

Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249,  
21A250, 21A251, 21A252, 21A258, 21A259, 21A260 and 21A267

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**In the Supreme Court of the United States**

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,  
ASSOCIATED BUILDERS AND CONTRACTORS  
OF ALABAMA, INC., INDEPENDENT ELECTRICAL  
CONTRACTORS, INC., and  
INDEPENDENT ELECTRICAL CONTRACTORS – FWCC, INC.

*Applicants,*

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR,

*Respondents.*

**REPLY BRIEF OF ABC AND IEC  
FOR IMMEDIATE STAY OF AGENCY ACTION  
PENDING DISPOSITION OF PETITION FOR REVIEW**

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
ARGUMENT AND AUTHORITY .....	1
A. The OSH Act Vests OSHA Only with Limited Authority that Does Not Include the Power to Require Mandatory Immunizations or Weekly Medical Tests.....	2
1. Any Authority to Prescribe Vaccines or Medical Tests Belongs to HHS, Not DOL. ....	2
2. OSHA’s Brief Ignores the Documented Unavailability of A Sufficient Supply of Tests to Meet the Needs of Millions of Unvaccinated Workers, Resulting in Imposition of an Unauthorized Vaccination Mandate.....	5
B. The Bloodborne Pathogens (BBP) Standard Is Materially Different..	6
C. OSHA Fails to Provide a Reasonable Explanation for Its Radical Departure from the June 21, 2021, ETS.....	7
D. The ETS is not Narrowly Tailored to Achieve Statutory Goals. ....	10
E. The Government Misrepresents the History of Recent Legislation..	12
F. Contrary to OSHA’s Brief, the Construction Industry and Many Others Will be Irreparably Harmed if the ETS Goes Into Effect, While The Government Will Suffer No Irreparable Harm if Implementation is Stayed. ....	13
G. OSHA Has Failed to Justify Federal Imposition of Vaccine Mandates, Which Have Always Been a State Health Concern.....	15
H. The Government Ignored ABC’s Contention That the ETS is Null and Void Because the Person Who Issued It Lacked Authority to Do So.....	16
CONCLUSION.....	17

## TABLE OF AUTHORITIES

<b>Federal Cases</b>	<b>Page(s)</b>
<i>Ala. Ass’n of Realtors v. Dep’t of Health &amp; Human Servs.</i> , 141 S. Ct. 2485 (2021) .....	3, 4, 16
<i>Am. Dental Ass’n v. Sec’y of Labor</i> , 984 F.2d 823 (7th Cir. 1993) .....	7, 11
<i>BST Holdings, LLC v. Occupation Safety and Health Admin.</i> , 17 F.4th 604, 618, 2021 U.S. App. LEXIS 33698 at 5 (5th Cir. 2021) .....	10, 13, 16
<i>Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.</i> , 140 S. Ct. 1891 (2020) .....	5
<i>Encino Motorcars, L.L.C. v. Navarro</i> , 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016) .....	8
<i>Fla. Peach Growers Ass’n v. U.S. Dep’t of Lab.</i> , 489 F.2d 120 (5 <sup>th</sup> Cir. 1974) .....	10
<i>Gustafson v. Alloyd Co.</i> , 513 U.S. 561, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995) .....	5
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905) .....	15
<i>Klaassen v. Trustees of Indiana Univ.</i> , 7 F.4th 592 (7th Cir. 2021) .....	17
<i>SW Gen. Inc. v. NLRB</i> , 796 F.3d 67 (D.C. Cir. 2015) .....	17
<i>Util. Air Regul. Grp. v. EPA</i> , 573 U.S. 302, 134 S. Ct. 2427 (2014) .....	4
<b>Federal Statutes</b>	
5 U.S.C. § 3348 .....	16
29 U.S.C. § 655 .....	6
29 U.S.C. § 669 .....	2, 3, 4, 5
<b>Other</b>	
29 C.F.R. § 1910.1030, (g)(2)(vii)(I) .....	6
29 C.F.R. § 1910.502 .....	7, 9

29 C.F.R. § 1926 .....	12
86 Fed. Reg. 32,376 (June 21, 2021) .....	12-13
86 Fed. Reg. 61,402 (Nov. 5, 2021) .....	12, 16, 17
U.S. Const., Amend. X .....	15

