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December 9, 2021

SUBMITTED VIA REGULATIONS.GOV

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

RE: RIN 1218-AD42: COVID-19 Vaccination and Testing; Emergency Temporary Standard

Dear Secretary Walsh:

We write to express our opposition to the U.S. Department of Labor (Department) Occupational Safety and Health Administration (OSHA) November 5, 2021, emergency temporary standard (ETS) on workplace COVID-19 vaccination and testing.¹ Republican Members of the Committee on Education and Labor, which has jurisdiction over the *Occupational Safety and Health Act of 1970* (OSH Act), previously requested the Department immediately suspend work on the administration's inappropriate, unprecedented, and unlawful ETS.² We are very disappointed that the Department dismissed these concerns and moved forward with issuing the ETS. In response, Committee Republicans, led by Subcommittee on Workforce Protections Ranking Member Fred Keller (R-PA), introduced a *Congressional Review Act* resolution of disapproval to nullify the ETS on November 17, 2021.³

In our view, the ETS grossly exceeds OSHA's statutory authority, weaponizes the federal bureaucracy at the expense of job creators and their workers, and worsens the nation's ongoing supply chain crisis and workforce shortages. For these reasons, and as explained more fully in

¹ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

² Letter from Rep. Virginia Foxx, Ranking Member, Comm. on Educ. & Lab. et al., to Martin J. Walsh, Sec'y of Lab. (Sept. 29, 2021), https://republicans-edlabor.house.gov/uploadedfiles/osha_ets_letter_-_final.pdf.

³ H.J. Res. 65, 117th Cong. (2021).

this letter, we urge the Department to immediately withdraw this deeply flawed ETS and to suspend any plans to enact the requirements of the ETS in a permanent final regulation.

OSHA Exceeds its Statutory Authority with this Unlawful ETS

In promulgating the vaccination-and-testing ETS, OSHA grossly exceeds the authority delegated to it by Congress under the OSH Act. By ordering OSHA to enact a federal vaccine-and-testing mandate, the Biden administration is bypassing congressional intent to impose a public health edict under the guise of workplace safety. For this and other reasons, and due to questions regarding the rule's constitutionality, the U.S. Court of Appeals for the Fifth Circuit has stayed the rule, ordering that OSHA take no steps to implement or enforce the ETS until further court order.⁴

Section 6(c) of the OSH Act authorizes OSHA to issue an ETS without following the regular *Administrative Procedure Act* rulemaking process if the Secretary of Labor determines that two legal requirements are met: (1) workers are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or from new hazards; and (2) an ETS is necessary to protect workers from that danger.⁵ Significantly, until the Biden administration took office, OSHA had issued only nine ETSs in the agency's history—and none since 1983. OSHA has used this authority only sparingly because nearly all ETSs that have been challenged have either been stayed or invalidated by federal courts.⁶

On October 26, 2021, the Subcommittee on Workforce Protections and Subcommittee on Civil Rights and Human Services held a joint subcommittee hearing to examine OSHA's authority to promulgate a vaccination-and-testing ETS. Republican Members warned the administration that such a mandate would likely be found unlawful under the OSH Act.⁷ In testimony before the joint subcommittee, Scott Hecker, senior counsel at Seyfarth Shaw LLP, explained that "Congress set a high legal bar for ETS implementation because ETSs were meant to be used rarely and only under certain dire circumstances."⁸ He continued as follows:

In passing the OSH Act, Congress found "that personal injuries and illnesses **arising out of work situations** impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." ... Further, Congress directed OSHA "to assure so far as possible every working man and woman in the Nation safe and healthful **working conditions**." ... If OSHA expands its jurisdiction to

⁴ BST Holdings, L.L.C. v. OSHA, No. 21-60845 (5th Cir. Nov. 12, 2021) (order reaffirming stay).

⁵ 29 U.S.C. § 655.

⁶ CONG. RESEARCH SERV., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19, Table A-1 (Nov. 17, 2021), <https://crsreports.congress.gov/product/pdf/R/R46288>.

⁷ *Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations: Hearing Before the Subcomm. on Workforce Protections & Subcomm. on Civ. Rights & Human Serv. of the H. Comm. on Educ. & Lab.*, 117th Cong. (2021) (statement of Rep. Fred Keller, Ranking Member, Subcomm. on Workforce Protections).

