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Assistant Secretary Douglas L. Parker
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Comments on: RIN 1218-AD42 COVID-19 Vaccination and Testing; Emergency
Temporary Standard**

Dear Assistant Secretary Parker:

On behalf of 11 local governments from across the United States (collectively, “Local Government Commenters”), Public Rights Project submits this comment in strong support of the Emergency Temporary Standard (“ETS”) for COVID-19 Vaccination and Testing.¹

We write to urge the Occupational Safety and Health Administration (“OSHA”) to adopt a final rule for three primary reasons. First, local governments’ experiences with vaccination policies demonstrate that the ETS, and a subsequent final rule, are effective and necessary to address COVID-19 in the workplace. In describing the experiences of local governments, Commenters also respond to OSHA’s specific requests for comments from entities with COVID-19 vaccination policies. Second, the ETS and the subsequent final rule are essential for ensuring that local governments are able to comply with requirements under the Americans with Disabilities Act (“ADA”) and other federal laws and regulations. Finally, the rule is necessary to protect local governments’ authority and power to provide safe workplaces, particularly in states that preempt local policies designed to protect workers and residents.

¹ Local Government Commenters are aware of the U.S. Supreme Court’s decision in *National Federation of Independent Business v. Department of Labor*, Nos. 21A244, slip op. (U.S. Jan. 13, 2022). Because litigation remains ongoing and because the Court specifically left the door open for vaccination-and-test rules of some kind (“That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID-19,” slip op. at 7), we are submitting this Comment to support the refinement and/or deployment of future rules to protect workers from the spread of COVID-19.

1. Local Governments' Experiences with Vaccine Policies for Their Employees Demonstrate That the ETS Is an Effective and Necessary Approach for Addressing the Significant Risks and Grave Dangers Posed by COVID-19

Vaccine mandates are not new or unique to COVID-19. Since the 19th century, vaccination mandates implemented by local governments have proved effective interventions to reduce disease spread. In 1905, the Supreme Court upheld the right of local governments to issue vaccine mandates.² Today, all fifty states plus the District of Columbia mandate diphtheria, tetanus, pertussis, polio, measles, rubella, and chickenpox as a prerequisite to school enrollment. Some states have moved beyond schools and extended vaccine requirements to the workplace. For example, New York requires all workers in hospitals, nursing homes, and other health care facilities be immunized against measles and rubella. Rhode Island requires childcare workers to be immunized against several common childhood diseases and receive the annual flu shot.³

Building upon these state and local requirements, local governments across the country have implemented COVID-19 vaccine policies to provide safe workplaces for their employees and protect the public that they serve.⁴ According to an October 2021 Bloomberg Cities analysis, thirteen of the fifty largest cities in the U.S. require COVID-19 vaccinations while an additional fifteen provide employees an option to get vaccinated or undergo regular testing.⁵ Local governments' recent experiences with COVID-19 vaccine policies have proven similar to those of private companies and universities: mandates are effective at increasing vaccination rates while fears of mass worker shortages and non-compliance are overblown. Recent data demonstrates that employees are receiving vaccines with minimal resulting workforce disruption or turnover.⁶ In particular, the implementation outcomes in three cities – Tucson, Denver, and Milwaukee – demonstrate the efficacy of COVID-19 vaccine policies that are similar to the rule proposed by the ETS. The policies in these cities did not lead to worker shortages or the halting of labor and led to robust vaccine adoption, subsequently reducing the risk presented by COVID-19.

a. Tucson, Arizona

The City of Tucson, Arizona enacted a COVID-19 vaccine policy on August 13, 2021 to “provide and maintain a safe and healthy workplace for employees and their families,” protect the public, and preserve the city’s ability to “provide essential services to the residents, businesses,

² Jacobson v. Mass., 197 U.S. 11, 39 (1905).

³ Drew DeSilver, *States Have Mandated Vaccinations Long Before COVID-19*, PEW RES. INST. (Oct. 8, 2021), <https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/>.

