

**No. 21-7000**

---

---

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

---

IN RE: OSHA RULE ON COVID-19  
VACCINATION AND TESTING,  
86 FED. REG. 61402

---

On Petitions for Review

---

**RESPONSE OF *AMICI CURIAE* IN SUPPORT OF  
THE GOVERNMENT'S MOTION TO DISSOLVE STAY**

---

Emmy L. Levens  
Richard A. Koffman  
Paul Stephan  
Brendan Schneiderman  
COHEN MILSTEIN SELLERS & TOLL PLLC  
1100 New York Ave NW, Suite 500  
Washington, DC 20005  
Telephone: (202) 408-4600  
elevens@cohenmilstein.com  
rkoffman@cohenmilstein.com  
pstephan@cohenmilstein.com  
bschneiderman@cohenmilstein.com

*Counsel for Amici Curiae*

---

---

## **Corporate Disclosure Statement**

The Small Business Majority (“SBM”) has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The American Independent Business Alliance (“AMIBA”) has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Border Grill Las Vegas, LLC, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Ciudad LA, LLC (Las Vegas, NV), has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Border Grill Truck and Catering, LLC (Los Angeles, CA), has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Feedfolks, LLC (Los Angeles, CA), has no parent corporation and no publicly held corporation owns 10% or more of its stock.

BG SM20, LLC (Santa Monica, CA), has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Mundo Management Group, LLC (Los Angeles, CA), has no parent corporation and no publicly held corporation owns 10% or more of its stock.

**TABLE OF CONTENTS**

	<b>Page</b>
I. Interest of <i>Amici Curiae</i> .....	1
II. Introduction and Summary of Argument.....	4
III. The Emergency Temporary Standard Is Critical to Keeping Small Businesses in Business.....	6
IV. OSHA’s Vaccine-or-Test Policy is Administratively Feasible .....	17
V. Conclusion.....	22

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
20 C.F.R. § 639.3(a)(i)–(ii) .....	13
42 C.F.R. § 411.101 .....	13
29 CFR § 1602.7 .....	13
86 Fed Reg. 61402 (Nov. 5, 2021) .....	17
Aaron Blake, <i>Tucker Carlson Makes a Great Point About Fox News’s Vaccination Policy</i> , Washington Post (Oct. 12, 2021) .....	19
<i>About Us</i> , Business Roundtable (last visited Dec. 1, 2021) .....	13
<i>About Us</i> , Small Bus. Majority .....	17
<i>A Group of 200-Plus CEOs from Companies like Amazon, Walmart, and Home Depot Says it ‘Welcomes’ Biden’s Vax-Or-Test Mandate</i> , Business Insider (Sep. 10, 2021) .....	19
Alison Kosik, <i>96% of Tyson’s Active Workers are Vaccinated</i> , CNN (Oct. 26, 2021) .....	21
Andrea Hsu, <i>Companies are telling unvaccinated workers to pay more for health insurance</i> , NPR (Nov. 22, 2021) .....	20
<i>Apple Will Require Unvaccinated Employees to Test for COVID-19 Daily</i> , Tech Crunch (Oct. 21, 2021) .....	19
Aya Elamroussi, <i>The US is Averaging More Than 100,000 New Covid-19 Cases a Day, the Highest Level in Two Months</i> , CNN (Dec. 5, 2021) .....	4
<i>CBO’s Budget and Economic Analysis During the Pandemic Pandemic</i> , Cong. Budget Office (Oct. 13, 2021) .....	7
<i>Coronavirus Aid, Relief, and Economic Security Act: Hearing Before the H. Comm. on Fin. Servs.</i> , 116 <sup>th</sup> Cong. ....	8
<i>Coronavirus Aid, Relief, and Economic Security Act: Hearing Before the H. Comm. on Fin. Servs.</i> , 117 <sup>th</sup> Cong. ....	7

*Coronavirus Aid, Relief, and Economic Security Act: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs., 116th*.....7

*Coronavirus and CARES Act: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs., 117th* .....7, 10

