

Nos. 21-7000 (lead), 21-4080, 21-4117

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**In the United States Court of Appeals  
for the Sixth Circuit**

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IN RE: MCP No. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION  
RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61402

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On Petition for Review  
from the Occupational Safety and Health Administration

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**TWENTY-SIX BUSINESS ASSOCIATION PETITIONERS'  
RESPONSE TO  
RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY**

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## CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1(c), the below Petitioners ("the Business Associations") certify that: no Petitioner has any parent corporation; no publicly held corporation holds any ownership interest in any Petitioner; and, no publicly owned corporation, not a party to the petition, has a financial interest in the petition's outcome.

National Federation of Independent Business\*  
 American Trucking Associations, Inc.\*  
 National Retail Federation\*  
 FMI – The Food Industry Association\*  
 National Association of Convenience Stores\*  
 National Association of Wholesaler-Distributors\*  
 International Warehouse and Logistics Association\*  
 International Foodservice Distributors Association\*  
 National Propane Gas Association<sup>†</sup>  
 Brick Industry Association<sup>†</sup>  
 American Bakers Association<sup>†</sup>  
 Kentucky Petroleum Marketers Association<sup>†</sup>  
 Kentucky Trucking Association<sup>†</sup>  
 Louisiana Motor Transport Association\*  
 Michigan Association of Convenience Stores<sup>†</sup>  
 Michigan Petroleum Association<sup>†</sup>  
 Michigan Retailers Association<sup>†</sup>  
 Michigan Trucking Association<sup>†</sup>  
 Mississippi Trucking Association\*  
 Ohio Grocers Association<sup>†</sup>  
 Ohio Trucking Association<sup>†</sup>  
 Tennessee Chamber of Commerce and Industry<sup>†</sup>  
 Tennessee Grocers and Convenience Store Association<sup>†</sup>

Tennessee Manufacturers Association<sup>†</sup>  
Tennessee Trucking Association<sup>†</sup>  
Texas Trucking Association<sup>\*</sup>

*\*Identifies Petitioners who filed a petition for review in the Fifth Circuit on November 11, 2021, in that court's Case No. 21-60845. These Petitioners were transferred to this Court and docketed as parties in Case No. 21-4080. This Court then consolidated that case with No. 21-7000 on November 19, 2021.*

*†Identifies Petitioners who filed a petition for review in this Court on November 23, 2021. These Petitioners were docketed as parties in Case No. 21-4117. This Court then consolidated that case with No. 21-7000 on November 24, 2021.*

Each of the Business Associations is represented by the same counsel in this Court. To ease administrability, the Business Associations file this single, joint Response to Respondents' Emergency Motion to Vacate Stay.

This Response is filed simultaneously in Nos. 21-7000 (the lead case), 21-4080, and 21-4117.

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## INTRODUCTION

The Fifth Circuit correctly stayed the effective date of the Occupational Safety and Health Administration’s (“OSHA”) *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (the “ETS”). This Court should deny Respondents’ motion to vacate that stay.

At issue is whether OSHA has statutory authority to create an immediately effective vaccine-and-testing regime for all businesses with 100 or more employees, thereby reaching “two-thirds of all private-sector workers,” *id.* at 61,403—*i.e.*, “84 million” Americans, or over 25% of the population, *id.* at 61,475. OSHA contends that it may do so without public notice and comment based upon a novel reading of an obscure statutory provision, § 655(c), that provides only a narrow emergency power. *Indus. Union Dep’t AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (plurality).

As Judge Duncan’s concurring opinion recognized, *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 619 (5th Cir. 2021), the major-questions doctrine bars OSHA’s attempt to “discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy,” *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (“UARG”) (cleaned up). Courts routinely reject statutory interpretations, such as the one Respondents offer, that “would bring about an enormous and transformative expansion in [an agency’s] regulatory authority without clear congressional authorization.” *Id.* Congress did not provide anything close to clear authority for the

extraordinary power OSHA asserts here. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

Lifting the stay would inflict irreparable harm upon the Business Associations' members—hundreds of thousands of businesses across retail, wholesale, warehousing, transportation, travel, logistics, and commercial interests that collectively employ millions of Americans and contribute trillions of dollars annually to the Nation's economy. It would impose substantial, nonrecoverable compliance costs on those businesses. It would devastate already fragile supply chains and labor markets at the peak holiday season. OSHA acknowledges the certainty that those opposed to vaccination and government-mandated testing will quit their jobs rather than submit, leaving many businesses with no choice but to shut their doors or reduce operations, hours, and service. The ETS will also cause additional irreparable harms, including lost profits, lost sales to competitors who have fewer than 100 employees, lost goodwill, and reduced employment.

A likelihood of success and irreparable harm are all that 5 U.S.C. § 705 requires for a stay pending review, but the equities also favor a stay. Any harm to OSHA is “outweigh[ed]” by “the greater public interest in having governmental agencies abide by the federal laws that govern their existence and operations.” *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994).

Maintaining the status quo does not require this Court to cast doubt upon the efficacy of COVID-19 vaccines, which are undeniable marvels of modern medicine. Indeed, the Business Associations' members have

distributed and administered hundreds of millions of doses of the vaccines for tens of millions of Americans. They have encouraged and incentivized their employees to get vaccinated against COVID-19.

But the goal of getting more Americans vaccinated does not allow the Executive Branch to use regulatory fiat to achieve a significant social, economic, and political change via the limited “emergency” power that Congress authorized. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490. Like the Fifth Circuit and nearly every other court to have reviewed OSHA’s attempts to issue emergency standards that avoid notice-and-comment, this Court should retain the stay pending review on the merits.

## ARGUMENT

### **I. The Business Associations Are Likely to Succeed on Their Argument that the ETS Exceeds OSHA’s Statutory Authority.**

The ETS is unlawful because OSHA could have initiated notice-and-comment procedures months ago instead of imposing an immediately effective “emergency” rule. This unusual procedure is therefore not “necessary.”

And under the major-questions doctrine, Congress did not give OSHA “unprecedented” power to overhaul the American economy via an emergency, temporary standard. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489. Congress has “narrowly circumscribed [OSHA’s] power to issue temporary emergency standards” and has “repeatedly expressed its concern about allowing the Secretary to have too much power over American industry.” *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 651. As the Supreme Court has admonished, “[i]n

the absence of a *clear* mandate in the [Act], it is unreasonable to assume that Congress intended to give [OSHA] . . . unprecedented power over American industry.” *Id.* at 645 (emphasis added).

**A. OSHA Was Required to Use Regular Notice-and-Comment Procedures Instead of Waiting Months to Issue an “Emergency” Action.**

Under the Occupational Safety and Health Act, standards must rely on substantial evidence vetted through notice-and-comment. 29 U.S.C. § 655(b); *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 639, 642. Congress granted only *limited* “emergency” powers to OSHA, in 29 U.S.C. § 655(c), for the potential exigency of protecting workers from a new or newly recognized workplace danger. *Asbestos Info. Ass’n v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984).

OSHA must demonstrate that issuing an ETS is “*necessary*” to protect workers from a grave danger before invoking the exceptionally limited “emergency” power. 29 U.S.C. § 655(c)(1) (emphasis added). This emergency power must be “*delicately exercised*,” *Fla. Peach Growers Ass’n, Inc. v. DOL*, 489 F.2d 120, 129 (5th Cir. 1974), and used only as “*an unusual response to exceptional circumstances*,” *Dry Color Mfrs. Ass’n, Inc. v. DOL*, 486 F.2d 98, 104 n.9a (3d Cir. 1973), not as an excuse to avoid notice-and-comment. OSHA “*cannot use its ETS powers as a stop-gap measure*.” *BST Holdings*, 17 F.4th at 616 (internal quotations omitted). A statutory delegation of power based on a “*necessary*” requirement cannot permit a “*breathtaking amount of authority*,” even during a pandemic. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

There is nothing necessary about avoiding the rulemaking process for a virus that has now been circulating in the country for almost two years and for which vaccines have been available to all adults for over six months. The Delta variant began spreading rapidly almost six months ago. OSHA could have initiated notice-and-comment procedures for a workplace standard months ago, too. Yet OSHA's delay—coupled with a months-long refusal to initiate notice-and-comment—confirms that OSHA cannot possibly justify its determination that forgoing notice and comment is “necessary.”

Employers and the public have amassed a wealth of knowledge about how to limit the spread of COVID-19 in their particular workplaces and how to encourage vaccination, and they are using that knowledge to combat COVID-19. Their input on such a monumental regulatory decision is critical.

Respondents assert (Emer. Mot. 24 n.9) that the gap between the “President’s announcement” and the ETS’s issuance “reflects great expedition.” But that ignores the months leading up to the President’s announcement in which OSHA could have sought public input on workplace responses to the pandemic. Both OSHA and the President have pondered vaccine mandates since early 2020. *See BST Holdings*, 17 F.4th at 614 & n.17. And the ETS’s testing portions could have been implemented more than a year ago.

By analogy, an agency cannot forgo notice-and-comment under the Administrative Procedure Act’s “good cause” exception, 5 U.S.C. § 533(b)(B), when it becomes aware of an emergency with enough time for informal rulemaking but chooses instead to wait and invoke the exception. *See, e.g., Air*

*Transp. Ass'n of Am. v. DOT*, 900 F.2d 369, 379 (D.C. Cir. 1990) (“[T]he FAA is foreclosed from relying on the good cause exception” where “[t]he agency waited almost nine months before taking action”), *vacated on other grounds*, 498 U.S. 1077 (1991); *Env’tl Def. Fund v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (per curiam) (rejecting as “baseless” the argument that “outside time pressures forced the agency to dispense with APA notice and comment procedures” where agency waited eight months). So too here.

But even more is required of OSHA here: a reviewing court “must take a ‘harder look’ at OSHA’s action than [it] would if [it] were reviewing the action under the more deferential arbitrary and capricious standard [under] the Administrative Procedure Act.” *Asbestos Info. Ass’n*, 727 F.2d at 421. This harder-look review dictates that OSHA’s delay precludes use of an emergency power to impose an extraordinarily sweeping, immediately effective standard without prior public input where it was not “necessary” to do so.

**B. Under the Major-Questions Doctrine, Congress Did Not Clearly Authorize OSHA to Commandeer Businesses into Implementing a COVID-19 Vaccine, Testing, and Tracking Mandate Covering 84 Million Americans.**

If Congress wants to authorize a “vast expansion” of an agency’s power, then it must “speak with the requisite clarity to place that intent beyond dispute.” *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849 (2020). Where there “is no clear expression of congressional intent in [a

statute] to convey such an expansive grant of agency power . . . [courts] will not infer one.” *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 671 (6th Cir. 2021).

All the factors courts use to identify “major” questions rebut OSHA’s claimed authority. That is why, in his concurring opinion, Judge Duncan emphasized that petitioners are “virtually certain” to succeed under the Supreme Court’s cases involving the major-questions doctrine. *BST Holdings*, 17 F.4th at 619; *see also id.* at 617 (Maj. Op.) (“[T]he major questions doctrine confirms that the [ETS] exceeds the bounds of OSHA’s statutory authority.”).

