January 19, 2022

Douglas L. Parker
Assistant Secretary of Labor for
Occupational Safety and Health
Occupational Safety & Health Administration
200 Constitution Ave. NW
Washington, DC 20210

Via Electronic Submission: www.regulations.gov

RE: Comments on behalf of America First Legal Foundation to the Occupational Safety & Health Administration, Interim Final Rule, "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61,402 (Nov. 5, 2021) (Docket No. OSHA–2021–0007)

Dear Mr. Parker:

America First Legal Foundation (AFL) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

We submit these comments regarding OSHA's Emergency Temporary Standard (ETS), *COVID-19 Vaccination and Testing*, 86 Fed. Reg. 61,402 (Nov. 5, 2021). Comments were originally due by December 6, 2021, but OSHA extended the comment period until January 19, 2022. *See* 86 Fed. Reg. 68,560. These comments are therefore timely.

For the reasons set forth below, OSHA should not adopt this ETS as a final rule.

Background

This ETS—one of only ten ever issued by OSHA—requires all employers with 100 or more employees to "develop, implement, and enforce a mandatory COVID-19 vaccination policy." 86 Fed. Reg. at 61,402. Employers may adopt an alternative policy of "regular COVID-19 testing and wear[ing] a face covering at work in lieu of vaccination." *Id.* Testing must be conducted at least weekly at the employee's own expense. *See id.* at 61,530. But that alternative is discouraged. "OSHA strongly

prefers that employers implement written mandatory vaccination policies." *Id.* at 61,529.

Certain exceptions apply. Employees who work from home, report to a worksite where no one else is present, or who work "exclusively outdoors" are not covered by the ETS. *Id.* at 61,419. Otherwise, every employer in every industry in every corner of the country with 100 or more employees must comply.

Sanctions for noncompliance are heavy. Employees who refuse to fall in line with a vaccination policy must be "removed from the workplace." *Id.* at 61,532. Employers who violate OSHA's standard face potentially ruinous fines: up to $13,653 for a single standard violation and up to $136,532 if the violation is willful. 29 C.F.R. § 1903.15(d).

OSHA claims authority for this sweeping control of American businesses from section 6(c)(1) of the OSH Act. It authorizes OSHA to issue an ETS without notice and comment when employees face "grave danger' from "exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and an "emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1).

Numerous states, businesses, and nonprofit associations challenged the ETS in federal circuits around the country, as provided by statute. *See id.* at § 655(f). Judicial review has not gone well for OSHA. The Fifth Circuit promptly entered a stay. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021). It concluded that the vaccinate-or-test mandate "likely exceeded OSHA's statutory authority, raised separation-of-powers concerns in the absence of clear delegation from Congress, and was not properly tailored to the risks facing different types of workers and workplaces." *NFIB v. OSHA*, 595 U.S. __, __ S. Ct. __, 2022 WL 120952, at *2 (Jan. 13, 2022) (per curiam). Following a random assignment, the various challenges were consolidated in the Sixth Circuit. There, the challengers requested initial hearing en banc that the court of appeals denied by an evenly divided 8-8 vote. *In re MCP No. 165*, 20 F.4th 264 (6th Cir. 2021). A three-judge panel, assigned to hear the case on the merits, then dissolved the Fifth Circuit's stay, ruling that "OSHA's mandate was likely consistent with the agency's statutory and constitutional authority." *NFIB*, 2022 WL 1209512, at *2. Several affected parties then applied with the U.S. Supreme Court for a stay of the ETS. In a highly unusual move indicative of the Court's view of OSHA's likelihood of success on such a sweeping measure, the Court granted expedited oral argument to hear from NFIB and a coalition of states, led by Ohio. *Id.* at *3.

Less than a week ago, the Supreme Court—by a vote of 6-3—granted a stay. *Id.* at *5. The ETS cannot be enforced until the Sixth Circuit renders a final judgment on its validity and the Supreme Court either denies a petition for certiorari by NFIB and the state coalition or grants a petition and renders a final judgment itself. *See id.*

Much of the opinion explains why NFIB and the state coalition were "likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate." *Id.* at *3, *8 n.*. Those reasons also elucidate why OSHA should withdraw the proposed Interim Final Rule since the Court's analysis of why OSHA lacked authority to issue the ETS applies to the proposed Rule as well.

First, the Court relied on a rule often referred to as the major questions doctrine: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* (citing *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U.S. ——, ——, 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted)). Both the rule and the citation are significant. Requiring Congress to speak with unusual clarity when an executive agency asserts authority over significant matters, involves an aspect of the nondelegation doctrine, which preserves the separation of powers by ensuring that "any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *Id.* at *7 (Gorsuch, J., concurring). And the reference to *Alabama Association of Realtors* reminds the attentive reader that the major questions doctrine also figured prominently in the Court's recent decision voiding the nationwide eviction moratorium imposed by the Centers for Disease Control. Because OSHA's ETS affects millions of American workers, the vaccinate-or-test mandate "qualifies" as an exercise of federal agency authority subject to the major questions doctrine. *Id.* at *5-6 ("This is no 'everyday exercise of federal power.' It is instead a significant encroachment into the lives—and health—of a vast number of employees.") (citation omitted).