## **ARGUMENT AND AUTHORITY**

The Government ignores or mischaracterizes the limitations on its power to require employers to compel their employees to be vaccinated or in the alternative, repeatedly tested as a condition of working in the construction industry (or any other industry). The government falsely claims that the OSH act provides it with the power to require immunization when in fact the Act provides only limited authority for the Department of Health and Human Services (HHS) to require immunizations and grants no such authority to OSHA. The government's attempt to show a reasoned explanation for its change in position from encouraging vaccinations and testing in the June 21 Healthcare ETS, to mandating vaccinations or weekly testing in the November 5 ETS - fails completely. OSHA's explanation of how it "tailored" the ETS shows instead that no meaningful tailoring occurred, particularly with regard to the construction industry.

Finally, OSHA's brief ignores the public record contradicting many of the basic premises on which the ETS is based: these include the documented failure of vaccines to prevent the spread of the Omicron variant (which OSHA knew nothing about and therefore failed to address when it drafted the ETS); and OSHA's claims of test kit availability which have been proven false, leading to massive testing shortages even before the ETS requirements have taken effect. These and other facts, nowhere addressed in OSHA's brief, render the ETS infeasible, and demonstrate the need for the stay of OSHA's unauthorized, incredibly burdensome, and unworkable ETS.

A. **The OSH Act Vests OSHA Only with Limited Authority that Does Not Include the Power to Require Mandatory Immunizations or Weekly Medical Tests.**

The Sixth Circuit and OSHA erroneously concluded that, because 29 U.S.C. § 669(a)(5) referenced “immunization,” the Act somehow gives OSHA authority to require vaccinations. That is not correct. OSHA’s brief fails to identify where such authority exists in the Act and mischaracterizes 29 U.S.C. § 669’s plain language, which vests that authority elsewhere in explicit terms. Nowhere in the text of the statute, or anywhere else in the OSH Act, is there any authority for what OSHA purports to do in the November 5, 2021, ETS.

1. **Any Authority to Prescribe Vaccines or Medical Tests Belongs to HHS, Not DOL.**

Taking a sentence out of context, OSHA asserts that “the OSH Act specifically contemplates that “immunization” may be “authorize[d] or require[d]” under the provisions of the OSH Act, in particular “where such is necessary for the protection of the health or safety of others.” 29 U.S.C. § 669(a)(5).” (OSHA brief at 5-6.) But the statutory section both cited and quoted in ABC’s opening brief authorizes only the Secretary of Health and Human Services – *not* the Secretary of Labor – to impose such requirements. The statute reads in pertinent part as follows:

The *Secretary of Health, Education, and Welfare*,<sup>1</sup> . . . may prescribe regulations requiring employers to measure, record, and make reports on the exposure of employees to substances or physical agents which the *Secretary of Health, Education, and Welfare* reasonably believes may endanger the health or safety of employees. The *Secretary of Health, Education, and Welfare* also is authorized to establish

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<sup>1</sup> The Department of Health, Education, and Welfare was created on April 11, 1953. It was renamed the Department of Health and Human Services in 1979, when the education function was spun off into a separate Department.

such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses. Nothing in this or any provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. . . . Upon the request of any employer who is required to measure and record exposure of employees to substances or physical agents as provided under this subsection, the **Secretary of Health, Education, and Welfare** shall furnish full financial or other assistance to such employer for the purpose of defraying any additional expense incurred by him in carrying out the measuring and recording as provided in this subsection.

*Id.* (edited; emphasis added). OSHA ignores this plain language and the settled principles of statutory construction to claim any grant of authority to this agency to require immunizations. This section was designed to cover special research, experiments and demonstrations relating to occupational safety and health and did not confer broad authority on the Secretary of Labor. *See Id.* § 669(a)(4).

ABC does not disagree that Congress has directed OSHA to exercise its authority to require employers to take steps to protect workers from workplace hazards, including exposure to COVID-19. (OSHA Brief at 6.) OSHA exercised that power when it issued the ETS for healthcare workers in June 2021 and did not require mandatory vaccination or weekly testing. But OSHA's power simply does not extend to compelling employers to require their employees to be immunized or tested weekly at considerable expense.

