

July 5, 2022

**VIA ELECTRONIC SUBMISSION**

The Honorable Douglas L. Parker  
Assistant Secretary of Labor  
Occupational Safety and Health Administration  
Room S-2002  
200 Constitution Ave., NW  
Washington, DC 20210

Re: **Docket No. OSHA-2021-0012**

**Opposition to Proposed Reconsideration and Revocation of Arizona State  
Plan Final Approval Status**

Dear Assistant Secretary Parker:

The Industrial Commission of Arizona (“ICA”) and the Arizona Division of Occupational Safety and Health (“ADOSH”) respectfully submit written comments in opposition to the Occupational Safety and Health Administration’s (“OSHA”) proposal to reconsider and revoke final approval of Arizona’s State Plan under Section 18(e) of the Occupational Safety and Health Act of 1970 (the “Act”). 87 Fed. Reg. 23783 (Apr. 21, 2022). The ICA strongly disagrees with OSHA’s assertion that Arizona’s State Plan is not “at least as effective” (“ALAE”) as OSHA. Aside from not having an objective definition of ALAE or appropriate metrics for evaluating its own program let alone a State Plan, OSHA has failed to set forth accurate data, statistics, or legal authority to support its conclusion that Arizona’s State Plan is not ALAE or to justify the severe

sanction of revocation of final approval.<sup>1</sup> Despite these objections, the ICA is committed to maintaining Arizona’s State Plan and, to that end, has completed the following measures to address OSHA’s concerns outlined in the Federal Register notice—some of which were completed years before the Federal Register notice was published:

- On April 22, 2014, the Governor of Arizona signed Senate Bill (“SB”) 1307 into law, which provided for the conditional repeal of Arizona-specific fall-protection statutes (Arizona Revised Statutes, Title 23, Chapter 2, Article 13). OSHA’s formal rejection of the Arizona-specific fall-protection statutes) on February 6, 2015, triggered the immediate repeal of the statutes and reinstatement of OSHA’s Part 1926 Subpart M. After a subsequent period of monitoring, OSHA determined that ADOSH was appropriately enforcing Subpart M and formally closed the finding related to the issue in the Fiscal Year (“FY”) 2015 FAME Report.
- Arizona timely adopted the National Emphasis Program (“NEP”) on Amputations in Manufacturing on April 20, 2020.
- Arizona timely adopted the NEP on Crystalline Silica on June 25, 2020.
- Arizona has updated all of its State Plan Application (“SPA”) portal entries to accurately reflect adoption dates for NEPs and final rules.

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<sup>1</sup> Arizona tried in good faith to get clarification from OSHA about its concerns in an attempt to amicably resolve any outstanding issues, months before OSHA published the Federal Register notice. However, OSHA largely ceased communicating with the ICA after advising that it planned to pursue revocation of Arizona’s 18(e) status. As a result, Arizona made a Freedom of Information Act (“FOIA”) request for documentation supporting OSHA’s decision to pursue revocation in November 2021. OSHA still has not produced a single responsive document seven months later, contrary to the statutory deadlines for a FOIA response. *See* 5 U.S.C. § 552(a)(6)(A)(i) (federal agencies are required to comply with FOIA requests within 20 business days).

- Arizona is in the final stage of the rulemaking process to adopt the Standards Improvement Project Phase-IV (“SIP-IV”), Beryllium in Construction and Shipyards, and Cranes and Derricks in Construction: Railroad Roadway Work final rules.
- The ICA adopted an increase to the minimum penalties for serious and non-serious violations to match OSHA minimums on October 21, 2021.
- On June 23, 2022, the Arizona Legislature passed House Bill (“HB”) 2120, amending A.R.S. § 23-418 to tie the statutory ADOSH maximum penalties (and minimum penalties for willful/repeat violations) to the corresponding OSHA maximum and minimum penalty levels, with annual adjustments for inflation.
- On June 23, 2022, the Arizona Legislature passed HB 2120, amending A.R.S. § 23-414 to authorize adoption of an Emergency Temporary Standard (“ETS”) when either the ICA **OR** OSHA deems the grave danger criteria met.
- Arizona adopted the recordkeeping and COVID-19 log requirements in OSHA’s COVID-19 Healthcare ETS as a permanent standard on February 17, 2022.

