No. _____

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

TANKCRAFT CORPORATION & PLASTICRAFT CORPORATION,
PETITIONERS,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
RESPONDENT.

EMERGENCY MOTION FOR STAY

I. INTRODUCTION

In a breathtakingly broad emergency rule, the President of the United States, through his Occupational Safety and Health Administration (OSHA), has ordered millions of American workers to vaccinate or submit to weekly testing. While vaccination may be the right thing to do for some, this type of federal management of personal healthcare decisions, even if permissible in the abstract, must be lawful in its execution. This extraordinary *diktat* does not come close.

On November 4, 2021, employing a rarely used federal law granting OSHA the power to issue "necessary" orders to address a "grave danger" without any notice or public comment, the Biden Administration ordered

all businesses with 100 or more employees to require vaccination or weekly testing and masking. This rule makes no allowance for employees who face little or no risk from COVID. Instead, OSHA claims that COVID is a "grave danger" to any unvaccinated employee employed in a business with over 100 employees, regardless of whether they have natural immunity, are otherwise young and healthy, or whether they work primarily outdoors or remotely.

Petitioners—two Wisconsin-based manufacturers—will suffer irreparable harm immediately unless a stay is granted. Petitioners must decide between two impossible choices: if they impose OSHA's mandate, they will lose employees who do not wish to be vaccinated or tested weekly and precious days of productivity due to testing, vaccinations, and vaccine side effects. But if Petitioners fail to comply, they will face staggering fines from OSHA.

This harm is being imposed solely by Presidential decree. There hasn't been any process allowing public comment on the rule. In fact, the text of the rule was not even publicly available until today, and it goes into effect tomorrow. What's more, the rule places upon employers not simply the obligation to make their workplaces safe, but it deputizes

employers into acting as agents of an unprecedented federal public health program. While the relevant law grants OSHA the power to impose emergency standards for workplace safety without public comment if these standards are "necessary" to address what OSHA believes is a "grave danger," this surely goes well beyond what Congress intended. If OSHA can use this authority to force 80 million American workers to vaccinate or test weekly, then it is hard to imagine what OSHA could *not* order. American businesses could be ordered to monitor and intervene in virtually any employee behavior that might pose a risk to others, whether directly related to the workplace or not.

Considering the serious statutory and constitutional claims at stake, and the immediate and irreparable injuries facing Petitioners, OSHA's emergency temporary standard should be put on hold immediately while the Court considers this case.

II. BACKGROUND

In 1970, Congress passed the Occupational Safety and Health Act (the "Act") to ensure "safe and healthful working conditions," 29 U.S.C. § 651, and authorized OSHA "to promulgate different kinds of standards." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 611 (1980)

(plurality op.). OSHA may promulgate these standards in either of two ways: (1) a permanent standard or (2) an emergency temporary standard (ETS). *See Fla. Peach Growers Ass'n, Inc. v. DOL*, 489 F.2d 120, 124 (5th Cir. 1974).

An ETS is an unusual administrative act. It takes "immediate effect upon publication." 29 U.S.C. § 655(c). There is no public notice, comment, or participation, as there is for a permanent standard. *See* 29 U.S.C. § 655(b). An ETS may be employed only if "employees are exposed to a grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and "such emergency standard is necessary to protect employees from such [grave] danger." *Id.* Put differently, the departure from normal administrative practice requires both an extraordinary danger posed by unsafe working conditions and a need for immediate action such that normal procedural protections must be suspended.

On September 9, 2021, President Biden announced his plan to require vaccination or weekly testing of a large portion of American workers. This plan became a reality on November 4, 2021, when OSHA released the text of the ETS. Ex. A (hereafter "ETS, __"). According to the

ETS, employers must either "develop, implement, and enforce a mandatory COVID-19 vaccination policy" or "adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work." ETS, 1. The ETS will take effect when it is published in the federal register tomorrow. Employers must immediately begin to develop a policy, collect information, and marshal the necessary resources to comply with the ETS within 30 days (and enforce any testing requirements, if applicable, within 60 days). ETS, 486.

