

United States Court of Appeals
For the Eighth Circuit

FILED

NOV 05 2021

MICHAEL GANS
CLERK OF COURT

STATE OF MISSOURI,)
STATE OF ARIZONA,)
STATE OF NEBRASKA,)
STATE OF MONTANA,)
STATE OF ARKANSAS,)
STATE OF IOWA,)
STATE OF NORTH DAKOTA,)
STATE OF SOUTH DAKOTA,)
STATE OF ALASKA,)
STATE OF NEW HAMPSHIRE,)
STATE OF WYOMING,)
AAI, INC.,)
DOOLITTLE TRAILER MFG., INC.,)
CHRISTIAN EMPLOYERS)
ALLIANCE,)
SIOUX FALLS CATHOLIC)
SCHOOLS D/B/A BISHOP)
O'GORMAN CATHOLIC SCHOOLS,)
HOME SCHOOL LEGAL DEFENSE)
ASSOCIATION, INC.,)

Petitioners,

v.

JOSEPH R. BIDEN, JR.,)
in his official capacity as)
President of the United States)
of America,)

THE UNITED STATES OF)
AMERICA,)

DOUGLAS PARKER,)

21-3494

Case No. _____

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NOV 05 2021

U.S. COURT OF APPEALS
EIGHTH CIRCUIT

Assistant Secretary of Labor)
for Occupational Safety and)
Health,)
)
OCCUPATIONAL SAFETY AND)
HEALTH ADMINISTRATION,)
)
MARTIN J. WALSH,)
Secretary of Labor,)
)
UNITED STATES DEPARTMENT OF)
LABOR,)
)
Respondents.)

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure and 29 U.S.C. § 655(f), the States of Missouri, Arizona, Nebraska, Montana, Arkansas, Iowa, North Dakota, South Dakota, Alaska, New Hampshire, and Wyoming; and AAI, Inc., Doolittle Trailer Manufacturing, Inc., Christian Employers Alliance, Sioux Falls Catholic Schools d/b/a Bishop O’Gorman Catholic Schools, and Home School Legal Defense Association, Inc., hereby petition the Court for review of the Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration of the U.S. Department of Labor, titled: “COVID-19 Vaccination and Testing; Emergency Temporary Standard.” That ETS was issued by OSHA on November 5,

2021, and is published in the Federal Register at 86 Fed. Reg. 61,402. A copy of the Emergency Temporary Standard is attached as Attachment A.

The Court has jurisdiction and is a proper venue for this action pursuant to 29 U.S.C. § 655(f). This Petition is timely filed as it is filed within 60 days of the November 5, 2021 publication date.

For over a century, the U.S. Supreme Court has recognized that policies on compulsory vaccination lie within the police powers of the States, and that “[t]hey are matters that do not ordinarily concern the national government.” *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). Until quite recently, the Biden Administration agreed. The White House stated on July 23 of this year that mandating vaccines is “not the role of the federal government.” But on September 9, 2021, that position underwent a dramatic reversal. The President announced several sweeping vaccine mandates, including a vaccine mandate to be issued by OSHA that would apply to all employers who employ more than 100 employees. OSHA published this “emergency” mandate two months later, crafting an elaborate *post hoc* justification for a policy that the President had already ordered it to impose. This sweeping

federal mandate encompasses, in OSHA's own estimation, "two-thirds of all private-sector workers in the nation."

This mandate is unconstitutional, unlawful, and unwise. The federal government lacks constitutional authority under its enumerated powers to issue this mandate, and its attempt to do so unconstitutionally infringes on the States' powers expressly reserved by the Tenth Amendment. OSHA also lacks statutory authority to issue the ETS, which it shoe-horned into statutes that govern workplace safety, and which were never intended to federalize public-health policy. OSHA's justification for the mandate is not supported by substantial evidence in the record considered as a whole under 29 U.S.C. § 655(f), as the ETS fails to consider obvious distinctions and critical aspects of the problem. Its unlawful mandate will cause injuries and hardship to working families, inflict economic disruption and staffing shortages on the States and private employers, and impose even greater strains on struggling labor markets and supply chains.

OSHA's justification for this unprecedented mandate constitutes the quintessential "*post hoc* rationalization[]" that "cannot be accepted as a basis for review." *Asbestos Info. Ass'n/N. Am. v. Occupational*

Safety & Health Admin., 727 F.2d 415, 422 (5th Cir. 1984). OSHA did not first discern a “grave danger” to employees and then devise a standard “necessary” to protect them, as the statute requires. 29 U.S.C. § 655(c). Instead, the President dictated his preferred policy to the agency in advance, and OSHA reverse-engineered a justification for that predetermined conclusion. It is a “foundational principle of administrative law” to reject such “impermissible *post hoc* rationalizations.” *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907, 1909 (2020). The Court should do so.

For these and many other reasons, Petitioners respectfully request that this Court hold unlawful, vacate, and set aside the Order, grant a stay of the Order pending judicial review, and grant such further relief as may be deemed just and proper.

Date: November 5, 2021

Respectfully submitted,

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Certificate of Compliance

The undersigned hereby certifies that this motion complies with the typeface and formatting requirements of Fed. R. App. P. 27 and 32, and that it contains 602 words as determined by the word-count feature of Microsoft Word.

/s/ D. John Sauer

Certificate of Service

I hereby certify that on November 5, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I will serve, by electronic mail, one date-stamped copy of the foregoing on each of the following parties at the following e-mail addresses:

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I also certify that I will serve, via U.S. Postal Service Certified Mail, one paper copy of the foregoing on each party at the following addresses:

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