For the reasons outlined here, and based on the substantial efforts the ICA has undertaken to address OSHA’s concerns and the many comments in support of Arizona’s State Plan, OSHA should withdraw the Federal Register notice proposing reconsideration and revocation of Arizona’s 18(e) status without the need for a hearing. Should OSHA be unwilling to do so, the ICA requests a hearing and the opportunity to appear with party status.

The comments below are divided into several sections:

- Section I presents an Executive Summary of the ICA's response to the issues raised in the Federal Register notice.
- Section II provides background information on Arizona's State Plan status and the State's robust commitment to workplace safety and health.
- Section III outlines the ICA's objections to OSHA's proposed action based on OSHA's unwillingness to define or provide reasonable guidance on the meaning of ALAE as it pertains to the operation of a State Plan.
- Section IV addresses the long-resolved fall-protection issue.
- Section V responds to the allegation of untimely adoption of standards and NEPs.
- Section VI discusses the maximum and minimum penalty level issue.
- Section VII responds to the COVID-19 Healthcare ETS allegations.
- Section VIII summarizes the actions Arizona has taken in good faith to address OSHA's concerns.

## **I. EXECUTIVE SUMMARY**

OSHA's proposed reconsideration and revocation of Arizona's Section 18(e) status is based on an unfounded and arbitrary assertion that Arizona is not ALAE because of alleged deficiencies in the following areas: (1) enforcement of fall protection standards; (2) timely adoption of standards and directives, such as the NEP on Amputations in Manufacturing Industries, the NEP on Respirable Crystalline Silica, the Beryllium Standard for Construction and Shipyards, and SIP-IV standard; (3) adoption of identical maximum and minimum penalty levels as OSHA; and (4) adoption of the COVID-19 Healthcare ETS. OSHA also claims that Arizona has not

provided certain documentation of adoption of the NEP on Trenching and Excavation and has not updated its entries appropriately in the SPA. OSHA unreasonably concludes that these deficiencies demonstrate that Arizona “routinely failed to maintain its commitment to provide a program that is at least as effective as the OSHA program in providing employee safety and health protection at covered workplaces.”

There are several problems with statements made and the documents relied on in support of OSHA’s proposed reconsideration and revocation of Arizona’s 18(e) status. First, OSHA’s first purported basis for reconsideration and revocation is premised entirely on stale allegations about a fall protection issue that was *fully* resolved seven years ago. Second, OSHA relies on incorrect information included in previous FAME reports about adoption and notification dates. OSHA also puts form over substance by overly focusing on documentation and SPA entries, rather than substantively evaluating what ADOSH has actually adopted and is actually enforcing. Third, the selective manner in which OSHA has presented “the facts” in the Federal Register notice and omitted any facts inconvenient to its agenda is misleading. Each of these issues speaks to OSHA’s inability or unwillingness to monitor State Plans in a transparent and fair manner.

As many commenters have noted, OSHA’s proposal to revoke Arizona’s 18(e) status appears to mainly stem from OSHA’s discontent over the ICA’s decision to follow specific Arizona law—approved by OSHA 50 years ago—and not adopt the COVID-19 Healthcare ETS as an emergency temporary standard. OSHA has characterized the issues it has with Arizona’s State Plan as a “history of shortcomings,” but much of what OSHA included in the Federal Register notice is pretext for revocation—an action that would undoubtedly result in increased injuries and fatalities in Arizona’s workforce. OSHA has never provided—nor can it now provide—a

definition of what it means to be ALAE—leaving state plans with an ill-defined and ever-shifting standard. OSHA’s position also suffers from a lack of data and an inability to measure *its own* effectiveness, let alone be able to compare the effectiveness of Arizona’s State Plan to OSHA’s effectiveness and conclude that Arizona is not ALAE. OSHA continues to advocate a theory that State Plans must rubber stamp everything OSHA does to be ALAE. But this contradicts the OSH Act itself and cannot be the basis for reconsidering and revoking Arizona’s 18(e) status.

