BRAD LITTLE
Governor
STATE OF IDAHO

LAWRENCE G. WASDEN
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CHUCK WINDER
President Pro Tempore
IDAHO STATE SENATE

SCOTT BEDKE
Speaker of the House
IDAHO HOUSE OF REPRESENTATIVES

January 19, 2021

Doug Parker
Assistant Secretary of Labor for
Occupational Safety and Health
Occupational Safety and Health Administration
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted Electronically via Regulations.gov

RE: Comments by Idaho Governor Brad Little, Attorney General Lawrence Wasden, Idaho Senate President Pro-Tempore Chuck Winder, and Idaho House of Representatives Speaker Scott Bedke (the latter two on behalf of their offices and the 66th Idaho Legislature) on the request for comment on COVID-19 Vaccination and Testing; Emergency Temporary Standard, and whether it should be adopted as a final standard (Docket No. OSHA-2021-0007)

Dear Assistant Secretary Parker:

The undersigned elected leaders of the State of Idaho submit the following comments in opposition to the COVID-19 Vaccination and Testing; Emergency Temporary Standard issued in 86 Fed. Reg. 61402 (Nov. 5, 2021) ("ETS"). The State of Idaho is a participant in a Petition to Review the ETS, which is pending at the U.S. Court of Appeals for the Sixth Circuit (In re MCP No. 165), and in which the United States Supreme Court granted an emergency application for stay of the ETS on January 14, 2022 (Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. ___ (2022) ("*NFIB*"). President Pro Tem Winder, Speaker Bedke, and the 66th Idaho Legislature are also petitioners in the consolidated action pending in the Sixth Circuit. They also applied to the U.S. Supreme Court for an emergency stay (Case No.

21A252). At the outset, the signatories to these comments are gravely concerned that in the face of a 6-3 decision from the United States Supreme Court that the Occupational Safety and Health Administration (OSHA) lacks the statutory authority to issue the type of rule reflected by the ETS, OSHA has yet to withdraw the ETS.

The State of Idaho is also a party to another set of comments in opposition submitted by the Attorneys General of several states. We incorporate those comments and adopt the legal reasoning therein as if it were our own. In addition to those comments, we offer these comments that are tailored to the Idaho-specific issues that the ETS promulgation overlooks, rendering it unnecessary. We therefore submit these comments to reinforce the legal conclusion that OSHA lacks authority, as well as to protect Idaho's sovereignty against ongoing unconstitutional federal encroachment into state police powers guaranteed by the 10th Amendment to the United States Constitution. As the United States Supreme Court held, OSHA does not have the authority to require that tens of millions of employees vaccinate or test against an endemic virus under the guise of a workplace regulation, when it is a usurpation of public health regulatory authority. OSHA should, therefore, immediately withdraw this ETS, suspend its efforts to promulgate a similar permanent standard, and accord the appropriate deference to the United States Constitution's allocation of police powers. If OSHA does not suspend its efforts, it must fully comply with the National Environmental Policy Act and the Federal Advisory Committee Act.

The 10th Amendment Precludes the ETS

Vaccinations and public health policy are traditional areas of state regulation and flow naturally from the police powers reserved to the states under the 10th Amendment to the United States Constitution. Regulating public health and safety is a police power, and the 10th Amendment reserves such police power for States. Idaho has thoughtfully and carefully managed its public health policy in a manner that appropriately fits its citizens and the businesses within its borders. Among the numerous debates within Idaho over the past two years has been an intense one with regard to the proper role of government and business regulation.

The Commerce Clause cannot be used to circumvent this limit on federal power. *See United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (noting the Supreme Court "always ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"). In sum, even if Congress were to expressly grant this authority to the Department of Labor or OSHA, such delegation would be constitutionally dubious. This conclusion has recently been reinforced through a series of recent court holdings. *See BST Holdings v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) (noting that a person's choice to remain unvaccinated and forgo regular testing is noneconomic activity) (citing to *NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J., concurring)). Adherence to the rule of law necessitates OSHA withdrawing this proposed ETS and corresponding formal rulemaking.

Idaho Has Responded to the Pandemic In a Manner Consistent With Its Police Powers

Through the police powers reserved the states under the 10th Amendment, each State may respond to the COVID-19 pandemic as its elected officials deem proper. The founders recognized and trusted the States under our Constitution to protect the health of their citizenry. *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring in the judgment) ("[T]he police power[] belongs to the States and the States alone."). Since the beginning of the COVID-19 pandemic, each State has responded to the ebbs and flows of the pandemic. For example, within Idaho, the State has recommended the wearing of masks, entered into crisis standards of care, and exited the same standards of care. Most importantly the State of Idaho has consistently and actively managed its response to the pandemic. This management has included consistent communication between its elected officials, business leaders, community leaders, school leaders, and healthcare providers. It is well documented that the pandemic does not affect all the states the same way at the same time, which should be a cautionary note for a one-size-fits-all federal regulation. What was necessary at times in one State might not have been necessary, or may have become unnecessary, in others. True, the COVID-19 pandemic has been a problem nationwide. But the ETS unlawfully pre-empts all State policy decisions regardless of the considerations made by the States.