As OSHA's brief acknowledges, "considerations of economic and political significance are relevant only if the text [is] ambiguous." (OSHA brief at 59, quoting *Ala. Ass'n of Realtors*, 141 S. Ct. 2489, 2489 (2021) (internal quotation marks omitted). And, just as this Court found in that case, "We expect Congress to speak

clearly when authorizing an agency to exercise powers of “vast ‘economic and political significance.’” *Ala. Id.* (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324, 134 S. Ct. 2427 (2014)) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S. Ct. 1291 (2000)). But OSHA turns the statute on its head in claiming there is insufficient ambiguity in the text to justify applying the holding of *Alabama Ass’n of Realtors*. At best the statute is ambiguous; but if anything the plain language of the Act withholds any authority from OSHA to impose a mandatory vaccinate/testing regime on millions of employers and their employees.

As this Court found in *Ala. Ass’n of Realtors*:

It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. . . . It is up to Congress, not the CDC, to decide whether the public interest merits further action here.

*Ala. Ass’n of Realtors*, 141 S. Ct. 2490, 2490 (2021) (citation omitted).

Thus, contrary to OSHA’s brief, 29 U.S.C. § 669(a)(5), is not a grant of authority to OSHA, but rather allows the Secretary of Health and Human Services to make reports as to the exposure to substances and physical agents and set up medical examinations and tests to determine the incidence of occupational illnesses and the susceptibility of employees to such illness (“measuring and recording”). Even under that limited authority, HHS must pay the employer for any additional expenses incurred. Neither the Sixth Circuit nor OSHA has cited cite any other provision of the OSH Act that grants authority to **require** vaccinations or any other medical examination or treatment.

OSHA certainly cannot use this very limited authority in 29 U.S.C. § 669(a)(5) as the basis for the broad authority to mandate vaccinations, or weekly testing at either the employees' or employers' expense. As the Supreme Court held in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1925 (2020). "Because we must interpret the statutes "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), these grants of authority must be read alongside the express limits contained within the statute."

**2. OSHA's Brief Ignores the Documented Unavailability of A Sufficient Supply of Tests to Meet the Needs of Millions of Unvaccinated Workers, Resulting in Imposition of an Unauthorized Vaccination Mandate.**

OSHA's brief repeatedly claims the ETS does not create a true vaccination mandate, because unvaccinated employees are given the choice to submit to weekly tests at their own expense. (OSHA Br. at 33,34). In making this claim, OSHA ignores the government's failure to make sufficient tests available to the millions of workers who will need to use them once the ETS goes fully into effect. The testing shortage is already well documented throughout the country, and has been acknowledged by the Administration.<sup>2</sup> Significantly, the shortages are occurring now when OSHA's testing mandate is not yet in effect. The shortage belies OSHA's claims that sufficient testing would be available by December 2021, when the ETS was originally scheduled to go

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<sup>2</sup> *Inside Biden's failure to avert a testing shortfall* - The Washington Post; *Where are all the rapid COVID tests? Biden to address shortage in Tuesday speech* - ABC News (go.com)

into effect. The situation is not improved even now. As a result, unvaccinated employees will have no choice but to get vaccinated or else lose their jobs if the stay of the ETS is not reinstated, because the current weekly testing requirement for millions of employees has been shown to be infeasible. The testing requirements will also be extremely burdensome on employers and employees, regardless of who is required to bear the costs under the ETS.<sup>3</sup>

**B. The Bloodborne Pathogens (BBP) Standard Is Materially Different.**

OSHA's brief purports to justify the ETS by relying on the bloodborne pathogen (BBP) legislation. This claim is misguided because the BBP law did not authorize OSHA to mandate vaccinations but only to make them "available" at the employees' option, and to provide information to employees about the vaccines. Even so, the BBP legislation only adopted OSHA's proposed bloodborne pathogen standard as final in the event that OSHA did not act by a date certain. Pub. L. No. 102-170, Tit. I, § 100(b), 105 Stat. 1107, 1113-1114 (1991). The BBP law certainly did not require weekly testing or removal of employees from employment should they decline the vaccine. The Final Rule as adopted by OSHA did not change these requirements. *See*, 29 C.F.R. § 1910.1030(f)(1), (g)(2)(vii)(I). Neither the Sixth Circuit nor OSHA can cite any legislation that authorizes OSHA to mandate, as opposed to make available,

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<sup>3</sup> The ETS purports to impose the cost of testing on the employees, seemingly at odds with the Act. 29 U.S.C. § 655(b)(7). But in reality, employers in many states and perhaps under the federal Fair Labor Standards Act, may be obligated to pay for the time employees spend in being tested.

vaccinations or weekly testing at the employees' expense, or the employee's termination from employment if they decline.