⁴ *COVID-19 Vaccine Resource Hub*, NAT’L ASSOC. OF CNTYS., <https://www.naco.org/covid19/vaccine-distribution-plans> (last visited Jan. 19, 2022) (describing 47 county-level vaccine policies and 56 city-level vaccine policies across the country).

⁵ Beth Blauer, *Data Watch: Which U.S. Cities Have COVID Vaccine Mandates for Employees?*, BLOOMBERG (Oct. 6, 2021) <https://bloombergcities.jhu.edu/news/data-watch-which-us-cities-have-covid-vaccine-mandates-employees>.

⁶ *Science Brief: COVID-19 Vaccines and Vaccination*, CDC (Sept. 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html>.

and visitors of Tucson,” among other reasons.⁷ Under the policy, the city’s 4,000 employees had to be fully vaccinated by December 15, 2021 or receive an exemption or accommodation on the basis of a qualifying disability, medical condition, or sincerely held religious belief. The policy does not require that exempted or accommodated employees complete regular COVID-19 testing. Non-compliant employees are subject to suspension and then termination. Initial fears of disruption of city services due to broad employee non-compliance have proven unfounded: as of December 2, 2021, the city had reached 99.7% compliance with only eleven permanent employees subject to termination.⁸ Compliance increased after the city amended the policy to require termination for failure to comply.⁹

b. Denver, Colorado

The City and County of Denver, Colorado also enacted its COVID-19 vaccine policy in August 2021.¹⁰ The policy requires vaccinations for all city and county employees without a medical or religious exemption. The policy also applies to some private employees in high-risk settings. Employees that receive an exemption must test every five days and are subject to additional masking and distancing requirements. As of December 17, 2021, the city and county have reached a 99.6% compliance rate among 12,497 employees. The city and county dismissed 22 employees and eight resigned after not getting vaccinated or receiving a religious/medical exemption. Twenty-one employees were suspended, six were dismissed, and two resigned after receiving exemptions but failing to adhere to the masking and/or testing requirements.

As a result, the overall rate of infection in the City and County of Denver decreased after the September 30, 2020 vaccination mandate. According to the City and County of Denver, without the vaccination mandate they would have seen higher rates of infection with the latest Omicron variant, supported by higher community transmission rates in surrounding jurisdictions. In addition, the City and County of Denver saw an improvement in the delivery of some of its services because staff and clients were more comfortable meeting face to face.

⁷ CITY OF TUCSON, MANDATORY COVID-19 VACCINATION, ADMIN. DIR. NO. 2.03-7 (Oct. 27, 2021) https://www.tucsonaz.gov/files/hr/ad/2.03-7_Vaccine_FINAL.pdf (hereinafter *Tucson Policy 2.03-7*).

⁸ Sam Kmack, *Nearly 100% of Tucson Employees Comply with City Vaccine Mandate*, TUCSON.COM (Dec. 14, 2021), https://tucson.com/news/local/nearly-100-of-tucson-employees-comply-with-city-vaccine-mandate/article_b6947c24-4644-11ec-bd3a-b3ff5a11bc62.html; see also CITY OF TUCSON, VACCINE STATUS DETAIL AS OF 12.2.21 (Dec. 2, 2021), available at <https://drive.google.com/file/d/1L1W1iJ546efvJaVpbiCFxdrpFIDrFrU/view?usp=sharing>; Bud Foster, *Tucson City Vaccine Mandate Gets 98% Compliance*, (Nov. 23, 2021 at 6:02 PM PST) <https://www.kold.com/2021/11/24/tucson-city-vaccine-mandate-gets-98-compliance/>.

⁹ Kmack, *supra* note 8.