Idaho operates under two polestars of government regulation. First, government should govern with the lightest touch possible. Second, the most effective government is that which is the closest to the people. The sledgehammer of the OSHA ETS's mandate on every business with more than 100 employees regardless of conditions, circumstances, or any other factors violates both of these governing principles of Idaho. This is compounded by the reality that OSHA and the Department of Labor are far flung, heavy-handed federal bureaucracies headquartered more than 2000 miles away with no practical knowledge of the State of Idaho and its needs. This perspective is found within OSHA claims that they have authority to impose a vaccinate-or-test mandate across "all industries" on 84 million Americans. See 86 Fed. Reg. at 61424. The breadth of the ETS has never before been claimed nor attempted by OSHA, and again reflects that pursuit of the ETS should be terminated.

Idaho's Governor and Legislature have been in almost constant communication with Idaho's business leaders as they have collectively worked to identify the best means to address the pandemic. Contrary to the one-size-fits all approach of the OSHA ETS, Idaho's governmental leaders have concluded that each business knows its needs, the needs of its employees, and the needs of its customers when it comes to how each should best address the pandemic. It should come as no surprise that Idaho's home builders came to a different conclusion than Idaho's health care providers when it comes to how they should best address COVID. A single across the board solution makes no sense for diverse industries working in different environments under different conditions.

In fact, the Supreme Court observed that, "It draws no distinctions based on industry or risk of exposure to COVID–19." *NFIB*, slip op. at 3. For example, much of Idaho's industry is agricultural, construction, tourist, and resource-based, which means that a large portion of Idaho's citizens work outside. At this point, it is well known that well ventilated and outside activities pose a greatly diminished risk for the contraction and spread of COVID. Although the ETS purports to take these factors into account, it has drawn the exemptions for outside work so narrowly that it has rendered them "as largely illusory." *NFIB*, slip op. at 3. This is impermissible and should be cause for the ETS and formal rulemaking to be withdrawn.

Congress Has Not Delegated this Authority to the Department of Labor or OSHA

Even if one were to assume the Constitution allows a federal vaccine or test mandate, which at this juncture is a highly questionable conclusion, this authority would have to be delegated by Congress to the Department of Labor. When a federal agency operates to enact a sweeping rulemaking, the Supreme Court has directed: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (per curiam) (slip op. at 6). As the United States Supreme Court held, there is "little doubt that OSHA's mandate qualifies as an exercise of such authority" (*NFIB*, slip op. at 6) given its "significant encroachment into the lives – and health – of a vast number of employees" (id. at 5). But the OSH Act does not authorize this mandate because it only authorizes the establishment of workplace safety standards, not broad public health measures. *NFIB*, slip op. at 6. Continued pursuit of this ETS would result in a significant and impermissible expansion of OSHA's regulatory authority without congressional authorization.

OSHA must comply with NEPA

If this ETS becomes a final rule, it must comport with the requirements of the National Environmental Policy Act of 1969, its implementing regulations at 40 C.F.R. Part 1500 et seq., and the Department of Labor's NEPA regulations at 29 C.F.R. Part 11. The ETS's one-paragraph statement of alleged compliance with NEPA and its implementing regulations, at 86 Fed. Reg. 61504 (Nov. 5, 2021), is inadequate under the statute, regulations, and controlling case law.

NEPA requires all agencies that propose a major federal action that significantly affects the quality of the environment to prepare an environmental impact statement that describes the environmental impacts of the action, unavoidable adverse environmental effects, alternatives to the action, and irretrievable and irreversible commitments of resources should the action be implemented. 42 U.S.C. § 4332(2)(C)(i)-(v). If the impact on the environment is uncertain, the agency must prepare an environmental assessment to

determine if an EIS is required. *Id.* at § 4332(2)(E). An agency must comply with NEPA "to the fullest extent possible." *Id.* at § 4332.

The ETS offers a conclusory statement that the ETS "will have no significant impact on air, water, or soil quality; plant or animal life; the use of land; or other aspects of the external environment." *Id.* The ETS then devotes three sentences to conclude that there will be no significant impact on the environment from test kits and supplies. *Id.*

There is no indication of any NEPA compliance in the Certified List of the Record supporting the ETS as filed by OSHA in the litigation in the Sixth Circuit Court of Appeals (Consolidated Case No. 21-7000, ECF No. 146, filed Nov. 26, 2021). An electronic search of the Certified List using search terms "NEPA", "Environmental Assessment", "EA", "EIS", "FONSI", "Decision Record", and "Record of Decision" produced no results. Counsel for the Idaho Legislature inquired with counsel for OSHA whether OSHA would stipulate to amend the Certified List to include the agency's NEPA analysis including but not limited to:

- Federal Register Notice(s) of Intent to prepare an Environmental Impact Statement (EIS) or Environmental Assessment (EA) and other public scoping notices
- the draft and final EIS or draft and final EA
- any supplementation of the final EIS or final EA
- OSHA's Finding of No Significant Impact or other finding that the Interim Final Rule has no significant impact on the environment, other than the referenced Interim Final Rule
- Any Record of Decision, Decision Record, or other decision document based on the NEPA analysis described above, other than the referenced Interim Final Rule.