*Coronavirus (COVID-19) Vaccines, Nat’l Health Serv. (updated Nov. 25, 2021)*.....9

*COVID-19: Our Global Response, Drs. Without Borders (Sept. 30, 2021)* .....9

David Leonhardt & Ian Prasad Philbrick, *Boosting Vaccinations*, N.Y. Times (July 23, 2021) .....21

David Smagalla, *Vaccine Mandate Legal Challenges Muddy the Waters for Employers Preparing to Implement Rules*, Wall St. J (Nov. 26, 2021),.....11

*Ensuring COVID-19 Vaccines Work*, Ctrs. for Disease Control & Prevention (Nov. 10, 2021) .....9

Eric Groves, *Road to Recovery Report*, Alignable (Aug. 10, 2021) (Aug. 10, 2021).....8

*Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*, White House (Sept. 9, 2021) .....21

Ewan Palmer, *Joe Biden’s Employee Vaccine Rule Means 98 Percent of Companies Unaffected*, Newsweek (Sept. 10, 2021).....5

Federal Rules of Appellate Procedure Rule 29 .....1

*Federal Workers Under Mandate Are Vaccinated*, PBS News Hour (Nov. 24, 2021).....15

*Frequently Asked Questions About Small Business*, U.S. Small Bus. Admin. ....4, 6

*Frequently Asked Questions*, Occupational Safety and Health Administration .....14

*Getting Back to Work Safely*, Small Bus. Ass’n of Mich ..... 12

Haley Messenger, *From McDonald’s to Goldman Sachs, Here are the Companies Mandating Vaccines for All or Some*, NBC News (Nov. 16, 2021)..... 18

Jessica Matthews, *All the Major Companies Requiring Vaccines for Workers*, Fortune (Aug. 30, 2021)..... 11

Jonathan A. Segal, *Employers Face Potential Preemption Clash on Vaccine Rules*, Bloomberg Law (Nov. 30, 2021) .....14

Joseph Briggs et al., *US Daily: The Effect of the Biden Vaccine Mandate on Vaccination and Employment*, Goldman Sachs (Sept. 13, 2021).....16

*New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection*, Ctrs. for Disease Control & Prevention (Aug. 6, 2021).....9

*New Poll Shows Small Businesses Hopeful as Pandemic Recovery Accelerates*, U.S. Chamber of Com. (June 14, 2021) .....10

Olivia S. Kim et al., *Revenue Collapses and the Consumption of Small Business Owners in the Early Stages of the COVID-19 Pandemic* (Nat’l Bureau of Econ. Rsch., Working Paper No. 28151, 2020)..... 6

Patricia Cohen & Melissa Eddy, *As Virus Cases Rise in Europe, an Economic Toll Returns*, N.Y. Times (Nov. 23, 2021).....5

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) .....7

Sarah Wild, *How the Omicron Variant Got So Many Scary Mutations so Quickly*, Sci. Am. (Dec. 3, 2021).....4

*Semiannual Monetary Policy Report to the Congress: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs., 117th*.....10

*Small Businesses Generate 44 Percent of U.S. Economic Activity*, U.S. Small Bus. Admin. (Jan. 30, 2019) .....4

*Small Businesses Support COVID-19 Vaccine Requirements Amid Setbacks from the Delta Variant*, Small Bus. Majority (Sept. 22, 2021) .....12

*Small Businesses Trying to Hire Face Growing Difficulty Finding Workers*, U.S. Chamber of Commerce (Oct. 28, 2021), ..... 11, 12

*Small Businesses Will Only Hire Vaccinated Employees Moving Forward*, Digital (Sept. 29, 2021) .....11

*Stocks Close Higher as Investors Shrug Off Omicron Worries*, Wall St. J. (Nov. 29, 2021) .....8

*Stocks, Oil Drop Sharply on Concerns Over New Covid-19 Variant*, Wall St. J. (Nov. 26, 2021).....8

*S&P 500 Index*, MarketWatch ..... 16

*The Federal Reserve’s Response to the Coronavirus Pandemic: Hearing Before the H. Select Subcomm. on the Coronavirus Crisis*, 117<sup>th</sup> Cong..... 10