¹⁰ Denver Public Health Order, Denver Department of Public Health & Environment, (Aug. 2, 2021) <https://www.denvergov.org/files/assets/public/covid19/documents/public-orders/ddphe-pho-8.2.21.pdf>; see also generally Joe Rubino, *Nearly 99% of Denver City Workers Complied with the Vaccine Mandate*, DENVER POST, (Oct. 1, 2021, 3:29 PM) <https://www.denverpost.com/2021/10/01/denver-vaccine-mandate-city-employees/>.

c. Milwaukee, Wisconsin

The City of Milwaukee enacted its mandatory vaccination policy in accordance with its “duty to provide and maintain a workplace free of known hazards” and “to safeguard the health of [its] employees, their families, visitors and the residents [the city] serve[s].”¹¹ All general city employees must be vaccinated or receive an accommodation on the basis of a disability or a sincerely held religious belief: accommodations are granted “where they do not cause undue hardship or pose a direct threat to the health and safety of others.”¹² Non-compliant employees are subject to a 30-day suspension and then to discharge if they remain noncompliant.¹³ In the four days before the deadline for employees to comply, the compliance rate increased by approximately 14%. Of the city’s approximately 3,100 employees that are subject to the policy, 95.3% were in compliance as of November 1, 2021.¹⁴

These cities’ experiences illustrate that vaccine policies can be successfully implemented with high compliance within a short period of time, do not lead to worker shortages or the halting of labor, and help reduce the spread of COVID-19. As demonstrated in the attached Appendix, the experiences of other Local Government Commenters with their own respective vaccine mandate and/or policies reflect similar outcomes.¹⁵

2. The ETS Helps Local Governments Meet the Requirements of Federal Law

Local governments must comply with a number of federal laws that govern both their workforces as well as the delivery of services to their constituents. Federal agencies may issue regulations that guide or instruct local governments on how to achieve such compliance. The ETS performs a similar role for local governments as its requirements reduce the risk presented by COVID-19 to local government employees and constituents and consequently helps local governments maintain compliance with the American with Disabilities Act (“ADA”) and Title VI of the Civil Rights Act of 1964 (“Title VI”).

a. Title I of the ADA

The OSHA ETS helps local governments meet their obligations and prevent discrimination against employees with disabilities. Under Title I of the ADA, local governments in their role as

¹¹ News: *City of Milwaukee COVID-19 Vaccination Updates*, Dep’t of Emp. Rels., CITY OF MILWAUKEE, <https://city.milwaukee.gov/DER> (last visited Jan. 19, 2022).

¹² CITY OF MILWAUKEE, COVID-19 VACCINATION POLICY FOR CITY OF MILWAUKEE EMPLOYEES (Dec. 20, 2021), available at <https://city.milwaukee.gov/ImageLibrary/Groups/derAuthors/Policies/COVID-19EmployeeVaccinationPolicy.pdf>. The policy does not include members of the Milwaukee Fire or Police Departments because they have implemented their own vaccine policy. See *95.3% of City of Milwaukee Workers Have Received COVID-19 Vaccination Following Friday’s Deadline*, WTMJ-TV MILWAUKEE (Nov. 1, 2021), <https://www.tmj4.com/news/local-news/95-3-of-city-of-milwaukee-workers-have-received-covid-19-vaccination-following-fridays-deadline>.

¹³ CITY OF MILWAUKEE, *supra* note 12.

¹⁴ *Id.*

¹⁵ See the Appendix to this Comment for a table summarizing select local government policies and outcomes.

employers cannot discriminate against employees with disabilities.¹⁶ For example, the ADA requires that local government employers provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” to ensure that a disabled employee is able to perform essential job functions and enjoy the “terms, conditions, and privileges of employment” that employees without disabilities enjoy.¹⁷ Without a vaccine policy that ensures their safety in the workplace, many local government employees with disabilities will not be able to return or will have to work under potentially dangerous conditions—especially because some employees with disabilities may be at a higher risk of contracting COVID-19 than the general population.¹⁸ In order to provide reasonable accommodations and achieve compliance with the ADA, local government offices might implement policies that would severely isolate and restrict workers with disabilities in order to mitigate COVID-19 risks. While these processes may mitigate the risk of infection, they also isolate the worker, may cause other forms of discrimination, and impact retention levels. Employers should be wary of such harmful mitigation strategies as studies have demonstrated that people with disabilities experienced loneliness, low perceived social support, and social isolation at significantly higher rates than people without a disability.¹⁹ Instituting vaccine-or-test requirements reduces the unique risks COVID-19 poses to employees with disabilities and helps local government employers achieve compliance with the ADA.

