

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON HEALTHCARE WORKERS FOR MEDICAL FREEDOM  
and MANDATE FREE OREGON,  
Petitioners,

v.

OREGON HEALTH AUTHORITY,  
Respondent.

Court of Appeals No. A176900

**ORDER DENYING MOTION TO STAY**

In this judicial review proceeding pursuant to ORS 183.400, petitioners move for a stay of enforcement of the Oregon Health Authority Administrative Order PH 42-2021 and OAR 333-019-1010 (the "Healthcare Vaccine Mandate"). Respondent Oregon Health Authority (OHA) opposes the requested stay. As explained below, the motion is denied.

OAR 333-019-1010 requires that "healthcare providers" and "healthcare staff" must show proof of vaccination or provide documentation of a medical or religious exemption by October 18, 2021, or they may not "work, learn, study, assist, observe, or volunteer in a healthcare setting." Petitioners are "non-profit member benefit corporation[s]" whose "members face termination on October 18, 2021, if they are not fully vaccinated."

The court has authority to stay enforcement of an administrative rule pending completion of judicial review under ORS 183.400. *Northwest Title Loans, LLC v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313 (2002).<sup>1</sup> In determining whether to grant a stay pending completion of rule-challenge proceedings, the court considers the

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<sup>1</sup> Although *Northwest Title Loans* was vacated as moot, the court continues to refer to portions of that decision that remain persuasive. *Lovelace v. Board of Parole and Post-Prison Supervision*, 183 Or App 283 n 3, 51 P3d 1269 (2002).

**ORDER DENYING MOTION TO STAY**

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REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

likelihood that petitioner will prevail on judicial review,<sup>2</sup> the likelihood of irreparable harm to the petitioners in the absence of an immediate stay, and the likelihood of harm to the public if a stay is granted. See *id.* at 13 & n 7 (stating that a stay will not be granted in the absence of a showing that failure to grant a stay will result in irreparable harm; suggesting that, in evaluating whether a stay should be granted in a judicial review proceeding under ORS 183.400, the court could require a petitioner to meet requirements analogous to those imposed in ORS 183.482). Petitioners assert that the relevant factors support their request for a stay. OHA, for its part, argues that the likelihood of harm to the public weighs decisively against a stay, that petitioners have no likelihood of success on the merits, and that petitioners do not face irreparable harm that would justify a stay. Petitioners reply, in part, that, in their view, the public will suffer irreparable harm if a stay is not granted.

The court determines that petitioners have little-to-no likelihood of success on the merits of their judicial review. As to that factor, petitioners argue that the Healthcare Vaccine Mandate (1) exceeds OHA's statutory authority, (2) violates the separation of powers doctrine of the Oregon Constitution, (3) was adopted without compliance with the temporary rule making process, and (4) violates healthcare workers' constitutional rights. In considering whether a stay should be granted, the court has evaluated all of the merits arguments set forth in the motion. The court will address some of those arguments in more detail below. Suffice it to say, however, that, although not all of petitioners' "merits" argument will be specifically discussed in this order, the court determines that none of them are sufficient to show a likelihood of success on judicial review.

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<sup>2</sup> In their motion, petitioners argue that they can establish a colorable claim of error. See ORS 183.482 (on judicial review of agency order in contested case proceeding, a stay will be granted on a showing of irreparable injury to the petitioner and a colorable claim of error in the order, unless substantial public harm will result if the order is stayed). However, in considering whether a stay should be granted in a rule-challenge proceeding under ORS 183.400, the court evaluates whether petitioners have a reasonable likelihood of success on appeal. *Northwest Title Loans*, 180 Or App at 21-22 ("A 'colorable' claim of error has been described as something less than a showing that the petitioner is reasonably likely to prevail on appeal, and as a seemingly valid, genuine, or plausible [claim] of error or substantial and nonfrivolous claim of error. A validly promulgated agency rule has the force of law and its enforcement should not be enjoined based on a merely plausible or nonfrivolous claim." (Brewer, J., concurring; internal citations omitted; brackets in original)).

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**ORDER DENYING MOTION TO STAY**

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

With respect to petitioners' argument that OHA exceeded its rulemaking authority in issuing and adopting the Healthcare Vaccine Mandate, in order "[t]o determine whether a challenged rule exceeds the agency's statutory authority, [the court] may consider only 'the wording of the rule itself (read in context) and the statutory provisions authorizing the rule.'" *Assn. of Acupuncture v. Bd of Chiropractic Examiners*, 260 Or App 676, 678, 320 P3d 575 (2014) (quoting *Wolf v. Oregon Lottery Commission*, 344 Or 345, 355, 182 P3d 180 (2008)). OHA points to the following four statutes as providing authority for the mandate: ORS 413.042, ORS 431A.010, ORS 431.110, and ORS 433.004. Petitioners argue that those statutes do not confer the requisite rulemaking authority on OHA. However, when taken together and "read in context," it is clear that those statutes do, in fact, authorize OHA to issue and adopt the Healthcare Vaccine Mandate.