III. Argument

The exceptional character of an ETS is reflected in the process for judicial review. Upon the filing of a petition for review, "a motion for a stay may be made to the court of appeals or one of its judges," Fed. R. App. P. 18(2), which the Court may grant in its discretion, 28 U.S.C. § 2349. To obtain a stay, petitioners must demonstrate a likelihood of success on the merits, irreparable harm, and that the balance of equities tips in the Petitioners' favor. *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020). This motion seeks emergency relief because

Petitioners face immediate and substantial labor disruptions, compliance costs, and a loss of procedural rights, as more fully described below.

A. Petitioners are likely to succeed on the merits because the ETS is illegal and unconstitutional

In addition to the standards required by the Administrative Procedures Act, 5 U.S.C. § 706(2) (prohibiting agency action that is arbitrary, capricious, contrary to law, or otherwise unconstitutional), courts considering an ETS must ultimately "take a 'harder look' at OSHA's action" than under a traditional APA review. *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 421 (5th Cir. 1984). Because "extraordinary power is delivered to the Secretary under the emergency provisions of [the Act]. That power should be delicately exercised, and only in those emergency situations which require it." *Fla. Peach Growers Ass'n, Inc.*, 489 F.2d at 129–30.

In the case commonly referred to as the "Benzene Case," in which the Court considered a permanent standard (not an ETS), the Court explained in a plurality opinion that although Congress "delegate[d] broad authority" (*Indus. Union Dep't*, 448 U.S. at 611) to the Secretary under the Act, the power to issue emergency temporary standards is more carefully circumscribed. Therefore, the Act "narrowly circumscribed

the Secretary's power to issue temporary emergency standards." *Id.* at 651.

Under this exacting standard, ETSs have apparently ***never*** been upheld in court when challenged.[1] Federal courts of appeal have vacated one ETS, *Fla. Peach Growers,* 489 F.2d 120 (5th Cir. 1974), partially vacated another, *Dry Color Mfrs Ass'n v. USDOL*, 486 F.2d 98 (3d Cir. 1973), and stayed three other ETSs, *Taylor Diving & Salvaged v. USDOL,* 537 F.2d 819 (5th Cir. 1976), *Indus. Union Dep't v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977), *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415 (5th Cir. 1984).

1. COVID is not the type of "substance," "agent," or "hazard" supporting issuance of an ETS

The Act authorizes OSHA to issue an ETS to protect "employees" from "exposure to substances," "agents," and "hazards." 29 U.S.C. § 655(c)(1). OSHA's standards must be directed at hazards in "places of employment." 29 U.S.C. § 652(8). The Act aims to reduce "injuries and illnesses *arising out of work situations*," and directs OSHA to address

[1] *But see* CRS, "ETS and COVID-19," Table A-1 (Sept. 13, 2021), https://crsreports.congress.gov/product/pdf/R/R46288 (incorrectly noting that *Vistron v. OSHA* resulted in an ETS being upheld).

"occupational safety and health hazards at [ ] *places of employment*." 29 U.S.C. § 651(a) & (b)(1) (emphasis added). As such, ETSs may address risks and hazards *in the workplace*, not in society broadly.

Here, OSHA seeks to address a worldwide pandemic—a virus found nearly everywhere—with an ETS that ought to be limited to hazards arising from workplace conditions. Were OSHA authorized to label generic and ubiquitous risks, such as COVID, as "hazards" worthy of regulation under the Act, then there would be no limiting principle to OSHA's powers under the Act. *See* Section III.A.4 *infra*. Influenza and norovirus, for example, are "hazards" in the workplace (as are obesity and other health risks based in part on personal choices, heredity, or behavior).[2] Yet OSHA does not set standards requiring vaccination or testing for influenza and norovirus because these are not hazards specific to the workplace.[3]

OSHA's reading of the Act would grant near unlimited powers by ignoring the phrase "places of employment" in the definition of standards,

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[2] *See* OSHA, https://www.osha.gov/seasonal-flu/non-healthcare-employers.

[3] For example, Petitioners are not aware of any OSHA action mandating annual vaccination for influenza, which causes up to 45 million illnesses each year. *See* CDC, https://www.cdc.gov/flu/about/burden/index.html.