*First*, courts view skeptically “an agency claim[] to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.” *UARG*, 573 U.S. at 324 (cleaned up). OSHA’s use of § 655(c) is rare: OSHA has invoked it only ten times in the Act’s 51-year history. *BST Holdings, LLC*, 17 F.4th at 609. Nine occurred in the late 1970s and early 1980s; seven were challenged in court; five of those seven were stayed or vacated; and one recent challenge remains pending. *Id.*

And the ETS is a novel and expansive use of OSHA’s emergency authority. OSHA has traditionally focused its emergency authority on the narrow task of lowering the permissible exposure level of workplace toxins, like asbestos, 48 Fed. Reg. 51,086 (Nov. 4, 1983); vinyl cyanide, 43 Fed. Reg. 2,586 (Jan. 17, 1978); benzene, 42 Fed. Reg. 22,516 (May 3, 1977); and certain pesticides, 38 Fed. Reg. 10,715 (May 1, 1973). *See Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 642-43. In fact, before OSHA issued the June 2021 ETS for health care workers, OSHA had never attempted to apply its emergency power to an



airborne virus in any manner, let alone via a vaccine mandate—despite the millions of workers every year who get the flu (and the tens of thousands who die from it) and the widespread availability of the flu vaccine. No standard under § 655(c) “has even begun to approach the size or scope” of this ETS. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

*Second*, courts “expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’” *Id.* (cleaned up). Congress has not done that here.

In § 655(c), Congress authorized OSHA to protect “employees” from exposure to emergent grave dangers in the workplace. Congress did not give OSHA power to impose emergency mandates and monitoring on 84 million employees for a known, omnipresent danger that presents no unique hazard to the identified workplaces. OSHA’s interpretation would drastically expand its authority in novel ways over “entire[]” industries—indeed, all of them (and treating them all exactly the same). *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). This expansion would give OSHA emergency authority over “a significant portion of the American economy.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

The Supreme Court has recognized the inherent limits on OSHA’s power by repeatedly explaining that the agency’s authority is limited to regulating risks from particular “workplaces.” *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 641, 642, 650. That is why “the Secretary must make a finding that the *workplaces in question* are not safe.” *Id.* at 642 (emphasis added). This limit on



OSHA's power tracks Congress's statement of findings and declaration of purpose in the Act, which focuses on "personal injuries and illnesses arising out of *work situations*." 29 U.S.C. § 651(a) (emphasis added).

OSHA's consistent practice has been to use its ETS authority to regulate new or newly discovered emergencies in particular types of workplaces or specific industries. The ETS, by contrast, is an unprecedented, one-size-fits-all mandate for *every* business with 100 or more employees. It is implausible given the text and structure of the Act and OSHA's own practice that Congress vested OSHA with the emergency power to address global pandemics affecting everyone, everywhere, all the time (whether at work or not).

Congress knows how to direct an agency to address communicable diseases. It directed the FDA to govern vaccine approval, including emergency use. 21 U.S.C. § 360bbb-3. It directed the CDC to address "the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). And Congress also specified that OSHA's authority does not displace other agencies' authority "to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). Yet displacement is inevitable under OSHA's theory.

Indeed, Congress knows how to authorize OSHA to address communicable diseases in the workplace, having in 1991 directed OSHA to promulgate a "final occupational health standard concerning occupational exposure to bloodborne pathogens." Pub. L. No. 102-170, tit. I, § 100(b), 105 Stat. 1107, 1113-1114 (1991). OSHA argues (Emer. Mot. 16-17) this congressional action

“explained” that OSHA could generally address pathogens. But this does not provide any support for the use of OSHA’s *emergency* authority. And if the Act already authorized the substantive outcome, Congress would not have needed to provide further express authority. Congress similarly could have enacted a law expressly directing OSHA to promulgate a final rule concerning occupational exposure to COVID-19. But it has not.

That is perhaps because the proper role of the federal Government and the States in responding to COVID-19 is the subject of “earnest and profound debate across the country,” making the “oblique form of the claimed delegation all the more suspect.” *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (citation and internal quotation omitted). OSHA’s action is a classic instance of an agency’s regulatory action “involving billions of dollars” and “affecting the price of [many goods and services] for millions of people”; one would expect Congress to speak clearly if it had authorized an executive agency to wield such power. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Such transformative action cannot be achieved via “work-around.” Callie Patteson, *Biden chief apparently admits vaccine mandate ‘ultimate work-around’*, N.Y. Post (Sept. 10, 2021), <https://tinyurl.com/s6fps5a2>.

Moreover, the canon of constitutional avoidance compels application of the major-questions doctrine here to avoid serious non-delegation doctrine concerns. The “fundamental policy decisions” made by the ETS are “the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.” *Indus. Union Dep’t, AFL-CIO*, 448 U.S.

at 687 (Rehnquist, J., concurring in the judgment); *accord id.* at 645-46 (Stevens, J., controlling op.); *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)).

OSHA notes (Emer. Mot. 21) that courts have rarely struck down statutes under the non-delegation doctrine. That misses the point: the doctrine serves to ensure that *Congress* retains its legislative responsibilities. And OSHA has never previously interpreted its ETS authority to arrogate those responsibilities to itself.

A nationwide COVID-19 vaccine-and-testing mandate, monitoring, and tracking database is a fundamental policy decision. Respondents apparently now believe that OSHA's emergency powers apply even where a danger "is not a uniquely work-related hazard." 86 Fed. Reg. at 61,407. Such "open-ended grant[s]" of delegated power must be avoided. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 646 (Stevens, J., controlling op.). That is particularly true here, where there are substantial questions whether Congress's enumerated constitutional powers allow it to impose a vaccine mandate upon the vast working public. *See, e.g., NFIB v. Sebelius*, 567 U.S. 519, 549-61 (2012) (holding that Affordable Care Act's health-insurance mandate is not a valid exercise of the Commerce Clause or Necessary and Proper Clause).

*Third* (and finally), Congress is "especially unlikely" to have given OSHA expansive authority to address COVID-19 because OSHA has "no expertise" in combating a worldwide pandemic. *King*, 135 S. Ct. at 2489. OSHA has expertise over job-related "working conditions," like industrial accidents

and workplace hazards. 29 U.S.C § 651(b). Even the federal agencies—like the CDC, part of the Department of Health and Human Services—with public-health, vaccine, and pandemic expertise lack the “breathtaking amount of authority” OSHA claims here. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

Although OSHA in June 2021 promulgated a separate COVID-19 ETS for healthcare workers, that action is readily distinguishable. There, OSHA required certain protocols and equipment for use in healthcare workplaces because those workplaces had a higher exposure to infected COVID-19 patients than others. *Occupational Exposure to COVID*, 86 Fed. Reg. 32,376 (June 21, 2021). But OSHA has never used its *emergency, temporary* authority to require vaccines, monitoring, and reporting throughout the *entire* economy.

OSHA’s *only* response (Emer. Mot. 20) is that the major-questions doctrine should not apply because OSHA thinks “the statutory text is unambiguous.” But there are numerous “deficiencies” in OSHA’s textual analysis of the Act. *BST Holdings*, 17 F.4th at 616. Even if the doctrine’s utility were limited to resolving word-by-word ambiguities, the Fifth Circuit identified numerous opportunities for the doctrine’s application here. *See id.* at 613-17.

And the major-questions doctrine is not so limited. The doctrine counsels a “measure of skepticism” when agencies claim to discover previously “unheralded power.” *UARG*, 573 U.S. at 324. It makes no difference whether the discovery inheres in a single word or in a greater-than-the-sum-of-its-parts interpretation of an entire statute. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489. “[A]n emergency provision addressing workplace ‘substances,’

‘agents,’ or ‘hazards’ that [OSHA] has used only ten times in the last 50 years and never to mandate vaccines” comes nowhere near the clarity required to authorize the ETS. *BST Holdings*, 17 F.4th at 619 (Duncan, J. concurring).

## **II. Lifting the Stay Would Cause Irreparable Harm to the Business Associations’ Members and the Broader Economy.**

Respondents assert (Emer. Mot. 42) that “regulated parties face little prospect of injury” until next year. That is false, as the evidence amply demonstrates. *See* Exs. A-L.

### **A. The ETS Would Impose Nonrecoverable Compliance Costs.**

If the stay were lifted, the Business Associations’ members would immediately face enormous and nonrecoverable compliance costs. These costs are irreparable. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489; *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) (“[A] regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.”). *Overstreet v. Lexington-Fayette Urb. Cty. Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002) “[H]arm . . . is irreparable if it is not fully compensable by monetary damages.”). These cases foreclose OSHA’s misplaced reliance (Emer. Mot. 44) on outdated and out-of-circuit precedent for the proposition that compliance costs cannot justify a stay.

OSHA itself predicts that compliance will cost employers nearly \$3 billion. 86 Fed. Reg. at 61,493, 61,495. But “OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status.” Ex. J at ¶27 (Decl. of MacKie). The ETS will require

“significant investments in human resources policy development and training,” Ex. C at ¶27 (Decl. of Sullivan). Testing alone will cost some employers millions. Ex. H at ¶22 (Decl. of West). Businesses will incur those costs over the extremely short period of the temporary standard, not the years- or even decades-long horizon often associated with regulatory costs.

Moreover, absent a stay, the Business Associations’ members would start incurring those costs immediately. OSHA, *Fact Sheet: OSHA’s Vaccination & Testing ETS: How You Can Participate* at 1, <https://bit.ly/3qCiFG0> (“Employers must comply with most requirements within 30 days of publication and certain testing requirements within 60 days of publication.”). They must “begin preparing immediately” to meet the requirements related to “record-keeping, tracking, identifying and securing testing, and deploying mask-compliance solutions.” Ex. F at ¶28 (Decl. of Sarasin). Because employers “must begin *now* to procure tests,” among other things, Ex. E at ¶14 (Decl. of Martz), “[c]omplying with the ETS will force [employers to] . . . immediately incur unrecoverable compliance costs,” Ex. G at ¶23 (Decl. of DeHaan). Businesses cannot conjure up a compliant workplace on the day that the ETS becomes enforceable.

Without the stay, the Business Associations’ members must immediately reallocate or hire scarce labor to perform the recordkeeping and other supervisory tasks that compliance requires. Ex. L at ¶23 (Decl. of Demos). When the penalties for noncompliance are so steep—\$13,653 per violation—the

Business Associations' members cannot afford to wait. *See Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992).

**B. The ETS Would Cause Businesses to Lose Employees, Lose Sales and Profits, and Reduce or Cease Operations, Which Would Harm Reputations and Goodwill.**

Lifting the stay would cause job dislocation and increase unemployment. A business's loss of "specialized employees" constitutes irreparable harm because "the revenue and profitability generated by employees in whom [an employer has] invested [can]not be easily calculated or compensated with monetary relief." *NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 944 (6th Cir. 2007).

The ETS will exacerbate the unprecedented labor shortage that businesses are facing. Ex. A at ¶¶25-36 (Decl. of Beckwith); Ex. D at ¶¶15-17 (Decl. of Harned); Ex. E at ¶15 (Decl. of Martz); Ex. J at ¶14 (Decl. of MacKie). The Business Associations' members report that that their "delivery partners ... will be unable to meet demand due to the labor shortage." *See* Ex. C at ¶24 (Decl. of Sullivan); Ex. D at ¶22 (Decl. of Harned). Indeed, it is widely reported that the trucking sector is already facing a shortage "of more than 80,000 drivers." Ex. G at ¶22 (Decl. of DeHaan). Stores already have closed or reduced hours because of the tight labor market, which means lost employee hours, pay, and sales. Ex. A at ¶¶25, 36 (Decl. of Beckwith); Ex. F at ¶14 (Decl. of Sarasin).