b. Title II of the ADA

The Rule will also help local governments ensure that their programs and services are ADA-compliant and accessible to constituents with disabilities. Under Title II, Section 12213 of the ADA, no person with disabilities shall “be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity” or “be subjected to discrimination.”²⁰ Like people with disabilities in the workforce, many disabled people are unable to navigate certain websites or receive assistance via some online platforms. Therefore, online-only COVID-19 mitigation measures implemented by local governments may not be sufficient

¹⁶ The ADA defines an individual with a disability as a person who: (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record or history of a substantially limiting impairment, or (3) is regarded or perceived by an employer as having a substantially limiting impairment. *See* 42 U.S.C. § 12102(1) (2020).

¹⁷ *See id.* at §§ 12101-12213.

¹⁸ Some people with disabilities have a higher risk of contracting COVID-19 or have severe illness because of underlying medical conditions, congregate living settings, or systemic health and social inequities. According to the CDC, “adults with disabilities are three times more likely than adults without disabilities to have heart disease, diabetes, cancer, or a stroke.” *People with Disabilities*, CTNS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/humandevelopment/covid-19/people-with-disabilities.html#:~:text=Most%20people%20with%20disabilities%20are,severe%20illness%20from%20COVID%20D19> (last visited Jan. 19, 2022).

¹⁹ Eric Emerson et al., *Loneliness, Social Support, Social Isolation and Wellbeing Among Working Age Adults With and Without Disability: Cross-Sectional Study*, 14 *DISABIL. HEALTH J.* 1 (2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7403030/#:~:text=People%20with%20disability%20experienced%20loneliness,were%20significantly%20greater%20for%20loneliness>.

²⁰ 42 U.S.C. § 12213.

under the ADA. A local government with inaccessible online programs or services must provide an alternative accessible way for citizens to use its programs or services. Even when local government offices reopen for in-person programs and services, constituents with disabilities may not be able to visit in person because they may be at higher risk of severe illness if infected by COVID-19. A vaccine-or-test requirement for all government employees reduces potential COVID-19 risk and thus helps ensure compliance with the ADA.

c. Title VI of the Civil Rights Act of 1964

In addition to the ADA, vaccine-or-test requirements like this rule help local governments provide language access services to persons with limited English proficiency (LEP) and thus not discriminate on the basis of national origin in accordance with Title VI.²¹ In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court held that, pursuant to Title VI, recipients of federal financial assistance have an affirmative responsibility to provide LEP persons with meaningful opportunity to participate in public programs. This responsibility has been interpreted to require local governments to implement policies that provide language access services to their constituents.²²

Although some local government websites offer translated materials, not every language is offered and therefore constituents with language access needs often need to visit local government offices in person to take advantage of language access services. Without a vaccine-or-test policy, the re-opening of local government offices and the staffing of local government offices to pre-COVID levels may be delayed, meaning in-person provision of language access services is also further delayed. Additionally, like disabled constituents, a constituent with language access needs may choose to not visit local government offices without a vaccine-or-test policy given the high risk of COVID infection. Vaccine-or-test policies thus help local government offices more reliably provide language access services and ensure compliance with Title VI.