29 U.S.C. § 652(8), and the other references to "health hazards at [ ] places of employment." 29 U.S.C. § 651(a) & (b)(1). But those important textual elements provide a reasonable limitation to the ETS authority to issue "necessary" emergency rules.

2. The ETS is not "necessary" to address a "grave danger"

An ETS must also be "necessary to protect employees from [grave] danger." 29 U.S.C. § 655(c)(1)(B). While overall, "the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks," *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 641, the issuance of an ETS must address something more than simply a "significant risk." An ETS is reserved for extreme cases and may be issued only where there is a "grave danger," not just a "significant risk". *See N. Am.'s Bldg. Trades Unions v. OSHA*, 878 F.3d 271, 282 (D.C. Cir. 2017) (discussing the lower "significant risk" standard for permanent standards). An ETS is "the most drastic measure in the Agency's standard-setting arsenal." *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983). OSHA's reasoning for an ETS must be closely scrutinized. *See generally Dry Color Mfrs. Ass'n*, 486 F.2d at 105.

The ETS here does not address a "grave danger." In fact, President Biden, in announcing this ETS, stated that "America is in much better shape than it was seven months ago," and that "vaccines provide strong protections."[4] Despite these claims, OSHA has issued an overinclusive ETS that attempts to protect all employees, even those who do not face a "grave danger." For four independently sufficient reasons, such a broad ETS, applying to all employers with more than 100 employees, is simply not "necessary" to address a "grave danger" and "emergency" as required by the text of the statute.

First, the government's own experts strongly suggest that COVID does not present a "grave danger" to many categories of workers. The CDC has published "risk factors" explaining that factors such as age and co-morbidities contribute to a heightened COVID risk, while individuals without these risk factors face a reduced risk.[5] CDC elsewhere lists ways to mitigate risks from COVID, such as social distancing, avoiding crowds,

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[4] White House Remarks, 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/.

[5] CDC, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/assessing-risk-factors.html.

washing hands, and having a healthy lifestyle.[6] The ETS also acknowledges the benefits of these measures. *E.g.*, ETS, 10, 79, 347. Therefore, given COVID's risk factors and the available mitigation strategies, the ETS is not necessary to protect workers at low risk of COVID due to their age, health, and mitigation strategies.

Second, the ETS is not "necessary" to protect individuals who have had COVID. According to CDC, "natural immunity is acquired from exposure to the disease organism" and, like vaccination, "immediately produces antibodies needed" to fight the disease.[7] The ETS applies to employees who have had COVID even though these employees will have a natural immunity to the virus. ETS, 481. This is surprising considering that, in a different vaccination program, OSHA completely exempts those with natural immunity. In the bloodborne pathogen standard, for example, OSHA requires employers to offer hepatitis vaccinations, but also correctly concedes that vaccination is unnecessary when "antibody testing has revealed that the employee is immune." *See* 29 C.F.R. §

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[6] CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[7] CDC, https://www.cdc.gov/vaccines/vac-gen/immunity-types.htm.

1910.1030(f)(2)(i).[8] Here, natural immunity similarly offers long-lasting protection, yet OSHA still applies the mandate to employees with that type of protection.[9]

Third, the ETS is not "necessary" to protect *all* workers in *all* companies with 100 or more employees. For example, the ETS applies to businesses that include remote workforces (*see, e.g.*, ETS, 343), outdoor workforces (*id.* at 344), and employers whose employees, like Petitioners', work in large and well-ventilated settings allowing for significant distancing between employees.[10] Ex. B, ¶¶3–11. In nearly every OSHA guidance document, OSHA has emphasized how COVID risks vary greatly depending on the type of workplace.[11] The ETS surveys various workplaces in which COVID cases have been detected, but the results of these surveys only confirm what is noted above—the virus is located

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[8] Moreover, the hepatitis program is not mandatory: OSHA simply requires certain employers to offer voluntary hepatitis vaccination to certain employees (not all), and then if an employee refuses, the employer must provide a disclosure statement detailing the risks. *See* 29 C.F.R. 1910.1030(f)(1)(i).