## II. BACKGROUND ON ARIZONA’S STATE PLAN STATUS

### A. The ICA and ADOSH

The ICA was created in 1925 as a result of legislation implementing the constitutional provisions establishing a workers’ compensation system. Over time, the ICA’s role evolved to include other labor-related issues, such as occupational safety and health, minimum wage, vocational rehabilitation, youth employment, resolution of wage-related disputes, workers’ compensation coverage for claimants of uninsured employers, and self-insured employers. The Commission consists of five Commissioners, each appointed to a five-year staggered term by the Arizona Governor.

As a division of the ICA, ADOSH administers the provisions of Arizona’s OSHA-approved State Plan. OSHA approved Arizona’s initial status as a State Plan under Section 18(b) of the OSH Act in 1974, and the ICA was designated as the state agency responsible for administering the State Plan. 39 Fed. Reg. 39037 (Oct. 29, 1974). Under Section 18(e) of the OSH Act, OSHA granted Arizona final approval effective June 20, 1985. 50 Fed. Reg. 25561 (June 20, 1985). This final approval included a finding that Arizona’s State Plan provided for “the development and enforcement of safety and health standards relating to one or more safety or

health issues, which standards (and the enforcement of which standards) are or will be at least as effective . . . as the standards promulgated under section 6.” 29 U.S.C. § 667(c)(2); *see also* 29 C.F.R. § 1952.19; A.R.S. §§ 23-401 *et seq.*

For almost fifty years, Arizona has effectively operated its State Plan, boasting some of the lowest state-wide fatality and injury and illness rates across the country—rates that have and continue to be significantly lower than OSHA-administered states.

B. ADOSH Work in Arizona

1. *General Outreach and the COVID-19 Task Force*

ADOSH accomplishes its mission through daily enforcement, but also through a strong emphasis on compliance outreach, education, and training. The State Plan maintains strong Compliance Assistance and Consultation programs. Both help employers and employees comply with occupational safety and health standards, identify actual and potential hazards, and promptly complete abatement to prevent injuries and illnesses from occurring in the workplace. Compliance Officers routinely inspect workplaces for hazardous conditions and the ICA issues citations in accordance with Arizona’s State Plan and the Field Operations Manual (“FOM”), as appropriate. ADOSH also heavily engages the regulated community through voluntary and cooperative programs focused on reducing occupational injuries, illnesses, and fatalities.

One of the keys to the success of the Arizona State Plan is ADOSH’s proactive and collaborative work with employers and employees across the state to provide education and guidance on safe work practices, changes to OSHA regulations, and, more recently, COVID-19-related guidance. In March 2020, at the outset of the pandemic, ADOSH experienced an increase

in volume of complaints and referrals (like OSHA). While OSHA experienced paralysis<sup>2</sup> as a result of the quickly evolving issues, ADOSH leadership quickly adapted and developed a special team to manage COVID-19 related complaints, referrals, and general questions that focused on keeping employers' workplaces and employees safe. In April 2020, ADOSH deployed this COVID-19 Task Force composed of Compliance, Compliance Assistance, and Consultation managers, supervisors, and consultants to ensure calls and emails were handled timely and maximize ADOSH's reach and impact. The Task Force met routinely and worked with employers and employees across the state to provide the most-current Centers for Disease Control ("CDC") guidance and provide training and guidance for COVID-19 compliance with the existing OSHA standards, such as respiratory protection, bloodborne pathogens, personal protective equipment, and the general duty clause. This greatly benefitted the health and safety of employees in all industries, including health care, as exhibited by ADOSH's frequent and successful collaboration with the Arizona Hospital and Healthcare Association. The COVID-19 Task Force was in place for 18 months.