*The White House, Press Briefing by White House COVID-19 Response Team and Public Health Officials*, White House (Nov. 22, 2021).....16

*Understanding COVID-19 Vaccines*, Nat’l Insts. of Health (Nov. 3, 2021) .....9

*Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees*, White House (Nov. 24, 2021), .....22

*US Workers Say They May Quit If Their Employer Doesn’t Mandate Vaccines*, Quartz at Work (Aug. 10, 2021)..... 15

*Vaccinated Are on a Collision Course at Work and School*, Perceptyx (July 22, 2021) ..... 15

*Vaccine Mandate Implementation Period*, Business Roundtable (Nov. 4, 2021).....13

*Vaccine and Testing Requirement*, Small Bus. Majority (Aug. 31, 2021) .....12

**I. 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.<sup>1</sup> 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.

Founded in 2005, SBM engages a network of over 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

---

<sup>1</sup> 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.



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 30 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 a 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 the Occupational Safety and Health Administration (“OSHA”), the pandemic has presented “special challenges for small businesses.”<sup>2</sup> 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.<sup>3</sup> Small businesses have also been struck especially hard by staff shortages.<sup>4</sup>

Through their roles as both experts in, and resources to, 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.

---

<sup>2</sup> COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61511 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## II. Introduction and Summary of Argument

Small businesses account for more than 40% of U.S. economic activity<sup>5</sup> and more than two-thirds of U.S. job creation.<sup>6</sup> Moreover, today's "large" businesses – automobile manufacturers, retail chains, technology firms, and many others – started out as small businesses. Accordingly, small businesses are vital to the health not only of the current economy but of the economy for generations to come.

Small businesses have been hit especially hard by the COVID-19 pandemic. With the emergence of new variants<sup>7</sup> and an increase in cases associated with the impending winter surge,<sup>8</sup> the economic toll of the pandemic on small businesses will only increase over the coming months. The pandemic has already forced other

---

<sup>5</sup> *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/>.

<sup>6</sup> *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>.

<sup>7</sup> 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/>.

<sup>8</sup> 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%2BKITV8UhQCastYzGahjnfiZd5HSsldV2Bi%2FY7WG7QfQboO1gk6S&bt\\_ts=1638791573975](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%2BKITV8UhQCastYzGahjnfiZd5HSsldV2Bi%2FY7WG7QfQboO1gk6S&bt_ts=1638791573975).

countries to re-impose community-wide quarantines.<sup>9</sup> Absent intervention, American communities may adopt similar measures, with harmful effects on small businesses.

The Emergency Temporary Standard (“ETS”), imposed by the Department of Labor’s Occupational Safety and Health Administration (“OSHA”), is necessary to protect the health of millions of American workers and, by extension, millions of small businesses. The ETS would ensure that 66.6% of the workforce – over 100 million Americans<sup>10</sup> – is either vaccinated against, or tests negative for, COVID-19, protecting the customers, family, friends, and, in some instances, employees<sup>11</sup> of small businesses against this deadly virus and 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

---

<sup>9</sup> 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>.

<sup>10</sup> 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>.

<sup>11</sup> 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.

restrictive than, OSHA’s ETS.<sup>12</sup> 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 lift the stay of OSHA’s ETS.

### **III. The Emergency Temporary Standard 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.<sup>13</sup> But they are also vulnerable. One-fifth of small businesses fail within the first year, and half fail within five years.<sup>14</sup> And during economic downturns, “[s]mall businesses typically contract earlier and more severely than large firms.”<sup>15</sup>

The COVID-19 pandemic has proven especially challenging for small businesses. As OSHA notes, early in the pandemic “66% of businesses with fewer than 100 employees had suffered revenue[] losses exceeding 30%. By contrast, only 27% of larger businesses with more than 100 employees had seen revenue

---

<sup>12</sup> See *infra* notes 31–40, 57–64 and accompanying text.

