


Appendix 6

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 15. Occupational Safety and Health (Refs & Annos)

29 U.S.C.A. § 655

§ 655. Standards

Currentness

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under [section 656](#) of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to [section 553 of Title 5](#), make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (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.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b), and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

CREDIT(S)

(Pub.L. 91-596, § 6, Dec. 29, 1970, 84 Stat. 1593; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

Notes of Decisions (295)

29 U.S.C.A. § 655, 29 USCA § 655

Current through PL 117-55.

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Appendix 7.A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Lyle Beckwith

I, Lyle Beckwith, declare as follows under penalty of perjury:

1. I am the Senior Vice President, Government Relations of the National Association of Convenience Stores ("NACS").
2. NACS is a non-profit trade association and is the preeminent representative of the interests of convenience store operators across the nation.
3. NACS has 1,500 retail and 1,600 supplier company members nationwide.
4. In 2020, the fuel wholesaling and convenience industry that NACS represents employed approximately 2.5 million workers and generated \$548.2 billion in total sales.
5. In all, the industry sells approximately 80 percent of the motor fuels purchased in the United States each year.

6. NACS has multiple members in every state in the nation including Louisiana, Mississippi, and Texas.

7. My responsibilities at NACS include communicating with, and advocating on behalf of, NACS members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

8. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to NACS members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

9. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many NACS' members.

10. The ETS will likely require NACS' members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees.

11. Some NACS members have indicated that they will not be able to procure testing kits or services sufficient to cover their workforce on a weekly basis.

12. Some members expect that they will have many employees quit their jobs rather than receiving vaccinations against their will.

13. Given the resistance of many employees to vaccination and the inability to secure tests, some members doubt they will be able to comply

with the ETS regardless of the cost and will, instead, be forced to pay substantial fines.

14. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

15. NACS members already report severe difficulty hiring an adequate number of employees to keep their stores open. Some have already reduced hours or closed locations due to this shortage of labor.

16. NACS members also are facing supply chain problems that they have not faced at any time in recent memory.

17. These supply chain issues are caused by a number of factors but the principal ones are the shortage of truck drivers to move products across the nation and the shortage of workers to perform other key tasks including manufacturing and distributing products.

18. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the extant issues including labor shortages, supply chain challenges, and rising prices.

19. NACS' members generally support their employees becoming vaccinated. Many of them have offered a variety of monetary and other incentives including paid time off for employees to get vaccinated. Vaccination protects employee health, and thus the workforce on which employers

depend. In other words, NACS' members have a strong incentive to encourage a vaccinated workforce and they do so.

20. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status).

21. There are also a significant number of employees who either refuse to submit to weekly testing or maintain that they cannot find testing resources on a weekly basis.

22. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

23. NACS' communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

24. NACS' members report not only that many of their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to quit or be fired if keeping their job required them to get vaccinated or submit to weekly testing.

25. NACS members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to close some locations, reduce hours, and take similar measures. These reductions have caused lost profits, lost sales, and reputational harm.

26. If the ETS takes effect, NACS members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees or face crippling fines.

27. By requiring NACS members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that NACS members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies hire additional employees—will make hiring even more difficult.

28. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

29. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of NACS' members because without an adequate number of employees, businesses cannot function. Members are already facing an historic inability to fill vacancies.

30. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales if they cannot meet customer demands.

31. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause NACS' members to lose control of their own reputations and ultimately to suffer reputational harm.

32. Many NACS members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. The ETS therefore places NACS members at a competitive hiring disadvantage in a constrained labor market.

33. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the convenience industry. They include store clerks, truck drivers who deliver motor fuels and other products, and many others. These jobs are critical to the American economy.

34. Many of the employees who hold these jobs are the same employees who stayed at their posts as "essential workers" from the first days of the pandemic. Significantly, many of these employees are at the lower end

of the pay scale and can least afford to find themselves unemployed. In other words, the ETS will require NACS member companies to lay off many of their most vulnerable workers.

35. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining member's profits.

36. Labor and materials shortages have already caused members to delay expansions and product roll outs, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

37. Complying with the ETS will force NACS' members to pay for testing (if they can find enough of it), implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

38. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health

information). In some instances, this will require programming and deploying new software solutions. OSHA's estimated costs for these measures are simply not realistic.

39. To meet the ETS's deadlines, NACS' members must begin preparing immediately to design and implement, among other things, record-keeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

40. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a "vaccinate-or-be-terminated" compliance approach.

41. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

42. NACS members will also suffer reputational harm and lose customers due to the reduced staffing, shortages of products, and reduced customer service that will result from the ETS. Those customers and members' goodwill and reputations cannot be repaired or compensated.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 9th day of November, 2021, at Alexandria, Virginia.


Lyle Beckwith, SVP Government Relations

Appendix 7.B

**DECLARATION OF MICHAEL GANNON, COO, CRST EXPEDITED, INC. d/b/a CRST
THE TRANSPORTATION SOLUTION, INC.**

I, Michael Gannon, hereby declare as follows:

1. I am the Chief Operating Officer (COO) for CRST Expedited, Inc. d/b/a CRST The Transportation Solution, Inc. (CRST).

2. I started my career with CRST in 1983 and have held various operations and leadership roles on my way to becoming COO, a position I have held for three years.

3. Based upon my decades of experience in the transportation industry and with CRST, I have personal knowledge of the facts set forth herein.

4. Founded in 1955, CRST is an Iowa-based, transportation and logistics company which services various niches and markets within the transportation industry. These markets include team driving, where two drivers share a truck to be able to deliver long-haul freight on an expedited basis. Team driving is also oftentimes required to deliver high-value, safety-sensitive freight such as pharmaceuticals and life-saving vaccines.

5. In a team-driving environment, the drivers generally are dispatched to deliver multiple loads, on irregular routes, staying out on the road for several weeks at a time. The drivers take turns driving so that more ground can be covered while remaining compliant with the U.S. Department of Transportation Hours of Service regulations.

6. CRST is among the largest, if not the largest, team carrier in the nation and it also provides training opportunities to introduce new drivers to the profession – in an industry that has been experiencing a driver shortage for years now and which has reached chronic and critical status.

7. CRST (and other large carriers) pair newly minted CDL holders with an experienced driver

in a mentor/mentee capacity so that new drivers can learn the profession and become a skilled and safe driver. This is critical to CRST and the transportation industry in general in terms of building and holding capacity (fleet size) and maintaining safety for the drivers and the motoring public.

8. In a team driving environment, the drivers still have de minimis contact with third parties and only have ongoing contact with one other person, i.e., their co-driver.

9. When the Biden Administration's large employer vaccine mandate was first announced, CRST surveyed its drivers to ascertain current vaccination levels and to get a sense of whether those drivers who had not been vaccinated would be willing to do so if required by law and/or in order to keep their jobs with CRST.

10. Five hundred and twenty (520) drivers in CRST's Expedited/Team division responded to the survey. Of those responding, 330 were not vaccinated (63.46%) and of those that were not vaccinated, two hundred and seventy-one (271) said they would *not* get vaccinated if required as part of a federal government requirement. Only ninety-five (95) drivers said they would get vaccinated. Sixty-nine (69) drivers reported that they would leave the trucking industry altogether to avoid the vaccine mandate and two hundred and fifty-three (253) drivers said they would move to a smaller carrier to avoid the mandate.

11. If team drivers (2-person) are not exempted from OSHA's ETS, it will result in multiple, irreparable harms to the transportation industry, our nation's supply chain, and the overarching economy. As set forth above, it will result in introducing fewer drivers into an industry that is starved for drivers. It will make it exceedingly difficult, if not impossible, to train new drivers to make them as skilled and safe as possible. Finally, it will legitimately risk stretching an already distressed supply chain to its breaking point, which will have a disastrous impact on our economy

including, but not limited to, reducing the ability transport and deliver Covid-19 vaccines, which require team drivers.

