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Occupational Safety and Health Administration
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Submitted Electronically via Regulations.gov

Re: Comments by the Commonwealth of Kentucky, and the States of Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming, on the request for comment on *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, and whether it should be adopted as a final standard (Docket No. OSHA-2021-0007)

Dear Assistant Secretary Parker:

The undersigned States submit the following comments on the *COVID-19 Vaccination and Testing; Emergency Temporary Standard* issued in 86 Fed. Reg. 61402 (Nov. 5, 2021) ("ETS"). The States have already filed a Petition to Review the ETS, which is pending at the U.S. Court of Appeals for the Sixth Circuit (*In re MCP No. 165*), and the United States Supreme Court granted an emergency application for stay of the ETS on January 14, 2022 (*Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. ___ (2022)).

However, despite that the United States Supreme Court—in a 6—3 decision—has held that the Occupational Safety and Health Administration (OSHA) lacks the statutory authority to issue the type of rule reflected by the ETS, OSHA has yet to withdraw the ETS. We therefore submit these comments to reiterate that OSHA lacks authority to require that tens of millions of employees vaccinate against an endemic virus that presents a generic risk, not a workplace risk. OSHA should,

therefore, immediately withdraw the ETS and suspend its efforts to promulgate a similar permanent standard.

I. The ETS is unlawful.

The Occupational Safety and Health Act of 1970 ("Act") grants authority to OSHA to promulgate an emergency temporary standard with immediate effect by demonstrating: (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger. 29 U.S.C. § 655(c) (1). OSHA failed to meet these requirements for four reasons.

First, the Act was designed to address dangers employees face at work because of their work—not dangers that are no more prevalent at work than in society generally. The United States Supreme Court agrees and held that the ETS—or any similar permanent standard for that matter—fails to address a unique workplace hazard and is therefore unlawful. *See Nat'l Fed'n of Indep. Bus.*, 595 U.S. at ___ (*per curiam*), slip op., p. 7 ("Permitting OSHA to regulate the hazards of everyday life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.").

The text of the Act supports the U.S. Supreme Court's clear holding. For example, the codified purpose of the Act is preventing "personal injuries and illnesses *arising out of work situations*." 29 U.S.C. § 651(a) (emphasis added). Provisions dealing with toxic substances also contemplate protecting employees from *workplace* exposure. *See* 29 U.S.C. § 675 (mandating OSHA make a report "listing . . . all toxic substances in industrial usage"); 29 U.S.C. § 669(a)(3) (directing OSHA to develop "criteria dealing with toxic materials and harmful physical agents and substances" such that "no employee will suffer impaired health or functional capacities or diminished life expectancy because of work experience"). When read in context, the Act does not extend to protecting workers against general exposure to COVID-19 that they also face outside the workplace.

OSHA has also long recognized this limiting principle. When promulgating the bloodborne pathogen standard, OSHA assessed risk by calculating the risk of contracting hepatitis B "attributable to occupational exposure" for healthcare workers compared to the background risk of contracting hepatitis B.[1] *See* 56 Fed. Reg. 64004, 64027 (Dec. 6, 1991). OSHA also noted the limitation in its standard

[1] Even that standard does not mandate hepatitis B vaccines for workers with heightened exposure to pathogen risks at work. *See* 29 C.F.R. § 1910.1030(f). And, that standard allows workers to decline the vaccine when made available by the employer. *Id*.

dealing with access to employee exposure records, excluding "situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations." 29 C.F.R. § 1910.1020(c)(8).

Lower courts have also agreed that OSHA's authority applies to specific workplace dangers rather than risks endemic to society at large. The D.C. Circuit, for example, has recognized that when the Act speaks of "hazard[s]," it is referring to dangers that workers encounter while engaged in "work or work-related activities." *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984). Along the same lines, the Eleventh Circuit has observed that, "for coverage under the Act to be properly extended to a particular area, the conditions to be regulated must fairly be considered working conditions, the safety and health hazards to be remedied occupational, and the injuries to be avoided work-related." *Frank Diehl Farms v. Sec'y of Lab.,* 696 F.2d 1325, 1332 (11th Cir. 1983). Any interpretation to the contrary is at odds with the plain text of the Act and would extend OSHA's jurisdiction into realms already regulated by other federal and state agencies.