<sup>13</sup> *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>. For the purpose of these statistics, the Small Business Administration defines small businesses as those with fewer than 500 employees.

<sup>14</sup> *Id.*

<sup>15</sup> 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>.

drops of more than 30%.”<sup>16</sup> When the pandemic started, small businesses experienced “mass layoffs, temporary closures, and downsizing.”<sup>17</sup> Relief from the federal government may have blunted the impact on small businesses,<sup>18</sup> 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.<sup>19</sup> In surveys, small businesses

---

<sup>16</sup> 86 Fed Reg. 61402, 61511 (Nov. 5, 2021) (citation omitted).

<sup>17</sup> Kim et al., *supra* note 15, at 5–6.

<sup>18</sup> 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 Office (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).

<sup>19</sup> *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.*

report that surging COVID cases, and the government-ordered shutdowns they may spark, are a major concern.<sup>20</sup>

Recent events have only underscored the connection between controlling the virus and growing our economy. On Friday, November 26, 2021, stock values fell around the world in response to troubling news of the Omicron variant.<sup>21</sup> Then on Monday, November 29, 2021, as the news about this new variant became more mixed and somewhat less ominous (while still concerning), stocks rebounded.<sup>22</sup>

---

*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) (“It 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>.

<sup>20</sup> 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).

<sup>21</sup> *Stocks, Oil Drop Sharply on Concerns Over New Covid-19 Variant*, Wall St. J. (Nov. 26, 2021), <https://www.wsj.com/articles/global-stock-markets-dow-update-11-26-2021-11637901748>.

<sup>22</sup> *Stocks Close Higher as Investors Shrug Off Omicron Worries*, Wall St. J. (Nov. 29, 2021), <https://www.wsj.com/articles/global-stock-markets-dow-update-11-29-2021-11638169716>.

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,<sup>23</sup> but also of the National Institutes of Health,<sup>24</sup> the Centers for Disease Control,<sup>25</sup> the U.K.'s National Health Service,<sup>26</sup> Doctors Without Borders,<sup>27</sup> and many others. *Amici* public health and health care practitioners have outlined the substantial research showing that vaccination is the most effective means of preventing COVID-19 infection and mortality.<sup>28</sup>

---

<sup>23</sup> Amicus Brief of American Medical Ass'n at 5–8 (ECF No. 102).

<sup>24</sup> *Understanding COVID-19 Vaccines*, Nat'l Insts. of Health (Nov. 3, 2021), <https://covid19.nih.gov/treatments-and-vaccines/covid-19-vaccines>.

<sup>25</sup> *Ensuring COVID-19 Vaccines Work*, Ctrs. for Disease Control & Prevention (Nov. 10, 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>.

<sup>26</sup> *Coronavirus (COVID-19) Vaccines*, Nat'l Health Serv. (updated Nov. 25, 2021), <https://www.nhs.uk/conditions/coronavirus-covid-19/coronavirus-vaccination/coronavirus-vaccine/>.

<sup>27</sup> *COVID-19: Our Global Response*, Drs. Without Borders (Sept. 30, 2021), <https://www.doctorswithoutborders.org/covid19>.

<sup>28</sup> Amicus Brief of American Public Health Ass'n et al. at 12–15 (ECF No. 244).



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[.]”<sup>29</sup> Federal Reserve Chair Powell has also said on multiple occasions that more vaccinations will help restore normal economic conditions.<sup>30</sup>

Unsurprisingly then, “[m]any businesses already were in the process of implementing different types of vaccine requirements before the . . . ETS[] was

---

<sup>29</sup> 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>.

<sup>30</sup> *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>.

issued.”<sup>31</sup> A Chamber of Commerce poll showed that a majority of small business owners require, or are likely to require, their staff to be vaccinated.<sup>32</sup> A Digital.com survey showed 59% of small businesses would require new employees to be vaccinated, and another 23% would consider it.<sup>33</sup> 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.<sup>34</sup> Even *amicus* Small Business Association of Michigan, which opposes the ETS, “supports vaccination[,] encourages its members to encourage employees to

---

<sup>31</sup> 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>.