Second, the decisive issue is "whether the [OSH] Act plainly authorizes the Secretary's mandate." *Id.* at *3. It does not. OSHA's authority to set *workplace* standards does not encompass "public health more generally, which falls outside of OSHA's sphere of expertise." *Id.* at *6. After all, the OSHA Act "repeatedly makes clear that OSHA is charged with regulating 'occupational' hazards and safety and health of 'employees,'" *id.* (quoting 28 U.S.C. §§ 652(8), 654(a)(2), 655(b)–(c))—not with commandeering the workplace as a "work-around" to increase the number of Americans who are vaccinated against a widespread disease. *Id.* at *6 (Gorsuch, J., concurring) (quoting *BST Holdings*, 17 F. 4th at 612). Just because employees suffer from COVID-19 and may spread it in the workplace, does not make the virus "an *occupational* hazard." *Id.* at *6 (per curiam) The risk of contracting the virus "is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases." *Id.* at *6–7.

Third, it follows that parties challenging the ETS will likely succeed in demonstrating that it is invalid. Restoring OSHA's authority to its lawful bounds could hardly be more important. "Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those risks while on the clock—would

significantly expand OSHA's regulatory authority without clear congressional authorization." *Id.* at *7. As the Court rightly discerned, "imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not 'part of what the agency was built for.'" *Id.* at *4 (quoting *id.* at *11 (Breyer, J., dissenting)).

The Supreme Court's verdict—even considering the procedurally narrow phase of the case before it—was historic. Like the eviction moratorium struck down last year, OSHA's emergency mandate exceeds the authority clearly traceable to a democratically accountable act by Congress. It would be better for OSHA to abandon its vaccination mandate voluntarily rather than being forced to that result, as CDC was.

Other reasons to withdraw the vaccinate-or-test ETS and the proposed Interim Final Rule have been ably identified by lower courts. It does not satisfy the statutory criteria for an emergency temporary standard. *See, e.g.*, *BST Holdings*, 17 F.4th at 613, 615–16; *In re MCP No. 165*, 20 F.4th at __ (Sutton, C.J., dissenting). It flouts the separation of powers. *See BST Holdings*, 17 F.4th at 617. And it travels far beyond the Constitution's limits on federal authority to regulate interstate commerce. *See id.*

Suppose that OSHA were not persuaded by the Supreme Court's analysis or by lower-court skepticism. Even then, persisting with the current course is not an efficient use of administrative resources. OSHA faces genuine difficulties before the Sixth Circuit, where half the judges have expressed substantive criticisms of the ETS and its legality before the Supreme Court weighed in. Assuming that the Sixth Circuit endorses OSHA's handiwork—and that's doubtful after the Supreme Court's recent opinion—the same justices who granted a stay will be unlikely to change their minds if the ETS returns for consideration on the merits. The major questions doctrine will be no less salient, and there are additional defects that the Court could find convincing. Hence, OSHA faces the unpalatable prospect of spending scarce resources defending a standard that the Supreme Court has already declared unlikely to survive judicial scrutiny.

Finally, the swiftly evolving nature of COVID-19 is undercutting the factual basis for a vaccination mandate. The government's leading authority on the virus, Dr. Fauci, has admitted that COVID-19 "will probably infect most Americans eventually," regardless of vaccination status. Andrew Jeong, Ellen Francis, Brittany Shammas, and Reis Thebault, *Virus may infect most, Fauci says, but risk of severe illness 'very, very low' for vaccinated*, Wash. Post Jan. 12, 2022. What's more, the overwhelming number of Americans suffering from the disease today have the Omicron variant, and research from Denmark and Canada suggests that Omicron infects the vaccinated at *higher* rates than the unvaccinated. *See* Luc Montagnier and Jed Rubenfeld, *Omicron Makes Biden's Vaccine Mandates Obsolete*, Wall Street Journal, Jan. 9, 2022. That paradoxical result of vaccination is not especially worrisome, however, since "the overwhelming majority of symptomatic U.S. Omicron cases have been mild." *Id.* As a

Nobel Prize-winning virologist and Yale Law School professor argue, "It would be irrational, legally indefensible and contrary to the public interest for government to mandate vaccines absent any evidence that the vaccines are effective in stopping the spread of the pathogen they target." *Id.* In fact, a recent study from Israel found that even a booster shot and a fourth shot—which are not mandated by OSHA—were not very effective against Omicron,[1] which variant made up 95% of U.S. cases two weeks ago (and is surely more now).[2] Yet the irrational exertion of federal power is exactly what OSHA's ETS and Interim Final Rule will achieve against a virus that spreads and infects regardless of a person's vaccination status.

Conclusion

This is a critical inflection point in the agency's history. OSHA can proceed with its plans to drastically expand federal power and face certain defeat in court, or it can abandon its efforts and return its focus to the core functions actually authorized by Congress. America First Legal will be watching—as will the broader coalition that has brought the ETS to a standstill—and we will not cease in our efforts to stop your lawless expansion of federal power. For the reasons above, we strongly oppose adopting this interim final rule and OSHA should withdraw it.[3]

[1] TOI Staff, *Israeli Trail, World's First, Finds 4th Dose 'Not Good Enough' Against Omicron*, The Times of Israel (Jan. 17, 2022), https://www.timesofisrael.com/israeli-trial-worlds-first-finds-4th-dose-not-good-enough-against-omicron/.

[2] Alexander Tin, *Omicron Now 95% of New COVID-19 Infections U.S., CDC Estimates*, CBS News (Jan. 4, 2022), https://www.cbsnews.com/news/covid-omicron-variant-95-percent-cases/.

[3] All that we have written should explain why America First Legal opposes any effort by OSHA "to address smaller employers in the future." 86 Fed. Reg. at 61,403. Not only is such an effort beyond OSHA's lawful authority, forcing small businesses to comply with the ETS would be potentially ruinous—especially for the restaurants, inns, and shops already devastated by the pandemic and the widespread labor shortages that have followed.