

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

IN THE
Supreme Court of the United States

IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION, INTERIM FINAL RULE: COVID-19
VACCINATION AND TESTING; EMERGENCY TEMPORARY
STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 4, 2021

*On Applications for Stays of Injunctions Issued by the United States District Courts
for the Western District of Louisiana and Eastern District of Missouri Pending
Appeals to the United States Courts of Appeals for the Fifth and Eighth Circuits*

**MOTION OF SMALL BUSINESS MAJORITY; AMERICAN INDEPENDENT
BUSINESS ALLIANCE; BORDER GRILL LAS VEGAS, LLC; CIUDAD LA, LLC;
BORDER GRILL TRUCK AND CATERING, LLC; FEEDFOLKS, LLC; BG SM20,
LLC; AND MUNDO MANAGEMENT GROUP, LLC FOR LEAVE TO FILE
ATTACHED *AMICUS* BRIEF IN OPPOSITION TO EMERGENCY
APPLICATIONS FOR A STAY OR INJUNCTION PENDING CERTIORARI
REVIEW; AND FOR LEAVE TO FILE WITHOUT 10 DAYS' NOTICE**

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December 30, 2021

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Amici Small Business Majority; American Independent Business Alliance; Border Grill Las Vegas, LLC; Ciudad LA, LLC; Border Grill Truck and Catering, LLC; Feedfolks, LLC; BG SM20, LLC; and Mundo Management Group, LLC respectfully move for leave **(1)** to file the attached *amicus curiae* brief in opposition to the eleven Emergency Applications, filed on December 17– 20, 2021, seeking a stay or injunction pending certiorari review of the Sixth Circuit’s decision granting a motion to dissolve a stay of the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard on COVID-19 vaccination and testing (ETS), which was issued by the Fifth Circuit before the matter was transferred to the Sixth Circuit, and **(2)** to file the enclosed brief without 10 days’ advance notice to the parties of *amici*’s intent to file.

Amici provided notice to all parties of their intent to file an *amicus* brief in opposition to the emergency applications by email on December 27, and 29, 2021. Counsel for the petitioners-applicants in 13 of the 14 applications—Nos. 21A243, 21A244, 21A246, 21A247, 21A248, 21A249, 21A250, 21A251, 21A252, 21A258, 21A259, 21A260 and 21A267—stated that they consent to the filing. Counsel for the U.S. Department of Labor responded that the government takes no position on our request for leave to file. Counsel for petitioners-applicants in No. 21A245 did not respond.

Founded in 2005, SBM engages a network of more than 85,000 small businesses and 1,500 business and other partner organizations to create a strong economy for all, through a combination of public policy advocacy and educational outreach. SBM advocates for the development of pro-entrepreneurial policy through

research, recruitment and training of spokespeople, and amplification of the voices of small businesses in the media. SBM also creates and distributes educational seminars for small businesses on topics such as access to capital, retirement security, and healthcare and other workforce benefits.

Founded in 2001, AMIBA is a network of independent business alliances, affiliates, and organizations supporting the “Buy Local” movement. AMIBA has more than 60 alliances spanning more than thirty states. Those alliances reach more than 50,000 locally owned businesses and organizations in the United States. AMIBA hosts networking events such as leadership roundtables and publishes resources such as guides on avoiding common business pitfalls, legal education materials, and guides on how to start one’s own independent business alliance.

Border Grill was founded in 1985 as a small, forty-seat “taco stand.” In the years since, founders Susan Feniger and Mary Sue Milliken have grown their business to several locations and food trucks. Border Grill also provides full-service events and catering business. Border Grill blends a commitment to building community with sustainability and a passion for authentic Mexican cuisine. With their first-hand knowledge of how harmful COVID-19 has been for small, independent businesses, and the need for regulatory intervention to ensure that employers are taking the steps necessary to slow and eliminate that harm, Border Grill is an example of the countless small businesses that would be both directly and indirectly affected by the ETS.

Amici have a substantial interest in protecting the health and safety of small business workers and operators while also reducing the probability of economic

catastrophe for America’s small businesses. According to OSHA, the pandemic has presented “special challenges for small businesses.” Whereas a quarter of larger businesses – defined as those with more than 100 employees – have seen revenue drop more than 30%, the same can be said for two-thirds of small businesses. Small businesses have also been struck especially hard by staff shortages. Through their roles as experts in, resources to, and members of the small and independent business communities, *amici* have an interest in guiding how workplace-related safety policies will impact small businesses, which account for 99% of all employer firms and half the country’s jobs and economic production. *Amici* filed together a brief as *amici curiae* in the Sixth Circuit.

