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BEFORE THE WORKPLACE PROTECTIONS  
AND  
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SUBCOMMITTEES  
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EDUCATION AND LABOR COMMITTEE  
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON PROTECTING LIVES AND LIVELIHOODS:  
VACCINE REQUIREMENTS AND EMPLOYEE ACCOMMODATIONS

October 26, 2021

Chair Adams and Bonamici, Ranking Members Keller and Fulcher, and Members of the Committees, thank you for inviting me to share my views on vaccine standards and employee accommodations. A court has noted that an emergency temporary standard (ETS) is an “an unusual response to exceptional circumstances.”<sup>1</sup> There can be no doubt that COVID 19 qualifies an exceptional circumstance requiring an unusual response.

My testimony focuses on four conclusions about an OSHA COVID ETS. First, OSHA clearly has the legal authority to issue an ETS requiring vaccines and testing to save workers’ lives from the continued risks of COVID-19. Second, the Occupational Safety and Health Act (Act) mandates that OSHA require vaccinations and testing because these protections save lives, more so than masking and distancing. Third, OSHA’s decision to require vaccines and testing is appropriate response to the Delta variant and a slowdown in the pace of vaccinations that has occurred since June when the existing ETS was issued. Finally, a vaccine requirement is exactly the sort of sensible safeguard that this country has taken going back to the days of George Washington.

I am the Frank U. Fletcher Chair of Administrative Law at the Wake Forest University School of Law. I am also the Vice-President and Member Scholar of the Center for Progressive Reform (CPR) (<http://progressivereform.org>). Founded in 2002, CPR is a 501(c)(3) nonprofit research and educational organization comprising more than 60 scholars across the nation. Our mission is to use the power of public participation and law to create a responsive and inclusive government, healthy and safe communities, and a just and sustainable world.

My work on regulation and administrative law includes eleven books, eight book chapters, and over 60 articles (as author or coauthor). My latest book (coauthored with Elizabeth Fisher) was published in 2020 by Cambridge University Press and addressed the history of administrative law and agency governance in this country. I have studied and written about OSHA for over 25 years. I have served as a consultant to government agencies, including OSHA, and have testified previously before Congress on regulatory subjects.

## A. OSHA AND COVID

Since the beginning of the pandemic, frontline workers have been forced to labor without effective mitigation measures to protect them.<sup>2</sup> Black, Latinx, and other people of color are disproportionately represented in many occupations that make up the low-paid, high-risk jobs, such as health services, childcare, public transit, grocery clerks, janitorial services, and meatpacking, which have been deemed essential during the pandemic.<sup>3</sup> More than 700,000 people

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<sup>1</sup>Dry Color Mfgs. Ass’n, v. Dept. of Labor, 486 F.2d 98, 104 n.9a (3d Cir. 1973)

<sup>2</sup> See, e.g., Thomas McGarity, et al., Ctr. for Progressive Reform, Protecting Workers in a Pandemic: What the Federal Government Should be Doing (2020), <https://progressivereform.org/our-work/workers-rights/protecting-workers-in-a-pandemic/>.

<sup>3</sup> Hye Jin Rho, et al., Ctr. for Econ. & Policy Research, A Basic Demographic Profile of Workers in Frontline Industries (2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>; Shawn Fremstad, et al., Ctr. for Econ. & Policy Research, Meatpacking Workers are a Diverse Group Who Need Better Protections (2020), [https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/#:~:text=Almost%20one%2Dhalf%20\(44.4%20percent,and%2022.5%20percent%20are%20Black\)](https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/#:~:text=Almost%20one%2Dhalf%20(44.4%20percent,and%2022.5%20percent%20are%20Black).).

have died from Covid in less than 2 years.<sup>4</sup> Many others have suffered long-term health effects. The pandemic continues. There is no occupational health hazard that has caused so much death and disease in our lifetimes.

In the early stages of the pandemic, OSHA told a federal court that its existing regulations – none of which directly address infectious diseases – coupled with enforcement under the general duty clause made an emergency COVID standard unnecessary. OSHA suspended an employer’s obligation to record work-related COVID infections, so it had no idea how widespread the problem had become. OSHA did few inspections and issued even fewer citations as workplace outbreaks of COVID affected transportation, meatpacking, health care, correctional, retail, and other workers.<sup>5</sup>

The agency also ignored calls by unions and workers to adopt an ETS to protect workers from infectious diseases, including coronavirus.<sup>6</sup> In fact, when unions challenged OSHA’s decision not to put in place an emergency standard for infectious diseases, the agency spent precious resources defending its inaction in court, rather than putting those resources to use protecting workers.

## B. The Previous ETS

OSHA has now recognized the flaw in its earlier approach. In June 2021, the Labor Department issued an emergency COVID standard that requires non-exempt medical facilities to conduct a hazard assessment and have a written plan to mitigate virus spread. It also requires healthcare employers to provide some employees with N95 respirators or other personal protective equipment.<sup>7</sup> The same employers must also ensure 6 feet of distance between workers or erect barriers between employees where feasible in situations when distancing is not possible.