Studies show that between 38-50% of unvaccinated employees say they would rather quit than submit to vaccination mandates. 86 Fed. Reg. at 61,475. “In a recent survey . . . more than 74% of the respondents told [one Petitioner] they expect to lose more than 10% of their workers as a result of the ETS. Almost 10% of the respondents expect to lose more than 50% of their workforce if the ETS takes effect.” Ex. H at ¶¶13 (Decl. of West). Another survey showed that 92% of respondents expected “that employees would quit their jobs rather than undergo weekly testing.” Ex. K at ¶12 (Decl. of Stillman). The same survey reported the expectation that 22% of employees would quit rather than submit to weekly testing, and 32% would quit rather than submit to vaccination. *Id.* at ¶¶13-14.

OSHA’s vaccine-or testing mandate would make hiring and retention harder in a wide variety of sectors. *See* Ex. A (Decl. of Beckwith); Ex. B at ¶¶11-19 (Decl. of Gannon); Ex. C at ¶17 (Decl. of Sullivan); Ex. D at ¶19 (Decl. of Harned); Ex. F at ¶21 (Decl. of Sarasin); Ex. J at ¶17 (Decl. of MacKie). As one employer put it, “[w]e are already struggling to get and keep employees. This mandate will create an even larger challenge to keep our business open and operating.” Ex. K at ¶20 (Decl. of Stillman).

The Business Associations’ members know they will lose employees if the stay is vacated because they have *already* tried to encourage vaccination through various incentives—including “paid time off,” “bonuses of as much as \$1,000,” “gift cards and gas cards,” and other measures. Ex H at ¶9 (Decl. of West). Many workers have “told employers directly and unequivocally



that they would choose to be fired if keeping their job required them to get vaccinated.” Ex. D at ¶13 (Decl. of Harned). As one employer explained: “I strongly support vaccinations, but the reality is that there is a percentage of my employees who are vehemently opposed to the covid vaccines, and no carrot or stick is going to change their mind.” Ex H at ¶19 (Decl. of West).

OSHA’s alternative—weekly testing—is available only where tests are available and affordable, something that is far from the case in many locales. Ex G at ¶25 (Decl. of DeHaan). One survey reported “that among those employers who have attempted to do so, only 28% are able to find adequate providers to ensure that weekly testing is available for their employees.” Ex. K at ¶17 (Decl. of Stillman). And even where testing is available, “[m]asking alone will result in employees quitting.” Ex. L at ¶32 (Decl. of Demos).

All this is happening at the worst possible time. Retailers are preparing for the holiday season, which generates a significant portion of their annual revenue. Ex. E at ¶10, 15-21 (Decl. of Martz). And this season ordinarily requires the retail sector to employ additional workers. Ex. J at ¶27 (Decl. of MacKie). Even if they can secure enough workers willing to accept forced vaccination or weekly testing, the retailers will still have to spend up to \$10 million each on the ETS’s recordkeeping obligations. *See* 86 Fed. Reg. at 61,491 (estimating costs to clothing and accessories stores).

If truckers are “unable to meet demand,” goods will not be delivered. Ex. C at ¶24 (Decl. of Sullivan). If retailers must “delay expansions and product roll outs,” goods will be difficult to purchase even aside from

transportation issues. Ex. E at ¶24 (Decl. of Martz). If grocers experience “diminish[ed] . . . ability . . . to meet the food needs of their communities,” families will experience food insecurity. Ex. F at ¶18 (Decl. of Sarasin). And if commercial kitchens cannot get food, “meal[s] away from home, whether at school, a hospital, or a military base, or on a cherished family night out,” will become harder to come by. Ex. I at ¶17 (Decl. of Allen).

“Without an adequate workforce—and strapped with compliance costs—[employers] will be forced to reduce their operations, forgo orders, and/or lose customers.” Ex. I at ¶22 (Decl. of Allen). “[A] reduced workforce will [also] decrease productivity and therefore injure the goodwill that [employers] have worked hard to earn from their customers.” Ex. D at ¶21 (Decl. of Harned). And businesses “will lose sales if they cannot meet customer demands” due to constraints in the labor and transport markets. Ex. F at ¶19 (Decl. of Sarasin). “The ETS therefore places [employers] at a competitive disadvantage in an already constrained labor market.” Ex. H at ¶21 (Decl. of West). The resulting “loss of fair competition” and “loss of customer goodwill,” *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992), are classic examples of “intangible, irreparable harm,” *S. Glazer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 853 (6th Cir. 2017).

For many of the Business Associations’ members, the harms discussed above are “of such a magnitude that the viability of their business [is] threatened,” and this alone “give[es] rise to an irreparable injury.” *Warren v. City of Athens*, 411 F.3d 697, 712 (6th Cir. 2005). As several employers reported:

“this could be catastrophic to our organization”; “[this] could put us out of business”; “[w]e already are 100 people short and these rules will close the stores due to lack of workers”; “it would bankrupt our company”; and, among many other similar reports “[the ETS] would be the most devastating event our company has ever experienced.” Ex. K at ¶19 (Decl. of Stillman).

### **III. The Balance of the Equities and the Public Interest Favor a Stay.**

The remaining “stay factors,” if any, *cf.* 5 U.S.C. § 705, “largely involve dueling considerations regarding who presumably will be harmed with (or without) a stay,” *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 735 (6th Cir. 2021). In this instance, “irreparable injury” together with a “strong likelihood of success” on the merits is enough to “carr[y] the day.” *Id.* at 736.

“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 of Realtors*, 141 S. Ct. at 2490 (citation omitted).

In essence, OSHA’s ETS attempts to use brute regulatory power to impel vaccination of millions of Americans in December. Many of the Business Associations implored Respondents to provide more time for compliance to avoid exacerbating each of the societal problems. But if the ETS takes effect

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*See, e.g., NFIB Letter to Marin J. Walsh* at 3 (Sept. 14, 2021), <https://assets.nfib.com/nfibcom/NFIB-Letter-David-Addington-9.15.21.pdf>.

now, there will be no ability to undo the transformational economic harms it would cause. *Chamber of Com. v. EPA*, 577 U.S. 1127 (2016).

The stay does not substantially burden Respondents or the public interest. The Government has delayed its vaccination deadline for federal contractors to January 18.<sup>2</sup> It has also “delay[ed] until 2022 issuing suspensions and other serious penalties related to noncompliance” by federal employees.<sup>3</sup> If more time is appropriate to require millions of the Government’s own employees and contractors to be vaccinated, then it cannot be inconsistent with the public interest to delay implementation of the ETS.

Nor is the federal Government the only authority that can address the pandemic. Many states are using their police powers to require vaccination. Some cities are requiring vaccination to eat at restaurants and for other indoor activities. And many private employers may require vaccination on their own. The stay does not prohibit any of these efforts, which the federal Government could still facilitate.

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<sup>2</sup> Courtney Bubl , *White House Clarifies Contractor Vaccination Deadline*, Government Executive (Nov. 12, 2021), <https://www.govexec.com/management/2021/11/white-house-clarifies-contractor-vaccination-deadline/186793/>.

<sup>3</sup> Erich Wagner, *Biden Administration Delays Vaccine Mandate Penalties Until 2022*, Government Executive (Nov. 29, 2021), <https://www.govexec.com/workforce/2021/11/biden-administration-delays-vaccine-mandate-penalties-until-2022/187128/>.

#### **IV. The Stay Should Not Be Modified.**

Respondents ask (Emer. Mot. 46) this Court to “modify” the stay “so that the masking-and-testing requirement can remain in effect.” It is difficult to distinguish vacating the stay entirely from this proposed alternative. If this Court vacates the stay, then OSHA would have authority to enforce penalties against any employer whose employees are neither vaccinated nor masked-and-tested. If the Court limits OSHA to requiring masking and testing (unless an employee is vaccinated), then OSHA gets to the same place.

A vaccine mandate with a mask-and-test alternative is indistinguishable from a mask-and-test mandate with a vaccine alternative. Thus, Respondents’ alternative does not avoid any of the statutory claims. *Supra* Part I.B.

The Respondents’ modification also would not eliminate the ETS’s irreparable harms. Employers would still need to determine which of their employees are unvaccinated and subject to the modified requirements, divert resources toward compliance and sourcing tests, and either incur the costs of testing or impose those costs on employees, which would encourage many of them to quit or change jobs, with all the attendant irreparable consequences for profits, goodwill, and reputation.

#### **CONCLUSION**

For the foregoing reasons, this Court should deny Respondents’ Emergency Motion and should continue to stay the ETS.

Dated: December 7, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 27(D)(2)**

This Response complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure Rule 27(d)(2)(A) because it contains 5,196 words pursuant to this Court's Order of December 3, 20221, and excluding the parts of the response exempted by Rule 27(a)(2)(B); and (2) the typeface requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Steven P. Lehotsky

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### CERTIFICATE OF SERVICE

On December 7, 2021, this Response was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Federal Rule of Appellate Procedure 25(a)(5); and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed, per this Court's Rule 25(a)(3).

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*Demos Brands (member, National Federation of Independent Business)*

# Exhibit A

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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Lyle Beckwith**

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I, Lyle Beckwith, declare as follows under penalty of perjury:

1. I am the Senior Vice President, Government Relations of the National Association of Convenience Stores ("NACS").

2. NACS is a non-profit trade association and is the preeminent representative of the interests of convenience store operators across the nation.

3. NACS has 1,500 retail and 1,600 supplier company members nationwide.

4. In 2020, the fuel wholesaling and convenience industry that NACS represents employed approximately 2.5 million workers and generated \$548.2 billion in total sales.

5. In all, the industry sells approximately 80 percent of the motor fuels purchased in the United States each year.

6. NACS has multiple members in every state in the nation including Louisiana, Mississippi, and Texas.

7. My responsibilities at NACS include communicating with, and advocating on behalf of, NACS members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

8. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to NACS members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

9. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many NACS' members.

10. The ETS will likely require NACS' members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees.

11. Some NACS members have indicated that they will not be able to procure testing kits or services sufficient to cover their workforce on a weekly basis.

12. Some members expect that they will have many employees quit their jobs rather than receiving vaccinations against their will.

13. Given the resistance of many employees to vaccination and the inability to secure tests, some members doubt they will be able to comply

with the ETS regardless of the cost and will, instead, be forced to pay substantial fines.

14. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

15. NACS members already report severe difficulty hiring an adequate number of employees to keep their stores open. Some have already reduced hours or closed locations due to this shortage of labor.

16. NACS members also are facing supply chain problems that they have not faced at any time in recent memory.

17. These supply chain issues are caused by a number of factors but the principal ones are the shortage of truck drivers to move products across the nation and the shortage of workers to perform other key tasks including manufacturing and distributing products.

18. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the extant issues including labor shortages, supply chain challenges, and rising prices.