Amici believe that a reversal of the Sixth Circuit’s decision not to stay the Emergency Temporary Standard (“ETS”) will have deleterious effects on the health and economic well-being of America’s small and independent businesses, most of which support the ETS. A stay would prevent a rule from going into effect that would set the ground floor for workplace protections, a rule that is necessary to make sure the ongoing “winter surge” of COVID-19, along with the new Omicron variant, does not cripple the American economy and that states do not enact legislation barring businesses from imposing similar rules designed to protect workers.

Amici are concerned that a stay would endanger small and independent businesses in three ways. First, those businesses which have at least 100 employees lose the direct protection of the ETS. Second, businesses that have fewer than 100 employees lose the indirect protection of having larger businesses abide by the ETS. Third, states would remain free to prevent employers from voluntarily implementing

vaccination and/or testing requirements to protect their employees and customers.

Given the expedited consideration of this matter of significant national interest, *amici* respectfully request leave to file the enclosed brief without 10 days' advance notice to the parties of intent to file. The Sixth Circuit granted the government's motion to dissolve the stay imposed by the Fifth Circuit on the evening of December 17, 2021, and the applications for a stay were filed in this Court on December 17, 18, and 20. The Court has now set a deadline of December 30 for respondent's brief. Counsel for *amici* provided notice to all parties on December 27 and 29. Because of the rapid schedule and because no party has opposed the filing (and nearly all parties have consented), *amici* request that the Court grant leave to file the attached *amicus* brief without 10 days' advance notice to the parties.

To the extent that leave is required, the proposed *amicus* respectfully moves for leave to file the attached brief on 8½- by 11-inch paper rather than in booklet form, given the expedited briefing. Should the Clerk's Office or the Court so require, the proposed *amicus* commit to re-filing expeditiously in booklet format. See S. Ct. Rule 21.2(c).

CONCLUSION

For the foregoing reasons, *Amici* Small Business Majority; American Independent Business Alliance; Border Grill Las Vegas, LLC; Ciudad LA, LLC; Border Grill Truck and Catering, LLC; Feedfolks, LLC; BG SM20, LLC; and Mundo Management Group, LLC respectfully request that the Court grant this motion to file the attached proposed *amicus* brief at the time submitted.

December 30, 2021

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INTEREST OF *AMICI CURIAE*

Small Business Majority (“SBM”) and American Independent Business Alliance (“AMIBA”) are non-partisan, non-profit national small business organizations that provide resources and support to empower small businesses in the United States. These organizations represent tens of thousands of small businesses and hundreds of thousands of workers around the country.¹ Border Grill Las Vegas, LLC; Ciudad LA, LLC; Border Grill Truck and Catering, LLC; Feedfolks, LLC; BG SM20, LLC; and Mundo Management Group, LLC (collectively “Border Grill” and, with SBM and AMIBA, “Small Business *Amici*” or “*amici*”) are a collection of independent restaurants and food trucks in Las Vegas and Southern California, ranging in size from a handful to nearly two hundred employees.

Amici have a substantial interest in protecting the health and safety of small business workers and operators while also reducing the probability of economic catastrophe for America’s small businesses. Through their roles as experts in, resources to, and members of the small and independent business communities, *amici* have an interest in guiding how workplace-related safety policies will impact small businesses, which account for 99% of all employer firms and roughly half the country’s jobs and economic production.

SUMMARY OF ARGUMENT

Small businesses are vital to the health of the American economy, accounting for more than 40% of U.S. economic activity and more than two-thirds of U.S. job creation. Small businesses have been hit especially hard by the COVID-19 pandemic. OSHA's ETS will reduce the risk of future shutdowns, preventing additional hardships for small businesses.

Studies have shown that most businesses, large and small, support OSHA's policy. For example, a Chamber of Commerce survey showed that approximately two-thirds of small businesses support the ETS. *Amicus* SBM's own polling of small businesses likewise shows that a majority supports a vaccine-or-test requirement for employees. The Business Roundtable, which represents the CEOs of large corporations, also supports the Administration's vaccination efforts. The businesses and business organizations challenging the ETS simply are not representative of the business community.