The BBP measures also are confined to workplace hazards: nothing in the BBP standard applies to potential exposure occurring elsewhere, whereas the vaccine mandate is not so limited. The Court recognized these limits in, *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 824 (7th Cir. 1993), in which it vacated the BBP rule to the extent that, as written, the rule did not provide petitioner home health services with a defense as its employees worked in patient's homes, maintenance of which was outside of petitioner's control.

**C. OSHA Fails to Provide a Reasonable Explanation for Its Radical Departure from the June 21, 2021, ETS.**

OSHA's brief labors mightily to produce a rational explanation for the dramatic policy changes OSHA made between the issuance of the June 21 Healthcare ETS, and the November 5 nationwide 100+ employer ETS. OSHA fails to provide a rational explanation, however, and the inconsistencies cast serious doubt on the agency's reasoning. For example, OSHA asserts that by June 2021 "vaccines were not yet available." (OSHA Br, at 29.) This is demonstrably false. A simple review of widely available CDC data shows that by June 21, 2021, 331,681,980 vaccine doses had been administered. (See CDC COVID Data Tracker; last visited January 1, 2022.) Also, the healthcare ETS addressed differences between vaccinated and unvaccinated employees, 29 C.F.R. § 1910.502(l)(1)(ii) (medical removal not required for employee fully vaccinated; § 1910.502(l)(6) (requirement to pay for employees to get vaccinated).

The Government further asserts that by November 5, 2021, when the ETS was issued, 725,000 people had died from COVID-19. (Gov’t brief at 24.) But by the time the Healthcare EST was published on June 21, 2021, 601,459 people had died.<sup>4</sup> Neither the Government in its brief nor OSHA in the November 5 ETS preamble can explain why a continuation of COVID-19 cases justified a profound shift from a policy of making vaccines available to one making either vaccines or weekly testing at employees’ expense mandatory. As this Court observed in, *Encino Motorcars, L.L.C.*, 136 S. Ct. 2125, 2125, 195 L. Ed. 2d 382 (?YEAR?), “Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” No such explanation has been offered here.

Elsewhere, OSHA’s brief asserts that the Delta variant became dominant after June 21, causing a surge in hospitalizations and fatalities that only increased vaccination could stop. (OSHA Br. at 29). But since the issuance of the ETS, the Delta variant has largely been superseded by the Omicron variant, with a much reduced efficacy of vaccines.<sup>5</sup> “CDC expects that anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don’t have symptoms.”<sup>6</sup> Whatever Delta-related justification existed for the ETS when it was first issued, that justification is no longer relevant because so much of the science has changed in the

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<sup>4</sup> CDC COVID Data Tracker (last visited January 1, 2022).

<sup>5</sup> As of the week ending 12/25/2021 the Omicron variant accounts for 58.6% of cases and expected to increase. CDC COVID Data Tracker

<sup>6</sup> Omicron Variant: What You Need to Know | CDC

last two months.<sup>7</sup> At a minimum, OSHA should be ordered to reconsider its previous justification for the ETS and to analyze fully the impact of the now-dominant Omicron variant. Meanwhile, the stay of the now-obsolete ETS should be reimposed.