3. The ETS Is Necessary to Protect Local Governments' Ability to Provide Safe Workplaces in States That Preempt Local Governments from Doing So

Although the OSH Act explicitly exempts “any State or political subdivision of a State” from its definition of employers covered by regulations issued by OSHA, OSHA standards significantly impact the workplace conditions of state and local government employees. The majority of states have consented to enforce OSHA regulations with respect to state and local

²¹ 42 U.S.C. § 2000d *et seq.*

²² *Id.* On August 11, 2000, Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” was issued. Under the Order, every federal agency that provides financial assistance to non-federal entities must publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations. Funding recipients are forbidden from “restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program” or from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.” “Improving Access to Services for Persons with Limited English Proficiency,” 3 C.F.R. § 13166 (2001).

employees by adopting state-specific OSHA plans.²³ Twenty-six states and two federal territories have adopted state plans, which must be “at least as effective in providing safe and healthful . . . places of employment” for state and local employees as federal OSHA standards, including emergency temporary standards.²⁴ The remaining states, while not required to adopt standards implementing or exceeding OSHA standards, are nonetheless preempted from promulgating laws that directly conflict with OSHA standards.²⁵ Thus, OSHA regulations play a crucial role in setting minimum safety standards for local government employees throughout the country.

The ETS is a critical intervention to stop states from preempting local governments’ ability to protect their communities and workers by imposing vaccination policies. Nearly a dozen cities with vaccination requirements for their employees are located in states that have aggressive anti-vaccine mandate laws.²⁶ Several states with state OSHA plans – Arizona, Indiana, and Tennessee – have banned vaccine requirements for local government workers,²⁷ and other states are currently considering similar bans.²⁸ The ETS and a subsequent final rule require these states to lift their bans and implement the vaccine-or-test requirement for state and local government workers. The rule also preempts the conflicting bans on vaccine mandates enacted by states without state OSHA plans, including Arkansas, Montana, Florida, Georgia, Nebraska, North Dakota, and Texas,

²³ 29 U.S.C. § 652(5).

²⁴ *Id.* at § 667(c); *see also* 29 C.F.R. § 1953.5b (2020); OSHA, *State Plans*, <https://www.osha.gov/stateplans/> (last visited Jan. 19, 2022).

²⁵ *See* JANE FLANAGAN ET AL., HOW STATES AND LOCALITIES CAN PROTECT WORKPLACE SAFETY AND HEALTH 1-3 (2020), available at https://lwp.law.harvard.edu/files/lwp/files/state_local_workplace_protection_lwp_nelp.pdf; OSHA, *Frequently Asked Questions*, <https://www.osha.gov/coronavirus/ets2/faqs> (last visited Jan. 19, 2022).

²⁶ Beth Blauer, *Data Watch: Which U.S. Cities Have COVID Vaccine Mandates for Employees?*, BLOOMBERG (Oct. 6, 2021), <https://bloombergcities.jhu.edu/news/data-watch-which-us-cities-have-covid-vaccine-mandates-employees>.

²⁷ *See* OSHA, *State Plans*, *supra* note 24; Adam Sabes, *Arizona Mayor Defies Governor’s COVID Vaccine Mandate Ban: ‘No Authority,’* FOX10 (Dec. 19, 2021), <https://www.fox10phoenix.com/news/arizona-mayor-defies-governors-covid-vaccine-mandate-ban-no-authority>; Kaitlin Lange, *Indiana Lawmakers Slip Language Banning ‘Vaccine Passports’ into Legislation*, INDIANAPOLIS STAR (Apr. 22, 2021, 5:14 PM), <https://www.indystar.com/story/news/politics/2021/04/22/indiana-lawmakers-slip-language-banning-vaccine-passports-into-bill/7328493002/>; Melissa Brown et al., *Tennessee Gov. Bill Lee Signs Sweeping COVID-19 Legislation into Law*, TENNESSEAN (Nov. 12, 2021, 6:07 PM), <https://www.tennessean.com/story/news/politics/2021/11/12/tennessee-gov-bill-lee-covid-19-legislation-general-assembly-legislature-businesses-masks/6264103001/>.