Small businesses need the ETS because it will preempt counter-productive state and local efforts to restrict employers' use of worker safety protocols and vaccine mandates. Thus far, more than 10 states have restricted businesses' abilities to impose vaccine requirements on their workers. Without federal intervention, businesses in these states would be restrained from taking effective, common-sense actions to protect themselves and the communities in which they operate.

Some opponents of the ETS contend that it will trigger a mass exodus of employees who do not want to be vaccinated or tested. The actual experiences of large employers that have required vaccinations and/or testing belie such concerns. It is

equally or more likely that vaccinated employees would leave their jobs rather than work side-by-side with unvaccinated and untested co-workers.

Finally, OSHA's ETS is administratively feasible. The federal government – the Nation's largest employer – and countless major corporations have effectively implemented policies at least as strict as the ETS, demonstrating the feasibility of such programs.

¹ Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici* hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submittal of this brief; and no person – other than *amici*, their members, or their counsel – contributed money that was intended to fund the preparation or submittal of this brief.

ARGUMENT

Small businesses are vital to the health of the current economy and the economy for generations to come. Small businesses account for more than 40% of U.S. economic activity² and more than two-thirds of U.S. job creation.³ Moreover, today's large businesses – automobile manufacturers, retail chains, technology firms, and many others – started out as small businesses.

Small businesses have been hit especially hard by the COVID-19 pandemic. With the emergence of new variants⁴ and an increase in cases associated with the burgeoning winter surge,⁵ the economic toll of the pandemic on small businesses will only increase over the coming months.⁶ The pandemic has already forced other countries to re-impose community-wide quarantines.⁷ Absent intervention in the form of OSHA's ETS, American communities may be forced to adopt similar measures, with harmful effects on small businesses.

The ETS is necessary to protect the health of millions of American workers

² *Small Businesses Generate 44 Percent of U.S. Economic Activity*, U.S. Small Bus. Admin. (Jan. 30, 2019), <https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/>.

³ *Frequently Asked Questions About Small Business*, U.S. Small Bus. Admin., <https://www.sba.gov/sites/default/files/advocacy/Frequently-Asked-Questions-Small-Business-2018.pdf>.

⁴ Sarah Wild, *How the Omicron Variant Got So Many Scary Mutations So Quickly*, *Sci. Am.* (Dec. 3, 2021), <https://www.scientificamerican.com/article/how-the-omicron-variant-got-so-many-scary-mutations-so-quickly/>.

⁵ Aya Elamroussi, *The US is Averaging More Than 100,000 New Covid-19 Cases a Day, the Highest Level in Two Months*, *CNN* (Dec. 5, 2021), https://www.cnn.com/2021/12/05/health/us-coronavirus-sunday/index.html?utm_term=1638791573973b3545c5bbe52&utm_source=cnn_Five+Things+for+Monday%2C+December+6%2C+2021&utm_medium=email&bt_ee=oEjEDQYIXt5AO%2BKITV8UhQCastYzGahjnfZd5HSsldV2Bi%2FY7WG7QfQboO1gk6S&bt_ts=1638791573975.

⁶ Harriett Torry & David Harrison, *Omicron Variant Is Expected to Dent Global Economy in Early 2022*, *Wall St. J.* (Dec. 27, 2021), <https://www.wsj.com/articles/omicron-variant-is-expected-to-dent-global-economy-in-early-2022-11640631554>.

⁷ Patricia Cohen & Melissa Eddy, *As Virus Cases Rise in Europe, an Economic Toll Returns*, *N.Y. Times* (Nov. 23, 2021), <https://www.nytimes.com/2021/11/23/business/economy/europe-covid-economy.html>.

and, by extension, millions of small businesses. The ETS would ensure that 66.6% of the workforce – over 100 million Americans⁸ – is either vaccinated against, or tests negative for, COVID-19. This in turn protects the customers, family, friends, and, in some instances, employees⁹ of small businesses against this deadly virus, while keeping America open for business.

Most small businesses support policies like OSHA’s ETS, and businesses of all sizes have feasibly implemented policies similar to, and at times more restrictive than, OSHA’s ETS.¹⁰ This policy should be allowed to go into effect, and the sooner the better for the health of American workers. Accordingly, the Small Business *Amici* ask that the Court decline to stay or enjoin OSHA’s ETS.

