233.) But the ETS Regulations, which apply to places of employment including retail stores and agricultural operations, pose no such constitutional concerns. "Absent a First Amendment concern or other reason for heightened scrutiny, the [state and county public health restrictions] are valid if they are rationally related to a legitimate governmental interest." (*Midway Venture LLC*, 2021 WL 222006, at *2 [reversing preliminary injunction against state's regional stay-at-home order, which did not implicate First Amendment, and thus rational basis review applied]; accord, *Mitchell v. Newsom* (C.D. Cal. Dec. 23, 2020) 2020 WL 7647741, at *4 [same].) Plaintiffs have not cited a single case outside the unique context of religious exercise, nor is the Court aware of one, in which a court enjoined emergency public health orders intended to slow the spread of the

virus.[32]

In short, weighing the interim harms to Plaintiffs, affected employees, and the public interest, the Court determines that the balance weighs heavily in favor of protecting employees' occupational health and the public interest, and cannot justify the issuance of extraordinary injunctive relief.

CONCLUSION

One court recently denied restaurants' request for a preliminary injunction against state orders prohibiting indoor dining in the following words, which apply equally here:

> An extraordinary public-health crisis like the COVID-19 pandemic requires an extraordinary response. In deciding what that response must be, the executive branch faces a Hobson's Choice: impose restrictions sure to effect economic harm to industries already facing crippling financial difficulties, or set less onerous rules sure to increase the rate of infections and fatalities attributable to the pandemic. It is a truly awful policy conundrum.
>
> At issue here, defendants' determination that the restaurant industry must yield to the greater concerns of public health is a rational and wholly appropriate policy justification for the limited-time mitigation orders. . . . In light of the conclusions set forth herein, we cannot provide any remedial assistance, and we must defer to other branches of government to address the restaurant industry losses.

(*M. Rae, Inc. v. Wolf* (M.D.Pa. Dec. 23, 2020) 2020 WL 7642596, at *10; see also, e.g., *Midway Venture LLC*, 2021 WL 222006, at * 2 ["Balancing these risks and harms in the midst of a deadly

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[32] Numerous courts across the country have refused to enjoin a wide variety of emergency orders issued in response to the COVID-19 public health crisis. (See, e.g., *Bayley's Campground, Inc.*, 2021 WL 164973 [Governor's executive order requiring out-of-state travelers to self-quarantine upon arrival for 14 days]; *Big Tyme Investments, L.L.C. v. Edwards* (5th Cir. Jan. 13, 2021) 2021 WL 118628 [executive order prohibiting on-site consumption of alcohol and food at bars]; *Hopkins Hawley LLC d/b/a Seaport House v. Cuomo* (S.D.N.Y. Feb. 9, 2021) 2021 WL 465437 [executive orders restricting restaurant dining]; *Oakes v. Collier County* (M.D.Fla. Jan. 27, 2021) 2021 WL 268387 [county emergency order requiring everyone in certain businesses to wear face coverings]; *Weisshaus v. Cuomo* (E.D.N.Y. Jan. 11, 2021) 2021 WL 103481 [governor's executive order requiring travelers to complete health form]; *Let Them Play MN v. Walz* (D.Minn. Dec. 18, 2020) 2020 WL 7425278 [governor's executive order imposing prohibitions on social gatherings and youth sports]; *Lawrence v. Polis* (D.Colo. Dec. 4, 2020) 2020 WL 7348210 [public health orders issued by governor and executive directors of state and city health departments imposing occupancy limitations and other restrictions on restaurants' operation]; *Desrosiers v. Governor* (Mass. 2020) 486 Mass. 369 [governor's emergency orders closing certain businesses and imposing restrictions on gatherings].)

pandemic is exceedingly difficult. It is a responsibility primarily entrusted to our elected officials, who are ultimately accountable to the public."]); *Plaza Motors of Brooklyn, Inc. v. Cuomo* (E.D.N.Y. Jan. 22, 2021), 2021 WL 222121, at *9 ["Serious public consequences could result if Defendants are enjoined from enforcing the restrictions, as it could undermine both the City and State's ongoing effort to save lives and ultimately reopen businesses. The current public health crisis presents a dynamic situation fraught with uncertainty. In these unprecedented times, it is not the Court's role to second-guess the decisions of state officials who have the expertise to assess the COVID-19 pandemic and institute appropriate measures. The Plaintiffs' interest in continuing to conduct . . . sales is clearly outweighed by the Government and the public's interest in slowing the spread of COVID-19 and protecting the health and safety of all [residents]."].) As another court put it, "the Court cannot quarterback the state's response to the COVID-19 pandemic from the bench." (*Hopkins Hawley LLC d/b/a Seaport House,* 2021 WL 465437 at *10.)

For the foregoing reasons, Plaintiffs' applications for a preliminary injunction are denied in their entirety.

IT IS SO ORDERED.

DATED: February 25, 2021

Judge Ethan P. Schulman
San Francisco Superior Court Judge

CGC-20-588367 NATIONAL RETAIL FEDERATION, ET AL VS. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, ET AL

CPF-21-517344 WESTERN GROWERS ASSOCIATION, ET AL VS. CALIFORNIA OCCUPATIONAL SAFETY, ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on February 25, 2021 I served the foregoing **order denying plaintiffs' applications for preliminary injunction** on each counsel of record or party appearing in propria persona by causing a copy thereof to be served electronically by email sent to the email addresses indicated below:

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