No. 21- 3491

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOB CREATORS NETWORK, INDEPENDENT BAKERS ASSOCIATION, LAWRENCE TRANSPORTATION COMPANY, GUY CHEMICAL COMPANY LLC, RABINE GROUP OF COMPANIES, PAN-O-GOLD BAKING COMPANY, TERRI MITCHELL,

Petitioners,

v.

U.S. DEPARTMENT OF LABOR, *et al.*,

Respondents.

On Petition for Review of an Emergency Temporary Standard of the United States Department of Labor's Occupational Safety & Health Administration

MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING JUDICIAL REVIEW

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SUMMARY OF THE CASE

Petitioners represent a collection of small businesses and organizations that challenge the Department of Labor's Occupational Safety and Health Administration's issuance of an emergency temporary standard ("ETS"), without notice and comment, requiring that every company with 100 or more employees either forcibly vaccinate its employees, forcibly test them every week, or fire them—subject to steep fines for violations.

Petitioners seek an administrative stay and a stay of this vaccine mandate pending merits review. Only nine ETSs were issued before 2021, and of the six that were challenged, only *one* fully survived—demonstrating the incredible burden OSHA faces. Petitioners are likely to succeed on the merits of their claims because the mandate violates the major-questions doctrine and nondelegation doctrine. Petitioners also demonstrate irreparable harm because they will permanently lose clients and reputation as a result of losing workers who immediately quit and join smaller companies rather than be vaccinated or tested weekly. The equities and public interest also favor Petitioners, especially because they provide critical food production, delivery, and supply chain services for the country.

The Court should grant an administrative stay and a stay pending judicial review. If the Court desires oral argument, Petitioners request 15 minutes of time.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Petitioners Job Creators Network, Independent Bakers Association, Lawrence Transportation Company, Guy Chemical Company LLC, The Rabine Group of Companies, and Pan-O-Gold Baking Company state that they do not have a parent corporation, and no publicly held corporation owns 10 percent or more of their stock.

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INTRODUCTION

Petitioners—Job Creators Network, the Independent Bakers Association, a coalition of small businesses, and an individual employee—ask this Court to issue an administrative stay and a stay pending judicial review of the emergency temporary standard ("Mandate") issued without notice-and-comment by the Department of Labor's Occupational Safety & Health Administration ("OSHA"). Petitioners satisfy the requirements for a stay, including a likelihood of success on the merits, irreparable injury, and a favorable balancing of the equities and public interest.

The Mandate covers 84 million American workers and will require 32 million of them to be vaccinated against COVID or undergo weekly tests—or be fired. Mandate (Ex. H) at 229. The Mandate applies to every company with 100 or more employees, across the country, with only the most minimal of exceptions. Violations can result in five- and six-figure fines.

Many of these businesses have encouraged their employees to get vaccinated. But that commitment to private persuasion does not excuse the federal government press-ganging companies into becoming vaccine police.

Before 2021, OSHA had issued only nine emergency temporary standards ("ETSs"), and of the six that were challenged in court, only *one* fully survived. This

low batting average demonstrates the rigorous burden that OSHA must satisfy—a burden the Mandate fails.

Petitioners are likely to prevail on the merits for several reasons. *First*, the Mandate violates the major-questions doctrine, which states that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). But there is not the slightest hint that Congress gave OSHA power to issue emergency orders covering 84 million Americans and requiring compelled vaccination or testing of 32 million of them.

The Supreme Court has warned OSHA about issuing such edicts: "In the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645, 651 (1980) (plurality).

Second, the Mandate violates the nondelegation doctrine, which prohibits Congress from transferring legislative powers *carte blanche* to an executive agency.

Third, even if OSHA did have the power to issue the Mandate, there is no unforeseen emergency necessitating a one-size-fits-all ETS, especially when the Mandate will severely disrupt essential services and—in a cruel twist—result in companies laying off *vaccinated* workers to stay solvent.

Petitioners have also demonstrated irreparable injury and favorable equities. They are small businesses deemed "essential" during lockdowns and have struggled to survive the last two years. As the attached detailed affidavits make clear, these companies face the distinct prospect that a substantial number of employees—a majority in some cases—will walk off the job rather than comply with the Mandate. Critically, they have every incentive to do this immediately rather than wait for the Mandate's deadlines to kick in. This will trigger a cascade of irreparable injuries as companies are unable to satisfy work orders, leading to lost clients, damaged reputation, and the threat of shutting their doors.