A. The ETS is critical to keeping small businesses in business. Small businesses are a vital part of the national economy, creating roughly two-thirds of all new jobs.¹¹ But they are also vulnerable¹² and bear the brunt of economic downturns.¹³

The COVID-19 pandemic has proven especially challenging for small businesses. As OSHA notes, early in the pandemic “66% of businesses with fewer than

⁸ Ewan Palmer, *Joe Biden’s Employee Vaccine Rule Means 98 Percent of Companies Unaffected*, Newsweek (Sept. 10, 2021), <https://www.newsweek.com/joe-biden-employee-vaccine-mandate-rules-98-percent-most-companies-unaffected-1627824>.

⁹ The U.S. Small Business defines a “small business” as one with 500 or fewer employees; accordingly some small businesses would be subject to the ETS.

¹⁰ See *infra* notes 31–38, 52–63 and accompanying text.

¹¹ *Frequently Asked Questions About Small Business*, *supra* note 3. For the purpose of these statistics, the Small Business Administration defines small businesses as those with fewer than 500 employees.

¹² *Id.* (reporting that one-fifth of small businesses fail within the first year, and half fail within five years).

¹³ Olivia S. Kim et al., *Revenue Collapses and the Consumption of Small Business Owners in the Early Stages of the COVID-19 Pandemic 1*, (Nat’l Bureau of Econ. Rsch., Working Paper No. 28151, 2020), <https://www.nber.org/papers/w28151>.

100 employees had suffered revenue[] losses exceeding 30%. By contrast, only 27% of larger businesses with more than 100 employees had seen revenue drops of more than 30%.”¹⁴ When the pandemic started, small businesses experienced “mass layoffs, temporary closures, and downsizing.”¹⁵ Relief from the federal government may have blunted the impact on small businesses,¹⁶ but the federal government is unlikely to offer such extraordinary relief again.

In the coming months and years, the fate of small businesses, and the American economy generally, will be dictated largely by the pandemic’s trajectory. Federal Reserve Chair Jerome H. Powell has made this clear in his testimony before Congress on several occasions.¹⁷ In surveys, small businesses report that surging COVID cases, and the government-ordered shutdowns they may spark, are a major

¹⁴ 86 Fed. Reg. 61402, 61511 (Nov. 5, 2021) (citation omitted).

¹⁵ Kim et al., *supra* note 13, at 5–6.

¹⁶ Ruth Simon, *Covid-19’s Toll on U.S. Business? 200,000 Extra Closures in Pandemic’s First Year*, Wall St. J. (April 16, 2021), <https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619>; Phillip L. Swagel, Director, *CBO’s Budget and Economic Analysis During the Pandemic*, Cong. Budget Off. (Oct. 13, 2021), <https://www.cbo.gov/system/files/2021-10/57520-Pandemic-Budget-Analysis.pdf> (COVID-19 legislation estimated to have grown GDP by \$1.5 trillion).

¹⁷ *Coronavirus and CARES Act: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. (2021) (statement of Jerome H. Powell, Chair, Federal Reserve) (citing the Delta variant as a reason for slower job growth this summer), <https://www.federalreserve.gov/newsevents/testimony/powell20211130a.htm>; *Coronavirus Aid, Relief, and Economic Security Act: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. (2021) (statement of Jerome H. Powell, Chair, Federal Reserve) (“As we have emphasized throughout the pandemic, the path of the economy continues to depend on the course of the virus.”), <https://www.federalreserve.gov/newsevents/testimony/powell20210323a.htm>; *Coronavirus Aid, Relief, and Economic Security Act: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 116th Cong. (2020) (statement of Jerome H. Powell, Chair, Federal Reserve) (“As we have emphasized throughout the pandemic, the outlook for the economy is extraordinarily uncertain and will depend, in large part, on the success of efforts to keep the virus in check.”), <https://www.federalreserve.gov/newsevents/testimony/powell20201201a.htm>; *Coronavirus Aid, Relief, and Economic Security Act: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. (2020) (statement of Jerome H. Powell, Chair, Federal Reserve) (“[I]t is safe to reengage in a broad range of activities. The path forward will depend on keeping the virus under control, and on policy actions taken at all levels of government.”), <https://www.federalreserve.gov/newsevents/testimony/powell20200922a.htm>.