12. The alternative option, testing and masking, will cause enormous expense. *See Bloomberg Law, Covid-19 Testing Doesn't Come Cheap for Companies Embracing It*, https://www.bloomberglaw.com/bloomberglawnews/pharma-and-life-sciences/X9ODARNG000000?bna_news_filter=pharma-and-life-sciences#jcite. Those costs cannot be recouped, ever. And given already tight margins, inflation, and the tight labor market, these costs will inflict irreparable harm on CRST, including lost profits, lost routes, and losing out on employees who go elsewhere for higher wages.

13. Given the lack of testing capacity CRST must start planning *now*—and implementing *now*—a compliance strategy.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 9th day of November 2021 in Cedar Rapids, Iowa.



Michael Gannon

Appendix 7.C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of William R. Sullivan, Jr.

I, William R. Sullivan, Jr., declare as follows under penalty of perjury:

1. I am the Executive Vice President for Advocacy of the American Trucking Associations, Inc. (“ATA”).

2. ATA is the national association of the trucking industry, comprising motor carriers, suppliers of equipment and services, affiliated state trucking associations, and national trucking conferences. ATA was created to promote and protect the interests of the trucking industry.

3. ATA’s direct membership includes approximately 1,800 trucking companies and suppliers. In conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation, including truckload and less-than-truckload carriers; for-hire and private fleets; fuel haulers; household goods movers; agriculture

and livestock transporters; auto carriers; and carriers who service the nation's container ports. These motor carriers range in size everywhere from tens of thousands of trucks to single digits.

4. My responsibilities at ATA include communicating with ATA's members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to ATA members with at least 100 employees and who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

6. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many ATA's members.

7. The ETS will likely require ATA's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

8. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American

economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

9. ATA's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, ATA's members have a strong incentive to encourage a vaccinated workforce.

10. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status) and who will likely refuse to submit to weekly testing.

11. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

12. ATA's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination, and likely a substantial number who will not submit to weekly testing and masking.

13. ATA's members report not only that their workers have in some instances refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated. ATA's members also report that testing and employer verification is not a logistically viable option for drivers who are subject to the requirements and often spend long periods on the road.

14. ATA's members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already reduced members' freight-hauling capacity, and these reductions have caused lost business opportunities and reputational harm.

15. If the ETS takes effect, ATA's members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees, or these employees will voluntarily move to a smaller employer not subject to the requirements.

16. By requiring ATA's members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that ATA's members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies both hire additional employees and earn a

significant portion of their annual revenue—will make hiring even more difficult.

17. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of ATA's members because without an adequate number of employees, businesses cannot function. Members are already facing historic inability to fill vacancies.

19. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause ATA's members to lose control of their own reputations and ultimately to suffer reputational harm.

21. Many ATA members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the

ETS. The ETS therefore places many ATA members at a competitive hiring disadvantage in a constrained labor market.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the trucking industry. They include team drivers and other drivers whose duties require them to come into regular contact with customers or other employees; mechanics and technicians; loaders, unloaders, and other logistics personnel; and safety managers, dispatchers and other back-office staff. These jobs are critical to the supply chain and the American economy.

23. Many of the employees who hold these jobs are the same employees who stayed at their posts as “essential workers” from the first days of the pandemic, in order to keep the nation’s supply chain moving. These workers indispensably and safely kept the country running during the height of the pandemic—delivering essentials from food, medicines, protective equipment, and the vaccines themselves—and should not face the potential loss of their jobs now.

24. Members’ suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on moving freight, and these increases are undermining member’s profits.

25. Labor and equipment shortages have already caused members to delay capacity expansions, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

26. Complying with the ETS will require ATA's members to pay for testing in cases involving medical or religious accommodations, and as a practical matter will force them to do the same in order to retain other covered drivers. Compliance will also require employers to implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, investments in safety technology and training).

27. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions, as well as significant investments in human resources policy development and training. OSHA's estimated costs for these measures—as well as for the paid time off required for vaccination and recovery from side effects—are simply not realistic.

28. To meet the ETS's deadlines, ATA's members must begin preparing immediately to design and implement, among other things, record-keeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

29. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a "vaccinate-or-be-terminated" compliance approach. This concern is particularly acute with respect to team drivers and other drivers whose duties require them to come into regular contact with customers or other employees—such drivers are often on the road for long periods of time, making it all the more difficult for them to reliably obtain weekly testing.

30. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 9th day of November, 2021, at Dewees Island, South Carolina.


William R. Sullivan, Jr.

Appendix 7.D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Karen R. Harned

I, Karen R. Harned, declare as follows under penalty of perjury:

1. I am the Executive Director of the National Federation of Independent Business Small Business Legal Center (“NFIB Legal Center”).

2. The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate and grow their businesses.

3. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

4. NFIB's members include all manner and type of business from manufacturers, warehouses, foundries, retailers, restaurants, farmers, franchisees of all types, construction firms, landscapers, etc.

5. My responsibilities at NFIB include communicating with NFIB's members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

6. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to NFIB members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

7. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many NFIB members.

8. The ETS will likely require thousands of NFIB's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

9. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the ongoing problems with the supply chain, the labor shortage, and rising prices.

10. NFIB has members across the country who have committed significant resources, including education and incentives, in an effort to ensure their employees are vaccinated.

11. Despite members' efforts to ensure that their workforce is vaccinated, there are still a significant number of employees across the country who remain unvaccinated and/or do not want to disclose their vaccination status.

12. I am aware of members who are concerned about a significant number of workers that wish to remain unvaccinated and will likely refuse weekly testing and masking.

13. Some NFIB members report not only that their workers have declined incentives offered to encourage them to get vaccinated, but those workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated.

14. I am also aware of NFIB members who themselves wish to remain unvaccinated, and object to requiring their employees be vaccinated or subject to testing.

15. NFIB members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to

reduce hours and adjust business operations. These reductions have caused lost profits, lost sales, and reputational harm.

16. If the ETS takes effect, NFIB members suggest that a significant number of employees, for a variety of reasons, will remain unvaccinated, and that member-employers will have no choice but to terminate these employees or incur significant costs associated with weekly testing. Some NFIB members also fear that many employees will refuse to submit to weekly testing, requiring termination of the employees.

17. By requiring NFIB members to terminate employees during a labor shortage, the ETS will exacerbate the severe labor difficulties that NFIB members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The holiday season—during which many companies both hire additional employees and earn a significant portion of their annual revenue—will make hiring even more difficult.

18. The ETS will also make it more difficult for members to hire new workers for current vacancies and for vacancies that the ETS will create.

19. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of NFIB's members because without an adequate number of employees, businesses cannot function. Members are already facing an historic inability to fill vacancies.

20. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining

employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

21. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause many of NFIB's members to lose control of their own reputations and ultimately to suffer reputational harm.

22. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining members' bottom-line.

23. Complying with the ETS will force many of NFIB's members to pay for testing, implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

24. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to

perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions. OSHA's estimated costs for these measures are simply not realistic. NFIB research consistently shows that federal paperwork is a significant problem confronting small business owners. (Holly Wade, NFIB Research Center "Small Business Problems & Priorities" 10th edition, <https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf>)

25. To meet the ETS's deadlines, NFIB's members must begin preparing immediately to design and implement, among other things, record-keeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

26. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to terminate employees or put untested employees on leave.

27. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of November, 2021, at Arlington VA.

A handwritten signature in black ink that reads "Karen Harned". The signature is written in a cursive style with a horizontal line underneath the name.