## 2. *ADOSH Partnerships*

ADOSH maintains more than 150 partnerships through its Compliance, Compliance Assistance, and Consultative activities. Partners include influential industry-specific groups such as the American Subcontractors Association ("ASA"), Arizona Chapter of Solid Waste

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<sup>2</sup> The U.S. Department of Labor Office of Inspector General found in an audit of OSHA's response to the pandemic in 2020, that while there was an increase in complaints, overall inspection numbers and onsite inspections declined, creating "an increased risk that OSHA has not been providing the level of protection that workers need at various worksites." COVID-19: Increased Worksites Complaints and Reduced OSHA Inspections Leave U.S. Workers' Safety at Increased Risk, U.S. DOL-OIG-Office of Audit, Report No. 19-21-003-10-105, p. 3 (Feb. 25, 2021).



Association of North America, Arizona Chapter of National Safety Council, ASU Del E. Webb Prevention Through Design, Home Builders Association of Central Arizona (“HBACA”), Arizona Associated General Contractors (“AGC”), and Arizona Builders Alliance. ADOSH has partnered with the AGC and the Arizona Builders’ Alliance (“ABA”) for over a decade. ADOSH actively participates in the dissemination of safety and health information to its partners. ADOSH leadership frequently provides education on OSHA standards adoption, Federal Program Changes like NEPs, how to remain in compliance while employees are working, best occupational safety and health practices, and ways to collaborate through a formal partnership program.

Through these partnerships and relationships, which include the Voluntary Protection Program (“VPP”),<sup>3</sup> Public Entities Partnership Program, Safety and Health Achievement Recognition Program and others, ADOSH and industry work collaboratively to find solutions to common safety and health hazards as well as address complex health issues such as COVID-19.

As an example, working with employers in the residential construction industry is paramount to ADOSH’s mission and vision to prevent fall hazards in construction. The HBACA and the Arizona Chapter of the ASA work closely with ADOSH to develop individual partnerships with HBACA and ASA members to improve workplace safety and health. Like it does with AGC and ABA, ADOSH routinely participates in meetings with HBACA and ASA to discuss ways to

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<sup>3</sup> The Voluntary Protection Program, approved by OSHA in 1993, promotes effective worksite-based safety and health. In the VPP, management, labor, and ADOSH establish cooperative relationships at workplaces that have implemented a comprehensive safety and health management system. VPP certification constitutes ADOSH's official recognition of the outstanding efforts of employers and employees who have achieved exemplary occupational safety and health. The average VPP worksite has a Days Away Restricted or Transferred (“DART”) case rate of 52% below the average for its industry as a result of their participation in VPP. VPP is codified in Arizona law. *See* A.R.S. § 23-432.

solve fall protection issues and adopt Safety and Health Management Systems in the residential construction industry, including at Fall-Protection Stand-Down events. The result of this collaboration is more than 30 HBACA or ASA member partnerships. Working with the HBACA and ASA allows ADOSH to be front and center with member's employees and trades—which contributes to a stronger commitment to workplace safety in the state.

To further increase fall protection safety awareness, the ICA Chairman and ADOSH developed the ICA Chairman's Roofers Alliance in 2016 with five of the largest commercial and residential roofing contractors in Arizona. The main area of focus was increasing awareness of fall protection hazards among the members and other mid-to-small roofing companies and their employees. The group has developed standardized training and routinely discusses various fall protection systems on the market. Today, there are more than 30 members of the Chairman's Roofers Alliance, ranging from roofing contractors to vendors that provide training and resources for compliance with Subpart M.

Finally, there are 64 VPP Star sites in Arizona. These sites are a mix of manufacturing, construction, and public entities. VPP sites surpass OSHA standards and implement highly effective Safety and Health Management Systems ("SHMS"). Collectively, more than 37,000 employees are covered under Arizona's VPP program and the 64 VPP sites are continuously looking for ways to improve the workplace with the best safety practices and to share their knowledge and experience with other employers. The program adds so much value to employers and contractors in Arizona that on April 10, 2017, SB 1478 was passed, codifying the Arizona VPP program into law. The result is state supported funding for Arizona's VPP program. To help

lead by example, the ICA also made a commitment to the VPP program and achieved VPP certification at both the Phoenix and Tucson ICA sites in 2019 and 2022 respectively.