19. NACS' members generally support their employees becoming vaccinated. Many of them have offered a variety of monetary and other incentives including paid time off for employees to get vaccinated. Vaccination protects employee health, and thus the workforce on which employers



depend. In other words, NACS' members have a strong incentive to encourage a vaccinated workforce and they do so.

20. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status).

21. There are also a significant number of employees who either refuse to submit to weekly testing or maintain that they cannot find testing resources on a weekly basis.

22. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

23. NACS' communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

24. NACS' members report not only that many of their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to quit or be fired if keeping their job required them to get vaccinated or submit to weekly testing.

25. NACS members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to close some locations, reduce hours, and take similar measures. These reductions have caused lost profits, lost sales, and reputational harm.

26. If the ETS takes effect, NACS members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees or face crippling fines.

27. By requiring NACS members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that NACS members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies hire additional employees—will make hiring even more difficult.

28. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

29. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of NACS' members because without an adequate number of employees, businesses cannot function. Members are already facing an historic inability to fill vacancies.



30. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales if they cannot meet customer demands.

31. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause NACS' members to lose control of their own reputations and ultimately to suffer reputational harm.

32. Many NACS members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. The ETS therefore places NACS members at a competitive hiring disadvantage in a constrained labor market.

33. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the convenience industry. They include store clerks, truck drivers who deliver motor fuels and other products, and many others. These jobs are critical to the American economy.

34. Many of the employees who hold these jobs are the same employees who stayed at their posts as "essential workers" from the first days of the pandemic. Significantly, many of these employees are at the lower end

of the pay scale and can least afford to find themselves unemployed. In other words, the ETS will require NACS member companies to lay off many of their most vulnerable workers.

35. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining member's profits.

36. Labor and materials shortages have already caused members to delay expansions and product roll outs, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

37. Complying with the ETS will force NACS' members to pay for testing (if they can find enough of it), implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

38. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health

information). In some instances, this will require programming and deploying new software solutions. OSHA's estimated costs for these measures are simply not realistic.

39. To meet the ETS's deadlines, NACS' members must begin preparing immediately to design and implement, among other things, record-keeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

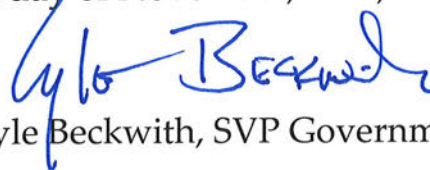
40. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a "vaccinate-or-be-terminated" compliance approach.

41. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

42. NACS members will also suffer reputational harm and lose customers due to the reduced staffing, shortages of products, and reduced customer service that will result from the ETS. Those customers and members' goodwill and reputations cannot be repaired or compensated.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 9th day of November, 2021, at Alexandria, Virginia.



Lyle Beckwith, SVP Government Relations

# Exhibit B



**DECLARATION OF MICHAEL GANNON, COO, CRST EXPEDITED, INC. d/b/a CRST  
THE TRANSPORTATION SOLUTION, INC.**

I, Michael Gannon, hereby declare as follows:

1. I am the Chief Operating Officer (COO) for CRST Expedited, Inc. d/b/a CRST The Transportation Solution, Inc. (CRST).

2. I started my career with CRST in 1983 and have held various operations and leadership roles on my way to becoming COO, a position I have held for three years.

3. Based upon my decades of experience in the transportation industry and with CRST, I have personal knowledge of the facts set forth herein.

4. Founded in 1955, CRST is an Iowa-based, transportation and logistics company which services various niches and markets within the transportation industry. These markets include team driving, where two drivers share a truck to be able to deliver long-haul freight on an expedited basis. Team driving is also oftentimes required to deliver high-value, safety-sensitive freight such as pharmaceuticals and life-saving vaccines.

5. In a team-driving environment, the drivers generally are dispatched to deliver multiple loads, on irregular routes, staying out on the road for several weeks at a time. The drivers take turns driving so that more ground can be covered while remaining compliant with the U.S. Department of Transportation Hours of Service regulations.

6. CRST is among the largest, if not the largest, team carrier in the nation and it also provides training opportunities to introduce new drivers to the profession – in an industry that has been experiencing a driver shortage for years now and which has reached chronic and critical status.

7. CRST (and other large carriers) pair newly minted CDL holders with an experienced driver

in a mentor/mentee capacity so that new drivers can learn the profession and become a skilled and safe driver. This is critical to CRST and the transportation industry in general in terms of building and holding capacity (fleet size) and maintaining safety for the drivers and the motoring public.

8. In a team driving environment, the drivers still have de minimis contact with third parties and only have ongoing contact with one other person, i.e., their co-driver.

9. When the Biden Administration's large employer vaccine mandate was first announced, CRST surveyed its drivers to ascertain current vaccination levels and to get a sense of whether those drivers who had not been vaccinated would be willing to do so if required by law and/or in order to keep their jobs with CRST.

10. Five hundred and twenty (520) drivers in CRST's Expedited/Team division responded to the survey. Of those responding, 330 were not vaccinated (63.46%) and of those that were not vaccinated, two hundred and seventy-one (271) said they would *not* get vaccinated if required as part of a federal government requirement. Only ninety-five (95) drivers said they would get vaccinated. Sixty-nine (69) drivers reported that they would leave the trucking industry altogether to avoid the vaccine mandate and two hundred and fifty-three (253) drivers said they would move to a smaller carrier to avoid the mandate.

11. If team drivers (2-person) are not exempted from OSHA's ETS, it will result in multiple, irreparable harms to the transportation industry, our nation's supply chain, and the overarching economy. As set forth above, it will result in introducing fewer drivers into an industry that is starved for drivers. It will make it exceedingly difficult, if not impossible, to train new drivers to make them as skilled and safe as possible. Finally, it will legitimately risk stretching an already distressed supply chain to its breaking point, which will have a disastrous impact on our economy

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including, but not limited to, reducing the ability transport and deliver Covid-19 vaccines, which require team drivers.

12. The alternative option, testing and masking, will cause enormous expense. *See Bloomberg Law, Covid-19 Testing Doesn't Come Cheap for Companies Embracing It*, [https://www.bloomberglaw.com/bloomberglawnews/pharma-and-life-sciences/X9ODARNG000000?bna\\_news\\_filter=pharma-and-life-sciences#jcite](https://www.bloomberglaw.com/bloomberglawnews/pharma-and-life-sciences/X9ODARNG000000?bna_news_filter=pharma-and-life-sciences#jcite). Those costs cannot be recouped, ever. And given already tight margins, inflation, and the tight labor market, these costs will inflict irreparable harm on CRST, including lost profits, lost routes, and losing out on employees who go elsewhere for higher wages.

13. Given the lack of testing capacity CRST must start planning *now*—and implementing *now*—a compliance strategy.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 9<sup>th</sup> day of November 2021 in Cedar Rapids, Iowa.

  
Michael Gannon

# Exhibit C



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

---

Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of William R. Sullivan, Jr.**

---

I, William R. Sullivan, Jr., declare as follows under penalty of perjury:

1. I am the Executive Vice President for Advocacy of the American Trucking Associations, Inc. (“ATA”).

2. ATA is the national association of the trucking industry, comprising motor carriers, suppliers of equipment and services, affiliated state trucking associations, and national trucking conferences. ATA was created to promote and protect the interests of the trucking industry.

3. ATA’s direct membership includes approximately 1,800 trucking companies and suppliers. In conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation, including truckload and less-than-truckload carriers; for-hire and private fleets; fuel haulers; household goods movers; agriculture

and livestock transporters; auto carriers; and carriers who service the nation's container ports. These motor carriers range in size everywhere from tens of thousands of trucks to single digits.

4. My responsibilities at ATA include communicating with ATA's members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to ATA members with at least 100 employees and who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

6. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many ATA's members.

7. The ETS will likely require ATA's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

8. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American

economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

9. ATA's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, ATA's members have a strong incentive to encourage a vaccinated workforce.

10. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status) and who will likely refuse to submit to weekly testing.

11. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

12. ATA's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination, and likely a substantial number who will not submit to weekly testing and masking.

13. ATA's members report not only that their workers have in some instances refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated. ATA's members also report that testing and employer verification is not a logistically viable option for drivers who are subject to the requirements and often spend long periods on the road.

14. ATA's members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already reduced members' freight-hauling capacity, and these reductions have caused lost business opportunities and reputational harm.

15. If the ETS takes effect, ATA's members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees, or these employees will voluntarily move to a smaller employer not subject to the requirements.

16. By requiring ATA's members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that ATA's members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies both hire additional employees and earn a

significant portion of their annual revenue—will make hiring even more difficult.

17. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of ATA's members because without an adequate number of employees, businesses cannot function. Members are already facing historic inability to fill vacancies.

19. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause ATA's members to lose control of their own reputations and ultimately to suffer reputational harm.

21. Many ATA members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the

ETS. The ETS therefore places many ATA members at a competitive hiring disadvantage in a constrained labor market.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the trucking industry. They include team drivers and other drivers whose duties require them to come into regular contact with customers or other employees; mechanics and technicians; loaders, unloaders, and other logistics personnel; and safety managers, dispatchers and other back-office staff. These jobs are critical to the supply chain and the American economy.

23. Many of the employees who hold these jobs are the same employees who stayed at their posts as “essential workers” from the first days of the pandemic, in order to keep the nation’s supply chain moving. These workers indispensably and safely kept the country running during the height of the pandemic—delivering essentials from food, medicines, protective equipment, and the vaccines themselves—and should not face the potential loss of their jobs now.

24. Members’ suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on moving freight, and these increases are undermining member’s profits.

25. Labor and equipment shortages have already caused members to delay capacity expansions, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

26. Complying with the ETS will require ATA's members to pay for testing in cases involving medical or religious accommodations, and as a practical matter will force them to do the same in order to retain other covered drivers. Compliance will also require employers to implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, investments in safety technology and training).

27. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions, as well as significant investments in human resources policy development and training. OSHA's estimated costs for these measures—as well as for the paid time off required for vaccination and recovery from side effects—are simply not realistic.

28. To meet the ETS's deadlines, ATA's members must begin preparing immediately to design and implement, among other things, record-keeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

29. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a "vaccinate-or-be-terminated" compliance approach. This concern is particularly acute with respect to team drivers and other drivers whose duties require them to come into regular contact with customers or other employees—such drivers are often on the road for long periods of time, making it all the more difficult for them to reliably obtain weekly testing.

30. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 9th day of November, 2021, at Dewees Island, South Carolina.



William R. Sullivan, Jr.



# Exhibit D

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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Karen R. Harned**

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I, Karen R. Harned, declare as follows under penalty of perjury:

1. I am the Executive Director of the National Federation of Independent Business Small Business Legal Center (“NFIB Legal Center”).
2. The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate and grow their businesses.

3. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

4. NFIB's members include all manner and type of business from manufacturers, warehouses, foundries, retailers, restaurants, farmers, franchisees of all types, construction firms, landscapers, etc.

5. My responsibilities at NFIB include communicating with NFIB's members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

6. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to NFIB members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

7. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many NFIB members.

8. The ETS will likely require thousands of NFIB's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

9. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the ongoing problems with the supply chain, the labor shortage, and rising prices.

10. NFIB has members across the country who have committed significant resources, including education and incentives, in an effort to ensure their employees are vaccinated.