The draft ETS that OSHA forwarded to OMB for review would have protected all workers from COVID, but the published ETS applies only to health care workers – and then only some of them. OSHA did not explain why other workers were not covered. Moreover, as discussed below, the existing standard does not require vaccinations or testing, but OSHA has determined that these protections are now necessary considering the impact of the Delta variant and the significant number of Americans who are not yet vaccinated.

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<sup>4</sup> Julie Bosman & Lauren Leatherby, U.S. Coronavirus Death Toll Surpasses 700,000 Despite Wide Availability of Vaccines, NY Times, Oct. 1, 2021, <https://www.nytimes.com/2021/10/01/us/us-covid-deaths-700k.html>.

<sup>5</sup> Letter from William Cochran, Acting Area Dir., Occupational Safety & Health Admin., to Winder Nursing Inc., Citation and Notification of Penalty (May 18, 2020), <https://aboutblaw.com/Q9u>; Tom Hals, Labor Dept Cites Ohio Nursing Homes for COVID-19 Violations, Reuters (July 22, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-nursing-homes-idUSKCN24N2DM>.

<sup>6</sup> Petition from Richard Trumka, President, AFL-CIO, to Eugene Scalia, Sec’y of Labor, Petition for Emergency Temporary Standard for Infectious Disease (Mar. 6, 2020), [https://aflcio.org/sites/default/files/2020-03/FINAL%20AFLCIO\\_Petition%20COVID-19.pdf](https://aflcio.org/sites/default/files/2020-03/FINAL%20AFLCIO_Petition%20COVID-19.pdf).

<sup>7</sup> OSHA, Occupational Exposure to COVID 19—An Emergency Standard, 86 Fed. Reg. 32376 (2021).

### C. STATUTORY AUTHORITY TO REGULATE

As the next step to protect employees, OSHA is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. Section 6(c) of the Occupational Health and Safety Act (Act) authorizes OSHA to issue an emergency standard if (1) employees “are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) if an “emergency standard is necessary to protect employees from such danger.” OSHA plans to issue an ETS to implement this requirement.

The courts have defined “grave danger” to mean a life-threatening hazard. A hazard is life-threatening when it is “incurable, permanent, or fatal” rather than “easily curable” or has “fleeting effects.”<sup>8</sup> These findings must be supported by evidence that shows more than a possibility that these effects will occur.<sup>9</sup> In the past, courts have recognized that 80 predicted deaths in six months would constitute a grave danger.<sup>10</sup>

The evidence that COVID meets this test is overwhelming. The statistics gathered by the federal and state governments demonstrates that many people, of all ages, races, occupations, and health status have died. The same data establish that many more than 80 people will die each month absent mandatory protections.

An ETS is “necessary” when workers are exposed to a life-threatening disease during the time the ETS is in effect while OSHA promulgates a permanent standard.<sup>11</sup> The courts that have refused to affirm an ETS perceived that OSHA lacked sufficient evidence that a significant number of workers might die or become seriously ill during the six month or so period before a permanent standard is issued.<sup>12</sup> Unlike the ETS at issue in those cases, we know for certain that workers will die from exposure to COVID unless they are protected by an ETS during the time it will take OSHA to write a permanent standard. Short-term exposure to COVID, especially the Delta variant, is a grave danger that requires immediate protection because that single short-term exposure is sufficient to cause the worker’s death or serious illness.

The fact that a person can be exposed to the COVID virus outside of the person’s place of employment does not eliminate OSHA’s authority to regulate. The courts have previously upheld OSHA standards addressing noise and diseases caused by bloodborne pathogens even though

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<sup>8</sup> Florida Peach Growers Ass’n v. Dept. of Labor., 449 F.2d 1483(6<sup>th</sup> Cir. 1978).

<sup>9</sup> Dry Color Mfgs. Ass’n, v. Dept. of Labor, 486 F.2d 98 (3d Cir. 1973)

<sup>10</sup> Asbestos Information Ass’n., 727 F.2d 415, 425-26 (5th Cir. 1984).

<sup>11</sup> Id. at 424.

<sup>12</sup>Id. at 425.

neither are unique to the workplace because both noise and bloodborne pathogens constituted a significant risk during employment.<sup>13</sup>

#### D. DEPARTURE FROM PREVIOUS STANDARDS

OSHA has not previously adopted a mandatory vaccination or testing requirement, but it clearly has the legal authority to do so. In fact, the Act requires this step because the risks presented by COVID 19 are unique and require a unique response.

Congress required OSHA, when “promulgating standards dealing with toxic materials or harmful physical agents,” to “set the standard which most adequately assures, to the extent feasible, based on the best available evidence, that no employee will suffer material impairment of health or functional capacity.”<sup>14</sup> If OSHA concludes that the wearing of masks or taking other precautions, such as staying six feet from other workers, is not sufficient to protect employees, the courts will uphold this determination as long as OSHA has significant evidence to support this determination. The courts have defined “substantial evidence” as the “evidence [that] a reasonable person would regard as sufficient to support a conclusion.”<sup>15</sup> It is likely that OSHA will be able to meet this burden of proof. Masking and distancing, while useful, do not reduce the risk to employees of contacting COVID as much as testing or vaccinations.