⁸ *Id.* (statement of A. Scott Hecker, Senior Counsel, Seyfarth Shaw LLP).

cover hazards not intrinsic to the workplace, then any public health hazard could qualify as a grave danger subject to an ETS.

The Fifth Circuit agreed with this argument, noting that in passing the OSH Act, Congress did not intend “to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways.”⁹

Prior to the issuance of the ETS mandate, which was demanded by President Biden and dictated from the White House podium without the proper and necessary input of agency experts, we expressed concerns directly to the Department that the administration was shamefully abusing its authority. We cited a Twitter communication from President Biden’s chief of staff Ron Klain, which stated, “OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.”¹⁰ We considered this message to be a tacit admission that, rather than seeking congressional authorization for a federal vaccine mandate, the administration is attempting to circumvent the law by stretching its limited authority under the OSH Act to implement this sweeping and broad public health mandate. The Fifth Circuit endorsed this view in its stay order, noting the rule’s “pretextual basis,” which it describes as one of the “hallmarks of unlawful agency actions.”¹¹

Further, we are deeply troubled that, despite the strong rebuke from a federal court, senior Biden administration officials continue to ignore the law by informing businesses that they should be complying with its illegal vaccine mandate.¹² The administration’s actions are inappropriate, authoritarian, and ignore the Constitution’s separation of powers. In enacting the vaccination-and-testing ETS mandate, OSHA has blatantly disregarded congressional intent and has grossly overstepped its authority.

The ETS Will Exacerbate Workforce Shortages and the Supply Chain Crisis

President Biden’s private-sector federal vaccine mandate will worsen the ongoing supply chain crisis and acute workforce shortage. The United States is currently dealing with massive supply chain issues, in part due to a major labor shortage. Many workers have already quit their jobs because of other recent government vaccine mandates,¹³ which have created chaos at airports, weakened police forces, and put our health care system in jeopardy. These problems will only be exacerbated if the OSHA ETS goes into effect.

⁹ BST Holdings L.L.C. v. OSHA, No. 21-60845, at 6 (order reaffirming stay).

¹⁰ Letter from Rep. Virginia Foxx et al., *supra* note 2.

¹¹ BST Holdings L.L.C. v. OSHA, No. 21-60845, at 12 (order reaffirming stay).

¹² Morgan Chalfant, *White House tells businesses to move forward with vaccine mandate*, THE HILL, Nov. 18, 2021, <https://thehill.com/homenews/administration/582232-white-house-tells-businesses-to-move-forward-with-vaccine-mandate>.

¹³ See Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021) (ensuring adequate COVID safety protocols for federal contractors); Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021) (requiring coronavirus disease 2019 vaccination for federal employees); Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021) (interim final rule with comment period).

The Society for Human Resource Management (SHRM) recently conducted a survey of HR professionals that found 89 percent of respondents believe some of their employees will quit their jobs due to the new requirements. Further, nearly 60 percent of workers who are not fully vaccinated said they do not intend to get vaccinated even after the mandate goes into effect.¹⁴

While the full impact of the ETS has yet to be felt, other federal vaccine mandates have had negative effects on the United States supply chain and workforce shortages. For instance, President Biden's vaccine mandate for federal contractors has wreaked havoc on the aerospace, distribution, defense, and trucking sectors, which has in turn led many companies to reconsider their contracts with the federal government.¹⁵ Additionally, despite the ongoing crisis at the U.S.-Mexico border, more than 4,000 Border Patrol agents and employees who remain unvaccinated—roughly 20 percent of its workforce—may face termination if their exemption requests are denied due to President Biden's federal employee vaccine mandate.¹⁶

Numerous business groups have also been sounding the alarm. On November 9, 2021, national trade associations, including the National Retail Federation (NRF), the American Trucking Associations, the National Federation of Independent Business, and the National Association of Wholesaler-Distributors, filed a legal challenge to the ETS, in which they explain the devastating impact of the OSHA ETS:

Sectors from transportation and logistics, to convenience, to retail food suppliers have made it clear that OSHA's vaccine and testing mandates will make it even harder to retain and hire needed employees. The consensus across these sectors is that OSHA's action will exacerbate their labor and supply chain issues. All this is happening at the worst possible time of the year.... The American economy cannot afford to have fewer employees willing to work because of sweeping federal vaccine, testing, and monitoring mandates imposed overnight on over 84 million workers.¹⁷

Job creators are facing an anemic economic recovery and are struggling to find workers. It is unconscionable for the Biden administration to impose such a harmful national mandate. Instead of empowering American workers and job creators, the Biden administration has forced Main Street's workers to make "a choice between their job(s) and their jab(s)."¹⁸ Our country cannot afford to lose more workers, and the OSHA ETS will only compound the supply chain crisis and worker shortage facing our nation.