11. Despite members' efforts to ensure that their workforce is vaccinated, there are still a significant number of employees across the country who remain unvaccinated and/or do not want to disclose their vaccination status.

12. I am aware of members who are concerned about a significant number of workers that wish to remain unvaccinated and will likely refuse weekly testing and masking.

13. Some NFIB members report not only that their workers have declined incentives offered to encourage them to get vaccinated, but those workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated.

14. I am also aware of NFIB members who themselves wish to remain unvaccinated, and object to requiring their employees be vaccinated or subject to testing.

15. NFIB members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to

reduce hours and adjust business operations. These reductions have caused lost profits, lost sales, and reputational harm.

16. If the ETS takes effect, NFIB members suggest that a significant number of employees, for a variety of reasons, will remain unvaccinated, and that member-employers will have no choice but to terminate these employees or incur significant costs associated with weekly testing. Some NFIB members also fear that many employees will refuse to submit to weekly testing, requiring termination of the employees.

17. By requiring NFIB members to terminate employees during a labor shortage, the ETS will exacerbate the severe labor difficulties that NFIB members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The holiday season—during which many companies both hire additional employees and earn a significant portion of their annual revenue—will make hiring even more difficult.

18. The ETS will also make it more difficult for members to hire new workers for current vacancies and for vacancies that the ETS will create.

19. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of NFIB's members because without an adequate number of employees, businesses cannot function. Members are already facing an historic inability to fill vacancies.

20. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining

employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

21. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause many of NFIB's members to lose control of their own reputations and ultimately to suffer reputational harm.

22. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining members' bottom-line.

23. Complying with the ETS will force many of NFIB's members to pay for testing, implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

24. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to

perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions. OSHA's estimated costs for these measures are simply not realistic. NFIB research consistently shows that federal paperwork is a significant problem confronting small business owners. (Holly Wade, NFIB Research Center "Small Business Problems & Priorities" 10<sup>th</sup> edition, <https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf>)

25. To meet the ETS's deadlines, NFIB's members must begin preparing immediately to design and implement, among other things, record-keeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

26. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to terminate employees or put untested employees on leave.

27. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of November, 2021, at Arlington VA.

A handwritten signature in black ink that reads "Karen Harned". The signature is written in a cursive style with a horizontal line underneath the name.

Karen Harned



# Exhibit E

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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Stephanie A. Martz**

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1. I am the Chief Administrative Officer and General Counsel of the National Retail Federation (“NRF”).

2. NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. NRF members account for 52 million employees through the U.S.

3. The purpose of NRF is to advocate for the economic and policy interests of retailers. NRF regularly convenes hundreds of retail brands to discuss issues as varied as supply chain management, data privacy, and tax and trade issues. NRF supports its members as they navigate new logistical and legal challenges, such as the global pandemic of COVID-19.

4. In my capacity as the Chief Administrative Officer and General Counsel, I am deeply familiar with challenges that retailers throughout the country have faced throughout the COVID-19 pandemic. I am familiar with these challenges because I work closely and directly with retailers

throughout the country, and coordinate with retailers to understand and address these challenges.

5. Since March of 2020, NRF has provided dozens of webinars and over 150 conference calls for our members to discuss their approaches to curbing the COVID-19 pandemic within retail. NRF has also provided numerous online tools, including an interactive map that shows laws, regulations, and orders that apply to retailers, as well as screening questionnaires and legal trackers. NRF has also developed and provided to its members training modules on COVID-19 safety and hygiene, as well as conflict mediation for employees who have to administer safe shopping policies.

6. NRF members have been critical components in distributing vaccines and vaccine information to our employees and customers. Many of our members administer vaccines, and others have created incentives, awarded time off, and set up on-site clinics to ensure that their employees have every opportunity to get vaccinated.

7. In addition, according to published reports, NRF members have likely spent upwards of \$8 billion on equipment and training to ensure safe store operations during COVID-19. As also detailed in the complaint, those measures include (but are not limited to) the following:

- Requiring masks and social distancing for employees and customers;
- Metering customers at entrances;
- Providing innovative purchasing solutions, such as curbside pick-up;
- Screening for employees for symptoms and exposure risk before shifts;
- Training for employees on COVID-19 safety and hygiene;

- Providing set-aside shopping hours for higher risk customers; and
- Installing contactless payment systems and Plexiglas at check-out stands.

8. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to NRF members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

9. I have personal knowledge of the ETS's requirements and of the severe effect it will have on NRF's members during the busiest and most profitable time of the year for the retail industry.

10. The ETS will require NRF's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination, and may also results in attrition, as employees – especially those concentrated in parts of the country with low vaccination rates – decide to quit their jobs rather than get vaccinated. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm, all during the already challenging 2021 holiday season.

11. NRF's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. Vaccinations have enabled stores to re-open, students to return to school, and therefore, employees to come back to work to continue to earn money to support their families and communities. In other words, NRF's members have a strong incentive to encourage a vaccinated workforce.

12. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated, do not wish to disclose their vaccination status, and/or who refuse to submit to weekly testing.

13. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

14. NRF's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

- a. In the last week, NRF has hosted 2 emergency calls for members to discuss the ETS. More than 300 people have joined the calls from retailers across the country.
- b. Retailers have reported grave concerns with gathering vaccination status information and storing it in a way that complies with myriad state and federal laws, developing policies for either a “hard mandate” or “soft mandate,” developing systems for adjudicating hundreds or even thousands of requests for exemptions based on religious belief or disability—within 30 days, during Black Friday, and in the face of already serious staffing challenges.
- c. In addition, although the test-or-vaccinate mandate begins in January, retailers must begin *now* to procure tests or assess the availability of tests in each market where a retailer has a store.

15. NRF members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to close storefronts, reduce hours, and take similar measures. These reductions have already caused lost profits, lost sales, and reputational harm. If the ETS takes effect during the holiday season, NRF members anticipate that they will face millions in lost sales stemming from absent workers due to paid leave requirements and vaccine refusal.

16. By effectively requiring NRF members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that

NRF members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies both hire additional employees and earn a significant portion of their annual revenue—will make hiring even more difficult.

17. The ETS, because it encompasses both seasonal workers as well as permanent workers, will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. Retail job openings were already at 1.3 million in August, and retailers expect to hire 700,000 workers this holidays season.

19. On top of these needs, each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause NRF's members to lose control of their own reputations and ultimately to suffer reputational harm.



21. Many NRF members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. Moreover, many other NRF members are neither large, national stores nor "unrelated" employers with fewer than 100 employees. Rather, they have between 101 and 500 employees, and do not have the systems or resources in place to comply with the ETS in such a short period of time, and during the holidays season, despite their strong desire to have a vaccinated workforce.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of retail, and critical to the American economy.

23. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining member's profits.

24. Labor and materials shortages have already caused members to delay expansions and product roll outs, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

25. The hard and direct costs of implementing the ETS – aside from the opportunity costs that come with the time spent by employees and managers to comply with the – are substantial. In addition to the massive investment that retailers have already made in health and safety, detailed in paragraph 7, the ETS will force NRF’s members to pay for testing (depending on state law and various exemption-based obligations), implement expensive and time-consuming tracking software, assess wage-and-hour implications of vaccinations and testing, implement new protocols for exemption requests (given the dramatic increase in numbers of these requests that retailers are expecting), respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

26. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense – both to perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions. OSHA’s estimated costs for these measures are simply not realistic.

27. To meet the ETS’s deadlines, NRF’s members must begin preparing immediately to design and implement, among other things,

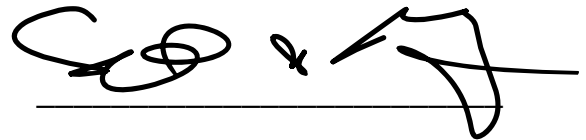
recordkeeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

28. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

29. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 9th day of November, 2021, at Washington, D.C.

A handwritten signature in black ink, appearing to read 'Stephanie A. Martz', written over a horizontal line.

Stephanie A. Martz

# Exhibit F

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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of FMI – The Food Industry Association**

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I, Leslie Sarasin, declare as follows under penalty of perjury:

1. I am the President and Chief Executive Officer of FMI – the Food Industry Association (“FMI”).

2. FMI is a trade association that works with and on behalf of the entire food industry to advance a safer, healthier and more efficient consumer food supply. FMI brings together a wide range of members across the value chain — from retailers who sell to consumers, to producers who supply the food, as well as the wide variety of companies providing critical services — to amplify the collective work of the industry.

3. FMI’s members include nearly 1,000 supermarket member companies that collectively operate almost 33,000 food retail outlets and employ approximately 6 million workers.

4. FMI's responsibilities include communicating with members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. FMI is familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is our understanding that the ETS applies to FMI members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

6. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many FMI members.

7. The ETS will likely require FMI members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

8. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

9. FMI's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the

maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, FMI's members have a strong incentive to encourage a vaccinated workforce. In fact, supermarket pharmacies have administered a significant percentage of COVID-19 vaccines.

10. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status) and who refuse to submit to weekly testing.

11. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find alternative employment (with businesses who employ fewer than 100 employees).

12. FMI's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

13. FMI's members report not only that their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated or submit to weekly testing.

14. FMI members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to close storefronts, reduce hours, and take similar measures. They are also having difficulty maintaining the stocking requirements of items offered under the federal WIC program for children under 6 years old. These reductions and shortages have caused lost profits, lost sales, fines and reputational harm.

15. If the ETS takes effect, FMI members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees.

16. By requiring FMI members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that FMI members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies both hire additional employees and earn a significant portion of their annual revenue—will make hiring even more difficult.

17. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. Terminations and unfilled vacancies on this scale will diminish the ability of FMI's members to meet the food needs of their communities



because without an adequate number of employees, businesses cannot function. Members are already facing historic inability to fill vacancies.

19. Each additional resignation or termination creates an even greater negative impact on operations, existing associates, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause FMI's members to suffer reputational harm.

21. Most employers are experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. The ETS therefore places FMI members at a competitive hiring disadvantage in a constrained labor market.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the food industry. They include but are not limited to jobs such as truck drivers, warehouse employees, production line workers, sales associates, cashiers, stockers, cleaning and sanitation staff, general maintenance workers, pickers, delivery workers, and more. These jobs are critical to the American economy.

23. Many of the employees who hold these jobs are the same employees who stayed at their posts as “essential workers” from the first days of the pandemic. Significantly, many of these employees are at the lower end of the pay scale and can least afford to find themselves unemployed. In other words, the ETS will require FMI member companies to lay off many of their most vulnerable workers, including a significant impact on communities of color.

24. Members’ suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining members’ ability to supply the needed items in their communities.

25. Labor and materials shortages have already caused members to delay expansions and product roll outs and reduce hours, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

26. Complying with the ETS will force FMI members to secure testing, implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, get parental approval for complying with the requirements as they relate to minor employees, and otherwise incur compliance costs using funds that would be

better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

27. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In most instances, this will require programming and deploying new software solutions. OSHA’s estimated costs for these measures are simply not realistic or sufficiently comprehensive.

28. To meet the ETS’s deadlines, FMI’s members must begin preparing immediately to design and implement, among other things, recordkeeping, tracking, identifying and securing testing, and deploying mask-compliance solutions. Each will require significant and immediate time and expense.

29. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

30. Because the federal government enjoys sovereign immunity, any compliance costs, lost sales, loss of goodwill, and reputational damages will be unrecoverable.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of November, 2021, at Nashville, Tennessee.

A handwritten signature in black ink, appearing to read "Leslie G. Sarasin", written over a horizontal line.

Leslie G. Sarasin

# Exhibit G

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

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Mississippi Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Steve DeHaan**

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I, Steve DeHaan, declare as follows under penalty of perjury:

1. I am the President of the International Warehouse Logistics Association (IWLA)

2. Founded in 1891, IWLA is the trade association representing warehouse-based third-party logistics (3PL) providers across North America. IWLA's 350 member companies and partners provide a range of services, including warehousing; fulfillment; reverse logistics; transportation; freight-forwarding and brokerage services; inventory and supply chain management; and a broad range of manufacturing and value-added services. Member companies range in size from 10,000 square foot single city warehouses to international companies with more than 25 million square feet of warehouse space.

3. My responsibilities at IWLA include communicating with members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

4. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to IWLA members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

5. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many IWLA members.

6. The ETS will require IWLA's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

7. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

8. IWLA's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to



the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, IWLA's members have a strong incentive to encourage a vaccinated workforce.

9. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status) and who refuse to submit to weekly testing.

10. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

11. IWLA's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

12. IWLA's members report not only that their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated or submit to weekly testing.

13. IWLA Members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have contributed to delays in the supply chain.

14. If the ETS takes effect, IWLA members expect that a significant number of employees will refuse both vaccination and weekly testing and seek other employment.

15. By requiring IWLA members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that IWLA members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season will make hiring even more difficult.

16. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

17. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of IWLA's members because without an adequate number of employees, businesses cannot function. Members are already facing historic inability to fill vacancies.

18. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack.

19. Many IWLA members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. The ETS therefore places IWLA members at a competitive hiring disadvantage in a constrained labor market.

20. The jobs these almost certain-to-be-terminated workers and current workers who seek other employment perform are critical to the successful operation of the third-party warehouse industry. They are warehouse workers, forklift operators, logistics professionals, and truck drivers. These jobs are critical to the American economy.

21. Many of the employees who hold these jobs are the same employees who stayed at their posts as "essential workers" from the first days of the pandemic. Significantly, many of these employees are at the lower end of the pay scale and can least afford to find themselves unemployed.

22. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining members' profits.

23. Complying with the ETS will force IWLA's members to pay for testing, implement expensive and time-consuming tracking software,

respond to negative employee morale that testing and tracking will create, and otherwise immediately incur unrecoverable compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

24. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions. OSHA’s estimated costs for these measures are simply not realistic.

25. To meet the ETS’s deadlines, IWLA’s members must begin preparing immediately to design and implement, among other things, recordkeeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

26. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

27. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of November 2021, at Des Plaines, IL

A handwritten signature in black ink, appearing to read "Steve DeHaan", written over a horizontal line.

Steve DeHaan

# Exhibit H

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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Jade West**

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I, Jade West, declare as follows under penalty of perjury:

1. I am the Chief Government Relations Officer of the National Association of Wholesaler-Distributors (“NAW”).

2. NAW is a non-profit, non-stock, incorporated trade association. NAW is the national voice of wholesale distribution. Its members include employers of all sizes, and national, regional, state, and local line-of-trade associations spanning the \$6 trillion wholesale distribution industry that employs more than 5.7 million workers in the United States. NAW affiliates and members include approximately 35,000 enterprises with places of business in all 50 states and the District of Columbia.

3. NAW members’ critical infrastructure workers form the backbone of the United States economy—the essential link in the supply chain for critical products and industries such as pharmaceutical, healthcare,



technology, biotechnology, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, as well as products used by other essential businesses and operations.

4. My responsibilities at NAW include communicating with NAW members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to members who would not otherwise be subject to any similar requirement.

6. NAW member companies report to us that the ETS will cause them to lose thousands of employees through resignation or termination, that compliance costs will stretch them to a breaking point, and that the ETS will inflict severe damage on employees and their families, individual businesses, and the recovering U.S. economy as a whole.

7. NAW member companies are fully committed to the mission of getting every eligible American vaccinated. Earlier this year, NAW partnered with National Football League teams and the National League of Cities to support mass vaccination and pop-up vaccine sites throughout the country. NAW member companies donated more than \$1 million in PPE and other supplies to this effort to help safely vaccinate thousands of Americans.

8. NAW member companies are also firmly pro-vaccine for their own employees, and they want their teams to be healthy and safe. Indeed, their interest in getting their employees vaccinated is greater than the government's.

9. NAW members have taken expensive and creative steps to encourage their workforce to get vaccinated, including offering:

- paid time off to employees to receive the vaccine and to recover from any side effects;
- reimbursement for any vaccine costs that are not covered by an employee's health plan;
- on-site vaccination and employer-organized vaccine appointments for their workers;
- monetary bonuses of as much as \$1,000 to employees who get the vaccinated;
- gift cards and gas cards;
- full days off with pay;
- extra vacation days and extra sick leave days.

10. Despite these employers' efforts, there are still a significant number of employees across the distribution industry who—for whatever reason—refuse to be vaccinated or submit to weekly testing. NAW members continue their efforts to get their employees vaccinated, but many would not enforce a vaccine or test-and-mask regime as a condition of employment.

11. It has been asserted that only a negligible number of workers will quit their jobs because of the ETS, but recent data contradicts that assertion. According to Bureau of Labor Statistics reports, more than 24 million workers have quit their jobs since April, with more than four million doing so in both August and September. This trend shows no signs of abating.

12. NAW member companies report not only that their workers have refused every incentive offered to encourage them to get vaccinated, but that many of these workers have told them unequivocally that they will choose to quit or be fired if keeping their job will require them to get vaccinated or submit to weekly testing.

13. In a recent survey of NAW member companies, more than 74% of the respondents told us they expect to lose more than 10% of their workers as a result of the ETS. Almost 10% of the respondents expect to lose more than 50% of their workforce if the ETS takes effect.

14. NAW member companies, like most businesses, know their employees well because that knowledge is vital to maintaining a stable and experienced workforce, and they have no evidence and no reason to believe that these workers will now acquiesce to a mandate from Washington.

15. Therefore, if the ETS takes effect, NAW members will be faced with the loss of thousands of workers through either resignation or the terminations that the ETS will require.

16. These workers are essential to the operation of distribution companies and to the economy; they are warehouse workers, drivers, operations

and front-line employees without whom products simply do not move from distribution centers through the supply chain.

17. Significantly, many of these employees are at the lower end of the socio-economic system and can least afford to find themselves suddenly unemployed. In other words, the ETS will require NAW member companies to lose or lay off many of their most vulnerable workers.

18. Whether this critical loss of employees results from resignations or terminations, the already tight labor market will make it virtually impossible to replace those lost workers. The ETS will worsen the severe labor difficulties that NAW members are already experiencing, in some cases making it impossible to continue in business.

19. NAW members echoed all of these points in response to a recent member survey.

- One NAW member responded to our recent survey saying that: “While my leadership team and I are supportive of vaccination, we are very concerned about the impact of the mandate given the condition of the labor market and escalating costs. We are already stretched so thin.”
- Another company reported that: “I strongly support vaccinations, but the reality is that there is a percentage of my employees who are vehemently opposed to the covid vaccines, and no carrot or stick is going to change their mind. The labor market is extremely tight, and we already can't fill all our open positions. Losing existing employees due to these rules would make an already difficult hiring environment almost impossible.”

- And another said: “If we felt that a vaccine mandate would push our unvaccinated employees to get the vaccine then we would go forward with a mandate. Instead we believe a mandate would force many unvaccinated employees to pursue other employment options.”

20. Many NAW members have direct and indirect competitors who employ fewer than 100 employees. The workers NAW member companies will lose will be in great demand elsewhere in this tight labor market and will be able to easily find new work with a company with fewer than 100 workers and not subject to the ETS.

21. The ETS therefore places NAW members at a competitive disadvantage in an already constrained labor market.

22. NAW members also report that complying with the ETS will impose direct and unrecoverable costs on their companies. Several NAW members reported that, while the ETS would allow them to require unvaccinated workers to pay for the alternative weekly testing, they cannot and will not require these generally lower-wage workers to do so. As a result, NAW members will largely absorb that cost, and some report that providing the tests will cost them, depending on the size of the employer and region, between \$500,000 to \$10 million per year. Moreover, the required record keeping will add to these already potentially crippling costs.


23. NAW members will face irreparable harm from the ETS in multiple ways: (1) the cost of paying for weekly alternative COVID tests for unvaccinated workers; (2) the high cost of competing for replacement labor in

this extremely tight labor market; and (3) potential loss of business resulting from labor shortages that will make it impossible for these companies to supply their customers' needs.

24. In the wholesale-distribution industry, the average after-tax profit margin is just 2%, and many wholesaler-distributors will be unable to absorb the ETS costs by cutting expenses elsewhere. These companies will have no choice but to attempt to pass the added costs on to their customers through increased prices, fueling already-rising inflation and causing irreparable harm to the supply chain and the overall economy.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 15<sup>th</sup> day of November, 2021, at Arlington, Virginia.



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Jade West

# Exhibit I



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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Mark S. Allen**

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I, Mark S. Allen, declare as follows under penalty of perjury:

1. I am the President & CEO of the International Foodservice Distributors Association (“IFDA”).

2. IFDA is the trade association representing foodservice distributors throughout the United States and internationally. IFDA members include broadline, systems, and specialty foodservice distributors who supply food and related products to more than one million professional kitchens daily, including restaurants, colleges and universities, K-12 schools, U.S. military and government facilities, hospitals and care facilities, hotels and resorts, and many other operations that make meals away from home possible.

3. Prior to the pandemic, the foodservice distribution industry operated more than 15,000 distribution facilities that together accounted for more than \$303 billion in annual sales in the United States alone.

4. My responsibilities at IFDA include overseeing IFDA's day-to-day operations, including all initiatives in education, research, and government relations, and serving on IFDA's Board of Directors, which comprises the presidents and CEOs of 25 major foodservice distribution companies and purchasing cooperatives.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to IFDA members who would not otherwise be subject to any similar requirement.

6. IFDA members have reported that the ETS will likely cause the loss of essential workers, such as commercial truck drivers and warehouse workers, resulting in a substantial impact on the ability of our members to maintain their operational capabilities and fulfill their customers' orders. The consequences to members could include lost profits, lost sales, loss of customer goodwill, and reputational harm.

7. IFDA's members are fully in favor of vaccinations as an effective way to stop the spread of COVID-19. In fact, when the vaccine was first announced, IFDA members were eager to be the first in line to access the vaccines for their employees. They saw the benefit of having a vaccinated workforce.

8. IFDA's member companies are motivated to encourage a vaccinated workforce because their employees are their greatest assets, and the health and safety of each employee is of paramount interest to them. IFDA

members have taken a variety of steps to get their employees vaccinated. Examples include providing bonuses, partnering with health clinics, and promoting vaccinations through corporate information campaigns.