ORS 413.042 provides, "In accordance with applicable provisions of ORS chapter 183, the Director of the [OHA] may adopt rules necessary for the administration of the laws that the [OHA] is charged with administering." ORS 431A.010 provides that OHA "and local public health administrators shall have the power to enforce public health laws," including, among other powers, as noted in ORS 431A.010(1)(c), the power to "[i]ssue administrative orders to enforce compliance with public health laws." ORS 431.110(7) provides that OHA shall "[h]ave full power in the control of all communicable diseases." Finally, 433.004(1)(d) provides that OHA "shall by rule \* \* \* [p]rescribe measures and methods for \* \* \* controlling reportable diseases."

As applied to this case, first, COVID-19 is a communicable disease of which OHA has "full power in the control." See ORS 431.110(7). Pursuant to ORS 433.004(1)(d), OHA must, by rule, "prescribe measures and methods" for controlling reportable diseases; COVID-19 is a reportable disease. Pursuant to ORS 413.042, OHA may adopt a rule necessary for the administration of the laws that it is charged with administering; ORS 433.004(1)(d) is a law that OHA is charged with administering. By adopting OAR 333-019-1010, OHA exercised the authority given to it by ORS 413.042 in order to administer ORS 433.004(1)(d). OHA then issued an administrative order to ensure compliance with OAR 333-019-1010 pursuant to ORS 431A.010. Although petitioners may disagree with OHA about the Healthcare Vaccine Mandate being *necessary* in order to administer ORS 433.004(1)(d), that does not mean that OHA has exceeded its rulemaking authority in issuing and adopting the mandate. Petitioners have not demonstrated a likelihood of success in prevailing on their argument that OHA has exceeded its statutory authority in issuing and adopting the mandate.

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**ORDER DENYING MOTION TO STAY**

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

Petitioners' further argue that the mandate "invades on the Legislature's powers as it attempts to overrule the Legislature." That argument is grounded on ORS 433.416, which provides that an employer of a "health care worker at risk of contracting an infectious disease in the course of employment shall provide to the worker preventive immunization [at no cost to the worker] \* \* \* if available and \* \* \* medically appropriate." ORS 433.416(1). Further, ORS 433.416(3) provides that a "worker shall not be required as a condition of work to be immunized under this section, unless such immunization is otherwise required by federal or state law, rule or regulation." Petitioners emphasize that the "Oregon Legislature has enacted no law authorizing vaccinations of workers," and argue that the mandate "directly contradicts the legislature's intent as expressed in ORS 433.416. However, in making that argument petitioners ignore the import of the statute's express text, which makes clear that immunizations *may* be a condition of work if required by, among other things, state rules or regulations. In other words, the statute specifically contemplates that an agency rule might, in some circumstances, require a health care worker to be immunized against an infectious disease. Thus, petitioners have little-to-no likelihood of success in arguing that the Healthcare Vaccine Mandate violates the separation of powers doctrine of the Oregon Constitution.

Petitioners' assert that OHA failed to follow the temporary rulemaking requirements set forth in ORS 183.335. An agency may adopt a temporary rule if it, among other things, prepares a "statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice." ORS 183.335(5)(a). OHA prepared such a statement, which provides as follows:

"The [OHA] finds that failure to act promptly will result in serious prejudice to the public interest, the [OHA], and healthcare personnel and patients seeking and relying on health care. This rule needs to be adopted promptly so that the state can continue to prevent and slow the spread of COVID-19, for the reasons specified above [in the statement regarding the need for the rule]. Requiring vaccination of healthcare personnel in healthcare settings is crucial to the effort in controlling COVID-19."

Petitioners assert that the statement is "superficial at best and fails to list 'the specific reasons for its findings of prejudice.'" The Supreme Court, however, has explained that, "[a]lthough not every prejudice will be sufficiently serious or require sufficiently prompt action to justify bypassing the public participation required by the permanent rulemaking

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**ORDER DENYING MOTION TO STAY**

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

process, the standard that the legislature adopted is [relatively] flexible and permissive." *Friends of the Columbia Gorge v. Energy Facility Siting Council*, 366 Or 78, 92, 456 P3d 635 (2020). Here, petitioners have little likelihood of success on their argument that the justification of temporary filing, which also references OHA's determination of the need for the rule, fails to meet the requirements of ORS 183.335(5)(a).