OSHA's brief further asserts as a justification for its unprecedented vaccine mandate that the agency had "nothing left at [its] disposal to curb" the COVID danger. (OSHA Br. at 44.) But when this statement was written, OSHA had not tried imposing any of the safety requirements on industries other than healthcare. OSHA had "everything" at its disposal for all the other industries, including construction. An examination of the safety provisions in the Healthcare ETS demonstrates the fallacy of OSHA's statement: OSHA could have required other industries to adopt written COVID 19 plans; following the CDC's guidelines for Isolation Precautions; the use of personal protective equipment; aerosol-generating procedures; physical distancing; cleaning and disinfection; ventilation; screening of employees; medical removal procedures; supporting employees voluntarily obtaining vaccines; training and reporting. (29 C.F.R. § 1910.502.) OSHA has given no explanation why it could not have tried these effective measures in industries outside healthcare for a six-month period, while limiting the additional immunization requirements to the highest risk industry, i.e., healthcare, where the other measures had already been

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<sup>7</sup> OSHA's requirement for vaccination, or weekly testing of unvaccinated employees has not considered breakthrough infections and deaths. For example, in Georgia, more than 11% of the total COVID-19 cases during 2021 were breakthrough cases, meaning the individuals were fully vaccinated, and at least 1,271 fully vaccinated people died from COVID-19 during 2021. The distinction between vaccinated and unvaccinated employees has lost much of its meaning.

tried. As recently as December 27, 2021, OSHA urged healthcare employers to continue to abide by the provisions in the Healthcare ETS.<sup>8</sup> And, as of December 24, 2021, OSHA had issued hundreds of citations for COVID-19-related violations under the General Duty clause and various other standards, to the tune of \$4,034,288 in initial total penalties.<sup>9</sup> OSHA's argument that it had no alternative to the draconian measures in the November 5 ETS is, quite simply, unbelievable.

**D. The ETS is not Narrowly Tailored to Achieve Statutory Goals.**

For similar reasons, OSHA fails in its argument that the ETS is narrowly tailored to protect unvaccinated employees and those who work outside. As the Fifth Circuit noted;

Six [ETS] were challenged in court; only one survived. The reason for the rarity of this form of emergency action is simple: courts and the Agency have agreed for generations that “[e]xtraordinary power is delivered to [OSHA] under the emergency provisions of the Occupational Safety and Health Act,” so “[t]hat power should be delicately exercised, and only in those emergency situations which require it.” *Fla. Peach Growers Ass’n v. U.S. Dep’t of Lab.*, 489 F.2d 120, 129-30 (5<sup>th</sup> Cir. 1974).

*BST Holdings, LLC v. Occupation Safety and Health Admin.*, 17 F.4th 604, 618, 2021 U.S. App. LEXIS 33698 at 5 (5<sup>th</sup> Cir. 2021).

The ETS covers every industry in the United States without making any distinction between vaccinated and unvaccinated among different industries confronting different levels of risk in the workplace. As Judge Posner put it:

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<sup>8</sup> <https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html>

<sup>9</sup> <https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations>.

OSHA cannot impose onerous requirements on an industry that does not pose substantial hazards to the safety or health of its workers merely because the industry is a part of some larger sector or grouping and the agency has decided to regulate at wholesale. That would be an irrational way to proceed.

*Am. Dental Ass’n*, 984 F.2d at 827. Here all industries and the entire community are at risk for infection. The fans at the NCAA semi-final football games on December 31, 2021, are just an example of possible community transmission. This wholesale application to all industries is neither narrowly tailored nor a rational way to proceed. *Ibid.*

As to the construction industry, OSHA’s ETS does not deny that the agency identified construction as a relatively low risk industry throughout the pandemic, until suddenly changing course and declaring that construction employers should be burdened with the same vaccine/testing mandates as every other employer, except where an employer can show proof that its employees work “exclusively outside.”<sup>10</sup> As a justification for imposing blanket mandates without regard to industry differences, OSHA references a single study based on a model, in Austin, Texas from March 13, 2020 to August 2020, for its conclusion that the construction industry should be included and that safety measures would mitigate the risk. Since there were no vaccines available at that time, the safety measures did not include vaccinations.<sup>11</sup> Other studies referenced in the ETS either failed to mention

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<sup>10</sup> Therefore, these studies provide some evidence for the low likelihood of outdoor transmission in other workplace activities greatly impacted by the pandemic, such as in construction. 86 FR 61402, 61420.

<sup>11</sup> 86 FR 61402, 61414-61415 (“The authors concluded that stringent workplace safety measures could significantly mitigate risks related to COVID-19 in the industry.”)

construction at all or indicated that the percentage of workers affected were less than 5 percent of the number of outbreaks of all other industries. 86 Fed. Reg. 61412-13.<sup>12</sup>

As noted in ABC's opening brief, and not denied by OSHA, the construction industry has long been recognized as having unique safety requirements and workplace needs, as recognized by OSHA itself by the creation of a separate regulation to deal with construction safety issues. 29 C.F.R. § 1926. OSHA has offered no justification for ignoring in the ETS the agency's own regulatory standards treating construction differently from other industries.