<sup>32</sup> *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>.

<sup>33</sup> *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/>.

<sup>34</sup> 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/>.

become vaccinated,”<sup>35</sup> and provides employers with sample vaccination policies on its website.<sup>36</sup>

It is also worth noting that businesses opposing OSHA’s 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.<sup>37</sup> SBM’s own polling of small businesses shows that a majority supports a vaccine-or-test requirement for employees.<sup>38</sup> Likewise, the Business Roundtable, which represents the CEOs of

---

<sup>35</sup> Amicus Brief of Small Business Ass’n of Michigan at 8 (ECF No. 89).

<sup>36</sup> *Getting Back to Work Safely*, Small Bus. Ass’n of Mich., <https://www.sbam.org/covid-19-resources/getting-back-to-work-safely/> (last visited Dec. 1, 2021).

<sup>37</sup> *Small Businesses Trying to Hire Face Growing Difficulty Finding Workers*, *supra* note 32.

<sup>38</sup> *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.”).

large corporations,<sup>39</sup> also “support[s] the Administration’s vaccination efforts.”<sup>40</sup>

The businesses and business organizations opposing the ETS here do not represent the views of most 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 over 100 employees and thus fall directly within the purview of the ETS. Moreover, businesses with 100 or more employees make up 1.9% of businesses, but employ about 66.6% of workers,<sup>41</sup> so the 100-employee cutoff is a reasonable way to protect roughly two-thirds of the workforce while minimizing the government’s oversight costs. In fact, such a cutoff is routine for OSHA and other administrative agencies.<sup>42</sup> Additionally, given that businesses with more than 100 employees manage two-thirds of America’s workers,<sup>43</sup> many,

---

<sup>39</sup> *About Us*, Business Roundtable, <https://www.businessroundtable.org/about-us> (last visited Dec. 1, 2021).

<sup>40</sup> *Business Roundtable Statement on Extension of Vaccine Mandate Implementation Period*, Business Roundtable (Nov. 4, 2021), <https://www.businessroundtable.org/business-roundtable-statement-on-extension-of-vaccine-mandate-implementation-period>.

<sup>41</sup> Palmer, *supra* note 10.

<sup>42</sup> *See, e.g.*, 20 C.F.R. § 639.3(a)(i)–(ii) (Worker Adjustment and Retraining Notification Act regulations); 42 C.F.R. § 411.101 (Large group health plans). *See also* 29 CFR § 1602.7 (since 1966, Equal Employment Opportunity Commission requirement that every employer with 100 or more employees must file a Standard Form 100).

<sup>43</sup> Palmer, *supra* note 10.

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 even if its requirements do not directly apply to them.

Finally, while many businesses have adopted policies similar to the ETS, the ETS is important because it will preempt state and local efforts to restrict employers' use of worker safety protocols and vaccine mandates.<sup>44</sup> As of the end of November 2021, at least 10 states had restricted businesses' abilities to impose vaccine requirements on their workers.<sup>45</sup> Without federal intervention, businesses in these states would be restrained from taking effective 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."<sup>46</sup> Thus, the ETS protects *all* American workers by permitting businesses to implement the safety protocols they believe will best protect their employees and communities.

---

<sup>44</sup> 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>.

<sup>45</sup> *Id.*

<sup>46</sup> *Frequently Asked Questions*, Occupational Safety and Health Administration, <https://www.osha.gov/coronavirus/ets2/faqs>.

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. But it is equally likely that vaccinated employees – who comprise the vast majority of American workers<sup>47</sup> – would leave their jobs rather than work side-by-side with unvaccinated and untested co-workers.<sup>48</sup> Moreover, COVID outbreaks previously prompted state and local governments to shut down small businesses, and future outbreaks could prompt similar action in the future.<sup>49</sup>

As the above discussion shows, it is the pandemic, not the ETS, that poses the gravest threat to businesses large and small. One brief cites a Goldman Sachs report stating that, “at least seven million affected workers report that they

---

<sup>47</sup> See Zeke Miller & Colleen Long, *White House Says 92 Percent of Federal Workers Under Mandate Are Vaccinated*, PBS News Hour (Nov. 24, 2021), <https://www.pbs.org/newshour/politics/white-house-says-92-percent-of-federal-workers-under-mandate-are-vaccinated> (“About 82.2 percent of American adults, or more than 212 million people, have received at least one dose. Of them about 71 percent, or over 183 million, are fully vaccinated.”)

