



## *A Message to the Administration from the Job Creators Network and America's Small Businesses*

Dear President Biden and Labor Secretary Walsh,

Job Creators Network, a nonpartisan membership organization whose mission is to educate employees of Main Street America and protect the 85 million people who depend on the success of small businesses, submits these comments and objections in response to the Department of Labor and the Occupational Safety & Health Administration's request for public comment on their proposal to convert the COVID-19 emergency temporary standard (ETS) into a permanent standard. See COVID-19 Vaccination & Testing: Emergency Temporary Standard, Docket No. OSHA-2021-0007.

On January 13, 2022, by a 6-3 vote, the Supreme Court soundly rejected OSHA's illegal power grab. See *NFIB v. Dep't of Labor*, Nos. 21A244 & 21A247, 595 U.S. \_\_\_ (S. Ct. Jan 13, 2022). The Court agreed with JCN's arguments at every step: (1) OSHA lacks statutory power to issue a regulation that applies to so many businesses; (2) OSHA lacks statutory power to issue a regulation addressing a disease that is not occupational in nature; (3) the ETS was a novel, de facto vaccine mandate despite a fig-leaf exception for weekly testing with perpetual masking; (4) the ETS's other "exceptions" (like for outdoor workers) are "illusory"; (5) the ETS would force "billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs."

In short: on every single issue at the Supreme Court, Job Creators Network won—and OSHA lost. OSHA should do the right thing: withdraw the ETS immediately and scrap plans to issue any future standard on vaccines or testing.

But if OSHA nonetheless insists on moving forward with its proposal to turn the ETS into a permanent standard, JCN offers the following comments and objections:

- (1) Because the Supreme Court has held that OSHA lacks statutory authority to issue a general regulation aimed at a non-occupational hazard like COVID-19, no broad OSHA standard on COVID-19 could ever pass legal muster. As the Supreme Court held, at the absolute most, OSHA could target only a few small types of industries where COVID presents an unusually high risk compared to other industries: "OSHA could regulate researchers who work with the COVID-19 virus" and perhaps could regulate "risks associated with working in particularly crowded or cramped environments."
- (2) Because the Supreme Court has held that OSHA lacks statutory authority to issue a regulation aimed at so many individuals (over 80 million Americans), no OSHA standard of widespread scope—regardless of what actions or precautions it mandates or authorizes—would be legal.
- (3) Because the Supreme Court held that even a de facto vaccine mandate is beyond OSHA's authority (on the basis that vaccines are "strikingly unlike" other OSHA requirements because vaccines "cannot be undone at the end of the workday"), OSHA lacks power to require or even "strongly encourage" (in its euphemistic language) vaccines, regardless of how wide or narrow such a de facto mandate is.
- (4) Because these key premises of the ETS have been rejected by the Supreme Court, any OSHA standard arising out of the ETS could not be a logical outgrowth of the ETS itself. See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). Any OSHA standard that would not immediately violate the Supreme Court's decision would have to be dramatically different in almost every single way from the ETS itself. Accordingly, OSHA cannot proceed by using the ETS. It would have to begin the process anew, with a public notice of proposed rulemaking. If OSHA nonetheless moves forward with the current ETS serving as the notice of proposed rulemaking, any resulting OSHA standard would likely be immediately stayed by a federal court.

Again, after such a decisive loss at the Supreme Court, OSHA should stand back and let America's small businesses give the nation's economy a much-needed boost to help with struggling supply chains and worker shortages. But if OSHA insists on moving forward with more harmful mandates, Job Creators Network stands ready to sue OSHA again—and will prevail again.

Sincerely,

A handwritten signature in black ink that reads "Alfredo Ortiz".

Alfredo Ortiz  
President and CEO  
Job Creators Network

**JobCreatorsNetwork.com**