¹⁴ Press Release, SHRM Surveys Reveal Employers' Anxiety Over Vaccine Mandate (Oct. 18, 2021), <https://www.shrm.org/about-shrm/press-room/press-releases/pages/shrm-surveys-reveal-employers%E2%80%99-anxiety-over-vaccine-mandate.aspx>.

¹⁵ Hailey Fuchs & Natasha Korecki, *Companies mull ending government contracts over vaccine mandate*, POLITICO, Oct. 31, 2021, <https://www.politico.com/news/2021/10/31/government-contracts-vaccine-mandate-517857>.

¹⁶ Nick Mirotti, *Border Patrol vaccination rates increase, but 20 percent of agency's workforce has not gotten shots*, WASH. POST, Nov. 13, 2021, https://www.washingtonpost.com/national/border-patrol-vaccination-rates-increase-but-20-percent-of-agencys-workforce-has-not-gotten-shots/2021/11/13/6e57c0ca-43f5-11ec-8534-ec852a55e0e6_story.html.

¹⁷ *Tex. Trucking Ass'n v. OSHA*, No. 21-60845, at 18-19 (5th Cir. filed Nov. 9, 2021) (mot. for stay).

¹⁸ *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, at 19 (order reaffirming stay).

The ETS is Bad for Workers, Bad for Businesses, and Bad for the Economy

In issuing this national ETS mandate, the Biden administration is weaponizing the federal bureaucracy to turn employers into the vaccination-and-testing police on behalf of the federal government. Doing so creates substantial uncertainty, costs, and liabilities for employers and threatens the liberties and livelihoods of their employees. At a time when 6.9 million Americans are out of work, the last thing Main Street needs is another unfunded mandate dictated from Washington.

More than 21 months into the pandemic, businesses have adopted effective COVID-19 protocols to fit the needs of their workforce and have made substantial investments to keep their employees safe. Despite this, the Biden administration is saddling employers with crushing cost and compliance burdens through the ETS.¹⁹ These costs will be particularly felt by smaller businesses, who do not have the same robust human resources and legal departments to navigate the plethora of new requirements. In adding this vaccination-and-testing mandate on top of the efforts and investments businesses have already made to respond to the pandemic, the ETS threatens to put our nation's job creators, still reeling from lockdowns and the reeling Biden economy, out of business.

As NRF and other national business associations explain in their legal challenge to the rule, "American businesses ... will face immediate irreparable harm—including enormous unrecoverable compliance costs, lost profits, lost sales to competitors who have fewer than 100 employees and therefore not subject to the action, lost goodwill, and unemployment." Regarding the substantial cost burdens, they continue:

The compliance costs alone will be staggering. Businesses must begin preparing to implement OSHA's directive immediately. This includes figuring out how to practically monitor employee vaccine-and-testing status, implementing systems to ensure this monitoring occurs, creating the requisite database to retain employee data for OSHA inspection, and devising policies for employee noncompliance.²⁰

Additionally, harsh fines for violating President Biden's mandate could run some already struggling companies out of business. The administration claims that this complex, convoluted ETS will impose punitive fines of up to \$14,000 per violation for noncompliance,²¹ but these fines could increase to as high as \$700,000 per violation if Democrats' so-called *Build Back Better Act* becomes law.²² These outrageous fines, inflated by a whopping 512 percent from current inflation-adjusted levels, coupled with onerous and confusing recordkeeping

¹⁹ DAN BOSCH & DAN GOLDBECK, THE COSTS OF THE BIDEN ADMINISTRATION'S COVID-19 MANDATE RULES, AM. ACTION FORUM (Nov. 4, 2021), <https://www.americanactionforum.org/insight/the-costs-of-the-biden-administrations-covid-19-mandate-rules/>.

²⁰ Tex. Trucking Ass'n v. OSHA, No. 21-60845, at 3-4 (mot. for stay).