<sup>48</sup> See, e.g., see also 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.”)

<sup>49</sup> See Groves, *supra* note 20.

definitely will not get the vaccine.”<sup>50</sup> But that same report concludes, “The medium-run net employment impact is likely *positive* since higher full vaccination rates will reduce virus spread, which should boost labor demand . . . .”<sup>51</sup> Not to mention that higher vaccination 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.”<sup>52</sup>

Evidence from the stock market confirms that the *pandemic* causes economic turmoil; the *ETS* does not. As noted above, the stock market reacted negatively to the first news of the Omicron variant on November 26 and recovered when concerns about the variant tempered on November 29.<sup>53</sup> By contrast, the stock market reacted very little when the President announced his intention to issue

---

<sup>50</sup> Phillips Manufacturing & Tower Co. et al. Motion for Emergency Stay at 44 (ECF No. 168).

<sup>51</sup> 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>.

<sup>52</sup> See *The White House, Press Briefing by White House COVID-19 Response Team and Public Health Officials*, White House (Nov. 22, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/22/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-69/>.

<sup>53</sup> *Supra* notes 21–22 and accompanying text.

the ETS (September 9), when the ETS was issued (November 5), or when the Fifth Circuit stayed it (November 6):<sup>54</sup>



Evidence from the stock market, the Federal Reserve Chair, and small and large businesses shows that the biggest threat to business is not the ETS but failure to abate the spread of COVID-19.

#### IV. 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.<sup>55</sup> 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

<sup>54</sup> *S&P 500 Index*, MarketWatch, <https://www.marketwatch.com/investing/index/spx/charts> (last visited Dec. 1, 2021) (annotations added).

<sup>55</sup> *About Us*, Small Bus. Majority, <https://smallbusinessmajority.org/about-us>.



subject to the ETS. Moreover, given that OSHA is considering reducing the ETS employee threshold to fewer than 100 employees,<sup>56</sup> 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, consider the scores of businesses that have implemented similar (or even more stringent) emergency measures in response to COVID-19. Countless major corporations – from financial firms to transportation entities – have chosen to impose policies at least as strict as the ETS, demonstrating the feasibility of such programs.<sup>57</sup> 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 vaccine-or-test policies that are virtually indistinguishable from the ETS.<sup>58</sup>

---

<sup>56</sup> See 86 Fed Reg. 61402, 61403 (Nov. 5, 2021).

<sup>57</sup> 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>.

<sup>58</sup> See *id.*

Many major employers actually *exceed* the stringency of the ETS. For example, American Express, a company of more than 60,000 employees,<sup>59</sup> requires in-person employees to be vaccinated.<sup>60</sup> Other major employers like Home Depot, United Airlines, Disney, and Wal-Mart have also demonstrated that a vaccination requirement is administrable.<sup>61</sup> Some employers – including the most highly-valued company in the United States<sup>62</sup> – require *daily* testing, whereas the ETS requires only weekly testing.<sup>63</sup>

American businesses are free to impose more demanding safety requirements on their employees than the ETS requires – whether by requiring daily testing, mandating vaccines, or imposing higher healthcare premiums on

---

<sup>59</sup> American Express Company 2020 Annual Report (Form 10-K), Securities Exchange Commission (2021).

<sup>60</sup> See Messenger, *supra* note 57.

<sup>61</sup> Hannah Towey, *A Group of 200-Plus CEOs from Companies like Amazon, Walmart, and Home Depot Says it 'Welcomes' Biden's Vax-Or-Test Mandate*, Business Insider (Sep. 10, 2021), <https://www.businessinsider.com/biden-vaccine-test-mandate-business-response-walmart-amazon-google-apple-2021-9>.

