

STATE OF TENNESSEE

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September 16, 2021

The Honorable Joseph R. Biden, Jr.  
President of the United States  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, D.C. 20500

Re: OSHA Emergency Temporary Standard Mandating Vaccination or Testing

Dear Mr. President,

I write to express serious concern over the legality of your recently announced proposal of using an Occupational Safety and Health Administration (“OSHA”) emergency temporary standard (“ETS”) to implement a vaccine or testing mandate on hundreds of thousands of Tennesseans. Our understanding of the proposed ETS is that every employer with 100 or more employees would have to require employees either (1) to get vaccinated, or (2) “to produce a negative test result on at least a weekly basis before coming to work.”<sup>1</sup> I am concerned that this unprecedented assertion of OSHA’s emergency regulatory power does not comply with the requirements of the OSH Act or the restraints of the U.S. Constitution.

As an initial matter, the proposed ETS likely violates the statutory text of the Occupational Safety and Health Act (“OSH Act”). As the U.S. Supreme Court has recognized, Congress “repeatedly expressed its concern about allowing the [OSHA] Secretary to have too much power over American industry” and thus “narrowly circumscribed the Secretary’s power to issue temporary emergency standards.”<sup>2</sup> The promulgation of an ETS is the harshest weapon in OSHA’s regulatory arsenal, and federal law strictly restricts its deployment.<sup>3</sup> That is why, until this year, OSHA had not issued an ETS since 1983, when it issued an emergency asbestos standard that the

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<sup>1</sup> The White House, *Path Out of the Pandemic: President Biden’s COVID-19 Action Plan* (Sept. 2021), <https://www.whitehouse.gov/covidplan/#vaccinate>.

<sup>2</sup> *Indus. Union Dep’t v. Am. Petroleum Prods.*, 448 U.S. 607, 651-52 (1980).

<sup>3</sup> See 29 U.S.C. § 655(c).

Fifth Circuit stayed.<sup>4</sup> Because the newly proposed ETS covers *all* employees of *all* private employers with at least 100 employees, it is difficult to see how OSHA can satisfy the stringent requirements of the OSH Act.

*First*, while I agree with you, Mr. President, that we want to keep Americans safe from COVID-19, this virus is not currently a “grave danger” at every job site in the nation.<sup>5</sup> And the OSHA Secretary must make the “threshold determination” that it is a grave danger for job sites *before* he can regulate them.<sup>6</sup> The “grave danger” necessary for an ETS sets an even higher bar than the “significant risk” standard that applies elsewhere with normally promulgated OSHA standards.<sup>7</sup> Many Tennessee employers have already taken steps to reduce the risks of COVID-19 exposure. Those steps include social distancing, masking, monitoring exposure, and remote work. But, at least based on The White House’s public statements, the ETS would require vaccination or testing *regardless* of the nature of the risk of COVID-19 at a given job site and *regardless* of what an employer has done to reduce the risk. “Congress specifically amended [the OSH Act] to make it perfectly clear that it does not require the Secretary to promulgate standards that would assure an absolutely risk-free workplace.”<sup>8</sup> A nationwide policy that applies across the board fails to consider the steps employers have already taken to reduce risks and protect their workers.

*Second*, even if COVID-19 were a “grave danger” at every job site of every large employer nationwide, mandatory vaccination or testing is *not* “necessary” for every employee.<sup>9</sup> Before the announcement of this proposed ETS, The White House and OSHA stated time and again that masking and other measures were sufficient to protect employees. Indeed, in June of this year, OSHA issued an ETS for healthcare providers that required masking but *not* vaccination.<sup>10</sup> COVID-19 vaccines are available for any eligible American who wants one, and over 175 million Americans have been voluntarily vaccinated. Additionally, at this point in the pandemic, tens of millions of Americans have natural immunity through prior exposure to COVID-19.

Whether due to widespread vaccination, natural immunity, or existing protective measures at a job site, a blanket vaccinate-or-test mandate is not necessary for every employee of a large employer. The risks of COVID-19 vary from employee to employee. Younger employees without comorbidities have high survival rates for COVID-19. As the CDC acknowledges, the “risk increases for people in their 50s and increases in 60s, 70s, and 80s. People 85 and older are the most likely to get very sick.”<sup>11</sup> The ETS’s sweeping vaccinate-or-test requirement fails to

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<sup>4</sup> See *Asbestos Info. Ass’n v. OSHA*, 727 F.2d 415 (5th Cir. 1984); see also Congressional Research Service, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, at 27 (Sept. 13, 2021), <https://sgp.fas.org/crs/misc/R46288.pdf> (documenting the low rate of success for OSHA in ETS litigation).

<sup>5</sup> 29 U.S.C. § 655(c)(1).

<sup>6</sup> *Indus. Union Dep’t*, 448 U.S. at 639-40.

<sup>7</sup> *Id.* at 639.

<sup>8</sup> *Id.* at 646-47.

<sup>9</sup> 29 U.S.C. § 655(c)(1).