The public will suffer tremendously, too. Petitioners provide critical supply-chain services like food production, grocery store food deliveries, and emergency repairs for buildings and roads. By forcing those companies to operate without a sizable part of their workforce, the Mandate will cause immediate shortages at grocery stores, shortages of household and commercial goods, and languishing critical infrastructure failures.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 29 U.S.C. § 655(f).

STATEMENT OF THE ISSUES

1. Whether the Mandate violates the major-questions doctrine.

   - 29 U.S.C. § 655(c).
   - *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302 (2014).

- *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

2. Whether the Mandate violates the nondelegation doctrine.
   - *Gundy v. United States*, 139 S. Ct. 2116 (2019).
   - *API*, 448 U.S. 607.
3. Whether OSHA demonstrated a grave harm and necessity to issue the Mandate.
   - *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415 (5th Cir. 1984).
4. Whether Petitioners have demonstrated irreparable injury.
   - *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).
5. Whether the balance of equities and public interest favor a stay.
   - *Nken v. Holder*, 556 U.S. 418 (2009).

STATEMENT OF THE CASE

I. COVID And The Mandate

COVID has presented enormous challenges to all Americans. But after tremendous sacrifices, the nation has turned the page. In nearly every state, COVID restrictions are easing. *COVID-19 Restrictions*, USA Today, https://www.usatoday.com/storytelling/coronavirus-reopening-america-map/ (last visited Nov. 4, 2021).

Despite this, on September 9, 2021, President Biden decided that there is such an urgent, new emergency in the form of COVID transmission in the workplace that he ordered OSHA to issue an ETS mandating that nearly every company in the country with 100 or more employees either forcibly vaccinate its employees, forcibly test them every week, or fire them. White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, Sept. 9, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/. This mandate would "affect about 100 million Americans," or "two thirds of all workers." *Id.*

After a substantial delay, OSHA finally issued the Mandate in accordance with President Biden's command. *See* Ex. H. It will become binding upon publication in the Federal Register, which will happen November 5, 2021. 29 U.S.C. § 655(c).

II. Petitioners

Job Creators Network is a nonpartisan membership organization whose mission is to educate employees of Main Street America and protect the 85 million people who depend on the success of small businesses. Affidavit of Alfredo Ortiz (Ex. A) ¶¶2-5. Its members will suffer tremendous harm from the Mandate. *See id.*, ¶¶6-11.

Independent Bakers Association is national trade association of over 200 family-owned wholesale bakeries and allied industry trades. Affidavit of Nicholas Pyle (Ex. B) ¶¶2-4. IBA's affidavit explains in detail how its members were deemed "essential" during lockdowns because of their critical role in feeding the country—but these members are facing dramatic worker shortages already, and the Mandate is expected to cause 20-30% of employees to leave, which will severely "disrupt retail trade patterns, exacerbate fast food supply chain issues and increase the food insecurity for the nation's most nutritionally at risk." *Id.*, ¶¶5-10. IBA has standing through its members, one of which has submitted an affidavit explaining how the Mandate will drastically worsen an already-critical worker shortage for every link in its production and supply chain, leading to severe reputational and public harms, including the communities supported by the company's wages. Affidavit of Mike McKee (Ex. C), ¶¶10-13.

Lawrence Transportation Company is a refrigerated truckload carrier in Rochester, Minnesota, with over 100 employees and thus subject to the Mandate. Affidavit of Eric Lawrence (Ex. D), ¶¶2-3. The company was deemed "essential" during the COVID lockdowns, *id.*, ¶9, and has encouraged its employees to get vaccinated, *id.*, ¶2. The Mandate will cause irreparable harm because Lawrence Transportation is already facing a severe truck driver shortage. *Id.*, ¶4. These drivers and the mechanics who repair the trucks require specialized licenses and training.