concern.¹⁸

Recent events have only underscored the connection between controlling the virus and growing our economy. The Omicron variant is likely to stifle economic growth in 2022.¹⁹ In Europe, Omicron is sapping consumer demand and spurring government shutdowns, threatening permanent closure for small businesses;²⁰ absent the ETS, small businesses here could face the same dire scenario.²¹

Clearly, COVID-19 is a major cause of economic turmoil for small businesses, and mitigating COVID-19 is the best available solution. Just as clearly, widespread vaccination is essential to combatting this pandemic. That is the view not only of *amicus* American Medical Association,²² but also of the National Institutes of Health,²³ the Centers for Disease Control,²⁴ the U.K.'s National Health Service,²⁵ Doctors Without Borders,²⁶ and many others. *Amici* public health and health care

¹⁸ Eric Groves, *Road to Recovery Report*, Alignable (Aug. 10, 2021), <https://www.alignable.com/forum/alignable-road-to-recovery-report-august-2021> (reporting that 47% of businesses were most concerned about government re-closures during rise of Delta variant).

¹⁹ Harriett Torry & David Harrison, *Omicron Variant Is Expected to Dent Global Economy in Early 2022*, Wall St. J. (Dec. 27, 2021), <https://www.wsj.com/articles/omicron-variant-is-expected-to-dent-global-economy-in-early-2022-11640631554>.

²⁰ Patricia Cohen & Melissa Eddy, *Omicron Is Turning Europe's Busy Season Silent*, N.Y. Times (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/business/omicron-europe-business.html?referringSource=articleShare>.

²¹ Jonelle Marte, *Analysis: Omicron Begins to Leave Mark on U.S. Economy, but Unlikely to Derail It*, Reuters (Dec. 23, 2021), <https://www.reuters.com/business/omicron-begins-leave-mark-us-economy-unlikely-derail-it-2021-12-23/>.

²² Sixth Circuit *Amicus* Brief of American Medical Ass'n at 5–8 (ECF No. 102).

²³ *Understanding COVID-19 Vaccines*, Nat'l Insts. of Health (Nov. 3, 2021), <https://covid19.nih.gov/treatments-and-vaccines/covid-19-vaccines>.

²⁴ *COVID-19 Vaccines are Effective*, Ctrs. for Disease Control & Prevention (Dec. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/index.html>; *New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection*, Ctrs. for Disease Control & Prevention (Aug. 6, 2021), <https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html>.

²⁵ *Coronavirus (COVID-19) Vaccines*, Nat'l Health Serv. (Dec. 22, 2021), <https://www.nhs.uk/conditions/coronavirus-covid-19/coronavirus-vaccination/coronavirus-vaccine/>.

²⁶ *COVID-19: Our Global Response*, Drs. Without Borders (Dec. 10, 2021), <https://www.doctorswithoutborders.org/covid19>.

practitioners have outlined the substantial research showing that vaccination is the most effective means of preventing COVID-19 infection and mortality.²⁷ And when employers require vaccination, experience shows that even employees who expressed hesitancy to get vaccinated do so in overwhelming numbers.²⁸ Small businesses recognize that widespread vaccination is the path to ending the pandemic and revitalizing the economy. As the U.S. Chamber of Commerce reports, “[s]mall businesses are very clear on what will help their businesses thrive: both easing COVID restrictions and more vaccinations. Small businesses say that [these] are the two biggest keys to their success[.]”²⁹ Federal Reserve Chair Powell has repeatedly testified that more vaccinations will help restore normal economic conditions.³⁰

Unsurprisingly, then, “[m]any businesses already were in the process of implementing different types of vaccine requirements before the . . . ETS[] was issued.”³¹ A Chamber of Commerce poll showed that a majority of small business

²⁷ Sixth Circuit *Amicus* Brief of American Public Health Ass’n et al. at 12–15 (ECF No. 244).

²⁸ Anupam B. Jena & Christopher M. Worsham, *Facts Alone Aren’t Going to Win Over the Unvaccinated. This Might.*, N.Y. Times (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/opinion/vaccine-hesitancy-covid-omicron.html>.

²⁹ Thaddeus Swanek, *New Poll Shows Small Businesses Hopeful as Pandemic Recovery Accelerates*, U.S. Chamber of Com. (June 14, 2021), <https://www.uschamber.com/small-business/new-poll-shows-small-businesses-hopeful-pandemic-recovery-accelerates>.