Karen Harned

Appendix 7.E

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Stephanie A. Martz

1. I am the Chief Administrative Officer and General Counsel of the National Retail Federation (“NRF”).

2. NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. NRF members account for 52 million employees through the U.S.

3. The purpose of NRF is to advocate for the economic and policy interests of retailers. NRF regularly convenes hundreds of retail brands to discuss issues as varied as supply chain management, data privacy, and tax and trade issues. NRF supports its members as they navigate new logistical and legal challenges, such as the global pandemic of COVID-19.

4. In my capacity as the Chief Administrative Officer and General Counsel, I am deeply familiar with challenges that retailers throughout the country have faced throughout the COVID-19 pandemic. I am familiar with these challenges because I work closely and directly with retailers

throughout the country, and coordinate with retailers to understand and address these challenges.

5. Since March of 2020, NRF has provided dozens of webinars and over 150 conference calls for our members to discuss their approaches to curbing the COVID-19 pandemic within retail. NRF has also provided numerous online tools, including an interactive map that shows laws, regulations, and orders that apply to retailers, as well as screening questionnaires and legal trackers. NRF has also developed and provided to its members training modules on COVID-19 safety and hygiene, as well as conflict mediation for employees who have to administer safe shopping policies.

6. NRF members have been critical components in distributing vaccines and vaccine information to our employees and customers. Many of our members administer vaccines, and others have created incentives, awarded time off, and set up on-site clinics to ensure that their employees have every opportunity to get vaccinated.

7. In addition, according to published reports, NRF members have likely spent upwards of \$8 billion on equipment and training to ensure safe store operations during COVID-19. As also detailed in the complaint, those measures include (but are not limited to) the following:

- Requiring masks and social distancing for employees and customers;
- Metering customers at entrances;
- Providing innovative purchasing solutions, such as curbside pick-up;
- Screening for employees for symptoms and exposure risk before shifts;
- Training for employees on COVID-19 safety and hygiene;

- Providing set-aside shopping hours for higher risk customers; and
- Installing contactless payment systems and Plexiglas at check-out stands.

8. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to NRF members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

9. I have personal knowledge of the ETS's requirements and of the severe effect it will have on NRF's members during the busiest and most profitable time of the year for the retail industry.

10. The ETS will require NRF's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination, and may also results in attrition, as employees – especially those concentrated in parts of the country with low vaccination rates – decide to quit their jobs rather than get vaccinated. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm, all during the already challenging 2021 holiday season.

11. NRF's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. Vaccinations have enabled stores to re-open, students to return to school, and therefore, employees to come back to work to continue to earn money to support their families and communities. In other words, NRF's members have a strong incentive to encourage a vaccinated workforce.

12. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated, do not wish to disclose their vaccination status, and/or who refuse to submit to weekly testing.

13. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

14. NRF's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

- a. In the last week, NRF has hosted 2 emergency calls for members to discuss the ETS. More than 300 people have joined the calls from retailers across the country.
- b. Retailers have reported grave concerns with gathering vaccination status information and storing it in a way that complies with myriad state and federal laws, developing policies for either a “hard mandate” or “soft mandate,” developing systems for adjudicating hundreds or even thousands of requests for exemptions based on religious belief or disability—within 30 days, during Black Friday, and in the face of already serious staffing challenges.
- c. In addition, although the test-or-vaccinate mandate begins in January, retailers must begin *now* to procure tests or assess the availability of tests in each market where a retailer has a store.

15. NRF members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to close storefronts, reduce hours, and take similar measures. These reductions have already caused lost profits, lost sales, and reputational harm. If the ETS takes effect during the holiday season, NRF members anticipate that they will face millions in lost sales stemming from absent workers due to paid leave requirements and vaccine refusal.

16. By effectively requiring NRF members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that

NRF members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies both hire additional employees and earn a significant portion of their annual revenue—will make hiring even more difficult.

17. The ETS, because it encompasses both seasonal workers as well as permanent workers, will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. Retail job openings were already at 1.3 million in August, and retailers expect to hire 700,000 workers this holidays season.

19. On top of these needs, each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause NRF's members to lose control of their own reputations and ultimately to suffer reputational harm.

21. Many NRF members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. Moreover, many other NRF members are neither large, national stores nor "unrelated" employers with fewer than 100 employees. Rather, they have between 101 and 500 employees, and do not have the systems or resources in place to comply with the ETS in such a short period of time, and during the holidays season, despite their strong desire to have a vaccinated workforce.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of retail, and critical to the American economy.

23. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining member's profits.

24. Labor and materials shortages have already caused members to delay expansions and product roll outs, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

25. The hard and direct costs of implementing the ETS – aside from the opportunity costs that come with the time spent by employees and managers to comply with the – are substantial. In addition to the massive investment that retailers have already made in health and safety, detailed in paragraph 7, the ETS will force NRF’s members to pay for testing (depending on state law and various exemption-based obligations), implement expensive and time-consuming tracking software, assess wage-and-hour implications of vaccinations and testing, implement new protocols for exemption requests (given the dramatic increase in numbers of these requests that retailers are expecting), respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

26. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense – both to perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions. OSHA’s estimated costs for these measures are simply not realistic.

27. To meet the ETS’s deadlines, NRF’s members must begin preparing immediately to design and implement, among other things,

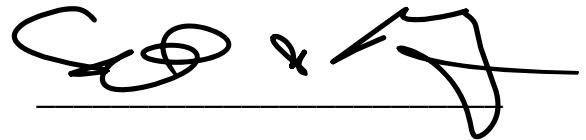
recordkeeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

28. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

29. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 9th day of November, 2021, at Washington, D.C.

A handwritten signature in black ink, appearing to read 'Stephanie A. Martz', written over a horizontal line.

Stephanie A. Martz

Appendix 7.F

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Leslie Sarasin

I, Leslie Sarasin, declare as follows under penalty of perjury:

1. I am the President and Chief Executive Officer of FMI – the Food Industry Association (“FMI”).

2. FMI is a trade association that works with and on behalf of the entire food industry to advance a safer, healthier and more efficient consumer food supply. FMI brings together a wide range of members across the value chain — from retailers who sell to consumers, to producers who supply the food, as well as the wide variety of companies providing critical services — to amplify the collective work of the industry.

3. FMI’s members include nearly 1,000 supermarket member companies that collectively operate almost 33,000 food retail outlets and employ approximately 6 million workers.

4. FMI's responsibilities include communicating with members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. FMI is familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is our understanding that the ETS applies to FMI members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

6. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many FMI members.

7. The ETS will likely require FMI members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

8. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

9. FMI's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the

maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, FMI's members have a strong incentive to encourage a vaccinated workforce. In fact, supermarket pharmacies have administered a significant percentage of COVID-19 vaccines.

10. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status) and who refuse to submit to weekly testing.

11. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find alternative employment (with businesses who employ fewer than 100 employees).

12. FMI's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

13. FMI's members report not only that their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated or submit to weekly testing.

14. FMI members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to close storefronts, reduce hours, and take similar measures. They are also having difficulty maintaining the stocking requirements of items offered under the federal WIC program for children under 6 years old. These reductions and shortages have caused lost profits, lost sales, fines and reputational harm.

15. If the ETS takes effect, FMI members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees.

16. By requiring FMI members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that FMI members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies both hire additional employees and earn a significant portion of their annual revenue—will make hiring even more difficult.

17. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. Terminations and unfilled vacancies on this scale will diminish the ability of FMI's members to meet the food needs of their communities

because without an adequate number of employees, businesses cannot function. Members are already facing historic inability to fill vacancies.

19. Each additional resignation or termination creates an even greater negative impact on operations, existing associates, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill they have worked hard to earn from their customers. Because replacement employees are not easy to come by in the current labor market, the ETS will cause FMI's members to suffer reputational harm.