²⁸ At the time of this writing, South Carolina and Utah are considering a ban on vaccine mandates for local governments. *See* Tara Jabour, *SC House Passes Bill Banning Vaccine Mandates for Local Governments and State Agencies*, ABC13 NEWS (Feb. 10, 2021), <https://wlos.com/news/local/sc-house-passes-bill-banning-vaccine-mandates-for-local-government-and-state-agencies>; Ben Winslow, *Bill Would Block Utah Governments from Imposing Vaccine Mandates*, FOX13 (Dec. 16, 2021), <https://www.fox13now.com/news/coronavirus/local-coronavirus-news/bill-would-block-utah-governments-from-imposing-vaccine-mandates>. Other states with state plans have limited vaccine mandates for state employees. *See, e.g.,* Dave Boucher, *Michigan Budget Bill Bans State COVID-19 Vaccine Mandates, Many Local School Mask Rules*, DETROIT FREE PRESS (Sept. 21, 2021), <https://www.freep.com/story/news/politics/2021/09/21/budget-bill-bans-covid-19-vaccine-mandates-school-mask-rules/5803622001/>.

because these bans directly conflict with the vaccination requirements outlined in the ETS.²⁹ Without federal intervention, local governments risk losing their ability to require vaccines and suffering severe retaliation from state governments if they adopt vaccine requirements for their own employees. As one example, Arizona threatened the City of Tucson with a major withdrawal of state funding after the city instituted its vaccination requirement for its employees.³⁰

State preemption of local authority to protect public health has profoundly impacted the ability of local governments to implement a cohesive COVID-19 mitigation policy. Local governments have already endured numerous legal challenges from states to public health policies designed to reduce the spread of COVID-19 and protect disabled community members.³¹ Municipalities across the nation have adopted COVID-19 mitigation policies that are proven to reduce infection, such as mask mandates,³² only to have their authority to do so preempted by far-reaching state laws curtailing local authority to adopt public health measures. Houston, Texas, for example, has faced legal challenges from state officials challenging its authority to require masks in all county government buildings.³³ State officials in South Carolina and Florida have furthermore banned mask mandates in schools,³⁴ and Florida has gone the extra step of threatening direct retaliation against districts that enforce mask mandates, including withdrawing state funding.³⁵

²⁹ See *State Efforts to Ban or Enforce Vaccine Mandates*, NAT'L ACAD. FOR STATE HEALTH POL. (Dec. 10, 2021), <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>; Gina Dvorak, *Nebraska Agencies Ordered Not to Comply with Federal COVID-19 Vaccine Mandate*, 6NEWS (Oct. 29, 2021, 1:20 PM), <https://www.wowt.com/2021/10/29/nebraska-agencies-ordered-not-comply-with-covid-19-vaccine-mandate/>; News Release, RON DESANTIS, *Governor Ron DeSantis Signs Legislation to Protect Florida Jobs* (Nov. 18, 2021), <https://www.flgov.com/2021/11/18/governor-ron-desantis-signs-legislation-to-protect-florida-jobs/>. Alabama has enacted legal measures to limit the enforcement of the ETS with respect to state or local government employees. See *Combating Overreaching COVID-19 Vaccine Mandates*, Ala. Exec. Order No. 724, (Oct. 25, 2021), available at <https://governor.alabama.gov/newsroom/2021/10/executive-order-724/>.

³⁰ See Memorandum from Mark Brnovich, Attorney General, to Gov. Doug Ducey, et al., Re: Whether the City of Tucson Ordinance 11869 Violates A.R.S. §§ 36-114, 36-184, 36- 681 (Effective 9/29/2021), or 36-787, or the Governor's Executive Order 2021-18 (Sept. 7, 2021), available at <https://www.azag.gov/sites/default/files/docs/press-releases/2021/rulings/Tucson%20Vaccine%20Mandate%201487%20Report.pdf>.

³¹ See *R.K. by and through J.K. v. Lee*, 2021 WL 5860924 (M.D. Tenn. Dec. 10, 2021).

³² See Gery P. Guy, Jr., et al., *Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates — United States, March 1–December 31, 2020*, MMWR MORBIDITY AND MORTALITY WKLY. REP. (Mar. 2021) (observing that mask mandates are correlated with decreased spread of COVID-19).