Id. Because of this, Lawrence Transportation "simply cannot hire more employees and have them start quickly." *Id.*

Approximately 10-15% of Lawrence Transportation's workforce "would rather walk off the job than be forced to get a vaccine or undergo weekly testing," and there is an incentive to do this sooner rather than later. *Id.*, ¶5. These workers "cannot be replaced at any point in the near future" and would have a "devastating" effect on the company. *Id.*, ¶¶6-7. Deliveries will be "delayed or canceled, resulting in severe financial and reputational damages for the Company, as well as a likely ripple effect of losing business to smaller trucking companies." *Id.*, ¶7.

The Company "would likely have to save costs by laying off non-drivers like office employees," who "are almost all vaccinated." *Id.* This means "*the mandate would result in vaccinated people losing their jobs*." *Id.* (emphasis added). The Mandate also imposes irreparable logistical harms, as drivers are on the road "for 7 to 10 days at a time, making it nearly impossible to get tested weekly." *Id.*, ¶10. The Mandate is designed to "force[] those drivers either to get vaccinated, or quit." *Id.*

The general public would also suffer because Lawrence Transportation delivers groceries that must be refrigerated. *Id.*, ¶9. "[T]hose deliveries will not be made, and people will not be able to get food deliveries to their grocery stores." *Id.*

Guy Chemical Company LLC is a manufacturer in Somerset County, Pennsylvania, with over 160 employees, and thus is subject to the Mandate.

Affidavit of Guy Berkebile (Ex. E), ¶¶1-4. Guy Chemical was deemed "essential" during the pandemic lockdowns, due to its work producing materials for household and construction products. *Id.*, ¶9. Guy Chemical is already facing an intense worker shortage, and its employees typically must have extensive training (required, ironically, by OSHA) and specialized knowledge that cannot be learned quickly, and—critically—a majority of employees at the Company would refuse to comply with the Mandate. *Id.*, ¶¶6-7. If even 25% of Guy Chemical's workers refuse to show up, the Company would be unable to complete orders, resulting not only in lost business but also reputational damages. *Id.*, ¶8. The Mandate also imposes irreparable harm in the form of logistics: the onerous testing requirements will have the effect of forcing companies to abandon testing and mandate the vaccine—"[t]here is no practical choice." *Id.*, ¶10.

The Rabine Group of Companies have over 300 employees, including over 100 just at Pipe View L.L.C. These companies perform critical infrastructure repairs for damaged roofs, roads, HVAC systems, and commercial doors and docks, as well as snow removal—and, like the other Petitioners, are already suffering from severe worker shortages even without the estimated 20% of workers who will leave because of the Mandate. Affidavit of Gary Rabine (Ex. F) ¶¶2-6. These projects must be done immediately or customers may face legal liability and physical dangers, but the Mandate will prevent the Group's companies from meeting timeliness obligations,

causing tremendous public harm, as well as critical business and reputational damages. *Id.*, ¶¶7-11.

As Job Creators Network CEO Alfredo Ortiz states, these companies represent only "the tip of the iceberg." Ortiz Affidavit (Ex. A) ¶11. Thousands of other companies are in the same situation.

Terri Mitchell is the Administrations Manager at Guy Chemical and is determined not to receive the vaccine because she previously had the coronavirus and has the confirmed presence of SARS-COV-2 antibodies. Affidavit of Terri Mitchell (Ex. G) ¶¶2, 4-5. She also refuses to subject herself to the physical harms and indignity of involuntary weekly testing. *Id.*, ¶5. She would rather lose her position than comply with the Mandate, and—as a result of her role at the company—knows that "a majority of employees at Guy Chemical feel the same way." *Id.*, ¶6.

SUMMARY OF THE ARGUMENT

Petitioners satisfy the requirements for issuing an administrative stay and a stay pending judicial review. The Mandate is illegal for numerous reasons, Petitioners demonstrate irreparable harm in the form of a variety of injuries, and there are substantial public injuries.

ARGUMENT

STANDARD OF REVIEW

The factors for a stay pending review are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see Taylor Diving & Salvage Co. v. U.S. Dep't of Lab.*, 537 F.2d 819, 821 n.8 (5th Cir. 1976); *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 418 & n.4 (5th Cir. 1984).