21. Most employers are experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. The ETS therefore places FMI members at a competitive hiring disadvantage in a constrained labor market.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the food industry. They include but are not limited to jobs such as truck drivers, warehouse employees, production line workers, sales associates, cashiers, stockers, cleaning and sanitation staff, general maintenance workers, pickers, delivery workers, and more. These jobs are critical to the American economy.

23. Many of the employees who hold these jobs are the same employees who stayed at their posts as “essential workers” from the first days of the pandemic. Significantly, many of these employees are at the lower end of the pay scale and can least afford to find themselves unemployed. In other words, the ETS will require FMI member companies to lay off many of their most vulnerable workers, including a significant impact on communities of color.

24. Members’ suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining members’ ability to supply the needed items in their communities.

25. Labor and materials shortages have already caused members to delay expansions and product roll outs and reduce hours, and members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

26. Complying with the ETS will force FMI members to secure testing, implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking will create, get parental approval for complying with the requirements as they relate to minor employees, and otherwise incur compliance costs using funds that would be

better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

27. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In most instances, this will require programming and deploying new software solutions. OSHA’s estimated costs for these measures are simply not realistic or sufficiently comprehensive.

28. To meet the ETS’s deadlines, FMI’s members must begin preparing immediately to design and implement, among other things, recordkeeping, tracking, identifying and securing testing, and deploying mask-compliance solutions. Each will require significant and immediate time and expense.

29. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

30. Because the federal government enjoys sovereign immunity, any compliance costs, lost sales, loss of goodwill, and reputational damages will be unrecoverable.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 9th day of November, 2021, at Nashville, Tennessee.

A handwritten signature in black ink, appearing to read "Leslie G. Sarasin", written over a horizontal line.

Leslie G. Sarasin

Appendix 7.G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Steve DeHaan

I, Steve DeHaan, declare as follows under penalty of perjury:

1. I am the President of the International Warehouse Logistics Association (IWLA)

2. Founded in 1891, IWLA is the trade association representing warehouse-based third-party logistics (3PL) providers across North America. IWLA's 350 member companies and partners provide a range of services, including warehousing; fulfillment; reverse logistics; transportation; freight-forwarding and brokerage services; inventory and supply chain management; and a broad range of manufacturing and value-added services. Member companies range in size from 10,000 square foot single city warehouses to international companies with more than 25 million square feet of warehouse space.

3. My responsibilities at IWLA include communicating with members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

4. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to IWLA members who would not otherwise be subject to any similar requirement (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

5. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many IWLA members.

6. The ETS will require IWLA's members to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing/masking and vaccination. In each instance, the consequences to members will be lost profits, lost sales, loss of customer goodwill, and reputational harm.

7. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

8. IWLA's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to

the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, IWLA's members have a strong incentive to encourage a vaccinated workforce.

9. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who refuse to be vaccinated (or refuse to disclose vaccination status) and who refuse to submit to weekly testing.

10. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

11. IWLA's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing and masking.

12. IWLA's members report not only that their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated or submit to weekly testing.

13. IWLA Members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have contributed to delays in the supply chain.

14. If the ETS takes effect, IWLA members expect that a significant number of employees will refuse both vaccination and weekly testing and seek other employment.

15. By requiring IWLA members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that IWLA members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season will make hiring even more difficult.

16. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

17. Terminations and unfilled vacancies on this scale will diminish the revenue and profits of IWLA's members because without an adequate number of employees, businesses cannot function. Members are already facing historic inability to fill vacancies.

18. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack.

19. Many IWLA members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers who oppose the ETS's requirements can avoid those requirements by working for the companies that are not subject to the ETS. The ETS therefore places IWLA members at a competitive hiring disadvantage in a constrained labor market.

20. The jobs these almost certain-to-be-terminated workers and current workers who seek other employment perform are critical to the successful operation of the third-party warehouse industry. They are warehouse workers, forklift operators, logistics professionals, and truck drivers. These jobs are critical to the American economy.

21. Many of the employees who hold these jobs are the same employees who stayed at their posts as "essential workers" from the first days of the pandemic. Significantly, many of these employees are at the lower end of the pay scale and can least afford to find themselves unemployed.

22. Members' suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining members' profits.

23. Complying with the ETS will force IWLA's members to pay for testing, implement expensive and time-consuming tracking software,

respond to negative employee morale that testing and tracking will create, and otherwise immediately incur unrecoverable compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

24. OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In some instances, this will require programming and deploying new software solutions. OSHA’s estimated costs for these measures are simply not realistic.

25. To meet the ETS’s deadlines, IWLA’s members must begin preparing immediately to design and implement, among other things, recordkeeping, tracking, and mask-compliance solutions. Each will require significant and immediate time and expense.

26. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

27. Because the federal government enjoys sovereign immunity, any compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 9th day of November 2021, at Des Plaines, IL

A handwritten signature in black ink, appearing to read 'Steve DeHaan', with a long horizontal stroke extending to the right.

Steve DeHaan

Appendix 7.H

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Jade West

I, Jade West, declare as follows under penalty of perjury:

1. I am the Chief Government Relations Officer of the National Association of Wholesaler-Distributors (“NAW”).

2. NAW is a non-profit, non-stock, incorporated trade association. NAW is the national voice of wholesale distribution. Its members include employers of all sizes, and national, regional, state, and local line-of-trade associations spanning the \$6 trillion wholesale distribution industry that employs more than 5.7 million workers in the United States. NAW affiliates and members include approximately 35,000 enterprises with places of business in all 50 states and the District of Columbia.

3. NAW members’ critical infrastructure workers form the backbone of the United States economy—the essential link in the supply chain for critical products and industries such as pharmaceutical, healthcare,

technology, biotechnology, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, as well as products used by other essential businesses and operations.

4. My responsibilities at NAW include communicating with NAW members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to members who would not otherwise be subject to any similar requirement.

6. NAW member companies report to us that the ETS will cause them to lose thousands of employees through resignation or termination, that compliance costs will stretch them to a breaking point, and that the ETS will inflict severe damage on employees and their families, individual businesses, and the recovering U.S. economy as a whole.

7. NAW member companies are fully committed to the mission of getting every eligible American vaccinated. Earlier this year, NAW partnered with National Football League teams and the National League of Cities to support mass vaccination and pop-up vaccine sites throughout the country. NAW member companies donated more than \$1 million in PPE and other supplies to this effort to help safely vaccinate thousands of Americans.

8. NAW member companies are also firmly pro-vaccine for their own employees, and they want their teams to be healthy and safe. Indeed, their interest in getting their employees vaccinated is greater than the government's.

9. NAW members have taken expensive and creative steps to encourage their workforce to get vaccinated, including offering:

- paid time off to employees to receive the vaccine and to recover from any side effects;
- reimbursement for any vaccine costs that are not covered by an employee's health plan;
- on-site vaccination and employer-organized vaccine appointments for their workers;
- monetary bonuses of as much as \$1,000 to employees who get the vaccinated;
- gift cards and gas cards;
- full days off with pay;
- extra vacation days and extra sick leave days.

10. Despite these employers' efforts, there are still a significant number of employees across the distribution industry who—for whatever reason—refuse to be vaccinated or submit to weekly testing. NAW members continue their efforts to get their employees vaccinated, but many would not enforce a vaccine or test-and-mask regime as a condition of employment.

11. It has been asserted that only a negligible number of workers will quit their jobs because of the ETS, but recent data contradicts that assertion. According to Bureau of Labor Statistics reports, more than 24 million workers have quit their jobs since April, with more than four million doing so in both August and September. This trend shows no signs of abating.

12. NAW member companies report not only that their workers have refused every incentive offered to encourage them to get vaccinated, but that many of these workers have told them unequivocally that they will choose to quit or be fired if keeping their job will require them to get vaccinated or submit to weekly testing.