Second, OSHA has not established how COVID-19 poses a "grave" danger, as contemplated by the Act, to employees working for an employer with 100 or more employees. Congress did not intend that every danger (that also occurs in the workplace) would justify the extraordinary use of the Act's emergency provision. It must be "very serious; dangerous to life." *Grave*, Webster's Third New International Dictionary (2003); *Grave*, Random House Unabridged Dictionary (2d ed. 1993). The risk posed to American employees by COVID-19 does not meet this definition for several reasons.

Every employee in the United States has the means to protect themselves from serious effects of COVID-19 if they so choose. Every adult in America can take the vaccine for free, and nearly two hundred million have done so. For U.S. residents aged 40–49, 70 percent are fully vaccinated, and 81 percent have had at least 1 dose of the vaccine.[2] Millions more likely have protective antibodies from a COVID infection. The National Institutes of Health has reported that a third of the population likely contracted COVID-19 in 2020,[3] and those who did likely developed strong natural immunity.[4] Furthermore, the likelihood of dying from COVID-19, for

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[2] *U.S. COVID-19 vaccine tracker: See your state's progress*, Mayo Clinic (last visited Dec. 13, 2021), https://mayocl.in/3CuIXgx.

[3] *See* Francis Collins, *COVID-19 Infected Many More Americans in 2020 than Official Tallies Show*, NIH Director's Blog (Sept. 7, 2021), https://perma.cc/6UPC-2BSB

[4] Sivan Gazit et al., Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity (Aug. 25, 2021), https://perma.cc/6JKH-JMQ5.

a fully vaccinated person of any age, is 1 in 137,698—about equal to the risk of dying from a lightning strike (1 in 138,849).[5] The risk of being hospitalized from COVID-19 is 1 in 31,030, or .003 percent.[6] *Id*. And the United States now has several treatments available—and more on the way—proven to be highly effective at preventing serious illness and death.

Additionally, even unvaccinated, working age Americans without natural immunity are not in grave danger from their workplace. To the extent a working age American faces a COVID-19 risk generally, he or she can get vaccinated—the risk OSHA identifies has nothing to do with whether the individual shows up to work. To the extent OSHA believes its authority extends to personal health decisions, not workplace risks, OSHA has an uphill climb to explain how the personal health decision to remain unvaccinated presents a "grave" danger. The median age of the workforce is 42 years old.[7] COVID-related deaths were reported at 0.02 percent for the age group 40–49 in 2020.[8] Today that risk is even smaller given medical advancements in treating the virus, including monoclonal antibody treatments and an anti-viral pill that has been shown to reduce hospitalization and death in high-risk patients by over one-half.[9]

OSHA skews the data when citing an infection death rate of 0.6 percent for everyone over the age of 16 by including retired elderly people at high risk of COVID-19 complications or death.[10] This analysis ignores that approximately 80% percent of the COVID-related deaths occurred in people over the age of 65 (*i.e.*, people most likely not participating in the workforce, especially if otherwise not healthy).[11]

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[5] Kevin Dayaratna & Norbert Michel, *A statistical analysis of COVID-10 breakthrough infections and deaths*, Heritage Foundation (Aug. 12, 2021), https://perma.cc/68HL-ZLSL.

[6] *Id*.

[7] *Median age of the labor force, by sex, race, and ethnicity*, U.S. Bureau of Labor Statistics (Sept. 8, 2021), https://perma.cc/X42L-BWCJ.

[8] *CDC*, *Weekly Updates by Select Demographic and Geographic Characteristics* (last visited Oct. 29, 2021), https://bit.ly/2XZAfIg (11,318 deaths "involved" COVID out a 40.28 million people falling within that age bracket).