9. IFDA members generally report that their office workforce vaccination rates are in line with national averages; however, the driver and warehouse workforce vaccination rates are substantially lower. Although IFDA members have worked diligently to educate their employees on the benefits of being vaccinated, great numbers of driver and warehouse personnel have chosen not to get vaccinated. These individuals may choose to leave their positions, possibly to join companies with under 100 employees, rather than submit to a vaccinate-or-test-and-mask regimen.

10. Even a loss of a very small percentage of their workforce, particularly truck drivers and warehouse workers, would have a dramatic impact on our members' ability to serve their customers.

11. In a recent member survey conducted by IFDA, members reported 15,000 driver openings (11.4 percent of the pre-pandemic total) and 17,500 warehouse positions that were open (14.4 percent of the total). In the same survey, 100 percent of members indicated it was "difficult" or "extremely difficult" to fill both driver and warehouse positions. Even prior to the pandemic, finding qualified workers was considerably challenging.

12. Without sufficient qualified staff, many members have not been able to service their foodservice customers as they have previously done,

and some have even had to forgo or resign business due to their inability to deliver foodservice products and supplies.

13. Recently, K-12 schools have received media attention, as foodservice distributors have had to walk away from the business due to their inability to find qualified labor. This has injured the goodwill they have worked hard to earn from their customers and caused them to suffer reputational harm.

14. The ETS will only compound the severe labor difficulties that IFDA members are already experiencing, if they are required to terminate employees. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality.

15. The ETS will also make it more difficult for members to hire new workers for current vacancies. Terminations and unfilled vacancies on this scale will diminish the capacity, revenue, and profits of IFDA's members because their businesses cannot function without an adequate number of qualified employees.

16. Each additional resignation or termination will create an even greater negative impact on operations, profits, and sales, because remaining employees no longer have the capacity to pick up the slack, which not only affects morale but will further impact their ability to deliver products to foodservice customers.

17. The jobs IFDA members' workers perform are critical for Americans to be able to have a meal away from home, whether at school, a hospital, or a military base, or on a cherished family night out.

18. Many of the employees who hold these jobs are the same employees who stayed at their posts as "essential workers" from the first days of the pandemic. Significantly, the ETS may require IFDA member companies to terminate some of their most valuable workers at a consequential time.

19. Many members' suppliers—including food manufacturers—are unable to meet the demand for product due to the labor shortage, and the ETS will exacerbate this risk, as well. Problems in the national supply chain have already required members to increase their spending on inventory and transportation, and these increases are reducing spending in other areas.

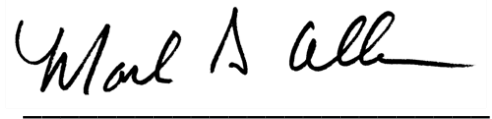
20. Complying with the ETS will force IFDA's members to implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking are likely to create, and otherwise incur compliance costs using funds that would be better spent in other areas, such as attracting, training, and retaining workers.

21. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a "vaccinate-or-be-terminated" compliance approach.

22. IFDA member companies continue to be committed partners in stemming the spread of COVID-19 while also ensuring the timely delivery of essential products and supplies to professional kitchens throughout the nation. Without an adequate workforce—and strapped with compliance costs—foodservice distributors will be forced to reduce their operations, forgo orders, and/or lose customers, causing not only irreparable harm and reputational damage to their businesses but diminishing their ability to contribute to their communities and our nation's economic recovery.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 16th day of November, 2021, at McLean, Virginia.

A handwritten signature in black ink, appearing to read "Mark S. Allen", is written over a horizontal line.

Mark S. Allen

# Exhibit J

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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Robb MacKie**

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I, Robb MacKie, declare as follows under penalty of perjury:

1. I am the President and CEO of American Bakers Association (“ABA”).

2. ABA is the Washington D.C.-based voice of the wholesale baking industry. Since 1897, ABA has worked to increase protection from costly government actions, build the talent pool of skilled workers with specialized training programs, and forge industry alignment by establishing a more receptive environment to grow the baking industry.

3. ABA’s members include more than 300 companies with a combined 1600+ facilities. Bakers are found in all 50 states, in the District of Columbia, and in Puerto Rico. The baking industry employs almost 800,000 skilled individuals, generates over \$44 billion in direct wages, and has an overall economic impact of over \$154 billion.



4. My responsibilities at ABA include communicating with ABA's members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to ABA members who would not otherwise be subject to any similar mandate (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

6. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many ABA's members.

7. ABA's members forecast that the ETS will require them to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing and vaccination. In each instance, the consequences to members will be loss of employees who refuse to be vaccinated or tested, low employee morale, lost profits, lost sales, loss of customer goodwill, and reputational harm.

8. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

9. ABA's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, ABA's members have a strong incentive to encourage a vaccinated workforce.

10. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who, for various reasons, refuse to be vaccinated (or refuse to disclose vaccination status) and who refuse to submit to weekly testing.

11. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

12. ABA's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing.

13. ABA's members report not only that their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated or submit to weekly testing. Members know their employees can

easily find employment with a competitor who employs fewer than 100 employees, or elsewhere.

14. ABA Members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to shut down production lines, reduce available products, and take similar measures. These reductions have caused lost profits, lost sales, and reputational harm.

15. If the ETS takes effect, ABA members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees. This will directly impact the amount of product that can be produced and supplied to retailers leading to SKU rationalization and potentially a reduced amount of available products for sale.

16. By requiring ABA members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that ABA members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies must hire additional employees and where companies earn a significant portion of their annual revenue—will make the effect of these terminations worse.

17. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. ABA members anticipate that terminations and unfilled vacancies on this scale will severely diminish their revenue and profits, because without an adequate number of employees, businesses cannot function and produce products. Members are already facing historic inability to fill vacancies. The loss of valued employees will directly impact the amount of products that can be produced, potentially leading to a reduction in the amount of available products for sale.

19. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their employees and customers. Because replacement employees are not easy to come by in the current labor market, members expect that the ETS will cause them to lose control of their own reputations and ultimately to suffer reputational harm.

21. Many ABA members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers and current member employees who oppose

the ETS's requirements can avoid those obligations by working for the companies that are not subject to the ETS. The ETS therefore places some ABA members at a competitive hiring disadvantage in a constrained labor market.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the baking industry. They are drivers, bakery production workers, distribution and shipping workers, and engineers and equipment maintenance workers. These jobs are critical to the American economy.

23. Many of the employees who hold these jobs are the same employees who stayed at their posts as "essential workers" from the first days of the pandemic. Significantly, many of these employees are at the lower end of the pay scale and can least afford to find themselves unemployed. In other words, the ETS will require ABA member companies to lay off many of their most vulnerable workers.

24. Members are also concerned that their suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and that the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining member's profits.

25. The baking industry is already dealing with strained supply chains for many ingredients. Additionally, labor and materials shortages

have already caused members to delay expansions and product roll outs and limit or terminate certain production lines. Members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

26. ABA members report that complying with the ETS will force them to pay for testing, implement time-consuming tracking, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

27. ABA's members also believe that OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In some instances this will require programming and deploying new software solutions. OSHA's estimated costs for these measures, and an employer's ability to comply with the obligations are simply not realistic.

28. To meet the ETS's deadlines, ABA's members must begin preparing immediately to design and implement, among other things, vaccination policies, post-vaccine sick time policies, recordkeeping, and tracking solutions. Each will require significant and immediate time and expense.

29. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available,

members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

30. Because the federal government enjoys sovereign immunity, ABA members understand that compliance costs, lost profits, loss of good-will, and reputational damages will be unrecoverable.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 21 day of November, 2021, at Columbia, Maryland.

A handwritten signature in blue ink, appearing to read "Robb MacKie", with a stylized flourish at the end.

Robb MacKie

# Exhibit K



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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Lori Buss Stillman**

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I, Lori Buss Stillman, declare as follows under penalty of perjury:

1. I am the Vice President of Research for the National Association of Convenience Stores (“NACS”).
2. NACS is a non-profit trade association and is the preeminent representative of the interests of convenience store operators across the nation.
3. NACS has 1,500 retail and 1,600 supplier company members nationwide.
4. In 2020, the fuel wholesaling and convenience industry that NACS represents employed approximately 2.34 million workers and generated \$548.2 billion in total sales.
5. In all, the industry sells approximately 80 percent of the motor fuels purchased in the United States each year.

6. NACS conducted a survey of its members regarding OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS") during the week of November 15-19, 2021 (the "Survey").

7. NACS regularly surveys its members regarding their businesses and the current business climate. The industry relies on the resulting survey data as accurate depictions of the state of the industry.

8. NACS compiles certain industry survey data into an annual State of the Industry report which is considered the leading source of data on the convenience industry in the United States.

9. The Survey generated more than eighty responses from companies in the convenience industry in the United States with more than one hundred employees. We consider this rate of response to provide a reliable cross-section of the convenience industry.

10. The Survey asked respondents for their data based upon the ETS going into effect.

11. The Survey found that 46% of the industry plans to provide employees with the option to get vaccinated or get tested weekly, while 6% plan to require all employees to be vaccinated and 48% remain undecided on which course to choose.

12. The Survey found that 99% of the industry expects that employees would quit their jobs rather than undergo vaccination, and that 92% of the industry expects that employees would quit their jobs rather than undergo weekly testing for COVID-19.

13. According to the Survey, employers indicating that they would lose employees expect that imposing a vaccination requirement would cause them to lose 32% of their employees.

14. According to the Survey, employers indicating that they would lose employees expect that imposing a weekly testing requirement would cause them to lose 22% of their employees.

15. The Survey revealed the following anticipated effects if the ETS were implemented:

- a. 89% of employers in the industry would be forced to reduce store hours;
- b. 58% would need to close one or more stores;
- c. 57% would expect increased difficulty getting products to their stores;
- d. 72% would need to reduce cleaning at one or more stores;
- e. 93% would face increased difficulty hiring staff; and
- f. 47% would expect reduced customer traffic.

16. According to the Survey, 65% of respondents have already researched the ability to secure testing resources on a weekly basis for their employees. Of those employers that have research testing resources, the average per-employee cost of testing per week was \$61.

17. The Survey found that among those employers who have attempted to do so, only 28% are able to find adequate providers to ensure that weekly testing is available for their employees.

18. According to the Survey, less than one-third (32%) of respondents report that they will be able to comply with the ETS if it goes into effect.

19. The Survey gave respondents the option to provide any comments on the ETS that they chose. Those comments include:

- a. "In ways we have not yet imagined, recruiting, training, lost sales, increased wages, Discouraged Essential work force, negative impact to consumers just to name a few."
- b. "OSHA should not mandate vaccines."
- c. "This is crazy to ask companies or employees to mandate vaccines."
- d. "We are already struggling to get and keep employees. This mandate will create an even larger challenge to keep our business open and operating."
- e. "[D]isaster."
- f. "Short term could be devastating - loss of employees and increased demand of those remaining. Will impact overall customer service and cripple out ability to staff the stores. Will probably drive wage rates up as a result."
- g. "We are already very short of staff in our stores. This mandate will cause many non vaccinated employees to quit and further limit our ability to get more staff. Most of our competition in small rural markets are not subject to this mandate as they are small employers."