13. In a recent survey of NAW member companies, more than 74% of the respondents told us they expect to lose more than 10% of their workers as a result of the ETS. Almost 10% of the respondents expect to lose more than 50% of their workforce if the ETS takes effect.

14. NAW member companies, like most businesses, know their employees well because that knowledge is vital to maintaining a stable and experienced workforce, and they have no evidence and no reason to believe that these workers will now acquiesce to a mandate from Washington.

15. Therefore, if the ETS takes effect, NAW members will be faced with the loss of thousands of workers through either resignation or the terminations that the ETS will require.

16. These workers are essential to the operation of distribution companies and to the economy; they are warehouse workers, drivers, operations

and front-line employees without whom products simply do not move from distribution centers through the supply chain.

17. Significantly, many of these employees are at the lower end of the socio-economic system and can least afford to find themselves suddenly unemployed. In other words, the ETS will require NAW member companies to lose or lay off many of their most vulnerable workers.

18. Whether this critical loss of employees results from resignations or terminations, the already tight labor market will make it virtually impossible to replace those lost workers. The ETS will worsen the severe labor difficulties that NAW members are already experiencing, in some cases making it impossible to continue in business.

19. NAW members echoed all of these points in response to a recent member survey.

- One NAW member responded to our recent survey saying that: “While my leadership team and I are supportive of vaccination, we are very concerned about the impact of the mandate given the condition of the labor market and escalating costs. We are already stretched so thin.”
- Another company reported that: “I strongly support vaccinations, but the reality is that there is a percentage of my employees who are vehemently opposed to the covid vaccines, and no carrot or stick is going to change their mind. The labor market is extremely tight, and we already can't fill all our open positions. Losing existing employees due to these rules would make an already difficult hiring environment almost impossible.”

- And another said: “If we felt that a vaccine mandate would push our unvaccinated employees to get the vaccine then we would go forward with a mandate. Instead we believe a mandate would force many unvaccinated employees to pursue other employment options.”

20. Many NAW members have direct and indirect competitors who employ fewer than 100 employees. The workers NAW member companies will lose will be in great demand elsewhere in this tight labor market and will be able to easily find new work with a company with fewer than 100 workers and not subject to the ETS.

21. The ETS therefore places NAW members at a competitive disadvantage in an already constrained labor market.

22. NAW members also report that complying with the ETS will impose direct and unrecoverable costs on their companies. Several NAW members reported that, while the ETS would allow them to require unvaccinated workers to pay for the alternative weekly testing, they cannot and will not require these generally lower-wage workers to do so. As a result, NAW members will largely absorb that cost, and some report that providing the tests will cost them, depending on the size of the employer and region, between \$500,000 to \$10 million per year. Moreover, the required record keeping will add to these already potentially crippling costs.


23. NAW members will face irreparable harm from the ETS in multiple ways: (1) the cost of paying for weekly alternative COVID tests for unvaccinated workers; (2) the high cost of competing for replacement labor in

this extremely tight labor market; and (3) potential loss of business resulting from labor shortages that will make it impossible for these companies to supply their customers' needs.

24. In the wholesale-distribution industry, the average after-tax profit margin is just 2%, and many wholesaler-distributors will be unable to absorb the ETS costs by cutting expenses elsewhere. These companies will have no choice but to attempt to pass the added costs on to their customers through increased prices, fueling already-rising inflation and causing irreparable harm to the supply chain and the overall economy.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 15th day of November, 2021, at Arlington, Virginia.



Jade West

Appendix 7.I

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Mark S. Allen

I, Mark S. Allen, declare as follows under penalty of perjury:

1. I am the President & CEO of the International Foodservice Distributors Association (“IFDA”).

2. IFDA is the trade association representing foodservice distributors throughout the United States and internationally. IFDA members include broadline, systems, and specialty foodservice distributors who supply food and related products to more than one million professional kitchens daily, including restaurants, colleges and universities, K-12 schools, U.S. military and government facilities, hospitals and care facilities, hotels and resorts, and many other operations that make meals away from home possible.

3. Prior to the pandemic, the foodservice distribution industry operated more than 15,000 distribution facilities that together accounted for more than \$303 billion in annual sales in the United States alone.

4. My responsibilities at IFDA include overseeing IFDA's day-to-day operations, including all initiatives in education, research, and government relations, and serving on IFDA's Board of Directors, which comprises the presidents and CEOs of 25 major foodservice distribution companies and purchasing cooperatives.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to IFDA members who would not otherwise be subject to any similar requirement.

6. IFDA members have reported that the ETS will likely cause the loss of essential workers, such as commercial truck drivers and warehouse workers, resulting in a substantial impact on the ability of our members to maintain their operational capabilities and fulfill their customers' orders. The consequences to members could include lost profits, lost sales, loss of customer goodwill, and reputational harm.

7. IFDA's members are fully in favor of vaccinations as an effective way to stop the spread of COVID-19. In fact, when the vaccine was first announced, IFDA members were eager to be the first in line to access the vaccines for their employees. They saw the benefit of having a vaccinated workforce.

8. IFDA's member companies are motivated to encourage a vaccinated workforce because their employees are their greatest assets, and the health and safety of each employee is of paramount interest to them. IFDA

members have taken a variety of steps to get their employees vaccinated. Examples include providing bonuses, partnering with health clinics, and promoting vaccinations through corporate information campaigns.

9. IFDA members generally report that their office workforce vaccination rates are in line with national averages; however, the driver and warehouse workforce vaccination rates are substantially lower. Although IFDA members have worked diligently to educate their employees on the benefits of being vaccinated, great numbers of driver and warehouse personnel have chosen not to get vaccinated. These individuals may choose to leave their positions, possibly to join companies with under 100 employees, rather than submit to a vaccinate-or-test-and-mask regimen.

10. Even a loss of a very small percentage of their workforce, particularly truck drivers and warehouse workers, would have a dramatic impact on our members' ability to serve their customers.

11. In a recent member survey conducted by IFDA, members reported 15,000 driver openings (11.4 percent of the pre-pandemic total) and 17,500 warehouse positions that were open (14.4 percent of the total). In the same survey, 100 percent of members indicated it was "difficult" or "extremely difficult" to fill both driver and warehouse positions. Even prior to the pandemic, finding qualified workers was considerably challenging.

12. Without sufficient qualified staff, many members have not been able to service their foodservice customers as they have previously done,

and some have even had to forgo or resign business due to their inability to deliver foodservice products and supplies.

13. Recently, K-12 schools have received media attention, as foodservice distributors have had to walk away from the business due to their inability to find qualified labor. This has injured the goodwill they have worked hard to earn from their customers and caused them to suffer reputational harm.

14. The ETS will only compound the severe labor difficulties that IFDA members are already experiencing, if they are required to terminate employees. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality.

15. The ETS will also make it more difficult for members to hire new workers for current vacancies. Terminations and unfilled vacancies on this scale will diminish the capacity, revenue, and profits of IFDA's members because their businesses cannot function without an adequate number of qualified employees.

16. Each additional resignation or termination will create an even greater negative impact on operations, profits, and sales, because remaining employees no longer have the capacity to pick up the slack, which not only affects morale but will further impact their ability to deliver products to foodservice customers.

17. The jobs IFDA members' workers perform are critical for Americans to be able to have a meal away from home, whether at school, a hospital, or a military base, or on a cherished family night out.

18. Many of the employees who hold these jobs are the same employees who stayed at their posts as "essential workers" from the first days of the pandemic. Significantly, the ETS may require IFDA member companies to terminate some of their most valuable workers at a consequential time.

19. Many members' suppliers—including food manufacturers—are unable to meet the demand for product due to the labor shortage, and the ETS will exacerbate this risk, as well. Problems in the national supply chain have already required members to increase their spending on inventory and transportation, and these increases are reducing spending in other areas.