[9] *See* 86 Fed. Reg. at 61530 (OSHA recognizing that monoclonal antibody treatments are effective); *Molnupiravir: The Game-Changing Antiviral Pill for COVID-19?,* Johns Hopkins Bloomberg School of Public Health (Oct. 18, 2021), https://perma.cc/AXH6-M5RL; *Britain Becomes First to Authorize an Antiviral Pill for Covid-19,* New York Times (Nov. 4, 2021), https://perma.cc/MEQ8-Q8A6; Carl Zimmer, *New Covid Pills Offer Hope as Omicron Looms*, New York Times (Dec. 7, 2021), https://perma.cc/CS8T-YDPQ.

[10] *See* Griffin, et al., *SARS-CoV-2 Infections and Hospitalizations Among Persons Aged ≥16 Years, by Vaccination Status—Los Angeles County, California, May 1–July 25, 2021*, MMWR Morb Mortal Wkly Rep 202; 0(34): 1172, https://perma.cc/4ZV3-94SA (relied upon at 86 Fed. Reg. at 61418).

[11] *Percentage of Percentage of COVID-19 infections, symptomatic illness, and hospitalizations, and deaths, by age group—United States, February 2020-September2021*, https://perma.cc/Y5EM-2YR6;

Moreover, OSHA does not account for certain other risk factors such as pre-existing medical conditions and obesity.[12] Instead, it implies that all unvaccinated employees working for employers with 100 or more employees regardless of age, medical condition, or particularized working conditions are in grave danger. And it does so less than a year after previously finding that COVID-19 did not merit a workplace safety rule. Furthermore, the finding that COVID-19 is a grave danger is belied by the ETS itself. If COVID-19 were truly a grave danger, then OSHA would not continue to bless smaller employers exposing their employees to it. Administrative ease is an odd trump card for *grave* danger.

Third, OSHA has not established that the ETS is "necessary" to avert a workplace danger. OSHA's overly broad vaccine mandate covers tens of millions of Americans, including those who work remotely for most (but not all) of the time, have limited interaction with co-workers, work almost entirely (but not "exclusively") outdoors, or have natural immunity.

The necessity of the ETS to protect workers is also contradicted by OSHA's previous positions. On his second day in office, President Biden issued an executive order directing OSHA to consider whether any emergency temporary standards related to COVID-19 were necessary.[13] A resultant draft emergency temporary standard, reported to be over 780 pages long, was never published.[14] Even in health care settings, OSHA made a deliberate decision not to impose vaccination or weekly testing requirements when it issued its emergency temporary standard for health care providers. *See* 29 C.F.R. § 1910.502. Now, with his "patience wearing thin" with those who make the conscious decision not to be vaccinated, President Biden has again mandated OSHA to consider an emergency temporary standard.[15] This time, OSHA capitulated.

In reliance on these deliberate past decisions not to impose a vaccine mandate or general standards applicable to every industry, employers have voluntarily utilized comprehensive, individualized approaches to protect workers including remote work and other policies. Now OSHA intends to impose a one-size-fits-all approach that requires employees to vaccinate, undergo onerous testing, or

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Civilian labor force participation rate by age, sex, race and ethnicity, U.S. Bureau of Labor Statistics, *available* at https://perma.cc/6BAE-USXK (noting that participation rate in 2020 for people age 65-74 was only 26.6% and 7.4% for people 75 or older).

[12] *See People with Certain Medical Conditions*, https://perma.cc/6FWM-J7TG.

[13] Exec. Order No. 13,999, 86 Fed. Reg. 7211 (January 21, 2021).

[14] Julia Zorthian, *Labor Dept. Officials Frustrated with White House Over COVID-19 Vaccine and Testing Mandate*, Time (Sept. 27, 2021), https://perma.cc/QMQ8-RUCA.

[15] Joseph Biden, Remarks at the White House (Sep. 9, 2021), *available at* https://perma.cc/GQG5-YBXK.

leave their employment. This overbroad, yet also under-inclusive approach, is completely unnecessary and arbitrary.