<sup>10</sup> See 29 C.F.R. § 1910.502.

<sup>11</sup> CDC, *COVID-19 Risks and Vaccine Information for Older Adults* (Aug. 2, 2021), <https://www.cdc.gov/aging/covid19/covid19-older-adults.html> (emphasis omitted).

acknowledge different risk levels for differently situated employees and, therefore, is not “necessary to protect employees” from COVID-19.<sup>12</sup> And it is far from clear that paid leave is “necessary” to protect employees from dangers *at the workplace*.

*Third*, it is difficult to see how COVID-19 is a “substance[] or agent[] determined to be toxic” or a “new hazard” under the statute.<sup>13</sup> Congress, in enacting the OSH Act, limited its application to “personal injuries and illnesses arising out of work situations” that “impose a substantial burden on . . . interstate commerce.”<sup>14</sup> COVID-19 is a virus tragically now commonplace in American life. It is not, however, a hazard specific to the workplace. Decades ago, when OSHA regularly issued emergency temporary standards, each ETS dealt with workplace exposure to asbestos, vinyl chloride, benzene, pesticides, vinyl cyanide, or similar hazards, where the exposure levels far exceeded those in everyday life. OSHA is better suited to addressing issues specific to the workplace. COVID-19, except in laboratories working with the virus, does not fit the bill.

We are still analyzing the text of the OSH Act and will consider the specific language of the ETS when it becomes available to determine whether this is an appropriate standard under the Act. For almost half a century, since Tennessee initially sought approval for its state-run plan in 1973, the State has cooperated with OSHA to ensure that workplace standards best protect our workers. Whenever the federal OSHA promulgates a standard, the Tennessee OSHA must either promulgate its own version of the standard or show that its standards are at least as effective.<sup>15</sup> The normal standard-making process provides us and other stakeholders the opportunity to work with OSHA and address concerns before the promulgation of the standard. Unfortunately, the ETS process does not afford the same procedures, so it is imperative to ensure that OSHA has the authority that it claims *before* it asserts that authority. Precluding the States and the public in general from commenting or engaging in a process essentially legislative in nature sows discord and suspicion, invites legal challenges, and undermines the ultimate policy result.

In addition to the statutory concerns, there are valid concerns that the OSHA Secretary’s unilateral promulgation of the vaccinate-or-test ETS violates constitutional restraints. Even if the ETS were a proper standard under the OSH Act, such an “open-ended grant” of power to OSHA would raise serious nondelegation concerns. *Indus. Union Dep’t*, 448 U.S. at 646 (adopting a “construction of the statute that avoids” nondelegation concerns in the normal standard-making process). The U.S. Constitution gives “[a]ll legislative powers” to Congress, and Congress cannot circumvent that restriction by delegating its powers to an entity within the executive branch, such as OSHA.<sup>16</sup> Any interpretation of terms such as “grave danger” and “necessary” that justifies the

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<sup>12</sup> 29 U.S.C. § 655(c)(1).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 651(a).

<sup>15</sup> *Cf.* 29 C.F.R. § 1953.5.

<sup>16</sup> U.S. Const. art. I, § 1; see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (ruling that the National Industrial Recovery Act’s delegation of rulemaking powers was unconstitutional).

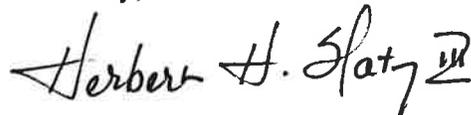
ETS leaves concern that Congress has not provided an “intelligible principle” for OSHA to use in implementing the OSH Act.<sup>17</sup>

But perhaps more importantly, the proposed ETS risks undermining the federalist structure of our joint government. States possess broad police powers that the Federal Government lacks. Historically, States and local governments have been the primary guardians and regulators of their citizens’ health, safety, and well-being. COVID-19 affects States differently at different times. What is necessary in one State might be or become unnecessary in another. For that reason, cases involving state regulation—such as *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—are inapposite when considering the proper scope of federal regulation.

Separately, consideration of the constitutionality of the ETS must also take into account individual citizens’ constitutional rights. I do not want to make assumptions about the contours of the proposed ETS, but, at a minimum, the vaccinate-or-test proposal will implicate religious liberty, free speech, and bodily autonomy concerns. We have already heard from Tennesseans expressing serious concerns about infringement of their constitutional rights. I encourage The White House and OSHA to keep those constitutional rights in mind when drafting the ETS. Robust accommodation provisions might alleviate some of those concerns.

Tennessee has worked diligently to respond to the pandemic by balancing the need for public health with the rights of its citizens. I agree that everyone eligible for COVID-19 vaccination should, in consultation with his or her doctor, get vaccinated. Over half of the Volunteer State’s citizens have already received at least one COVID-19 vaccination shot. Ultimately, however, public health decisions are best left in the hands of States, communities, businesses, and free citizens. I appreciate your consideration of the legal concerns identified in this letter.

Sincerely,



Herbert H. Slatery III  
Attorney General and Reporter of Tennessee

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<sup>17</sup> *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).