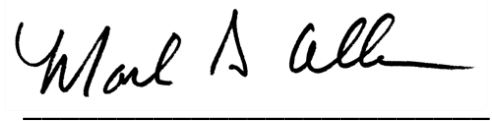
20. Complying with the ETS will force IFDA's members to implement expensive and time-consuming tracking software, respond to negative employee morale that testing and tracking are likely to create, and otherwise incur compliance costs using funds that would be better spent in other areas, such as attracting, training, and retaining workers.

21. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available, members are concerned that the ETS leaves them no choice but to select a "vaccinate-or-be-terminated" compliance approach.

22. IFDA member companies continue to be committed partners in stemming the spread of COVID-19 while also ensuring the timely delivery of essential products and supplies to professional kitchens throughout the nation. Without an adequate workforce—and strapped with compliance costs—foodservice distributors will be forced to reduce their operations, forgo orders, and/or lose customers, causing not only irreparable harm and reputational damage to their businesses but diminishing their ability to contribute to their communities and our nation’s economic recovery.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 16th day of November, 2021, at McLean, Virginia.

A handwritten signature in black ink, reading "Mark S. Allen", written over a horizontal line.

Mark S. Allen

Appendix 7.J

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Robb MacKie

I, Robb MacKie, declare as follows under penalty of perjury:

1. I am the President and CEO of American Bakers Association (“ABA”).

2. ABA is the Washington D.C.-based voice of the wholesale baking industry. Since 1897, ABA has worked to increase protection from costly government actions, build the talent pool of skilled workers with specialized training programs, and forge industry alignment by establishing a more receptive environment to grow the baking industry.

3. ABA’s members include more than 300 companies with a combined 1600+ facilities. Bakers are found in all 50 states, in the District of Columbia, and in Puerto Rico. The baking industry employs almost 800,000 skilled individuals, generates over \$44 billion in direct wages, and has an overall economic impact of over \$154 billion.

4. My responsibilities at ABA include communicating with ABA's members on subjects including workplace safety, hiring practices, the labor market, relevant regulations, and other topics of interest.

5. I am familiar with OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS"). It is my understanding that the ETS applies to ABA members who would not otherwise be subject to any similar mandate (*i.e.*, who are not covered by the federal-contractor mandate or the healthcare mandate).

6. I have personal knowledge of the ETS's requirements and of the severe effect it will have on many ABA's members.

7. ABA's members forecast that the ETS will require them to incur significant and unrecoverable compliance costs. It will also, in some instances, require members to incur the cost of testing to retain employees. Some members also expect that the ETS will force them to terminate employees who refuse testing and vaccination. In each instance, the consequences to members will be loss of employees who refuse to be vaccinated or tested, low employee morale, lost profits, lost sales, loss of customer goodwill, and reputational harm.

8. The ETS will inflict severe damage on members' businesses and on their employees and families—all at a critical moment for the American economy given the upcoming holiday season and the extant issues including supply chain challenges and rising prices.

9. ABA's members are in favor of vaccination and have committed significant resources to ensuring that their employees are vaccinated to the maximum extent possible. Vaccination protects employee health, and thus the workforce on which employers depend. In other words, ABA's members have a strong incentive to encourage a vaccinated workforce.

10. Despite members' incentive to ensure that their workforce is vaccinated, and despite their efforts and commitment to achieving that goal, there are still a significant number of employees across the industry who, for various reasons, refuse to be vaccinated (or refuse to disclose vaccination status) and who refuse to submit to weekly testing.

11. Members know their employees' attitudes because this knowledge is vital to maintaining a stable and experienced workforce—especially in the current labor market, where dissatisfied employees can easily find employment with a competitor (who employs fewer than 100 employees) or elsewhere.

12. ABA's communications with members unquestionably confirm that there remain a significant number of individuals who adamantly refuse vaccination and will not submit to weekly testing.

13. ABA's members report not only that their workers have refused generous incentives offered to encourage them to get vaccinated but that many of these workers have told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated or submit to weekly testing. Members know their employees can

easily find employment with a competitor who employs fewer than 100 employees, or elsewhere.

14. ABA Members also report an unprecedented percentage of vacancies in full-time jobs. These shortages have already forced members to shut down production lines, reduce available products, and take similar measures. These reductions have caused lost profits, lost sales, and reputational harm.

15. If the ETS takes effect, ABA members expect that a significant number of employees will refuse both vaccination and weekly testing, and that member-employers will have no choice but to terminate these employees. This will directly impact the amount of product that can be produced and supplied to retailers leading to SKU rationalization and potentially a reduced amount of available products for sale.

16. By requiring ABA members to terminate employees during a labor shortage, the ETS will worsen the severe labor difficulties that ABA members are already experiencing. The already tight labor market will make it immeasurably more difficult to replace employees, further hampering members' productivity and functionality. The upcoming holiday season—during which many companies must hire additional employees and where companies earn a significant portion of their annual revenue—will make the effect of these terminations worse.

17. The ETS will also make it more difficult for members to hire new workers—both for current vacancies and for vacancies that the ETS will create.

18. ABA members anticipate that terminations and unfilled vacancies on this scale will severely diminish their revenue and profits, because without an adequate number of employees, businesses cannot function and produce products. Members are already facing historic inability to fill vacancies. The loss of valued employees will directly impact the amount of products that can be produced, potentially leading to a reduction in the amount of available products for sale.

19. Each additional resignation or termination creates an even greater negative impact on operations, profits, and sales, because remaining employees no longer have capacity to pick up the slack. Members report that they will lose sales to competitors if they cannot meet customer demands.

20. Members also report that a reduced workforce will decrease productivity and therefore injure the goodwill that they have worked hard to earn from their employees and customers. Because replacement employees are not easy to come by in the current labor market, members expect that the ETS will cause them to lose control of their own reputations and ultimately to suffer reputational harm.

21. Many ABA members have direct or indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a labor shortage. Job seekers and current member employees who oppose

the ETS's requirements can avoid those obligations by working for the companies that are not subject to the ETS. The ETS therefore places some ABA members at a competitive hiring disadvantage in a constrained labor market.

22. The jobs these almost certain-to-be-terminated workers perform are critical to the successful operation of the baking industry. They are drivers, bakery production workers, distribution and shipping workers, and engineers and equipment maintenance workers. These jobs are critical to the American economy.

23. Many of the employees who hold these jobs are the same employees who stayed at their posts as “essential workers” from the first days of the pandemic. Significantly, many of these employees are at the lower end of the pay scale and can least afford to find themselves unemployed. In other words, the ETS will require ABA member companies to lay off many of their most vulnerable workers.

24. Members are also concerned that their suppliers—including delivery partners—will be unable to meet demand due to the labor shortage, and that the ETS will exacerbate this risk. It is widely reported that the trucking sector is already facing a shortage of more than 80,000 drivers. Problems in the national supply chain have already required members to increase their spending on shipping, and these increases are undermining member's profits.

25. The baking industry is already dealing with strained supply chains for many ingredients. Additionally, labor and materials shortages

have already caused members to delay expansions and product roll outs and limit or terminate certain production lines. Members will face even greater threats in this area if the ETS goes into effect and worsens the already strained supply chain and labor market.

26. ABA members report that complying with the ETS will force them to pay for testing, implement time-consuming tracking, respond to negative employee morale that testing and tracking will create, and otherwise incur compliance costs using funds that would be better spent in other areas (*e.g.*, raising salaries to stay competitive in the current labor market).

27. ABA's members also believe that OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status. The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information). In some instances this will require programming and deploying new software solutions. OSHA's estimated costs for these measures, and an employer's ability to comply with the obligations are simply not realistic.

28. To meet the ETS's deadlines, ABA's members must begin preparing immediately to design and implement, among other things, vaccination policies, post-vaccine sick time policies, recordkeeping, and tracking solutions. Each will require significant and immediate time and expense.