³⁰ *Coronavirus and CARES Act: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. (2021) (statement of Jerome H. Powell, Chair, Federal Reserve) (“Continued progress on vaccinations would help support a return to more normal economic conditions.”), <https://www.federalreserve.gov/newsevents/testimony/powell20210928a.htm>; *The Federal Reserve’s Response to the Coronavirus Pandemic: Hearing Before the H. Select Subcomm. on the Coronavirus Crisis*, 117th Cong. (June 22, 2021) (statement of Jerome H. Powell, Chair, Federal Reserve) (“Job gains should pick up in coming months as vaccinations rise…… Continued progress on vaccinations will support a return to more normal economic conditions.”); *Semiannual Monetary Policy Report to the Congress: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. (Feb. 23, 2021) (statement of Jerome H. Powell, Chair, Federal Reserve) (“In particular, ongoing progress in vaccinations should help speed the return to normal activities.”), <https://www.federalreserve.gov/newsevents/testimony/powell20210223a.htm>.

³¹ David Smagalla, *Vaccine Mandate Legal Challenges Muddy the Waters for Employers Preparing to Implement Rules*, Wall St. J. (Nov. 26, 2021), <https://www.wsj.com/articles/vaccine-mandate-legal-challenges-muddy-the-waters-for-employers-preparing-to-implement-rules-11637952516>.

owners require, or are likely to require, their staff to be vaccinated.³² Another survey showed that 59% of small businesses would require new employees to be vaccinated, and another 23% would consider it.³³ Large businesses, too – including AT&T, Bank of America, CVS, McDonald’s, Tyson Foods, United Airlines, UPS, Walmart, and many others – now require employees to be vaccinated.³⁴

It is also worth noting that businesses opposing the ETS are outliers: several studies have shown that most businesses, large and small, support the policy. For example, a Chamber of Commerce survey showed that around two-thirds of small businesses support the ETS.³⁵ SBM’s own polling of small businesses shows that a majority supports a vaccine-or-test requirement for employees.³⁶ Likewise, the Business Roundtable, which represents the CEOs of large corporations,³⁷ also “support[s] the Administration’s vaccination efforts.”³⁸ Importantly, the businesses and business organizations opposing the ETS here do not represent the views of most

³² *Small Businesses Trying to Hire Face Growing Difficulty Finding Workers*, U.S. Chamber of Commerce (Oct. 28, 2021), <https://www.uschamber.com/workforce/small-businesses-trying-to-hire-face-growing-difficulty-finding-workers>.

³³ *60% of Small Businesses Will Only Hire Vaccinated Employees Moving Forward*, Digital (Sept. 29, 2021), <https://digital.com/small-businesses-to-only-hire-vaccinated-employees/>.

³⁴ Jessica Matthews, *All the Major Companies Requiring Vaccines for Workers*, Fortune (Aug. 30, 2021), <https://fortune.com/2021/08/23/companies-requiring-vaccines-workers-vaccination-mandatory/>.

³⁵ *Small Businesses Trying to Hire Face Growing Difficulty Finding Workers*, *supra* note 32.

³⁶ *Small Businesses Support COVID-19 Vaccine Requirements Amid Setbacks from the Delta Variant*, Small Bus. Majority (Sept. 22, 2021), <https://smallbusinessmajority.org/our-research/small-businesses-views-on-vaccine-requirements>; *see also California Small Businesses Support Statewide COVID-19 Vaccine and Testing Requirement*, Small Bus. Majority (Aug. 31, 2021), <https://smallbusinessmajority.org/our-research/california-small-businesses-support-statewide-covid-19-vaccine-and-testing-mandate> (59% of California small businesses “would support a state law requiring businesses to mandate vaccinations and/or weekly testing for employees.”).

³⁷ *About Us*, Business Roundtable, <https://www.businessroundtable.org/about-us> (last visited Dec. 29, 2021).

³⁸ *Business Roundtable Statement on Extension of Vaccine Mandate Implementation Period*, Bus. Roundtable (Nov. 4, 2021), <https://www.businessroundtable.org/business-roundtable-statement-on-extension-of-vaccine-mandate-implementation-period>.

American businesses.