Last, OSHA is interpreting its authority in a manner contrary to the United States Constitution. Assuming the Constitution allows a federal vaccine mandate—a doubtful proposition—Congress would have to delegate the authority with a clear, intelligible principle that the present text of the Act does not provide. The major-questions doctrine requires "Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regulatory Grp.*, 573 U.S. 302, 324 (2014). As the United States Supreme Court held, there is "little doubt that OSHA's mandate qualifies as an exercise of such authority" (*Nat'l Fed'n of Indep. Bus.*, slip op. p. 6) given its "significant encroachment into the lives – and health – of a vast number of employees" (*id.*, p. 5).

OSHA has used the Emergency Provision to issue an Emergency Temporary Standard only eleven times, and never has it been so expansive. Here, OSHA claims it has authority to impose a vaccinate-or-test mandate across "all industries" on 84 million Americans. *See* 86 Fed. Reg. at 61424. If Congress wanted to grant such immense power to OSHA, it would have been clearer about its intention. *See Nat'l Fed'n of Indep. Bus.,* slip op., p. 6; *Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021); *In re MCP No. 165, Occupational Safety and Health Admin., Interim Final Rule: COVID-19 Vaccination and Testing*, --- F.4th ---, 2021 WL 5914024, at *1 (Dec. 15, 2021) (Sutton, C.J., dissenting from denial of initial hearing *en banc*).

Furthermore, Congress lacks the power under the Commerce Clause to make personal health care decisions for millions of workers. *See BST Holdings v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) (noting that a person's choice to remain unvaccinated and forgo regular testing is noneconomic activity) (citing to *NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J., concurring)). Regulating public health and safety is a police power, and the Tenth Amendment reserves such police power for States. The Commerce Clause cannot be used to circumvent this limit on federal power. *See United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (noting the Supreme Court "always ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power").

II. OSHA has failed to adequately consider the interests of the States in issuing the ETS and considering a similar permanent standard.

OSHA failed to adequately consider the States' interests in choosing the best manner to protect the health of their citizens during this pandemic. The undersigned States appreciate that public health policy decisions have an impact on the economic well-being of their citizens and that, in many ways, health and economic stability are

interconnected. And each State has encouraged its eligible citizens to get vaccinated; millions have done so voluntarily. But the States have decided against vaccine mandates after seeing the negative economic impact they have had in other states. Employers are already facing enormous challenges as they respond to the COVID-19 pandemic while continuing to provide employment, goods, and services to our local and national economy. The last thing the States want to do is exacerbate these economic woes.

Unless in conflict with individual citizens' constitutional rights, each State may respond to the COVID-19 pandemic as its elected officials deem proper. This is because the States have been reserved police power authority under our Constitution to protect the health of their citizenry. *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring in the judgment) ("[T]he police power[] belongs to the States and the States alone."). Since the beginning of the COVID-19 pandemic, each State has responded to the ebbs and flows of the pandemic. What was necessary at times in one State might not have been necessary, or may have become unnecessary, in others. True, the COVID-19 pandemic has been a problem nationwide. "But it's a problem in which [state] borders add tools and flexibility for fixing the problem." Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 5 (2021). OSHA should not scrap this federalist solution to the pandemic's challenges by turning the entire country into one "single laboratory of experimentation." Jeffrey S. Sutton, 51 I*mperfect Solutions: States & the Making of American Constitutional Law* 216 (2018); *see, e.g.*, 86 Fed. Reg. 61406. And yet the ETS unlawfully imposes a heavy-handed national vaccine mandate that OSHA claims pre-empts all State policy decisions to the contrary.

III. The "significant risk" threshold will not cure the illegality of a permanent standard based on the ETS.

The Supreme Court has foreclosed the possibility that OSHA can finalize a standard based on the ETS:

> Although Congress has indisputability given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.