[9] NIH, https://www.nih.gov/news-events/nih-research-matters/lasting-immunity-found-after-recovery-covid-19.

[10] The ETS provides some limited durational exceptions for specific employees while working "exclusively outdoors" or "from home." ETS, 474.

[11] OSHA, https://www.osha.gov/sites/default/files/publications/OSHA3993.pdf; OSHA Alerts, https://www.osha.gov/coronavirus/news-updates.

everywhere and is not specifically a workplace hazard. ETS, 37–54. In fact, until the ETS, OSHA has never claimed that COVID risk was connected to whether an employer has over 100 employees or under 100 employees: OSHA always acknowledged risk relative to employee setting.[12]

Fourth, and finally, there is little evidence that the ETS is "necessary" to address an actual "emergency" as required by the text of the statute. 29 U.S.C. § 655(c). OSHA has known about the risks and dangers of COVID for months, yet they waited until now to issue an ETS. At the very least, "OSHA must offer some explanation of its timing in promulgating an ETS, especially when, as here, for years it has known of the serious health risk the regulated substance poses, and has possessed, albeit in unrefined form, the substantive data forming the basis for the ETS." *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 423. So far, OSHA has not adequately explained its delay in this alleged "emergency" situation.[13]

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[12] In fact, OSHA itself acknowledges that the 100-employee threshold is merely one of administrative convenience, as the ETS "targets unvaccinated workers in any indoor work setting . . . where more than one person is present." ETS, 6, 113.

[13] The "emergency" claim is further belied by the numbers. According to CDC, approximately 80% of adults have had at least one vaccination dose. CDC, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total. The ETS itself further acknowledges that case counts are on the decline. ETS, 102.

3. A broad reading of the Act raises grave constitutional questions

There is a "background assumption that Congress normally preserves the constitutional balance between the National Government and the State." *Bond v. United States*, 572 U.S. 844, 862 (2014) (citations omitted). Because "the regulation of health and safety matters is primarily, and historically, a matter of local concern," *Hillsborough Cty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985), the Act should not be read to permit a federal vaccination or testing requirement that would apply to a large portion of workers in the United States.

Moreover, courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n Realtors v. HHS*, 2021 WL 3783142, *3 (U.S. Aug. 26, 2021). And of course, a "statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

These settled doctrines counsel in favor of a narrow reading of OSHA's ETS authority and against the argument that OSHA may do anything "necessary" to prevent a "grave danger." If the ETS is valid,

however, it presents at least two substantial constitutional questions that this Court should address.

Non-Delegation. "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019) (plurality op.). When addressing a possible nondelegation problem, the "constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Id.* at 2123. Congress "cannot delegate legislative power to the [executive] to exercise unfettered discretion to make whatever laws he thinks may be needed or advisable." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935). Five justices have indicated its willingness to revive this doctrine. *See Gundy*, 139 S.Ct. at 2134 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *Gundy*, 139 S.Ct. at 2131 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S.Ct. 342 (2019) (Statement of Kavanaugh, J.).

As the Court recently pointed out in *Alabama Association of Realtors,* if the government takes the position that a statute "gives the [agency] broad authority to take whatever measures it deems necessary

to control the spread of COVID-19," then the "sheer scope" of such claimed authority "would counsel against the Government's interpretation." 2021 WL 3783142 at *5-6. Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *USFS v. Cowpasture River Preservation*, 140 S.Ct. 1837, 1850 (2020).

A statute permitting any "necessary" regulation to address any "grave danger" has no logical stopping point. If this ETS is valid, then what principle would limit the statute's application to seasonal influenza, obesity, or a host of other hazards? Such hazards pose a "grave danger" if COVID does. The idea that "necessity" justifies a departure from procedural norms implies both novelty and immediacy. We are well into the second year of the pandemic and vaccines have been widely available for months.