Small businesses – whether affected directly or merely indirectly by the ETS – support OSHA’s regulation. Some of SBM’s members, though still considered small businesses, have more than 100 employees and thus fall directly within the purview of the ETS. Additionally, given that businesses with more than 100 employees manage two-thirds of America’s workers,³⁹ many, if not most, customers of small businesses are likely employees of large businesses covered by the ETS. Thus, the ETS protects small businesses and their employees and customers even if its requirements do not directly apply to them.

Finally, small businesses need the ETS because it will preempt counter-productive state and local efforts to restrict employers’ use of worker safety protocols and vaccine mandates.⁴⁰ Thus far, more than 10 states have restricted businesses’ abilities to impose vaccine requirements on their workers.⁴¹ Without federal intervention, businesses in these states would be restrained from taking effective, common-sense actions to protect themselves and the communities in which they operate. However, OSHA has stated that it intends for the ETS to preempt “any State or local requirements that ban or limit an employer’s authority to require vaccination, face covering, or testing.”⁴² Thus, the ETS protects *all* American workers by

³⁹ Palmer, *supra* note 8.

⁴⁰ See Jonathan A. Segal, *Employers Face Potential Preemption Clash on Vaccine Rules*, Bloomberg Law (Nov. 30, 2021), <https://news.bloomberglaw.com/daily-labor-report/employers-face-potential-preemption-clash-on-vaccine-rules>.

⁴¹ *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, Nat’l Acad. for State Health Pol’y (Dec. 21, 2021), <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>.

⁴² *Frequently Asked Questions*, Occupational Safety and Health Admin., <https://www.osha.gov/coronavirus/ets2/faqs>.

permitting businesses to implement the safety protocols they believe will best protect their employees and communities.

Several parties and *amici* argue that the ETS will trigger a mass exodus of employees who do not want to be vaccinated or tested for COVID. The experiences of large employers that have required vaccinations show that these concerns are exaggerated.⁴³ It is equally or more likely that vaccinated employees would leave their jobs rather than work side-by-side with unvaccinated and untested co-workers.⁴⁴ Moreover, COVID outbreaks previously prompted state and local governments to shut down small businesses, and future outbreaks could necessitate similar action.⁴⁵ The ETS would make such future outbreaks less likely.

As the above discussion shows, it is the pandemic, not the ETS, that poses the gravest threat to businesses large and small. One brief below cites a Goldman Sachs report stating that, “at least seven million affected workers report that they definitely will not get the vaccine.”⁴⁶ But that same report concludes, “[t]he medium-run net employment impact is likely *positive* since higher full vaccination rates will reduce virus spread, which should boost labor demand”⁴⁷ Moreover, higher vaccination

⁴³ Jena, *supra* note 28.

⁴⁴ See, e.g., Lila MacLellan, *Nearly 4 in 10 US Workers Say They May Quit If Their Employer Doesn't Mandate Vaccines*, Quartz at Work (Aug. 10, 2021), <https://qz.com/work/2045018/survey-shows-the-business-risk-of-not-adopting-a-vaccine-mandate/>; *New Research Shows the Unvaccinated and the Vaccinated Are on a Collision Course at Work and School*, Perceptyx (July 22, 2021), <https://blog.perceptyx.com/news-research-vaccinated-versus-unvaccinated-at-work-and-school> (“[O]nly 19 percent of vaccinated workers feel very little or no stress/anxiety” working with unvaccinated co-workers..... “If [vaccinated employees’] concerns aren’t addressed, employers could see quit rates rise even higher as the vaccinated look for remote-friendly jobs and/or offices they feel are safer.”).

⁴⁵ See Groves, *supra* note 18.

⁴⁶ Phillips Manufacturing & Tower Co. et al. Motion for Emergency Stay at 44 (ECF No. 168).