³³ See *Abbott v. Harris Cnty., Tex.*, No. 03-21-00429-CV (Tex. App. Jan. 6, 2022).

³⁴ See *Disability Rts. of S.C. v. McMaster*, 2021 WL 4444841 (D.S.C. Sept. 28, 2021); *Florida's On-Again, Off-Again Ban on Mask Mandates Is Back in Force*, NPR (Sept. 10, 2021), <https://www.npr.org/sections/back-to-school-live-updates/2021/09/10/1036033583/court-desantis-ban-on-school-mask-mandates-back-in-force>.

³⁵ See Joe McLean & Steve Patrick, *Board of Education Votes to Sanction Duval, 7 Other Florida School Districts over Mask Mandates*, NEWS 4 JAX (Oct. 7, 2021), <https://www.news4jax.com/news/local/2021/10/07/board-of-education-votes-to-fine-duval-8-other-florida-school-over-mask-mandates/>; *Florida's Board of Education to Consider Possible Punishments for Districts Enforcing Mask Mandates*, CBS (Oct. 8, 2021), <https://www.cbsnews.com/news/florida-school-mask-mandates-covid/>.

Despite multiple interventions from federal courts to protect the rights of disabled students and the authority of local governments to adopt these protective measures,³⁶ states continue to cut away local authority to promulgate regulations aimed at managing the pandemic. As federal courts have recognized, these bans have sowed confusion by forcing city officials to choose between fulfilling their federal obligations and safeguarding the rights of disabled people versus complying with newly enacted, preemptive legislation.³⁷ The cost of preemptive legislation that inhibits local governments from deploying their resources to mitigate viral spread grows each day as the Omicron variant continues to infect a record-breaking number of people.³⁸

Local governments have been protectors of public health for more than a hundred years, and continue to be major innovators in developing public health measures to address national health problems.³⁹ By overriding irrational states bans of vaccine mandates and protecting local prerogatives, the ETS preserves a crucial tool necessary to promote the safety of municipal workplaces and members of the public who rely on the government to safely provide critical services and resources by increasing vaccination rates.

* * *

Local governments have successfully implemented vaccine policies across the nation, but as states attempt to preempt local power and authority by banning any sort of vaccination requirement, the rule is crucial to provide a nationwide standard and protect local authority. As demonstrated in this comment, the ETS is critical in protecting local governments' ability to provide safer workplaces, prevent workplace discrimination, and ensure equal access to public services.

Thank you for your consideration of our comment. Should you need any further information, please do not hesitate to contact us directly at any of the email addresses listed below.

³⁶ See, e.g., *R.K.*, 2021 WL 5860924; *Disability Rts. of S.C.*, 2021 WL 4444841.

³⁷ See Order, *R.K.*, 2021 WL 5860924 (No. 3:21-CV-00853) (noting that the conflict between state laws preempting mask mandates and federal laws protecting disability rights risks creating confusion for schools).

³⁸ Maria Caspani & Lisa Shumaker, *U.S. Breaks COVID-19 Hospitalization Rate at Over 132,000 as Omicron Surges*, REUTERS (Jan. 10, 2022), <https://www.reuters.com/world/us/us-breaks-covid-19-hospitalization-record-omicron-surges-2022-01-10/>.

³⁹ See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1278–79 (2014) (discussing the impact of local health officials in developing solutions to combat health problems associated with tobacco use and obesity).