The existing ETS, which does not require vaccinations or testing, was promulgated at a time in the country when it appeared possible that most Americans would become vaccinated and before the new outbreaks of COVID that appeared in the fall due to the Delta Covid variant. OSHA must assess the need for an ETS by considering the evolving understanding of the best ways to protect workers in their places of employment. Moreover, OSHA found that since there was already a high level of vaccination (75 percent) among health care workers,<sup>16</sup> the protections it ordered would be sufficient as most of the rest of health care workers become vaccinated. It seems likely that there may be hundreds of American workplaces where the rate of vaccination is far below the 75 percent OSHA found among health care workers.

Unlike previous OSHA standards, a vaccine and testing requirement requires that employers undergo a medical procedure. COVID, however, creates a unique risk that OSHA has not previously addressed. Regarding previous standards, the toxic or other harmful substances used in the workplace created a risk that workers would die or become seriously ill. Workers were not putting each other in danger of dying or of a serious disease. The source of the risk of COVID, by comparison, is the workers’ themselves. Workers who are not vaccinated or tested increase the

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<sup>13</sup> *Forging Industry Ass’n v. Secretary*, 773 F.2d 1437, 1444 (4th Cir. 1985) (affirming OSHA’s Occupational Noise Exposure standard, 29 CFR 1910.95); *Dental Ass’n v. Martin*, 984 F.2d 823 (7th Cir. 1993) (affirming OSHA’s Bloodborne Pathogens standard, 29 CFR 1910.1030).

<sup>14</sup> 29 USC 655(b)(5).

<sup>15</sup> *Consolidated Edison Co. v. NLRB*, 305 US 197, 229 (1938).

<sup>16</sup> 86 Fed. Reg. at 32510.

risk that fellow workers will become die or become seriously ill. The way to minimize this risk is to create a vaccination and testing mandate.

Vaccine requirements have long been recognized in the United States as a valid policy tool for protecting the public interest in similar circumstances. The story of General George Washington mandating what amounted to a crude precursor to the smallpox vaccine for soldiers stationed at Valley Forge during the fabled winter of 1777 is now a common part of many high school U.S. history classes.<sup>17</sup> More than two centuries later vaccine requirements have become commonplace in various contexts of American life. For instance, the U.S. military requires up to 18 different vaccines, depending on the individual member's branch of service or geographic assignment.<sup>18</sup> Similarly, all 50 states require that children receive a wide variety of vaccinations as a condition of attending school, whether public or private. More recently, states have begun requiring certain vaccines for individuals employed in certain high-risk industries, such health care or childcare.<sup>19</sup> Significantly, the Supreme Court has consistently upheld various vaccine requirements as consistent with constitutional protections of individual liberty.<sup>20</sup>

This history recognizes that the public interest outweighs the limited intrusion on a person's privacy of a vaccine requirement. Moreover, OSHA will offer the alternative of testing which is an even more limited such invasion of privacy.

## E. CONCLUSION

OSHA's intent to require vaccinations or testing is unique for the agency, but it is the type of sensible safeguard that the country has relied on to protect people since George Washington fought for our independence. OSHA not only has the legal authority to issue an ETS requiring vaccines and testing, but its statutory mandate also requires it to take this step. The agency must choose the method of protection that is feasible and "most adequately assures" that workers will not die or become seriously ill. These protections save lives, more so than masking and distancing.

OSHA declined to require vaccinations or testing in its June ETS which protected health care workers, but it must evaluate the risk to workers based on the evolving nature of that risk. An ETS

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<sup>17</sup> Lindsay Chervinsky, *The Long History of Mandated Vaccinations in the United States*, GOVERNING, Aug. 5, 2021, <https://www.governing.com/now/the-long-history-of-mandated-vaccines-in-the-united-states> (last visited Oct. 8, 2021).

<sup>18</sup> See U.S. Dept. of Def., Military Health System, Vaccine Recommendations by AOR, <https://www.health.mil/MHSHome/Military%20Health%20Topics/Health%20Readiness/Immunization%20Healthcare/Vaccine%20Recommendations/Vaccine%20Recommendations%20by%20AOR#NORTHCOM> (last visited Oct. 8, 2021).

<sup>19</sup> Drew DeSilver, *States Have Mandated Vaccinations Since Long Before COVID-19*, PEW RESEARCH, Oct. 8, 2021, <https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/> (last visited Oct. 20, 2021).

<sup>20</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding a state law requiring free smallpox vaccinations for adults over 21); *Zucht v. King*, 260 U.S. 17 (1922) (upholding a local ordinance barring children who had been vaccinated against smallpox from attending school).

requiring vaccinations or testing is now necessary because of the impact of the Delta variant and a slowdown in the pace of vaccinations.

People should not have to risk their lives when they go to work when there are sensible safeguards that would protect them. An ETS requiring vaccinations or testing would fulfill this life-saving mandate.