Nat'l Fed'n of Indep. Bus., slip op, at 9. Yet, OSHA has refused to withdraw the ETS, suggesting that it may attempt to issue a permanent standard anyway. If it does, OSHA must present substantial evidence that the standard is "reasonably necessary and appropriate to remedy a significant risk of material health impairment." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 639 (1980); *see also* 86

Fed. Reg. 61403 (explaining that "if OSHA were to finalize a rule based on the ETS, it would be a standard adopted under 6(b) of the OSH Act, which requires a finding of significant risk from exposure to COVID-19." But OSHA cannot cure the ETS's defects by promulgating the same rule under the lower showing of "significant risk" because an employee is not subject to an occupational risk simply because she works for an employer with more than 100 employees. *See Nat'l Fed'n of Indep. Bus.,* slip op., p. 7.

In addition, reissuing the ETS as a permanent standard would not be "reasonably necessary or appropriate" to remedy workplace risk for several reasons. Every employee can protect themselves from COVID-19 risks by receiving a free vaccine if they choose. To the extent regulating a personal health decision is ever reasonably necessary, it must be to account for risks faced at work. Take the bloodborne pathogen standard, for example. There, OSHA determined that healthcare workers faced a work-specific threat of contracting hepatitis B and tailored the standard to address that work-specific threat, including by limiting the standard to healthcare workers.

Here, OSHA cannot demonstrate that a standard is reasonably necessary or appropriate if the standard remains in its current form. Nor can the States provide comment on measures tailored to a risk that hasn't been calculated. First, OSHA must calculate—as it did for bloodborne pathogens—the workplace risk of complications arising from COVID-19 and subtract the background risk of the same. Only then can OSHA *possibly* explain what actions are or are not necessary to remedy that workplace risk. And only then can the public provide adequate comments to inform OSHA's final decisions. Finally, any Constitutional concerns regarding OSHA's power to impose a vaccine mandate would apply with equal force to a permanent standard as they do to the ETS.

IV. The testing alternative to vaccination is a coercive tool rather than a necessary means to ensure workplace safety.

The weekly testing regimen for unvaccinated workers as an alternative to requiring vaccination fails to increase safety in the workplace and imposes untold financial burdens on both employees and employers with no meaningful increase in safety.[16] What's worse is that OSHA acknowledges both. The ETS explicitly

[16] OSHA cites to Chine E. et. al, *Frequency of routine testing for COVID-19 in high-risk healthcare environments to reduce outbreaks* (Sept. 9, 2020), as support for its testing alterative. *See* 86 Fed. Reg. at 61439. But the conclusion of this study was that weekly testing was not adequate to prevent outbreaks when community spread is high. This study also did not consider the more contagious Delta and Omicron variants, which was not prevalent at the time of study, nor did it consider the effect of weekly testing when only a fraction of the workforce was tested.

acknowledges that the testing alternative's goal is to increase vaccination among employees rather than to detect COVID infections and prevent outbreaks:

> [I]n this ETS, OSHA intends to strongly encourage employees to choose vaccination, not regular COVID-19 testing. Because employees who choose to remain unvaccinated will generally be required to pay for their own COVID-19 testing, this standard creates a financial incentive for those employees to become fully vaccinated and avoid that cost.

89 Fed. Reg. at 61532.

The testing alternative is also contrary to current CDC guidance. Under that guidance, a person who contracts COVID-19 does not pose a significant risk of infection after five days if they are asymptomatic or after their symptoms are resolving (without a fever for 24 hours).[17] An employee is therefore allowed to return to work without providing proof of the negative test that is required by the ETS. But the ETS or similar permanent standard would bar an employee who has fully recovered from COVID from work for up to 12 weeks because that person may have traces of the virus sufficient to trigger a false positive COVID-19 PCR test result.[18] This nonsensical outcome does not comport with the Act's general purpose of providing a safe and healthful workplace or the ETS's specific purpose of protecting unvaccinated workers.

Not only will unvaccinated employees bear the cost of weekly testing, but they must also bear the inconvenience and discomfort of weekly testing, presumably on their own time without compensation. Making matters worse, testing centers have long wait times, and there are shortages of needed testing supplies.[19] If employees cannot obtain a test or timely negative test result, they will miss work, even if they recovered from COVID-19 and are no longer infectious. But the ETS does not account for this economic impact to both employees and employers. Rather, it erroneously concludes that "there is sufficient—and increasing—availability of COVID-19 testing supplies to enable compliance with the ETS testing option." 89 Fed. Reg. at 61455. Furthermore, both vaccinated and unvaccinated employees can be infected and spread COVID-19 in the workplace. But vaccinated employees are not required to be

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[17] CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population, Dec. 27, 2021, https://perma.cc/P8WM-69EG;Jackie Salo, *Walensky defends CDC's lack of testing requirement to end COVID isolation*, New York Post, Dec. 29, 2021, *available* at https://perma.cc/H6ZG-TEUE.