A statute that permits the President to do almost anything whenever he feels the time is right provides no intelligible principle or effective limit. Congress did not provide OSHA with such sweeping authority when it enacted OSHA fifty years ago, nor has it since provided

a specific delegation of authority to the agency to take the actions outlined in the ETS. To interpret 29 U.S.C. § 655(c)(1)'s delegation of authority in this manner reflects no intelligible principle and no logical limit of authority. As explained above, a reasonable limitation would be to employ the language already in the Act and limit OSHA's authority to true "emergency" situations to protect workers from a "grave danger" that is unique "to the workplace." *See supra*, III.A.1.

Commerce Clause. In addition to the non-delegation doctrine, a broad reading of the ETS authority would raise significant questions under the Commerce Clause. Under that clause, Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000). Only the third category conceivably applies here.

As the Court observed in a challenge to a criminal statute involving school zones in *United States v. Lopez*, 514 U.S. 549, 565 (1995), if Congress can regulate activities that affect the learning environment, "it also can regulate the educational process directly. Congress could determine that a school's curriculum has a 'significant' effect on the

extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools…." But the Court rejected such an expansive interpretation, noting that it would convert the clause "to a general police power of the sort retained by the states" and putting at risk the "distinction between what is truly national and what is truly local." *Id.* at 567–68; *Morrison*, 529 at 615–16 (rejecting reasoning that could "be applied equally as well to family law and other areas of traditional state regulation").

The vaccine-or-testing mandate is an attempted "work-around" for this problem, using the Act and the Commerce Clause as a pretextual jurisdictional hook,[14] to supplant state and local officials who retain primary responsibility for protecting health and safety of their citizens. The mandate, as President Biden put it, is meant to "get them out of the way"[15] so he can legislate through the federal executive. *See Dep't of Com.*

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[14] *See* Edmund DeMarche, "White House's Ron Klain panned for retweeting post on 'ultimate work-around' for federal vaccine mandate," Fox News, Sept. 10, 2021, https://www.foxnews.com/politics/klain-vaccine-coronvirus-mandate.

[15] White House, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

v. New York, 139 S. Ct. 2551, 2575 (2019) (executive action is doomed when there is "a significant mismatch between the decision the Secretary made and the rationale he provided.") But the Commerce Clause does not provide the federal government with such far-reaching powers.

More recently, in *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Court held that "compel[ing] an individual to *become* active in commerce by purchasing a product" does not "regulate existing commercial activity." *Id.* at 552. Compelling a worker to make a healthcare decision (vaccinate or test) similarly does not regulate existing commercial activity; instead, the ETS directs individual employees to make certain healthcare decisions. *Cf. Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 7 (D.C. Cir. 2014) (it would be unconstitutional to mandate the purchase of health insurance with no alternative). The ETS crosses the line that *Sebelius* prohibited—it requires employees to get a vaccine, submit to testing, or face life-changing consequences, including possible termination of employment. It effectively compels employers to enforce the mandate for the government or face steep fines. *See* 29 C.F.R. § 1903.15(d) (authorizing fines of up to $136,532). These are not real

choices, just like the "buy or be taxed" individual mandate in *Sebelius*, and the ETS cannot pass muster.

B. Petitioners will be irreparably harmed absent a stay

A harm is irreparable if it "cannot be prevented or fully rectified by the final judgment after trial." *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1044-45 (7th Cir. 2017). Petitioners face three categories of irreparable harm: labor disruptions, compliance costs, and a violation of their procedural rights.

1. Labor disruption and uncertainty are irreparable harms, particularly where the disruption leads to the loss of future business. *See United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 2008 WL 4936847 at *45 (N.D. Ill. Nov. 17, 2008) (slowdown campaign by union caused irreparable harm). Additionally, the Seventh Circuit acknowledges that the loss of employees through termination or layoff may be considered irreparable. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of Am.*, 549 F.3d 1079, 1090 (7th Cir. 2008); *Nat'l Waste & Recycling Ass'n v. Warrick Cty. Solid Waste Mgmt. Dist.*, 2016 WL 1222353 at *12 (S.D. Ind. Mar. 29, 2016).