C. Indicators of the Effectiveness of the Arizona State Plan

Arizona's comprehensive approach to occupational safety and health has resulted and continues to result in measurable indicators of success. In FY 2020, ADOSH accomplished just some of the following:

- Responded timely to imminent danger complaints and referrals – 100%
- Responded to work-related fatalities within 1 day – 100%
- Responded to complaint investigations – 1-day average
- Responded to complaint inspections – 6-day average
- Retention of Initial Assessed Penalty – 90.27%
- Average Abatement Time – 10 days (a reduction from 31 days)
- High-Hazard Compliance Assistance and Consultation Visits - 861 visits (goal was 800)
- Number of Employees Trained – 11,172 employees (goal was 2,341)

Another indicator, a measure of actual effectiveness (rather than process), is Arizona's low injury rates as compared to nationwide and in particular, OSHA jurisdictions. Arizona consistently outranks most OSHA states in injury and fatality rates. In 2020, Arizona's fatality rate was 3.1, as compared to the national average of 4.1 and 3.8 in OSHA states. See <https://www.bls.gov/iif/oshstate.htm#AZ> (last visited June 13, 2022).

Based on these metrics, leading indicators of safety, and injury/illness rates, it is unsurprising that Arizona's private-sector, state, and local government employers and employees alike strongly advocate for the Arizona State Plan and its effectiveness.

### III. OSHA HAS NOT DEFINED ALAE UNDER THE OSH ACT

OSHA has never fully defined or provided adequate guidance on how it determines effectiveness, which makes it impossible for OSHA to measure and even more difficult for State Plans to achieve *in OSHA's eyes*. In an October 13, 2016 ICA meeting, then Commissioner Robin Orchard asked the Area Director of the OSHA Area Office in Arizona to define ALAE. The OSHA Area Director replied:

You've asked me a very difficult question. It's a fair question, but it's a very difficult question to answer and I don't think we have a, ***in fact I know we don't have, a definition I can just print off and give to you.*** It is the legal measurement by which we compare states, and if we believe that a state is in any one portion is not capable of performing their statutory functions, in a manner that is similar, has the same deterrent effect as Federal OSHA, then we would find that that state plan would not be at least as effective as.

Audio Transcript of October 13, 2016 ICA Meeting (emphasis added). It seems that OSHA wants Arizona—and every other State Plan—to simply rubber stamp nearly everything OSHA does at the federal level. But the OSH Act does not require State Plans to be identical to OSHA. In fact, Congress recognized that there would be variability among the standards promulgated by OSHA and those promulgated by states with approved plans. H.R. Rep. No. 16785, 91<sup>st</sup> Cong., 2d Sess. (1970), *reprinted in* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 1018. Congress specifically allowed for, and encouraged, this variability. The design of the OSH Act

contemplated that State Plans would approach occupational safety and health hazards differently, even being “experimental.” Section 2 of the OSH Act provides:

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources –

11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist *in identifying their needs and responsibilities in the area of occupational safety and health*, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, *and to conduct experimental and demonstration projects in connection therewith;*

29 U.S.C. § 651(b)(2) (emphasis added).

For a State Plan to receive initial approval under Section 18(b), it must “provide[] for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be *at least as effective* in providing safe and healthful employment and places of employment as the standards promulgated under Section 6 which relate to the same issues.” 29 U.S.C. § 667(c)(2) (emphasis added). Yet little guidance exists as to what constitutes ALAE and OSHA’s approach is to declare any deviations from Federal standards to be not ALAE. OSHA’s approach is antithetical to the kind of occupational safety and health programs Congress envisions—programs where experimentation and differences were to be embraced rather than discouraged. OSHA’s approach stifles creativity, innovation, and progress that could prevent injuries, illnesses, and fatalities across the nation.