[18] *Id.*

[19] Cecelia Smith-Schoenwalder, *Biden acknowledges Coronavirus testing shortages, pledges to do more*, U.S. News & World Report (Dec. 27, 2021), *available* at https://bit.ly/3HBdCLc (last visited Jan. 4, 2021).

tested under the ETS. And an employee with a negative test on day one of the work week could accumulate enough viral load to spread the virus by the end of the week.[20]

In addition, employers will have difficulty adhering to the testing alternative. They must undertake the administrative burden of ensuring all employees have a COVID-19 test result prior to reporting for work. And they must maintain meticulous testing records or be fined up to $136,532,[21] or perhaps even face criminal liability, for failing to prove that each unvaccinated employee had OSHA's permission to work each day of the week.[22]

Prior to the U.S. Supreme Court stay, OSHA indicated it would have started fining employers as early as February if they had not used diligent efforts to comply with the ETS after January 10, 2022.[23] In times of unprecedented staffing shortages, employers may lack the human resources to efficiently conduct business if even a few employees neglect to report to work with their required COVID-19 test result. Unions may also object to employees having to endure testing on their own time without pay and strike for breach of collective bargaining agreements. Even the ETS acknowledges that the administrative burden of implementing the ETS would amount to almost $3 billion nationwide, even if employees pay for testing. But, as a practical matter, employers struggling to find employees will most likely bear the cost of this testing. Given these administrative costs and burdens associated with testing, employers will have no other choice than to impose a vaccine mandate. Again, that appears to be by design.

The testing alternative is an abusive tactic unrelated to the Act's purpose of providing safe and health working conditions for employees and contrary to CDC guidance. It is simply designed as a coercive tool aimed at imposing massive costs on both employers and employees to force vaccination. Congress never intended OSHA

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[20] Schooley & Martin, *Weekly coronavirus tests are terrible substitute for vaccination,* Washington Post (Sept. 28, 2021), *available at* https://perma.cc/79AQ-658A.

[21] *See* Memorandum from Patrick J. Kapust on 2021 Annual Adjustments to OSHA Civil Penalties (Jan. 8, 2021) (available at https://perma.cc/T9JD-YGT8); 86 Fed. Reg. 61444 (noting the ETS "will facilitate 'willful' and 'egregious' determinations," so OSHA is enabled "to impose penalties high enough to motivate the very large employers").

[22] According to an update from OSHA, the agency will begin issuing citations on February 9, 2022 and may issue citations for noncompliance sooner if the agency believes the employer is not "exercising reasonable, good-faith efforts to come into compliance." COVID-19 VACCINATION AND TESTING ETS, https://perma.cc/A5KF-8EJF.

[23] The ETS had been stayed until the Sixth Circuit Court of Appeals lifted the stay on December 17, 2021. See *In re MCP No. 165*, --- F.4th ---, 2021 WL 5989357 (Sixth Cir. Dec. 17, 2021). The United States Supreme Court has scheduled for oral argument concerning the legal validity of the ETS for January 7, 2022 in *Nat'l Fed'n of Indep. Bus., et. al. v. OSHA*, Case No. 21A244, and *Ohio, et. al. v. OSHA*, Case No. 21A247.

to commandeer employers to be instruments of an "ultimate work-around" of the federal government's lack of authority to impose national vaccination requirements.[24]

V. The ETS or a similar permanent rule will exacerbate an existing labor crisis and negatively impact small businesses.

The ETS states that OSHA chose the 100-employee threshold to mark the applicability of the ETS because OSHA could not determine whether smaller businesses could absorb the cost of implementing the standard. The 100-employee mark is an odd threshold and does not align with OSHA's findings, the Small Business Association's standards, or the Family and Medical Leave Act. Nonetheless, OSHA seeks comments about whether the ETS's requirements should apply to businesses with even less than 100 employees. The undersigned States urge OSHA to abandon this or a similar rule in its entirety, as it is detrimental to all employers, especially small businesses. To the extent OSHA draws a line, the line must be based in substantial evidence that employers on one side of the line should be treated differently—from a COVID-19 risk perspective, not from an administrability perspective—than employers on the other side.