Petitioners will experience significant labor uncertainties and disruption when the ETS goes into effect. Ex. B, ¶¶16–19. Before the mandate, Petitioners had approximately 100 open positions. If the ETS goes into effect, several employees will quit (including key managers) because they do not want the vaccine and do not want to submit to weekly testing. Ex. C (collection of declarations from employees who will resign if the ETS is in effect). Even if these employees do not quit tomorrow, these employees have signaled they will not comply with the ETS, and Petitioners will need to take immediate steps to fill their positions or face irreparable harm. Ex. B, ¶¶ 16–20.

Additionally, some employees may be forced to quit or be terminated because they will not have *access* to weekly testing. Ex. B, ¶23. CDC has notified the public that there is a shortage of testing kits,[16] which will of course be exacerbated by the ETS. And where Petitioners do business, there are only a handful of testing locations, none of which have rapid antigen tests.[17] Even assuming employees can procure over-

[16] CDC, https://www.cdc.gov/csels/dls/locs/2021/09-02-2021-lab-advisory-Shortage_COVID-19_Rapid_Tests_Increase_Demand_Laboratory_Testing_1.html.

[17] Wis. DHS, https://www.dhs.wisconsin.gov/covid-19/community-testing.htm.

the-counter tests, such employees cannot rely on these unless they test in the presence of the employer or a medical provider, causing a further drain on resources. ETS, 474–75. Without testing and results, an unvaccinated employee cannot work. Petitioners will be forced to keep employees who can't get access to testing off the job—exacerbating their own labor shortage—or face hefty fines.[18]

For those employees who choose to become vaccinated in response to the ETS, Petitioners will face labor disruptions due to vaccine side effects. Vaccine side effects are "normal" and well-documented. According to CDC, side effects are "normal signs that your body is building protection."[19] CDC further instructs that "side effects may affect your ability to do daily activities, but they should go away in a few days." Under the ETS, Petitioners must not only allow time off due to vaccine side effects, which means lost productivity, they must also pay for it.[20]

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[18] There will also be upstream effects, causing disruption to Petitioners. For example, the American Trucking Associations told OSHA that up to 37% of truck drivers could quit if the ETS was enforced. *See* https://www.ttnews.com/articles/ata-warns-vaccine-mandate-could-worsen-supply-chain-troubles.

[19] CDC, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html.

[20] ETS, 481.

Ex. B, ¶19. As noted above, every day of missed work by an employee is an irreparable harm and will affect the companies' productivity, reputation, and revenue. Additionally, some of the documented side effects of the vaccines, including thrombosis,[21] pericarditis, and myocarditis,[22] however rare, are themselves serious and potentially fatal to employees.[23]

2. The considerable time, effort, distraction, and expense of compliance with the ETS is also an irreparable harm. *See Jones-El v. Berge*, 374 F.3d 541, 544 (7th Cir. 2004) (upgrading prison facility); *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001) (altering facility and lost revenue from compliance). If the ETS goes into effect while this case is pending, then Petitioners will be forced to expend considerable resources in setting up a system to implement the ETS, which cannot be recovered. Ex. B, ¶¶20–23. Enforcement of the ETS falls

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[21] CDC, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html.

[22] CDC, https://www.cdc.gov/vaccines/covid-19/clinical-considerations/myocarditis.html.

[23] The public, however, will not know the nature and extent of the side effects resulting from the ETS because OSHA suspended the reporting requirements under 29 C.F.R.§ 1904. *See* OSHA, https://www.osha.gov/coronavirus/faqs#vaccine.

chiefly on employers, who face steep penalties for the noncompliance of their employees. To comply with the ETS, Petitioners must immediately undertake a multi-step process requiring considerable time and effort to comply with the ETS within 30 days (and any testing program in 60 days). *Id.*, ¶¶ 16, 20.