"The purpose of [an] administrative stay is to give the court sufficient opportunity to consider the merits of the motion for a stay pending appeal." *Brady v. NFL*, 638 F.3d 1004, 1005 (8th Cir. 2011).

I. Petitioners Are Likely To Succeed On The Merits.

A. Prior Emergency Temporary Standards

The Occupational and Health Safety Act of 1970 ("OSH Act") provides the Secretary of Labor the incredible power to issue ETSs that are immediately effective upon publication in the Federal Register, without having to comply with *any* of the requirements of the Administrative Procedure Act. 29 U.S.C. § 655(c). The Secretary must determine, *inter alia*, that the covered "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." § 655(c). The Secretary has delegated this

authority to the Assistant Secretary for Occupational Safety and Health. *Edison Elec. Institute v. OSHA*, 849 F.2d 611, 614 (D.C. Cir. 1988).

This is an "extraordinary power," *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974), and represents "OSHA's most dramatic weapon in its enforcement arsenal." *Asbestos*, 727 F.2d at 426. This weapon must be "delicately exercised, and only in those emergency situations which require it." *Peach Growers*, 489 F.2d at 129-30.

Before 2021, OSHA had issued less than 10 ETSs. Of the six that were challenged, five (83.3%) were fully or partially vacated or stayed, *Asbestos*, 727 F.2d at 426; *Am. Petroleum Institute v. OSHA*, 581 F.2d 493, 503 (5th Cir. 1978), *aff'd*, 448 U.S. 607 (1980); *Taylor*, 537 F.2d at 821; *Peach Growers*, 489 F.2d at 129; *Dry Color Mfrs. Ass'n, Inc. v. Dep't of Labor*, 486 F.2d 98 (3d Cir. 1973).

This low batting average—even when defending *limited* ETSs—demonstrates the extraordinarily high burden OSHA must satisfy. As demonstrated next, the Mandate does not survive this scrutiny.

B. OSHA Lacked Authority To Issue The Mandate.

Petitioners are likely to succeed on the merits of their challenge to the Mandate for several reasons.

1. The Mandate Violates The Major-Questions Doctrine.

The Mandate presents an unprecedented assertion of power by OSHA, regulating far more than any prior ETS during the 50 years of OSHA's existence: 84 million Americans (32 million currently unvaccinated), in every industry, representing almost 2/3 of all workers across the entire country. Its dictates are also unprecedented: OSHA is press-ganging private companies into being vaccination police who forcibly vaccinate or test their employees—or fire them. For the first time in history, OSHA seeks to regulate the citizenry itself.

Under the major-questions doctrine, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.*

The Mandate fails this doctrine because there is no "clear statement" in § 655(c) giving OSHA such sweeping powers over the nation's economy, nor to mandate vaccination or intrusive weekly testing for 32 million people, nor to expand its purview beyond the workplace.

Only once before has OSHA attempted anything close to the Mandate—and the Supreme Court rejected it and forewarned OSHA from trying again. In the

famous "benzene case," OSHA had issued a permanent standard pursuant to § 655, governing low levels of benzene, under such a broad theory of workplace harm that OSHA could effectively regulate substantial portions of the nation's industry. *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 623 (1980) ("*API*"). The Supreme Court rejected OSHA's claimed power: "In the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view" of § 655." *Id.* at 645 (plurality). The government's argument "would in turn justify pervasive regulation limited only by the constraint of feasibility." *Id.* The Court also criticized OSHA for "apply[ing] the same limit to all [industries], largely as a matter of administrative convenience." *Id.* at 650.

Significantly, the Court made these statements in the context of a *permanent* standard while noting that OSHA's ETS authority is *even more* "narrowly circumscribed." *Id.* at 651. The Supreme Court warned OSHA against abusing ETSs: "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry," and thus Congress "*narrowly circumscribed the Secretary's power to issue temporary emergency standards*." *Id.* (emphasis added). But the Mandate thumbs its nose at this precedent.

Nor can OSHA claim that COVID provides cause to ignore *API*. The Supreme Court recently relied on the major-questions doctrine in holding that the CDC's eviction moratorium was illegal. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). The moratorium applied to "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction." *Id.* Those figures pale in comparison to the Mandate, which applies to 100% of the country's geographic scope and over 84 million individuals (forcing vaccination or testing on 32 million of them).