²¹ See Ben Penn & Bruce Rolfsen, *Biden's Employer Shot Mandate Tasks OSHA with New Rulemaking*, BLOOMBERG GOV'T, Sept. 9, 2021, <https://www.bgov.com/core/news/#!/articles/QZ6YHNT1UM63>.

²² H.R. 5376, 117th Cong. § 21004(a) (2021).

requirements, will endanger small businesses and embolden government inspectors to harass job creators, who will be hesitant or unable to afford to contest these huge citations.

Further, the ETS mandate is incredibly divisive and threatens to disrupt workplaces around the country. The ETS inappropriately singles out unvaccinated employees by reinstating controversial mask mandates and, in an unprecedented move, allows employers to shift the cost of COVID-19 testing to these employees. The vaccine and testing requirements in the ETS are overly burdensome, and it appears their intent is to punish and ostracize those who remain unvaccinated rather than to fulfill their purported intent of ensuring workplace safety. This sentiment was shared by 82 percent of businesses participating in SHRM's survey, who believe the OSHA mandate will make maintaining the morale and engagement of their workforce more difficult.²³ Weaponizing the regulatory process to force employers to be the vaccine-and-testing police on behalf of the federal government will do irreparable damage to the nation's workers, employers, and the economy.

Establishing a Permanent Vaccination-and-Testing Standard

To keep workers and job creators under the thumb of the federal government forever, OSHA is considering prolonging its emergency authority indefinitely by turning the ETS into a permanent and even more intrusive standard. In its Federal Register notice, the agency states that it is accepting comments on whether to make the ETS permanent and even more onerous, such as by expanding the rule to cover small businesses with fewer than 100 employees; requiring masks for fully vaccinated individuals; adopting a strict vaccination requirement without a testing option; and requiring businesses to adopt additional protocols such as social distancing, barriers, ventilation, and sanitation requirements.²⁴

It is unfathomable that OSHA is considering ways to make the ETS even more burdensome to employers and their workers. Further, this scheme comes almost two years into the ongoing public health emergency despite OSHA determining a mere six months ago that such measures were unnecessary outside the health care industry.²⁵ Adding additional rigid, one-size-fits-all requirements permanently would threaten the future of business owners who have already taken extraordinary efforts to mitigate the spread of the virus in the workplace. We fiercely oppose OSHA's efforts to expand its regulatory overreach and restrict the ability of all businesses, especially small businesses, to adopt protocols for an endemic disease that are effective, and which best fit the needs of their workers.

Conclusion

In promulgating this unprecedented and illegal vaccination-and-testing ETS, the Biden administration is attempting to enact a sweeping public health mandate utilizing workplace safety law. As such, OSHA has massively exceeded its limited authority delegated to it by Congress under the OSH Act. Moreover, the real-world impacts of the ETS will be devastating,

²³ Press Release, SHRM Surveys Reveal Employers' Anxiety Over Vaccine Mandate (Oct. 18, 2021).

²⁴ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,403-61,404.

²⁵ See Occupational Exposure to COVID-19; Emergency Temporary Standard, 86 Fed. Reg. 32,376 (June 21, 2021).

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threatening job creators and workers with their livelihoods while exacerbating the ongoing workforce shortage and further damaging the nation's supply chain. The ETS is illegal, harmful for workers, damaging for businesses, and bad for the economy. We therefore urge the Department to withdraw the deeply flawed and unlawful ETS immediately and to stop any and all work on a permanent final rule.

Thank you for your consideration of these comments.

Respectfully submitted,



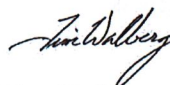
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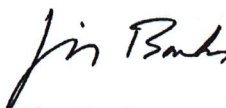
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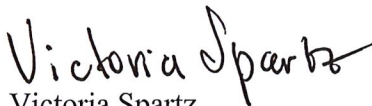
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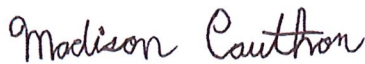
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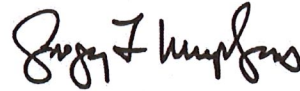
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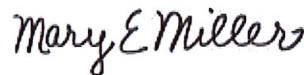
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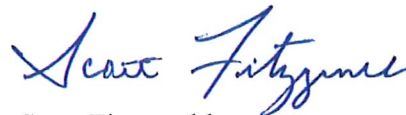
Burgess Owens
Member of Congress



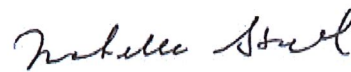
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