

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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IN RE: OCCUPATIONAL SAFETY AND	)	
HEALTH ADMINISTRATION, INTERIM	)	
FINAL RULE: COVID-19 VACCINATION	)	Nos. 21-7000 (lead), 21-
AND TESTING; EMERGENCY	)	4027/4028/4031/4032/4033, 21-
TEMPORARY STANDARD 86 FED. REG.	)	4080, 21-4091/4090, 21-
61402, ISSUED ON NOVEMBER 4, 2021.	)	4093/4088/4101/4096, 21-
	)	4097/4102/4083
	)	
	)	MCL No. 165
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**MOTION FOR EMERGENCY STAY**

Petitioner, Oberg Industries, LLC, respectfully moves this Court pursuant to Federal Rule of Appellate Procedure 18, 28 U.S.C. §2112, and 29 U.S.C. §655(f) to extend the emergency stay of the Occupational Safety and Health Administration’s “COVID-19 Vaccination and Testing; Emergency Temporary Standard,” 86 Fed. Reg. 61402 (Nov. 5, 2021) (“Vaccine Mandate”) until final resolution of the consolidated challenges and to deny the government’s emergency motion to dissolve the stay, Doc. No. 69 (Nov. 23, 2021).

**I. Petitioners Are Likely to Succeed on the Merits.**

For the reasons set out in the Fifth Circuit’s holding in *BST Holdings v. OSHA*,

17 F.4th 604 (5th Cir. 2021), Petitioner is likely to succeed on the merits of this consolidated challenge to OSHA’s Vaccine Mandate. Petitioner also incorporates by reference the merits portion of the emergency stay motion filed by Petitioners Phillips Tower and Manufacturing and Sixarp LLC, Doc. 168.

## **II. Petitioner will suffer irreparable harm if the stay is lifted.**

Petitioner will suffer irreparable harm from the Vaccine Mandate if the stay is lifted. As an initial matter, “complying 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 in part and in the judgment). Because “[t]he Mandate places an immediate and irreversible imprint on all covered employers in America,” it irreparably harms Petitioner. *BST Holdings*, 17 F.4th 604.

Petitioner will also incur immediate losses—more than \$22 million in lost revenue per year. Moreover, the Mandate will imperil Petitioner’s business moving forward given significant labor market shortages. *Cf. Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995). Indeed, Oberg has 21 open positions across the company that it cannot fill. And studies show that at least seven million affected workers report that they definitely will not get the vaccine. *See Goldman Sachs, The Effect of the Biden Vaccine Mandate on Vaccination and Employment* (Sept. 13, 2021), <https://bit.ly/3FkoPj4>. The Mandate will significantly exacerbate these shortages. Based on Oberg’s communications with its employees, it estimates that the Mandate

could lead to the loss of 200 employees—approximately 30% of its existing workforce. And even if only testing were mandated, Oberg stands to lose seven additional employees. Such losses—either from a vaccine mandate, testing mandate, or both—would be crippling to Oberg and endanger its ability to fulfill existing orders. Finally, in the absence of a stay, Oberg would have to immediately begin to prepare for the Vaccine Mandate and expend significant time and money to begin the multi-step process of setting up a system to ensure compliance.

These losses are irreparable for several reasons. First, Petitioner’s monetary harm is unrecoverable due to sovereign immunity. *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 599-600 (6th Cir. 2014) (injury irreparable because sovereign immunity may bar claim for money damages); *see also Texas v. United States Env’t Prot. Agency*, 829 F.3d 405, 433-34 (5th Cir. 2016) (“No mechanism here exists for the power companies to recover the compliance costs they will incur if the Final Rule is invalidated on the merits.”); *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996) (same); *State v. Becerra*, 2021 WL 2514138, at \*47 (collecting cases). Second, courts have not hesitated to find irreparable harm from onerous ETS Rules. *Taylor Diving & Salvage Co. v. U. S. Dep’t of Lab.*, 537 F.2d 819, 821 (5th Cir. 1976). Third, courts—including the Supreme Court—have found irreparable harm due to compliance with analogous COVID mandates. *See Ass’n of Realtors*, 2021 WL 3783142, at \*4 (“The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery.”); *see also State v. Becerra*, 2021

WL 2514138, at \*48. Fourth, the Vaccine Mandate directly and immediately imperils Petitioners' business and ability to function given their current labor shortage and the significant number of current employees who will refuse the vaccine. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (“loss of opportunity to pursue [Petitioner’s] chosen profession” including inability “to expand his business” “constitutes irreparable harm”). Finally, compliance with an unconstitutional standard is per se irreparable harm. *See, e.g., Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (“[T]he constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm.”); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 950 (N.D. Ill. 2017) (“plaintiff established a ‘constitutional injury’ and irreparable harm ‘by being forced to comply with an unconstitutional law or else face financial injury.’”).

As the Fifth Circuit has already held, “companies” such as Petitioner. will “be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, the diversion of resources necessitated by the Mandate, or by OSHA’s plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees.” *BST Holdings*, 17 F.4th 604. In the absence of a stay, Petitioner will suffer these same irreparable injuries.