⁴⁷ Joseph Briggs et al., *US Daily: The Effect of the Biden Vaccine Mandate on Vaccination and Employment*, Goldman Sachs (Sept. 13, 2021) (emphasis added), <https://www.gspublishing.com/content/research/en/reports/2021/09/13/cd67a3b5-bb9e-4659-b605-6618d5aa825f.html>.

rates will result in fewer employees lost to avoidable deaths: according to the latest data from the Centers for Disease Control, “unvaccinated people are at 14 times greater risk of dying from COVID-19 than people who are vaccinated.”⁴⁸

B. OSHA’s vaccine-or-test policy is administratively feasible. Opponents of the ETS argue that it is burdensome to administer, but evidence suggests precisely the opposite. Consider, for example, the Signatories to this brief. The SBM itself represents a network of more than 85,000 small businesses and 1,500 partner organizations.⁴⁹ AMIBA, likewise, has fostered alliances that protect over 50,000 independent businesses. Together, these groups include hundreds of businesses with more than 100 employees that are directly subject to the ETS. Moreover, given that OSHA is considering reducing the ETS employee threshold to fewer than 100 employees,⁵⁰ it is possible that even more small businesses will become subject to the ETS. Small Business *Amici*, with their substantial expertise in what businesses need to not only survive but thrive, enthusiastically support the policy at issue here.

Moreover, countless major corporations – from financial firms to transportation entities – have effectively implemented policies at least as strict as the ETS, demonstrating the feasibility of such programs.⁵¹ For example, the investment bank Goldman Sachs, hospitality chain MGM Resorts International, and Amtrak – all companies with thousands if not tens of thousands of employees – have implemented

⁴⁸ See *Covid Data Tracker*, Ctrs. for Disease Control & Prevention <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status> (last visited Dec. 29, 2021).

⁴⁹ *About Us*, *supra* note 37.

⁵⁰ See 86 Fed. Reg. 61402, 61403 (Nov. 5, 2021).

⁵¹ See, e.g., Haley Messenger, *From McDonald’s to Goldman Sachs, Here are the Companies Mandating Vaccines for All or Some Employees*, NBC News (Nov. 16, 2021), <https://www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-n1275808>.

vaccine-or-test policies indistinguishable from the ETS.⁵² Indeed, many corporations have successfully implemented policies more stringent than the ETS. For example, some employers – including the most highly valued company in the United States⁵³ and the most-watched cable channel in the United States⁵⁴ – require *daily* testing of non-vaccinated employees, whereas the ETS requires only weekly testing.

Opponents of the ETS argue that it could cause employees to quit their jobs rather than comply with the policy. But this has not been the experience of those employers who have required vaccines; to the contrary, vaccine uptake rates for these employees has been strikingly high. Tyson Foods, for example, gave its employees three months to get vaccinated or cease working. Before that deadline had even passed, over 96% of employees had complied.⁵⁵ When United Airlines required its employees to be vaccinated, less than 0.3% of its employees chose termination over vaccination.⁵⁶ At Houston Methodist Hospital, less than one in a hundred employees quit or was fired for refusing to comply with a vaccine requirement.⁵⁷ Perhaps no data point is more compelling on the question of uptake rates than the federal government's success in protecting its own employees. Despite being the largest

⁵² *See id.*

⁵³ *See* Mariella Moon, *Apple Will Require Unvaccinated Employees to Test for COVID-19 Daily*, Tech Crunch (Oct. 21, 2021), <https://techcrunch.com/2021/10/21/apple-will-require-unvaccinated-employees-to-test-for-covid-19-daily/>.

⁵⁴ *See* David Bauer, *Fox's Vaccine Criticism Focuses Attention on its Own Policy*, Fox (Sept. 16, 2021), <https://apnews.com/article/joe-biden-business-health-arts-and-entertainment-fox-corp-26096a8781c7c7f1d6c0ddff98a5fe6d>.

⁵⁵ Alison Kosik, *96% of Tyson's Active Workers are Vaccinated*, CNN (Oct. 26, 2021), <https://www.cnn.com/2021/10/26/business/tyson-covid-vaccine/index.html>.

⁵⁶ Jena, *supra* note 28.

⁵⁷ David Leonhardt & Ian Prasad Philbrick, *Boosting Vaccinations*, N.Y. Times (July 23, 2021), <https://www.nytimes.com/2021/07/23/briefing/vaccination-mandates-delta-breakthrough-infections.html>.

workforce in the United States – with more than *3.5 million* workers, worldwide – as of November 24, 2021, 97.2% of federal employees had complied with the Executive Order requiring vaccination.⁵⁸

CONCLUSION

For the foregoing reasons, Small Business *Amici* respectfully request that this Court decline to stay or enjoin the ETS.

⁵⁸ *Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees*, White House (Dec. 9, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/12/09/update-on-implementation-of-covid-%E2%81%A019-vaccination-requirement-for-federal-employees/>.

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