Because there is no clear Congressional authorization, the Mandate fails the major-questions doctrine and violates *API*.

2. The Mandate Violates The Nondelegation Doctrine.

If OSHA truly does have such broad statutory authority to issue the Mandate, then § 655 violates the nondelegation doctrine. "[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.). Thus, Congress may not "delegate ... powers which are strictly and exclusively legislative." *Wayman v.*

Southard, 10 Wheat. 1, 42-43 (1825). This requirement—known as the nondelegation doctrine—is a central component of separation of powers.

The original understanding of the Constitution prohibited any transfer of Congress's vested legislative powers to any other entity. *Gundy*, 139 S. Ct. at 2135-37 (Gorsuch, J., dissenting). Congress must "make[] the policy decisions when regulating private conduct." *Id.* OSHA's interpretation of § 655(c) violates this original understanding. Under OSHA's view, "what constitutes a risk worthy of Agency action is a policy consideration"—an "essentially legislative task." *Asbestos*, 727 F.2d at 421, 425; Mandate at 15 ("determinations are 'essentially legislative'"). But policymaking is the role of Congress, and it "would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

Indeed, OSHA's interpretation of § 655 would run afoul even of the more-lenient modern interpretations of the nondelegation doctrine. *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). Under OSHA's view, "the degree of agency discretion" and "the scope of the power congressionally conferred" are practically limitless. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

OSHA cannot claim surprise, as *API* held that if OSHA were correct that § 655 permits regulation of the national economy, then "the statute would make such

a sweeping delegation of legislative power that it might be unconstitutional under the Court's reasoning in" its nondelegation cases. 448 U.S. at 646 (plurality). The Court chose to apply a constitutional-avoidance canon to reject a broad interpretation of OSHA's power. *Id.*

The Court here should follow the same path, but if the Court nonetheless adopts OSHA's view of § 655, it violates the nondelegation doctrine.

C. Even If OSHA Has Authority, An ETS Is Inappropriate.

OSHA has also failed to satisfy the statutory requirements for imposing an ETS. The Court must "take a 'harder look' at OSHA's action" because it was not subject to the APA. *Asbestos*, 727 F.2d at 421.

No Necessity. OSHA can invoke its extraordinary ETS powers only upon a finding that an urgent emergency has arisen such that the agency simply cannot wait for the normal notice-and-comment process to occur. 29 U.S.C. § 655(c). That is, OSHA must "prove[] that the ETS, OSHA's most dramatic weapon in its enforcement arsenal, is '*necessary*' to achieve the projected benefits." *Asbestos*, 727 F.2d at 426 (emphasis added).

"[T]he Agency's failure to act may be evidence that a situation is not a true emergency." *Asbestos*, 727 F.2d at 423; *see Peach Growers*, 489 F.2d at 131 (the alleged grave concern "has been going on during the last several years thus failing to qualify for emergency measures"). But it is common knowledge that the COVID

pandemic has been ongoing since early 2020, and vaccines have been widely available for almost all of 2021. OSHA provides no persuasive justification for why there is suddenly such an emergency now—in November 2021—when nearly every single state is easing its COVID restrictions, and so many Americans have *already* gotten vaccinated. *COVID-19 Restrictions*, USA Today, https://www.usatoday.com/storytelling/coronavirus-reopening-america-map/ (last visited Nov. 4, 2021).

Notably, OSHA refused to issue an ETS in 2020 because "employers are maintaining hazard-free work environments." *In re Am. Fed'n of Lab. & Cong. of Indus. Organizations*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020). That was during the height of the pandemic and is especially telling because OSHA claims it is *mandated* to issue an ETS when conditions warrant. *Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 FR 32376-01, 32380 (June 21, 2021) (claiming § 655(c) "is not discretionary").

The Mandate is not "necessary" for another reason: OSHA cannot demonstrate that a one-size-fits-all rule is needed to achieve the supposed benefits. In *API*, the Court criticized OSHA for "decid[ing] to apply the same limit to all [industries], largely as a matter of administrative convenience." *API*, 448 U.S. at 650 (plurality). "[I]t is expected that even an emergency temporary standard not overlook those obvious distinctions among … uses and plant practices that make certain

regulations that are appropriate in one category of cases entirely unnecessary in another." *Dry Color*, 486 F.2d at 105. But, again, the Mandate flunks these basic requirements by imposing the same standards on nearly the entire country, with only minimal exceptions.