### **III. The Public Interest and Balance of Harms Support Maintaining the Stay.**

A stay of the Vaccine Mandate “is firmly in the public interest” because “the

mere specter of the Mandate has contributed to untold economic upheaval in recent months.” *BST Holdings*, 17 F.4th 604. Moreover, “a stay will do OSHA no harm whatsoever” because “[a]ny interest OSHA may claim in enforcing an unlawful (and likely unconstitutional) ETS is illegitimate.” *Id.* And to the extent Respondents are harmed at all, such harm “pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies.” *Id.* Although “the public has a strong interest in combating the spread of the COVID–19 Delta variant ... our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors v. HHS*, 2021 WL 3783142, at \*4 (U.S. Aug. 26, 2021). As with the Eviction Moratorium, “[i]t is up to Congress, not [OSHA], to decide whether the public interest merits further action here.” *Id.* In sum, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *see also Marysville Baptist Church v. Beshear*, 957 F.3d 610, 614-15 (6th Cir. 2020) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”).

## CONCLUSION

For the foregoing reasons, this Court should leave the stay in place and deny the government’s emergency motion to dissolve the stay.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume requirements and contains 1,850 words. See Fed. R. App. P. 27(d)(2)(A). I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14- point Garamond font.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2021, I caused the foregoing Motion to be served via the Court's CM/ECF system on all registered counsel.

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OBERG INDUSTRIES, LLC,

Petitioner,

v.

UNITED STATES DEPARTMENT OF  
LABOR; UNITED STATES OCCUPATIONAL  
SAFETY AND HEALTH ADMINISTRATION;  
MARTY WALSH, IN HIS OFFICIAL  
CAPACITY AS SECRETARY OF LABOR;  
DOUGLAS L. PARKER, IN HIS OFFICIAL  
CAPACITY AS ASSISTANT SECRETARY OF  
LABOR FOR OCCUPATIONAL SAFETY  
AND HEALTH,

Respondents.

Nos. 21-7000 (lead), 21-  
4027/4028/4031/4032/4033, 21-  
4080, 21-4091/4090, 21-  
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MCL No. 165

**DECLARATION OF RICH BARTEK**

I, Rich Bartek, hereby declare as follows:

1. I am CEO of Oberg Industries. Oberg Industries is a metals contract manufacturer that was founded in 1948. Oberg manufactures products for a variety of markets, including medical, food & beverage, commercial and residential building construction, consumer products, defense, energy and automotive sectors.

2. Oberg currently employees 697 full-time employees, the vast majority of

whom are highly skilled machinists and operators. Oberg operates manufacturing facilities in four locations: Freeport, Pennsylvania; Sarver, Pennsylvania; Chicago, Illinois; and Wallingford, Connecticut. All but our Connecticut facility have more than 100 employees on site.

3. As CEO of Oberg, I have personal knowledge of our facilities, employees, operations and experience. Moreover, because Oberg is self-insured, I have knowledge as to many of our employees' experiences with COVID-19 and the available vaccines to date. I am thus able to describe the effects of the OSHA "COVID-19 Vaccination and Testing; Emergency Temporary Standard" ("Vaccine Mandate") on Oberg.

4. As mentioned above, we employ hundreds of employees at four different manufacturing facilities. I understand that all of these facilities would be subject to the Mandate given the overall size of Oberg.

5. Oberg Industries has worked hard to address the risks associated with the pandemic while maintaining safe operations for our employees. Since the spring of 2020, we have hired agencies for deep cleaning services to disinfect work areas; deployed hand sanitizers, face coverings, and wipes; practiced social distancing where possible; used temperature checks on employees to screen for infections; emphasized personal hygiene; implemented flexible work hours, working from home, and staggered work schedules and lunches; improved HVAC ventilation; formed a COVID committee to ensure we continue to follow proper procedures; and regularly communicated our policies and efforts to limit spread.

6. These efforts have cost the company more than \$84,000 per year.
7. Since January of 2020, more than 180 employees have tested positive for COVID-19 and thus possess some form of natural immunity.
8. We know that 43% of Oberg's full time employees have received the vaccine (although this may not account for some employees whose vaccines were administered or covered outside the company's health insurance plan).
9. Due to the state of the economy and Oberg's need for skilled labor, Oberg has had difficulty filling its open positions. As of November 2021 there were more than 21 open positions across the company.
10. Based on communications with employees and the number who have not yet been vaccinated, we estimate that a vaccination requirement could lead to the loss of more than 200 employees—nearly 30% of our existing workforce. Even if we lost only half of those employees, it would equate to a \$22 million loss per year in revenue to the company, based on current efficiencies.
11. Moreover, we estimate a loss of seven additional employees in the event we mandated only testing.
12. Given the difficulty of filling existing openings, the anticipated losses associated with these Vaccine Mandate would be economically crippling to Oberg, endangering its ability to fulfill existing orders.
13. Apart from the employment effects, the Vaccine Mandate will impose substantial economic hardship on Oberg. We have investigated the feasibility of setting



up weekly testing at our sites. Due to the limited number of suppliers of the PCR testing kits (which, per our health insurance contractor, currently costs more than \$100 per kit), we anticipate that testing our 286 unvaccinated employees could cost more than \$32,000 per week, or up to \$1.7 million annually. And this does not account for the lost employee time necessary to accomplish the testing.

14. These costs are economically unsustainable for Oberg, and would force us to curtail operations and ultimately eliminate jobs.

I declare under penalty of perjury that the foregoing is correct. Executed on this 6 day of December, at Pennsylvania.

  
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Rich Bartek, CEO, Oberg Industries