The pandemic and government-mandated shutdowns wreaked havoc on the economy, causing many small businesses to fold. As the United States tries to recover from these shutdowns, businesses that did not fold face unprecedented labor shortages, inflation, rising cost of materials, and supply chain problems.[25] Requiring vaccination eliminates the possibility of hiring qualified candidates who, for whatever reason, do not want to take the vaccine.[26] The ETS fails to adequately consider the widespread economic damage the vaccine mandate may cause. This impact will be especially felt by vulnerable small businesses if a permanent standard applies to them.

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[24] Emman Colton, Fox News, *Turley says Ron Klain's vaccine retweet is legal issue for Biden: 'Breathtakingly daft'*, https://perma.cc/8LSE-LAH9 (Sep. 10, 2021); Andrew Mark Miller, Fox News, *Psaki says business vaccine requirement a means of mandating vaccination 'through certain pathways,'* https://perma.cc/JK9F-SP7F (Sep. 11, 2021).

[25] Caroline Valetkevitch, *No end in sight for labor shortages as U.S. companies fight high costs*, Reuters (Oct. 26, 2021), *available at* https://perma.cc/9CTQ-URL7; Patti Domm, *Labor shortage, supply constraints and inflation hold back economy trying to emerge from pandemic*, CNBC (Oct. 29, 2021), *available at* https://perma.cc/74KR-GPGM.

[26] *See, e.g.*, Maria Caspani & Nathan Layne, *New York Hospitals Fire, Suspend Staff Who Refuse COVID Vaccine*, Reuters (Sept. 28, 2021), *available at* https://perma.cc/8DXR-ZVWT ("[S]taff shortages prompted some hospitals to postpone elective surgeries or curtail services."); Karen Zraick, *A Long Island Emergency Room Goes Dark As a Vaccine Mandate Gets Stricter*, N.Y. Times (Nov. 23, 2021) ("A Long Island emergency room was forced to close its doors on Monday because of a nursing staff shortage, as a New York state rule took effect that bars unvaccinated medical workers from their jobs.").

VI. Three other federal mandates with different requirements than the ETS create a regulatory morass for employers.

The Biden administration has issued the ETS in conjunction with three other vaccine mandates. President Biden signed Executive Order 14042 on September 9, 2021, forcing federal contractors to agree to the Safer Federal Workforce Task Force Guidance.[27] On November 5, 2021, the Centers for Medicare & Medicaid Services (CMS) issued a final interim rule applying to medical providers receiving Medicare or Medicaid reimbursement.[28] On November 30, 2021, the Secretary for Health and Human Services issued a final interim rule applying to staff and volunteers working with children enrolled at Head Start pre-school programs.[29] These four vaccine impose different requirements.

For example, the CMS, Head Start, and federal contractor mandates do not provide a testing alternative to vaccination and apply regardless of the number of employees an employer has. The federal contractor mandate also applies to all employees working in connection with a federal contract, even if they work exclusively outside and or at home. And a federal contractor must determine whether its employees who do not work in connection with a federal contract nonetheless encounter an employee who does. If so, those employees must also be vaccinated. These and other inconsistent rules create a regulatory morass for employers who may have some employees subject to one set of rules and other employees subject to another.

VII. OSHA must consider the emergence of the Omicron variant in the context of both the ETS and any permanent rule it may promulgate.