Counsel for OSHA responded on December 16, 2021 that the administrative record contains the materials relevant to OSHA's NEPA compliance.[1] Counsel for OSHA did not otherwise identify those materials in the Certified List. For example, the Certified List is devoid of any reference to OSHA's finding of no significant impacts, the environmental assessment on which the finding is based, and the public comments in response to these documents that are required to be included in the public record pursuant to OSHA's NEPA regulations. 29 C.F.R. § 11.12(c).

[1] The signatories, on behalf of the State of Idaho, the 66th Idaho Legislature, and their offices, do not waive any claims they may have against the ETS before it is finalized as a permanent standard.

The ETS applies to roughly 84 million workers who must be either vaccinated or obtain a medical test each week and wear a mask each workday. The impacts on the human environment from vaccinations, testing, and masking some subset of 84 million Americans may be significant, insignificant, or significant but subject to mitigation to render the impacts insignificant. Regardless, those impacts must be analyzed under NEPA, with notice and comment opportunities for the public, and a record of the analysis and public involvement made a part of OSHA's official records.

OSHA's Certified List of the Record hints at the significant impacts on the environment due to the ETS. See, e.g., Doc. 143 and 508 regarding use of masks and respirators; Doc. 201 and 230 regarding testing supply chain; Doc. 205 and 302 regarding test kits; Doc. 206 regarding testing reagents; Doc. 211, 228, and 259 regarding production of foam tip swabs; Doc. 314 regarding soaring sales of RVs; Doc. 353 regarding use of personal protective equipment; Doc. 407 regarding disinfection; Doc. 480 regarding the socio-economics of the ETS; Doc. 623 and 630 regarding aerosols; and Doc. 641 regarding hand hygiene. And then there is the enormous question of the environmental impact on the SARS-CoV-2 virus itself, a living organism, and the impact on the environment from its suppression through the final rule.

It is frankly inconceivable that a federal agency regulation affecting 84 million Americans in every state, territory, and the District of Columbia would not have a significant impact on the environment, but that is precisely what NEPA requires OSHA to analyze and document. While an EIS may not be necessary for a six-month ETS, when that ETS is replaced by a permanent standard as OSHA proposes to do here, a completed EIS is required under NEPA. *Dry Color Mfrs' Ass'n v. Dep't of Labor*, 486 F. 2d 98, 108 (3rd Cir. 1973).

If OSHA adopts the ETS as a permanent standard, OSHA must, to the fullest extent possible, comply with NEPA's analytical and public notice and comment requirements before final promulgation of the standard. Failure to do so will subject the permanent standard to the risk of adverse judicial review.

OSHA must comply with FACA

Under the Federal Advisory Committee Act, no advisory committee shall be established by a federal agency unless such establishment is "determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator [of General Services] with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law." 5 U.S.C. App. 2, § 9(a)(2). Further, no advisory committee shall "meet or take any action until an advisory committee charter has been filed … with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and House of Representatives have legislative jurisdiction of such agency." 5 U.S.C. App. 2, § 9(c).

The term "advisory committee" means "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof … which is— … established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees or the Federal Government …." 5 U.S.C. App. 2, § 3(2).

Agency heads or other federal officials creating an advisory committee shall "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2, § 5(b)(2), (c). Advisory committees must meet certain prescribed requirements and follow certain prescribed procedures, including:

> (1) Each advisory committee meeting shall be open to the public.
>
> (2) Timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to ensure that all persons are notified of such meeting prior thereto.
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> (3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator [of General Services] may prescribe.
>
> (4) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.
>
> (5) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of the matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.
>
> (6) There shall be a designated officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. No advisory committee shall conduct any meeting in the absence of that officer or employee.

> (7) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the federal government, and with an agenda approved by such officer or employee. 5 U.S.C. App. 2, § 10.

If, in the process of issuing the ETS or promulgating it as a final rule, OSHA established or utilized any committees meeting the statutory definition of a FACA committee for the purpose of obtaining advice or recommendations on SARS-CoV-2, COVID-19, or any aspect of the ETS and failed to follow FACA's requirements, OSHA violated FACA. The final rule should state whether such committees were established or utilized for the purposes covered by FACA and, if so, how OSHA complied with the law. The agency records relevant to OSHA's FACA compliance should be preserved.

Conclusion

Numerous reasons have been advanced in these comments seeking the termination of the ETS and formal rulemaking with regard to Docket No. OSHA-2021-0007 seeking to implement a vaccine or testing mandate. We respectfully requests that this effort immediately cease because it violates the 10th Amendment, it unnecessarily invades the province of the State of Idaho as it tailors it COVID-19 response to the specific needs of its citizens and businesses, and no congressional authorization for this rule has been advanced or identified. If OSHA proceeds to promulgate a permanent rule, it must first fully comply with NEPA and FACA. We respectfully request that the ETS and rulemaking be permanently withdrawn.

Sincerely,

BRAD LITTLE
Governor
State of Idaho

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CHUCK WINDER
President Pro Tempore
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