Petitioners currently do not know who has been vaccinated. Ex. B, ¶21. Therefore, under the ETS, Petitioners must first dedicate time and resources to collect and compile that information. The ETS *requires* this significant undertaking. ETS, 478. For unvaccinated employees, the companies must then determine who will get vaccinated and when. Ex. B, ¶22. This will involve an employee questionnaire, which will require employee time to compose, complete, and review (putting regular duties on hold). For employees who choose to remain unvaccinated, the companies must establish some system to ensure weekly testing. Ex. B,

¶23. This will involve a technological solution entailing a significant cost in both time and money.[24]

If this case proceeds without an injunction, there is no way for Petitioners to recoup this lost time, effort, and costs. *See Sofinet v. I.N.S.,* 188 F.3d 703, 707 (7th Cir. 1999) (when "no one suggests that the United States government could be required to pay money damages later," "lack of an adequate remedy at law is always present.") Petitioners would not otherwise incur these significant compliance costs in the normal course of business.

3. Finally, issuing the ETS rather than following traditional rulemaking deprives Petitioners of their rights to advance notice and comment. A "preliminary injunction may be issued solely on the grounds that a regulation was promulgated in a procedurally defective manner." *Eli Lilly & Co. v. Cochran*, 2021 WL 981350 at *10 (S.D. Ind. Mar. 16,

[24] Petitioners will face other legal compliance costs. For example, Petitioners must navigate the Food, Drug, and Cosmetic Act, which, among other things, requires informed-consent disclosures and "the option to accept or refuse." *See* 21 U.S.C. § 360bbb-3(e)(1)(A). Additionally, OSHA, in acknowledging its refusal to mandate vaccinations for the H1N1 pandemic, also cautioned employers that employees refusing a vaccine may trigger protections under the Act. *See* OSHA, https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09. Finally, Petitioners must also accommodate employees under other federal laws. ETS, 477.

2021) (collecting cases). These procedural requirements are not simply meaningless bureaucratic boxes to be checked—pre-enforcement notice and comment is typically the *only* method to challenge the application of a standard to an employer. Stripping away the checks and balances of federal rulemaking constitutes an irreparable harm because, once issued, Petitioners will have no say in how the ETS is enforced.

C. The balance of the equities favors a stay

"It is ultimately necessary ... to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E–Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). The harms to Petitioners—labor uncertainty, compliance costs, denial of procedural rights—are laid out above. The government, on the other hand, will face no harm. In fact, OSHA has the option (and has had the option for many months) of following available regulatory processes in 29 U.S.C. § 655. And finally, the public at large faces no immediate harms unique to this moment in time: the vaccine remains available to anyone who wants it and Americans may continue to assess and mitigate their own personal risk on a daily basis.

D. Seeking relief from OSHA would be impracticable

Appellate Rule 18 provides that an application for stay should ordinarily be made in the first instance to the agency. But that requirement is cast "in flexible terms and is not intended to apply in a case where the application would be an exercise of futility." *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983). Here, it would be impractical to seek review before OSHA. First, it is unclear whether this rule applies. Congress created a specific procedure allowing any person adversely affected by an ETS to file suit in the Court of Appeals without exhausting any administrative procedures before the agency. *See* 29 U.S.C. § 655(f). Second, existing OSHA procedures only allow a stay in the case of OSHA citations. 29 C.F.R. § 2200.63. Third, the ETS goes into effect tomorrow and requires full compliance within 30 days (and testing in 60 days), after which an employer faces severe consequences. Employers and employees should not be required to make the choice to either pay fines or incur significant compliance costs (including intime and money lost due to testing or taking a vaccine against their will—an action which, once done, cannot

be undone) when there are serious questions about the agency's authority to act.

IV. CONCLUSION

The motion for stay should be granted on an emergency basis and the ETS put on hold before it goes into effect on November 5, 2021.

Dated this 4th day of November, 2021.

WISCONSIN INSTITUTE FOR LAW & LIBERTY

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because this motion contains 5,192 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

This motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(E), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this motion has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: November 4, 2021

/s/ *Daniel P. Lennington*
DANIEL P. LENNINGTON

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2021 I filed the foregoing with the Clerk of the Court via email, as requested by the Clerk. As provided by 29 U.S.C. § 655(f), a "copy of the petition shall be forthwith transmitted by the clerk of the court to the secretary."

A copy of this motion was also transmitted to the Respondent via the email address listed in the ETS.

Dated: November 4, 2021

/s/ *Daniel P. Lennington*
DANIEL P. LENNINGTON