29. Members also report serious concerns regarding the availability of tests. In areas where tests are not readily and dependably available,

members are concerned that the ETS leaves them no choice but to select a “vaccinate-or-be-terminated” compliance approach.

30. Because the federal government enjoys sovereign immunity, ABA members understand that compliance costs, lost profits, loss of goodwill, and reputational damages will be unrecoverable.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 21 day of November, 2021, at Columbia, Maryland.



Robb MacKie

Appendix 7.K

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Lori Buss Stillman

I, Lori Buss Stillman, declare as follows under penalty of perjury:

1. I am the Vice President of Research for the National Association of Convenience Stores (“NACS”).

2. NACS is a non-profit trade association and is the preeminent representative of the interests of convenience store operators across the nation.

3. NACS has 1,500 retail and 1,600 supplier company members nationwide.

4. In 2020, the fuel wholesaling and convenience industry that NACS represents employed approximately 2.34 million workers and generated \$548.2 billion in total sales.

5. In all, the industry sells approximately 80 percent of the motor fuels purchased in the United States each year.

6. NACS conducted a survey of its members regarding OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard" (the "ETS") during the week of November 15-19, 2021 (the "Survey").

7. NACS regularly surveys its members regarding their businesses and the current business climate. The industry relies on the resulting survey data as accurate depictions of the state of the industry.

8. NACS compiles certain industry survey data into an annual State of the Industry report which is considered the leading source of data on the convenience industry in the United States.

9. The Survey generated more than eighty responses from companies in the convenience industry in the United States with more than one hundred employees. We consider this rate of response to provide a reliable cross-section of the convenience industry.

10. The Survey asked respondents for their data based upon the ETS going into effect.

11. The Survey found that 46% of the industry plans to provide employees with the option to get vaccinated or get tested weekly, while 6% plan to require all employees to be vaccinated and 48% remain undecided on which course to choose.

12. The Survey found that 99% of the industry expects that employees would quit their jobs rather than undergo vaccination, and that 92% of the industry expects that employees would quit their jobs rather than undergo weekly testing for COVID-19.

13. According to the Survey, employers indicating that they would lose employees expect that imposing a vaccination requirement would cause them to lose 32% of their employees.

14. According to the Survey, employers indicating that they would lose employees expect that imposing a weekly testing requirement would cause them to lose 22% of their employees.

15. The Survey revealed the following anticipated effects if the ETS were implemented:

- a. 89% of employers in the industry would be forced to reduce store hours;
- b. 58% would need to close one or more stores;
- c. 57% would expect increased difficulty getting products to their stores;
- d. 72% would need to reduce cleaning at one or more stores;
- e. 93% would face increased difficulty hiring staff; and
- f. 47% would expect reduced customer traffic.

16. According to the Survey, 65% of respondents have already researched the ability to secure testing resources on a weekly basis for their employees. Of those employers that have research testing resources, the average per-employee cost of testing per week was \$61.

17. The Survey found that among those employers who have attempted to do so, only 28% are able to find adequate providers to ensure that weekly testing is available for their employees.

18. According to the Survey, less than one-third (32%) of respondents report that they will be able to comply with the ETS if it goes into effect.

19. The Survey gave respondents the option to provide any comments on the ETS that they chose. Those comments include:

a. "In ways we have not yet imagined, recruiting, training, lost sales, increased wages, Discouraged Essential work force, negative impact to consumers just to name a few."

b. "OSHA should not mandate vaccines."

c. "This is crazy to ask companies or employees to mandate vaccines."

d. "We are already struggling to get and keep employees. This mandate will create an even larger challenge to keep our business open and operating."

e. "[D]isaster."

f. "Short term could be devastating - loss of employees and increased demand of those remaining. Will impact overall customer service and cripple out ability to staff the stores. Will probably drive wage rates up as a result."

g. "We are already very short of staff in our stores. This mandate will cause many non vaccinated employees to quit and further limit our ability to get more staff. Most of our competition in small rural markets are not subject to this mandate as they are small employers."

- h. “Our workforce will not get vaccinated & they are not going to put forth effort to test. They also will not wear masks (we already fought that battle). We will not be able to operate to provide fuel & food as we do today. Huge cost that is unnecessary and most importantly will not make a difference. . . . We operated through the pandemic: did not lose 1 team member and had very few actually contract covid. Our current protective measures are working.”
- i. “We have grave reservations about being held responsible for verifying medical testing records and vaccination records due to the effect it will have on labor, liability associated, and increased record keeping associated with HR.”
- j. “The OSHA mandate is a major inconvenience that is unhelpful and most probably destructive. We run a geographically diverse business making frequent testing highly infeasible.”
- k. “At a time where hiring is our number one issue, this will have us lose good employees that currently are employed.”
- l. “This mandate makes little to no sense.”
- m. “Could put us out of business.”
- n. “[T]his could be catastrophic to our organization.”
- o. “This will be very difficult to track and will cause a lot of confusion and extra work for our frontline team members.”

p. “This ETS is government over-reach on a scale I never thought I’d see in my lifetime. Not a single employee and/or business leader that I have spoken with wants to worry with this nonsense. It is not small-business’s role to play ‘enforcer’ for hare-brained government ideas where the science is shaky at best. Case-in-point - the state of Vermont has the highest vaccination rate in the country, yet the 7-day average of COVID cases in Vermont today is double what it was in April. This vaccine mandate is NOT the way out of this thing, and it distracts business in a very real way at a time we are all working to get the economy back on track.”

q. “We already are 100 people short and these rules will close the stores due to lack of workers.”

r. “This is an undue hardship on already struggling companies and a ridiculous burden on HR and safety personnel.”

s. “[R]educed staff, inability to continue to operate in rural areas, reduced gas availability, store closures.”

t. “It will have a negative impact all around, financially, strategically, and operationally. This is why business [would] rather leave the US and rather take jobs to other countries. This is too intrusive, not only on people, but on business as a whole.”

u. “We have 145 employees over 18 locations and an HR Dept. of 1. Each location runs []with a maximum of 5 employees

at any one time making the risk extremely low given all protocols we have put in place over the last 20 months. The administrative tracking and requirements are overly burdensome to a small company who has done everything to keep employees safe during this pandemic.”

v. “If the OSHA Mandate becomes effective it would be the most devastating event our company has ever experienced.”

w. “Unfairly applies to Large dispersed organizations. Independent operators with less than 100 employees are exempt.”

x. “[I]t would bankrupt our company because of the closure of so many stores. We have already reduced hours in some stores due to staffing issues.”

y. “In an environment where team members are difficult to find and keep. This is a well intentioned but short sighted power grab by a government reliant on the tax revenues small businesses supply. As Covid-19 becomes endemic as opposed to pandemic, this is a scary precedent for increasing government oversight.”

z. “We have a large number of employees that have not gotten vaccinated (over 50%). They will not get vaccinated if it is required.”

aa. “It would be a total disaster to our company, our industry, and to the U.S. economy.”

bb. “This mandate will be a serious detriment to our ability to operate our business.”

cc. “We will be able to comply with the mandate, but the loss in staff and resulting decrease in revenue could be catastrophic.”

dd. “[I]mpossible to comply with and will have very negative impacts on us as we will have to cut hours and /or close stores due to staffing issues.”

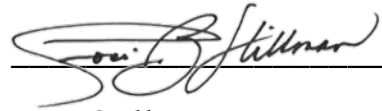
ee. “In order to stay in business, we would have to allow weekly testing as there are just too many other businesses with less than 100 employees that our employees could leave us for. We have already been unable to hire several people who did not want to work for company that would be under this mandate. They went to work for someone smaller. The idea that we can test weekly and track it is ludicrous. We operate large stores (30 - 50 employees) in very rural communities with little access to testing. This would require our store managers to manage this, on top of what they already do. This mandate puts even more strain on good, hard-working people that have been very loyal to us and their communities throughout this pandemic.”

ff. “With multiple retail sites spread over 2 states I'm not sure how practical the weekly testing will be. It will also be difficult with a small HR department.”

gg. “This will the[] straw that breaks the camel[‘s] back for a lot of our locations. Especially more rural locations where there is over 50% of the people unvaccinated (or higher). They will simply just not work anymore.”