Further, "an ETS must, on balance, produce a benefit the costs of which are not unreasonable. The protection afforded to workers should outweigh the economic consequences to the regulated industry," *Asbestos*, 727 F.2d at 423-24, "without eliminating the [relevant] enterprise and the associated jobs," *Peach Growers*, 489 F.2d at 130. But the Mandate will have precisely that effect and, ironically, will encourage employees to switch to employers who are not covered by the Mandate—causing severe economic disruption in the meantime. Pyle Affidavit (Ex. B), ¶8; Lawrence Affidavit (Ex. D) ¶5; Berkebile Affidavit (Ex. E) ¶¶7-8. As one Petitioner notes, the Mandate will actually force him to layoff *vaccinated* workers to save costs. Lawrence Affidavit (Ex. D) ¶7.

Moreover, side effects from vaccines are a critical cost of the Mandate—but OSHA has deliberately blinded itself to any calculation of these costs by saying it "will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination." OSHA, *FAQ*, https://www.osha.gov/coronavirus/faqs#vaccine.

No Grave Danger Demonstrated From Workplace Transmission. OSHA must also demonstrate that the Mandate addresses a "grave" danger. 29 U.S.C. § 655(c). The question is not whether COVID *generally* presents a grave danger, but whether the lack of a vaccine mandate and weekly testing for the next few months presents a grave danger to the workplace for the entire nation. *Asbestos*, 727 F.2d at 427. But as demonstrated above, OSHA failed to explain persuasively why all companies with 100 or more employees, across dozens of industries and across the entire country, face a grave danger from risk of COVID transmission at the workplace, especially at this moment.

II. Petitioners Will Suffer Irreparable Injury In The Absence Of A Stay.

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). Non-quantifiable financial harms include "loss of intangible assets such as reputation and goodwill." *Id.* A regulation imposes an improper "risk of irreparable harm" when it "depriv[es]" parties of "payments with no guarantee of eventual recovery." *Ala. Ass'n*, 141 S. Ct. at 2489.

"[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring). That alone is sufficient

here. But Petitioners will also suffer a variety of harms recognized as irreparable under any circumstances. Because of the word limits of Rule 27, Petitioners respectfully direct the Court to the background section, as well as the attached affidavits, but to pick just a few examples:

Petitioners are already facing intense labor shortages, and they often require many employees with specialized licenses or training, leading to an extremely small pool of potential hires, plus on-boarding processes that prevent new hires from quickly ramping up. McKee Affidavit (Ex. C), ¶7; Lawrence Affidavit (Ex. D) ¶4; Berkebile Affidavit (Ex. E) ¶6; Rabine Affidavit (Ex. F), ¶¶4-5. But sizable portions of their workforce—sometimes a majority—have indicated that they will not comply with the Mandate, and to maximize the odds of finding a job at a company not covered by the Mandate, there is a strong incentive for them to leave soon, *regardless of when OSHA will actually start enforcing the Mandate*, and changing jobs is especially easy given the strong employment market. Berkebile Affidavit (Ex. E) ¶7; Lawrence Affidavit (Ex. D) ¶5. Indeed, "OSHA strongly encourages employers to implement the required measures to support employee vaccination *as soon as practicable*" in advance of the deadlines. Mandate at 468.

Because of the difficulty in finding replacement workers, these companies will be drastically short in workers, meaning cascading lost business with no hope of recovery. *Ala. Ass'n*, 141 S. Ct. at 2489. These delayed and canceled shipments

and services will sour customer relationships, leading to lost business and reputational harm. Pyle Affidavit (Ex. B) ¶7; Lawrence Affidavit (Ex. D) ¶¶7-8; Berkebile Affidavit (Ex. E) ¶8; Rabine Affidavit (Ex. F), ¶8. To stay afloat, companies will have to make drastic employment cuts, including of vaccinated workers. *See, e.g.*, Lawrence Affidavit (Ex. D) ¶7.