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Appendix

Information provided by the localities in response to request from Public Rights Project

	Policy	Compliance & Termination	Verification
City of Alameda, CA	Vaccination is mandatory for all employees. Unvaccinated employees must undergo testing twice a week.		
City of Boston, MA	Boston previously implemented a vaccination-or-test policy for its workforce. The City’s new policy requires vaccination for all employees. Unvaccinated employees are subject to administrative leave and potential termination. Employees that qualify for a medical or religious exemption must undergo regular testing.	New policy went into effect on 1/15/22. As of that date, approximately 95% of the city’s workforce (17,435 workers) had received at least one vaccination dose. The compliance deadline is now 1/24/22.	
City of Cincinnati, OH	All city employees and contractors must be vaccinated or submit a negative test every two weeks. Medical and religious exemptions are available. The policy applies to the police and fire departments. Non-compliant employees are placed on leave and must use accrued sick or personal time or remain in an unpaid status.	Compliance data is incomplete as the city is still gathering verification information. 80.6% compliance (4,812 of 5,970 employees). 71.6% immunized; 9% received an exemption.	Employees attest to vaccination status through the City’s benefits portal. Attestations are audited by Human Resources staff against the state’s database.
County of Milwaukee, WI	Vaccination is mandatory for county employees, excluding certain union employees. Medical and religious accommodations are available. Noncompliant employees may be subject to an unpaid 10-day suspension and possibly termination. Employees on the County’s healthcare plan will incur a \$20/day surcharge.	As of 1/3/22: 97.2% compliance (3,422 employees). 5 terminations for non-compliance.	Review and validation of verification documentation was time consuming.

Comment of Local Governments

RIN 1218-AD42 COVID-19 Vaccination and Testing; Emergency Temporary Standard

January 19, 2022

	Policy	Compliance & Termination	Verification
City of New York, NY	<p>Vaccination is mandatory for all city employees and city contracted organizations with limited accommodations based on religious or medical grounds. Non-compliant employees are placed on leave without pay.</p> <p>Unvaccinated individuals must undergo weekly testing.</p> <p>Implementing a vaccine-or-test mandate, and later a full vaccine mandate, for all City employees helped the City return to a fully in-person working environment in September 2021. As the most important of multiple risk mitigation methods, it was an important strategy to reduce COVID transmission and maintain City operations.</p>	<p>As of 1/12/22: 95% compliance (excluding Department of Education and the Health and Hospital Corporation, which were subject to a separate vaccine mandate).</p> <p>1,459 employees (less than 1% of city workforce) are on leave without pay for non-compliance.</p>	<p>The verification process went smoothly: the City provided consistent guidance to all its agencies regarding the procedures for establishing proof of vaccination. The City’s Department of Health and Department of Citywide Administrative Services have also provided ongoing support to agencies to troubleshoot any challenges.</p>
City of Portland, OR	<p>Vaccination is mandatory for city employees except those that are excluded under state law, including law enforcement officers. Medical and religious exemptions are available.</p> <p>Unvaccinated individuals must wear KN95 masks at all times while performing work in City facilities, take extra social distancing precautions during mealtimes and when drinking. In the future, they may be required to get fit-tested for N95 masks and undergo weekly testing.</p>	<p>As of 12/2/21: 100% compliance (6074 employees).</p> <p>94% fully vaccinated (5737 employees).</p> <p>6% approved exemption (337 employees).</p> <p>34 employees terminated for non-compliance.</p>	<p>Portland began using a software module to allow for input of vaccination card photographs. Once in place, vaccination verification went smoothly.</p>

Comment of Local Governments

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January 19, 2022

	Policy	Compliance & Termination	Verification
County of Santa Clara, CA	All employees must be fully vaccinated and, as of January 24, 2022, up to date on all boosters for which they are eligible. The same policy applies to non-employee personnel (e.g., contractors) who perform work onsite at a County facility.	94.3% fully vaccinated (20,440 out of 21,676 employees).	Employees must submit a signed verification form with proof of vaccination.
City of West Hollywood, CA	Vaccination is required for all employees and officials and for contractors providing service in a City facility or engaging in person with city employees, community members, or city businesses. Medical and religious exemptions are available.	As of 1/18/22: 98.93% of employees submitted vaccination status forms (253 of 256 employees). 1.17% (3 employees) are new hires pending proof of vaccination. 96.88% of employees are vaccinated and 1.56% (4 employees) received an exemption. 1 non-compliant employee is on a leave of absence.	