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 22nd day of November, 2021, at Bristol, Virginia.



Lori Stillman

Appendix 7.L

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Texas Trucking Association et al.,

Petitioners

v.

United States Occupational Safety and
Health Administration et al.,

Respondents.

Declaration of Peter Demos

I, Peter Demos, declare as follows under penalty of perjury:

1. My name is Peter Demos. I am the President and CEO of Demos Brands.
2. Demos Brands is a family, independently owned restaurant group comprising Demos Restaurants in Murfreesboro, Lebanon and Hendersonville, Tennessee; and PDK Southern Kitchen & Pantry in Bellevue and Mt. Juliet, Tennessee. Demos Brands is a member of the National Federation of Independent Business.
3. Demos Brands employs approximately 300-350 employees. I oversee the entire business.
4. I am familiar with the “COVID–19 Vaccination and Testing; Emergency Temporary Standard” (the “ETS”). It is my understanding that the ETS applies to Demos Brands.

5. As President and CEO of Demos Brands, and an attorney, I have personal knowledge of what the ETS requires and how it will affect Demos Brands.

6. We are a Christian business, and one of the reasons I am concerned about the ETS is that it will require us to go against our values by terminating employees during the holiday season.

7. We are already short-staffed by a large percentage, and we are already having to close early and lose shifts because of the pandemic and ongoing labor shortage. The ancillary impacts of the existing labor shortage and supply chain issues would be exacerbated if the ETS were to go into effect.

8. We already struggle completing existing regulatory paperwork requirements because we don't have staff. The ETS will only increase the amount of paperwork we will have to do. I predict I personally will lose up to two days of being able to be in business. I also predict that Demos Brands will lose five servers or two grill cooks for several days.

9. Demos Brands complied with all the state regulations as they came up. Among other things, we instituted a policy requiring employee temperature checks, masking, social distancing of tables, and increased frequency of cleaning. We made bars carryout stations and put up plywood separators. We started curbside delivery, which included systems that allowed guests to be paged in their cars when their order was ready. Our

locations already had strong ventilations system with more HVC units than required.

10. Demos Brands would not enforce a vaccine or test-and-mask mandate but for the ETS.

11. Demos Brands has 300-350 employees, who are spread across five locations: three Demos Restaurants in Murfreesboro, Lebanon, and Hendersonville, Tennessee, and two PDK Southern Kitchen & Pantry restaurants in Bellevue and Mt. Juliet, Tennessee. We have been trying for over a year to obtain a permit to open a third PDK Southern Kitchen & Pantry but cannot because the government is so behind and short-staffed due to the pandemic.

12. I meet with managers quarterly, and one of the most frequent questions I am asked involves what managers would do if the mandate went into effect. Many managers said they would quit if the mandate takes effect.

13. I estimate that about 75 percent of Demos Brands' hourly employees, 50 percent of salaried on-site restaurant employees, and 25 percent of administrative employees have been vaccinated.

14. I estimate that 90 percent of our employees who are in management or administration have had Covid. To the best of my knowledge, no one has been hospitalized from it. We have experienced no deaths.

15. Covid has had an impact on business. We were forced to close when employees were sick because we did not have enough employees to operate. We were forced to close two days a week for three weeks at two different locations.

16. The average age of my management employees is thirty years of age, for hourly employees the average age is twenty-three. Including myself, Demos Brands has only three employees who are fifty or older.

17. To the best of my knowledge my employees are generally in good health.

18. Although I don't know how many employees I would lose if the mandate were to take effect, I know that my managers at each of the restaurants are worried about losing people.

19. Some employees will not get vaccinated for political and other reasons not related to religious belief or medical conditions.

20. We have already lost employees because they believed we had too many rules relating to protecting against transmission of Covid-19. Others quit because they did not think we had enough rules.

21. If the mandate were to take effect, we anticipate losing enough employees to cause us to have to close a minimum of one day a week.

22. The ETS will worsen the severe labor difficulties that Demos Brands is already experiencing.

23. The ETS will also make it more difficult to hire new workers for current vacancies, for vacancies that the ETS will create, and for new position(s) that the ETS will require us to create and fill (for example, someone to oversee recordkeeping requirements for vaccination and testing status).

24. Demos Brands has direct and indirect competitors who employ fewer than 100 employees. These competitors are also experiencing a

labor shortage. Job seekers who oppose the ETS's requirements can avoid them by working for the companies that are not subject to the Mandate. The ETS therefore places Demos Brands at a competitive disadvantage in an already constrained labor market.

25. When we had to shut down for a day or two due to being short-staffed as referenced above. That shutdown significantly impacted our net profit. For some periods we had a net loss.

26. We typically see a ten percent increase in sales between Thanksgiving and Valentine's Day. Within the last two weeks we had three people call out at one of our restaurants leaving us with four servers and only one cashier (instead of three). That night we lost fifty to sixty percent in sales, yet our electricity bill stayed the same.

27. When it comes to implementing the OSHA ETS, every manager would be responsible for ensuring the compliance of their own restaurant, reporting up to human resources to maintain the records, and then the Vice President of Operations and I would audit to ensure proper compliance. There are many compliance issues we will face, even with this structure.

28. Recordkeeping is going to be particularly hard due to: (a) the ever-changing make up of our employee workforce due to people quitting and others getting hired; (2) lack of physical space to keep records and keep them secure; (3) lack of technology to keep them stored digitally in a manner that is safe; (4) time it will take to get employees tested and test results properly stored if and when we figure out how we will do that. Given the

transient nature of our workforce we already struggle with current record-keeping requirements.

29. At this point I do not know how I am going to track employees. For vaccinated employees I think I could devise a system. For the unvaccinated, there are so many factors including how to track them on a weekly basis.

30. We are not a Monday-Friday business. Managers and employees are all on different schedules. Oversight is going to be very challenging.

31. We will monitor mask compliance the way we did when masks were required in restaurants in Tennessee, which is the same way we monitor uniforms. We line up the employees at the beginning of the shift and check them. But the problems with masks are the difficulties properly wearing them in a restaurant environment. For example, elderly customers couldn't hear my employees and so the employee would have to pull down the mask to speak. In the kitchen, my cooks are wearing masks while cooking over grease and hot fumes. They do not have the time or ability to change their mask every thirty minutes.

32. Masking alone will result in employees quitting.

33. Monitoring will harm worker morale. I pride myself on how we treat employees. I have an employee council comprising one employee per location. These representatives meet only with me – one-on-one. They give me suggestions and we have an open and productive dialogue. With this new mandate, most of the employees are going to think they must follow

these rules because I am making them do it. They will see my competitors with under 100 employees and how they are not following the same rules.

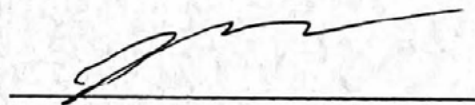
34. I really have no earthly idea how I'm going to keep the data secure. Many of our office doors don't have locks, and some units don't even have doors.

35. None of us can afford the testing. If the company pays, it won't be able to stay open.

36. Our employees can't afford to pay for tests either. They are paycheck to paycheck. For an employee who works only a few hours each week, paying for testing could cause that employee's wage to be a net negative.

* * *

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 7 day of December, 2021, at Putnam County, Tennessee.

A handwritten signature in black ink, appearing to read "Peter Demos", is written over a horizontal line.

[Peter Demos]