The Mandate's onerous logistical requirements for testing will likewise cause irreparable harm by effectively "forc[ing] [workers] either to get vaccinated, or quit." *Id.*, ¶10. Companies often have no sterile location to do testing, nor even the manpower to carry it out—meaning workers must leave the premises to get tested, causing additional lost productivity. Berkebile Affidavit (Ex. E) ¶10. The testing regime is undoubtedly designed to be so burdensome that it presents no real option for the vast majority of companies.

For the individual Petitioner Terri Mitchell, a compelled vaccination represents an irreparable harm because it cannot be undone, and involuntary nasal or throat testing—by edict of the President—is a breach of personal autonomy. As Justice Scalia said: "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting).

III. The Equities And Public Interest Strongly Favor A Stay.

The equities and public interest likewise favor a stay. *Nken*, 556 U.S. at 435.

It "is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n*, 141 S. Ct. at 2490. That ends the matter: OSHA has no equitable interest in enforcement of an invalid ETS.

Moreover, Respondents have diminished equities. OSHA seeks to press-gang private parties into forcibly vaccinating or testing over 30 million employees. And OSHA issued the Mandate without even posting drafts or summaries online to inform the public—unwarranted secrecy in the false name of efficiency, given that the COVID pandemic has been around for nearly two years. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (equitable interests "tilt[] against" a party who waits "years" to initiate action). Meanwhile, even before the Mandate was issued, the Department of Labor demanded that companies "begin the process of adopting vaccination mandates,"[1] an obvious *in terrorem* scheme where Respondents use threat of the Mandate to strong-arm companies into giving the government what it wants, regardless of whether the Mandate will be upheld in court.

Threatening to issue illegal edicts as a strategy to force involuntary vaccinations and testing is a cynical exercise of government powers, unworthy of

[1] Ben Penn, *Top DOL Lawyer Courts Business Support for Biden's Vaccine Order*, Bloomberg Law, Sept. 10, 2021, https://news.bloomberglaw.com/daily-labor-report/top-dol-lawyer-courts-business-support-for-bidens-vaccine-order.

equitable charity. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945).

By contrast, Petitioners have strong equitable interests. They have already suffered greatly over the last two years and now face terribly difficult choices about the viability of their businesses, as demonstrated above.

There are also very strong public interests in staying the Mandate, as the attached affidavits explain in detail. Petitioners were deemed "essential" during the lockdown because they serve as critical cogs in our nation's economy. Lawrence Affidavit (Ex. D) ¶9; Berkebile Affidavit (Ex. E) ¶9; Rabine Affidavit (Ex. F), ¶10. These companies represent just a tiny fraction of those affected. Nationwide, thirty percent of unvaccinated workers have indicated they will not comply, which will wreak havoc on supply chains. *See, e.g.*, Spencer Kimball, *Business Groups Ask White House to Delay Biden Covid Vaccine Mandate Until After the Holidays*, CNBC, https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-delay-biden-covid-vaccine-mandate-until-after-holidays.html.

Food will not be produced or transported to grocery stores, schools, and nursing homes; household products will not be manufactured; damaged roofs and sinkholes will not be repaired; snow will not get removed; and buildings with broken HVAC systems will turn into freezing meat lockers. Pyle Affidavit (Ex. B) ¶10; McKee Affidavit (Ex. C), ¶11; Lawrence Affidavit (Ex. D) ¶9; Berkebile Affidavit

(Ex. E) ¶9; Rabine Affidavit (Ex. F), ¶9. This in turn will cause a cascade effect that takes down companies at each link in the supply chain, along with the workers at those companies and their local communities. McKee Affidavit (Ex. C), ¶¶12-13.

IV. The Court Should Stay The Mandate Nationwide.

Because the Mandate was issued without legal authority, it is void, and Respondents (including Rule 65(d)(2) parties) should be stayed from enforcing the Mandate nationwide, especially because JCN's and IBA's members are located across the country. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established….").[2]

CONCLUSION

The Court should grant an administrative stay and a stay pending judicial review.

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Respectfully submitted

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[2] At the very least, a stay would extend to all Petitioners, including Job Creators Network's members and IBA's members. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("[I]t can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.").

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