Petitioners further argue that the rule violates "the privileges and immunities granted to [them] under the Oregon Constitution." See Or Const, Art 1, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms shall not equally belong to other citizens."). However, only laws that disparately treat a "true class" may violate the Privileges and Immunities Clause of Article I, section 20. See *Tanner v. OHSU*, 157 Or App 502, 520, 971 P2d 435 (1998) ("In attempting to describe precisely what is meant by a 'true class,' the cases draw a distinction between classes that are created by the challenged law or government action itself and classes that are defined in terms of characteristics that are shared apart from the challenged law of action."). Further, even where a rule creates disparately treated true classes, depending "on what type of true class is involved, the legislation or governmental action may be upheld in spite of the disparity." *Id.* at 521. Disparate treatment of "nonsuspect true class[es]" may "be justified on a 'rational basis' examination." *Id.* at 523. As the state correctly points out, the class ("healthcare workers") that petitioners' assert is subject to disparate treatment under the rule does not appear to be a true class, as that term has been defined, and, thus, it appears that the Privileges and Immunities Clause may not even be implicated by the mandate. In any event, however, even if a true class, healthcare workers are clearly *not* a suspect class (unlike classes based on characteristics like race, gender, alienage, and religious affiliation) and, thus, the rule would only have to survive rational basis review. See *id.* Petitioners have little-to-no likelihood of success in persuading the court on judicial review that the rule has no rational basis.

Likewise, petitioners are unlikely to succeed in their constitutional argument that the Healthcare Vaccine Mandate violates their religious freedom. The rule itself expressly provides for religious exemptions from the vaccination requirement. See OAR 333-019-1010(2)(g) ("'Religious exception' means that an individual has a sincerely held religious belief that prevents the individual from receiving a COVID-19 vaccination."); OAR 333-019-1010(4)(b)(B) ("A religious exception must be corroborated by a document \* \* \* signed by the individual stating that the individual is requesting an exception from the COVID-19 vaccination requirement on the basis of a sincerely held religious belief and including a statement describing the way in which the vaccination requirement conflicts with the religious observance, practice, or belief of the

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**ORDER DENYING MOTION TO STAY**

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

individual." Petitioners have little likelihood of success in arguing that, despite the specific provision of religious exceptions to the vaccine requirement, the Healthcare Vaccine Mandate violates healthcare workers' religious freedom.

The same is true of petitioners' remaining arguments. Simply put, petitioners have demonstrated little-to-no likelihood of success in any of the arguments they seek to raise on judicial review.

The likelihood of success factor, together with the risk of harm to the public if a stay is granted, dispositively weighs against granting a stay in this case. Even assuming that petitioners have made a sufficient showing of irreparable harm to their members that will result from the denial of a stay, the court agrees with the state that granting a stay would be harmful to the public interest. As all involved are aware, this case arises during the COVID-19 pandemic; COVID-19 is a disease that has caused hundreds of thousands of deaths in this country. As the rule itself states, healthcare workers generally have contact with many patients, including those who are "more likely than the general public to have conditions that put them at risk for complications due to COVID-19." According to OHA, requiring healthcare workers to be vaccinated is an effective way to increase vaccination rates and, thereby, to help control COVID-19, protect patients, and protect the state's healthcare workforce. See OAR 333-019-1010(1). As the Supreme Court discussed more than a year ago in *Elkhorn Baptist Church v. Brown*, 366 Or 506, 509, 466 P3d 30 (2020):

"There have been and will continue to be debates about how best to respond to the threat posed by the coronavirus. Those debates include debates about what balance government should strike between protecting lives and protecting liberties. To the extent that those debates concern policy choices, they are properly for policymakers. That is, those difficult choices must be made by the people's representatives in the legislative and executive branches of government."

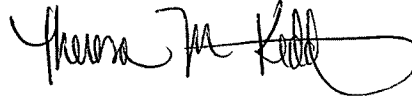
Here, the rules are directly aimed at protecting the public and, although petitioners disagree with the way that is being done, the executive branch is "uniquely situated, and duty bound, to protect the public in emergency situations and to determine, in such emergencies, where the public interest lies." *Id.* at 546 (Garrett, J, concurring). The court determines that the agency has properly made that determination here and that the risk of harm to the public if a stay is granted is significant.

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**ORDER DENYING MOTION TO STAY**

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

In sum, in light of petitioners' lack of a reasonable likelihood of success on judicial review and the likelihood of harm to the public if a stay is granted, petitioners' motion for a stay of enforcement of the Healthcare Vaccine Mandate pending completion of the rule-challenge proceeding is denied.



THERESA M. KIDD  
APPELLATE COMMISSIONER  
10/5/2021 8:44 AM

C: Daniel E Thenell  
Kirsten L Curtis  
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