OSHA premised the grave danger and necessity findings for the ETS on the prevalence of the Delta variant. Only two months after the ETS was issued, however,

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[27] That guidance is available through the Task Force's website, *see* https://perma.cc/4QRX-L5K2, and later was repeated verbatim in an OMB determination published in the Federal Register, *see* 86 Fed. Reg. 63418 (Nov. 16, 2021). A district court in Kentucky granted an injunction in Ohio, Tennessee, and Kentucky. A district court in Georgia later granted a nationwide preliminary injunction on enforcement of the mandate on December 7, 2021. The federal government has appealed the injunction in the Sixth and Eleventh Circuit Courts of Appeal.

[28] *See Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61555 (Nov. 5, 2021).

[29] See *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs,* 86 Fed. Reg. 68052 (November 30, 2021). District Courts in Louisiana and Texas have enjoined this rule in 25 States.

the Delta variant is nearly extinct and has been replaced by the Omicron variant.[30] Early indications are that breakthrough infections with Omicron are common among the vaccinated and that vaccination may no longer effectively serve the purpose of preventing spread of the virus.[31] Dr. Anthony Fauci states that "just about everybody" will be infected with Omicron.[32] Luckily, early studies suggest that Omicron may present a lower level of risk for severe disease than Delta.[33] OSHA must revisit its findings used to support the ETS in light of the current data on this new predominant variant. Failure to do so would be arbitrary and capricious.

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We appreciate the opportunity to provide input on this ETS and the possible consideration of a similar permanent standard. But to be clear, the undersigned States maintain that OSHA has overstepped its authority by coercing employees to undergo vaccination through an unprecedented use of the Act. The U.S. Supreme Court has already agreed. The ETS should therefore be withdrawn, and OSHA should abandon any further efforts to establish a similar permanent standard.

Sincerely,

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[30] *See* CDC COVID Data Tracker, Variant Proportions, https://covid.cdc.gov/covid-data-tracker/#variant-proportions (last visited Jan. 4, 2022) (showing that Omicron accounted for about 95% of cases as of January 1, 2022)

[31] Michaeleen Doucleff, *Studies suggest sharp drop in vaccine protection vs. omicron – yet cause for optimism*, NPR (Dec. 8, 2021), *available* at https://perma.cc/4S4-72NT; Stephanie Nolan, *Most of the World's Vaccines Likely Won't Prevent Infection From Omicron,* N.Y. Times (Dec. 19, 2021), *available* at https://perma.cc/26N5-HMXD; Lexi Lonas, *Fauci: Omicron will infect 'just about everybody'*, The Hill, Jan. 12, 2022, available at https://thehill.com/policy/healthcare/589344-fauci-omicron-will-infect-just-about-everybody.

[32] *Id*.

[33] Paul Sandle, *Omicron case at much lower risk of hospital admission, UK says*, Reuters (Dec. 23, 2021), available at https://reut.rs/3HzOogh (last visited Jan. 4, 2021); Carl Zimmer and Azeen Ghorayshi, *Studies Suggest Why Omicron is Less Severe: It Spares the Lungs,* Yahoo News! (Dec. 31, 2021), https://perma.cc/5KYT-UJSF; Carl Zimmer, *California hospitals find that Omicron causes fewer hospitalizations and short stays*, NY Times, Jan. 11, 2022, available at https://perma.cc/ZBV3-XALK.

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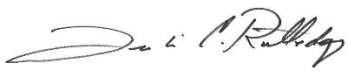

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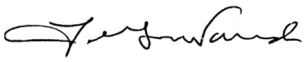

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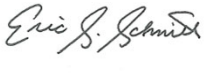

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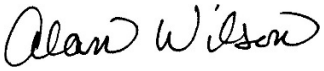

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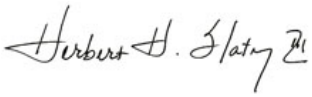

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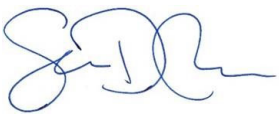

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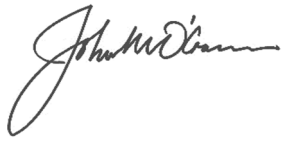

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