- h. “Our workforce will not get vaccinated & they are not going to put forth effort to test. They also will not wear masks (we already fought that battle). We will not be able to operate to provide fuel & food as we do today. Huge cost that is unnecessary and most importantly will not make a difference. . . . We operated through the pandemic: did not lose 1 team member and had very few actually contract covid. Our current protective measures are working.”
- i. “We have grave reservations about being held responsible for verifying medical testing records and vaccination records due to the effect it will have on labor, liability associated, and increased record keeping associated with HR.”
- j. “The OSHA mandate is a major inconvenience that is unhelpful and most probably destructive. We run a geographically diverse business making frequent testing highly infeasible.”
- k. “At a time where hiring is our number one issue, this will have us lose good employees that currently are employed.”
- l. “This mandate makes little to no sense.”
- m. “Could put us out of business.”
- n. “[T]his could be catastrophic to our organization.”
- o. “This will be very difficult to track and will cause a lot of confusion and extra work for our frontline team members.”

p. “This ETS is government over-reach on a scale I never thought I’d see in my lifetime. Not a single employee and/or business leader that I have spoken with wants to worry with this nonsense. It is not small-business’s role to play ‘enforcer’ for hare-brained government ideas where the science is shaky at best. Case-in-point - the state of Vermont has the highest vaccination rate in the country, yet the 7-day average of COVID cases in Vermont today is double what it was in April. This vaccine mandate is NOT the way out of this thing, and it distracts business in a very real way at a time we are all working to get the economy back on track.”

q. “We already are 100 people short and these rules will close the stores due to lack of workers.”

r. “This is an undue hardship on already struggling companies and a ridiculous burden on HR and safety personnel.”

s. “[R]educed staff, inability to continue to operate in rural areas, reduced gas availability, store closures.”

t. “It will have a negative impact all around, financially, strategically, and operationally. This is why business [would] rather leave the US and rather take jobs to other countries. This is too intrusive, not only on people, but on business as a whole.”

u. “We have 145 employees over 18 locations and an HR Dept. of 1. Each location runs []with a maximum of 5 employees

at any one time making the risk extremely low given all protocols we have put in place over the last 20 months. The administrative tracking and requirements are overly burdensome to a small company who has done everything to keep employees safe during this pandemic.”

v. “If the OSHA Mandate becomes effective it would be the most devastating event our company has ever experienced.”

w. “Unfairly applies to Large dispersed organizations. Independent operators with less than 100 employees are exempt.”

x. “[I]t would bankrupt our company because of the closure of so many stores. We have already reduced hours in some stores due to staffing issues.”

y. “In an environment where team members are difficult to find and keep. This is a well intentioned but short sighted power grab by a government reliant on the tax revenues small businesses supply. As Covid-19 becomes endemic as opposed to pandemic, this is a scary precedent for increasing government oversight.”

z. “We have a large number of employees that have not gotten vaccinated (over 50%). They will not get vaccinated if it is required.”

aa. “It would be a total disaster to our company, our industry, and to the U.S. economy.”

bb. “This mandate will be a serious detriment to our ability to operate our business.”

cc. “We will be able to comply with the mandate, but the loss in staff and resulting decrease in revenue could be catastrophic.”

dd. “[I]mpossible to comply with and will have very negative impacts on us as we will have to cut hours and /or close stores due to staffing issues.”

ee. “In order to stay in business, we would have to allow weekly testing as there are just too many other businesses with less than 100 employees that our employees could leave us for. We have already been unable to hire several people who did not want to work for company that would be under this mandate. They went to work for someone smaller. The idea that we can test weekly and track it is ludicrous. We operate large stores (30 - 50 employees) in very rural communities with little access to testing. This would require our store managers to manage this, on top of what they already do. This mandate puts even more strain on good, hard-working people that have been very loyal to us and their communities throughout this pandemic.”

ff. “With multiple retail sites spread over 2 states I'm not sure how practical the weekly testing will be. It will also be difficult with a small HR department.”



gg. “This will be the[] straw that breaks the camel[s] back for a lot of our locations. Especially more rural locations where there is over 50% of the people unvaccinated (or higher). They will simply just not work anymore.”

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 22nd day of November, 2021, at Bristol, Virginia.

A handwritten signature in cursive script, appearing to read "Lori Stillman", is written over a horizontal line.

Lori Stillman

# Exhibit L

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

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Texas Trucking Association et al.,

*Petitioners*

v.

United States Occupational Safety and  
Health Administration et al.,

*Respondents.*

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**Declaration of Peter Demos**

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I, Peter Demos, declare as follows under penalty of perjury:

1. My name is Peter Demos. I am the President and CEO of Demos Brands.
2. Demos Brands is a family, independently owned restaurant group comprising Demos Restaurants in Murfreesboro, Lebanon and Hendersonville, Tennessee; and PDK Southern Kitchen & Pantry in Bellevue and Mt. Juliet, Tennessee. Demos Brands is a member of the National Federation of Independent Business.
3. Demos Brands employs approximately 300-350 employees. I oversee the entire business.
4. I am familiar with the “COVID–19 Vaccination and Testing; Emergency Temporary Standard” (the “ETS”). It is my understanding that the ETS applies to Demos Brands.

5. As President and CEO of Demos Brands, and an attorney, I have personal knowledge of what the ETS requires and how it will affect Demos Brands.

6. We are a Christian business, and one of the reasons I am concerned about the ETS is that it will require us to go against our values by terminating employees during the holiday season.

7. We are already short-staffed by a large percentage, and we are already having to close early and lose shifts because of the pandemic and ongoing labor shortage. The ancillary impacts of the existing labor shortage and supply chain issues would be exacerbated if the ETS were to go into effect.

8. We already struggle completing existing regulatory paperwork requirements because we don't have staff. The ETS will only increase the amount of paperwork we will have to do. I predict I personally will lose up to two days of being able to be in business. I also predict that Demos Brands will lose five servers or two grill cooks for several days.

9. Demos Brands complied with all the state regulations as they came up. Among other things, we instituted a policy requiring employee temperature checks, masking, social distancing of tables, and increased frequency of cleaning. We made bars carryout stations and put up plywood separators. We started curbside delivery, which included systems that allowed guests to be paged in their cars when their order was ready. Our

locations already had strong ventilations system with more HVC units than required.

10. Demos Brands would not enforce a vaccine or test-and-mask mandate but for the ETS.

11. Demos Brands has 300-350 employees, who are spread across five locations: three Demos Restaurants in Murfreesboro, Lebanon, and Hendersonville, Tennessee, and two PDK Southern Kitchen & Pantry restaurants in Bellevue and Mt. Juliet, Tennessee. We have been trying for over a year to obtain a permit to open a third PDK Southern Kitchen & Pantry but cannot because the government is so behind and short-staffed due to the pandemic.

12. I meet with managers quarterly, and one of the most frequent questions I am asked involves what managers would do if the mandate went into effect. Many managers said they would quit if the mandate takes effect.

13. I estimate that about 75 percent of Demos Brands' hourly employees, 50 percent of salaried on-site restaurant employees, and 25 percent of administrative employees have been vaccinated.

14. I estimate that 90 percent of our employees who are in management or administration have had Covid. To the best of my knowledge, no one has been hospitalized from it. We have experienced no deaths.

15. Covid has had an impact on business. We were forced to close when employees were sick because we did not have enough employees to operate. We were forced to close two days a week for three weeks at two different locations.

16. The average age of my management employees is thirty years of age, for hourly employees the average age is twenty-three. Including myself, Demos Brands has only three employees who are fifty or older.

17. To the best of my knowledge my employees are generally in good health.

18. Although I don't know how many employees I would lose if the mandate were to take effect, I know that my managers at each of the restaurants are worried about losing people.

19. Some employees will not get vaccinated for political and other reasons not related to religious belief or medical conditions.

20. We have already lost employees because they believed we had too many rules relating to protecting against transmission of Covid-19. Others quit because they did not think we had enough rules.

21. If the mandate were to take effect, we anticipate losing enough employees to cause us to have to close a minimum of one day a week.

22. The ETS will worsen the severe labor difficulties that Demos Brands is already experiencing.

23. The ETS will also make it more difficult to hire new workers for current vacancies, for vacancies that the ETS will create, and for new position(s) that the ETS will require us to create and fill (for example, someone to oversee recordkeeping requirements for vaccination and testing status).

24. Demos Brands has direct and indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a

labor shortage. Job seekers who oppose the ETS's requirements can avoid them by working for the companies that are not subject to the Mandate. The ETS therefore places Demos Brands at a competitive disadvantage in an already constrained labor market.

25. When we had to shut down for a day or two due to being short-staffed as referenced above. That shutdown significantly impacted our net profit. For some periods we had a net loss.

26. We typically see a ten percent increase in sales between Thanksgiving and Valentine's Day. Within the last two weeks we had three people call out at one of our restaurants leaving us with four servers and only one cashier (instead of three). That night we lost fifty to sixty percent in sales, yet our electricity bill stayed the same.

27. When it comes to implementing the OSHA ETS, every manager would be responsible for ensuring the compliance of their own restaurant, reporting up to human resources to maintain the records, and then the Vice President of Operations and I would audit to ensure proper compliance. There are many compliance issues we will face, even with this structure.

28. Recordkeeping is going to be particularly hard due to: (a) the ever-changing make up of our employee workforce due to people quitting and others getting hired; (2) lack of physical space to keep records and keep them secure; (3) lack of technology to keep them stored digitally in a manner that is safe; (4) time it will take to get employees tested and test results properly stored if and when we figure out how we will do that. Given the

transient nature of our workforce we already struggle with current record-keeping requirements.

29. At this point I do not know how I am going to track employees. For vaccinated employees I think I could devise a system. For the unvaccinated, there are so many factors including how to track them on a weekly basis.

30. We are not a Monday-Friday business. Managers and employees are all on different schedules. Oversight is going to be very challenging.

31. We will monitor mask compliance the way we did when masks were required in restaurants in Tennessee, which is the same way we monitor uniforms. We line up the employees at the beginning of the shift and check them. But the problems with masks are the difficulties properly wearing them in a restaurant environment. For example, elderly customers couldn't hear my employees and so the employee would have to pull down the mask to speak. In the kitchen, my cooks are wearing masks while cooking over grease and hot fumes. They do not have the time or ability to change their mask every thirty minutes.

32. Masking alone will result in employees quitting.

33. Monitoring will harm worker morale. I pride myself on how we treat employees. I have an employee council comprising one employee per location. These representatives meet only with me – one-on-one. They give me suggestions and we have an open and productive dialogue. With this new mandate, most of the employees are going to think they must follow



these rules because I am making them do it. They will see my competitors with under 100 employees and how they are not following the same rules.

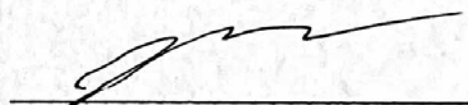
34. I really have no earthly idea how I'm going to keep the data secure. Many of our office doors don't have locks, and some units don't even have doors.

35. None of us can afford the testing. If the company pays, it won't be able to stay open.

36. Our employees can't afford to pay for tests either. They are paycheck to paycheck. For an employee who works only a few hours each week, paying for testing could cause that employee's wage to be a net negative.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 7 day of December, 2021, at Putnam County, Tennessee.



[Peter Demos]