<sup>62</sup> 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/>.

<sup>63</sup> Aaron Blake, *Tucker Carlson Makes a Great Point About Fox News's Vaccination Policy*, Washington Post (Oct. 12, 2021), <https://www.washingtonpost.com/politics/2021/10/12/tucker-carlson-makes-great-point-about-fox-newss-vaccination-policy/>.

employees who refuse to get vaccinated.<sup>64</sup> Each of these policies is more demanding of employers and employees than the ETS, and yet each is a measure that major American businesses have voluntarily imposed. Given this fact, the ETS, which stops short of these more drastic measures, cannot reasonably be rejected on administrability grounds. But businesses – especially small businesses – need support from the government in order to impose standards that they feel adequately protect their workers. Consider Border Grill, a signatory to this brief, which has imposed vaccine mandates in its California locations, but has refrained from doing so at its Nevada location, which has 183 employees, because the lack of governmental support in Nevada would undermine employee compliance with the requirements Border Grill would like to impose.

Opponents of the ETS argue that it burdens employers with tracking who is vaccinated and developing testing regimes for those who are not. But this argument overlooks two important facts. First, while much has been made of workers who claim that they will refuse to get vaccinated in a vaccine-or-test or even vaccine-mandate regime, there is reason to think these threats are vastly overstated. Consider, for example, Houston Methodist Hospital, where less than one in a

---

<sup>64</sup> See, e.g., Andrea Hsu, *Companies are telling unvaccinated workers to pay more for health insurance*, NPR (Nov. 22, 2021), <https://www.npr.org/2021/11/22/1056238770/covid-delta-unvaccinated-higher-health-insurance-premiums>.

hundred employees actually quit or was fired after refusing to comply with a vaccine mandate.<sup>65</sup>

Second, as mentioned above, if an employer does find the tracking of unvaccinated employees difficult to administer, it is free to impose a simpler policy, such as a vaccine mandate. In fact, the uptake rates observed by employers who require their workers to get vaccinated is 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.<sup>66</sup>

Perhaps no data point is more compelling on the question of uptake rates than the federal government's success in protecting its own employees. On September 9, 2021, President Biden issued an Executive Order requiring that federal employees receive a COVID-19 vaccination, except under limited circumstances.<sup>67</sup> Despite being the largest workforce in the United States – with more than 3.5 million workers, worldwide – as of November 24, 2021, 96.5% of

---

<sup>65</sup> 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>.

<sup>66</sup> 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>.

<sup>67</sup> *Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*, White House (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>.

federal employees had complied with the policy.<sup>68</sup> Of that 96.5%, 92% had received at least one vaccine dose.<sup>69</sup>

## V. Conclusion

For the foregoing reasons, Small Business *Amici* respectfully request that the stay of the ETS be lifted.

Date: December 7, 2021

Respectfully submitted,

/s/ Emmy L. Levens

Emmy L. Levens  
Richard A. Koffman  
Paul Stephan  
Brendan Schneiderman  
COHEN MILSTEIN SELLERS &  
TOLL PLLC  
1100 New York Ave NW, Suite 500  
Washington, DC 20005  
Telephone: (202) 408 4600  
elevens@cohenmilstein.com  
rkoffman@cohenmilstein.com  
pstephan@cohenmilstein.com  
bschneiderman@cohenmilstein.com

*Counsel for Amici Curiae*

---

<sup>68</sup> *Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees*, White House, (Nov. 24, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-implementation-of-covid-19-vaccination-requirement-for-federal-employees/>.

<sup>69</sup> *Id.*

**CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)(A)**

I hereby certify that the foregoing response complies with Fed. R. App. P. 27(d)(2)(A) because it contains 4,407 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced font in Microsoft Word 2010 using 14-point Times New Roman.

Date: December 7, 2021

Respectfully submitted,

/s/ Emmy L. Levens

**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: December 7, 2021

Respectfully submitted,

/s/ Emmy L. Levens