**E. The Government Misrepresents the History of Recent Legislation.**

The Government claims that the American Rescue Plan Act of 2021 ("Rescue Plan") directed OSHA to use its existing regulatory authorities "to carry out COVID-19 related worker protection activities." The Rescue Plan, which authorized additional funding, became law on March 11, 2021, at a time when there was no talk of mandating vaccinations, or testing and mask wearing, for unvaccinated employees. On June 21, 2021, OSHA adopted the Healthcare Emergency Temporary Standard ("Healthcare ETS") for the purpose of protecting workers from COVID-19 in settings where they provide healthcare or healthcare support services. 86 Fed. Reg. 32,376

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<sup>12</sup> The government's argument that the ETS does not apply to employees who work exclusively outside (the actual regulatory language) provides little support to the argument that the ETS is narrowly tailored. Employees at construction sites regularly gather for safety training required by OSHA. OSHA found that transmission outdoors is considerably lower but failed to apply that finding to the construction industry, the vast majority of whose employees work outdoors most of the time. Further, the government's distinction as to *de minimus* exposure to indoors environments is not reflected in the regulatory language.

(June 21, 2021). The Healthcare ETS encouraged, but did not require, vaccination. In September 2021, President Biden “lost patience” and directed OSHA to require that employers with 100 or more employees impose vaccinations on their employees. Two months later OSHA issued the ETS for employers with 100 or more employees. The Healthcare ETS expired on December 21, 2021, without adoption of a final rule. Accordingly, because OSHA found no authority in the Rescue Plan to mandate vaccinations for healthcare workers, the Rescue Plan provides no such authority with respect to the ETS.

**F. Contrary to OSHA’s Brief, the Construction Industry and Many Others Will be Irreparably Harmed if the ETS Goes Into Effect, While The Government Will Suffer No Irreparable Harm if Implementation is Stayed.**

The Fifth Circuit found that individuals, states, and employers would be “substantially burdened” by the OSHA ETS due to the compliance costs, loss of constitutional freedom, and intrusion into States’ “constitutionally reserved police power.” *BST Holdings, LLC v. Occupational Safety and Health Admin.*, 17 F.4th 604, 618, 2021 U.S. App. LEXIS 33698 (5th Cir. 2021). In contrast, the Fifth Circuit summarily concluded that “a stay will do *OSHA* no harm whatsoever” and “a stay is firmly in the public interest.” *Id.* at 618–19 (emphasis in original).

The threatened injury to employers in the construction industry is by no means “speculative,” contrary to OSHA’s brief. (OSHA Br. at 14.) A significant percentage of construction workers have resisted vaccination efforts and have resigned their employment when confronted with “voluntary” mandates or have threatened to resign in no uncertain terms. Construction is an essential industry that is already

confronting a labor shortage of more than 400,000 workers. The disruptions caused by allowing the ETS to go into effect will be devastating on the supply chain, and the unavailability of sufficient vaccinated workers will have a devastating impact on the construction economy.

Even in connection with other industries, OSHA's claims of insignificant impact of vaccine mandates have been belied by the published facts. Thus, vaccine mandates applied strictly to health care workers have resulted in significant numbers of employees quitting (or being fired) rather than submitting.<sup>13</sup> Healthcare staff shortages are widely reported and on December 27, 2021, the CDC cut its recommended quarantine period in half, at least in part to hasten the return of workers to staff-starved healthcare providers.<sup>14</sup> If the vaccine mandate has this degree of impact on healthcare providers, whose employees necessarily are more attuned to public health considerations and exposed to the risk of contracting COVID-19 in the workplace, it is not "mere speculation" to anticipate a comparable, if not greater, impact on other employers. Further, the only reason that the record does not reflect this information is that OSHA, for the second time in 2021, did not submit the temporary standard to notice and comment.

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<sup>13</sup> See, e.g., <https://www.fiercehealthcare.com/hospitals/how-many-employees-have-hospitals-lost-to-vaccine-mandates-numbers-so-far>  
<https://www.beckershospitalreview.com/workforce/vaccination-requirements-spur-employee-terminations-resignations-numbers-from-6-health-systems.html>.

<sup>14</sup> <https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html>.

**G. OSHA Has Failed to Justify Federal Imposition of Vaccine Mandates, Which Have Always Been a State Health Concern.**

OSHA's Brief maintains that OSHA has the power to protect workers in the workplace from outbreaks of broadly community-wide diseases such as smallpox and rubella. (OSHA Br., at 45.) Yet OSHA fails to acknowledge that the agency has never before presumed to require employers to compel employees to be inoculated against either malady even though such vaccines are readily available. The government's protestations to the contrary notwithstanding, the ETS, by its terms, *is* a vaccine mandate: it commands covered employers either to require all employees to be vaccinated, or else test weekly at the employees' expense at a time when insufficient tests are available for the millions of unvaccinated employees. As explained above, the BBP standard authorizes employers to make vaccines available *at the employees' option*: that's worlds apart from what the ETS purports to do. (See Gov't brief at 51.)

*Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021), is inapposite because that involved a State actor, not a federal agency like OSHA, that imposed a vaccination requirement on a public university. Such a decision is within the police powers of a State but beyond the reach of the Federal government. (Gov't brief at 53: see. U.S. CONST., Amend. X; accord *Jacobson v. Massachusetts*, 197 U.S. 11, 25-35 (1905).) And private employers like United Airlines are free to require their employees to be vaccinated, much as they can impose uniforms and standards of personal grooming. But OSHA, a Federal agency, is not clothed with that power, even in an emergency.

*Regarding Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct.

2485 (2021), the Fifth Circuit said it best:

[H]ealth agencies do not make housing policy, and occupational safety administrations do not make health policy. *Cf. Ala. Ass’n of Realtors*, 141 S. Ct. at 2488-90. In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.

*BST Holdings*, 17 F.4th 608, 2021 U.S. App. LEXIS 33698, at \*26. Congress enacted the OSH Act under the Commerce Clause because it found that “*illnesses arising out of work situations* impose a substantial burden upon . . . interstate commerce.” 29 U.S.C § 651(a) (emphasis added). OSHA was charged with ensuring worker safety and health “by developing innovative methods, techniques, and approaches for dealing with *occupational* safety and health problems.” *Id.* § 651(b)(5).” (Dkt. 386-2 at 5 (emphasis added).)

**H. The Government Ignored ABC’s Contention That the ETS is Null and Void Because the Person Who Issued It Lacked Authority to Do So.**

The Government fails to address ABC’s contention that the ETS is without force or effect because the person who issued it lacked the statutory authority to do so. *See* 5 U.S.C. § 3348(d). The ETS was issued on November 5, 2021, by James Frederick, who purported to be the “Acting Assistant Secretary of Labor.” 86 Fed. Reg. at 61551. But there was no “Acting Assistant Secretary of Labor” on November 5, 2021, because on November 3, 2021, Douglas L. Parker, was sworn in as the Assistant Secretary of Labor.<sup>15</sup> Accordingly, Frederick had no authority to issue the

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<sup>15</sup> OSHA, *Special Edition Meet OSHA’s New Leader* (Nov. 3, 2021) <https://www.osha.gov/quicktakes/11032021>.

ETS. *See SW Gen. Inc. v. NLRB*, 796 F.3d 67, 81–83 (D.C. Cir. 2015). For this reason alone, the stay of enforcement of the ETS should be granted.

### **CONCLUSION**

OSHA has never before (1) issued a vaccine mandate, even in the alternative. (2) imposed as the sole alternative to vaccination a testing regimen that is demonstrably infeasible due the lack of sufficient tests and the crushing burden of paying for them; or (3) imposed a blanket ETS without regard to the differences among various industries and certainly without considering the unique aspects of the construction industry. For the foregoing reasons, ABC and IEC respectfully request an immediate stay of the effective date of OSHA’s “COVID-19 Vaccination and Testing; Emergency Temporary Standard,” 86 Fed. Reg. 61,402 (Nov. 5, 2021).

Respectfully Submitted this 3<sup>rd</sup> day of January 2022.

/s/ J. Larry Stine

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