A. DOL Office of Inspector General Report Found OSHA Has No Way to Measure Effectiveness of its Own Program, Let Alone State Plans

In 2011, DOL’s Office of Inspector General (“OIG”) conducted an audit to determine whether OSHA had ensured that State Plans were operating ALAE programs. OIG found that OSHA did not, itself, quantify the extent of impact it has had on reducing work-related fatalities, injuries, and illnesses. OSHA Has Not Determined If State OSH Programs Are At Least As Effective In Improving Workplace Safety And Health As Federal OSHA’s Programs, Office of Inspector General—Office of Audit, U.S. Dept. of Labor, Report No. 02-11-201-10-105, p. 4 (Mar. 31, 2011). OIG also found that OSHA had not established qualitative factors establishing effectiveness and therefore could not ensure that State Plans were operating in an effective manner. *Id.* OIG specifically stated that “***OSHA needs to define when State programs would be deemed as performance failures, to serve as a basis for using its ultimate authority to revoke State Plan approval.***” *Id.* (emphasis added). As of today—over ten years later—OSHA has still not acted on the OIG’s recommendation to OSHA to define ALAE for the State Plans, much less establish criteria for using its ultimate authority to revoke a State Plan.

Contrary to the goals of the OSH Act, OSHA frustrates states’ efforts by imposing overly rigid administrative and process-based requirements, regardless of results and despite Congressional intent. In establishing indices for evaluating State Plans, the Secretary of Labor uses case-by-case, process-based criteria, and not outcome-based measure, to assess the effectiveness of State Plans, leaving State Plans without suitable guidance. OIG concluded that, “as a result, OSHA lacks evidence to demonstrate the effectiveness of State Plans and the merits of any program changes which may impact its decisions on policies, enforcement priorities, and funding.” *Id.* at 2.

As a result of the OIG Report, the House of Representatives' Subcommittee on Workforce Protections, Committee on Educ. and the Workforce held a hearing on June 16, 2011. During that hearing, Elliott Lewis, DOL OIG Assistant Inspector General for Audit noted that "in monitoring state plans, OSHA reviews output data such as inspection counts, penalty amounts, measures for timeliness and completion of inspections, violation classification, timely adoption of standards." *Is OSHA Undermining State Efforts to Promote Workplace Safety?: Hearing Before the Workforce Protections Subcomm. on Workforce Protections Comm. of the House Comm. on Educ. and the Workforce, 112<sup>th</sup> Cong. 12 (June 16, 2011) (Statement of Elliott Lewis).* Lewis further testified about the need for outcome-based performance metrics, because OSHA's current measures "do not necessarily measure the effect of these actions on actually achieving safety and health improvements." *Id.* Lewis further testified

OSHA has not defined effectiveness for health and safety programs whether they are operated by the states *or at the federal level*. This not only limits OSHA's ability to ensure its own program operates in an effective manner, but it also limits OSHA's ability to determine whether state plans are at least as effective as OSHA.

*Id.* at 13 (emphasis added).

Kevin Beauregard, then head of the North Carolina Department of Labor and Chair of the Occupational Safety and Health State Plan Association ("OSHSPA") testified that State Plan programs "are not merely an extension of federal OSHA." They are "distinct and separate government entities operating under dully [sic] elected governors or other officials" and also "operate under state constitutions and legislative processes." *Id.* at 33. In live and written testimony, he outlined OSHSPA's concerns about OSHA requiring State Plans to adopt all of its NEPs and identical penalties. *Id.* at 32, 36-38. Despite all of this, OSHA is now even more firmly entrenched in its administrative and process-based view of ALAE and is now taking the

unprecedented step of reconsidering Arizona's 18(e) approval based on an unreasonable and groundless conclusion that Arizona's State Plan is not ALAE—a conclusion that is wholly unsupported by *actual* indices of effectiveness.

B. ADOSH'S Partnerships, Compliance Outreach Efforts, and Injury Rates are a Good Measure of Actual Effectiveness

Little has changed since the OIG report, which makes the evaluation of the effectiveness of State Plans a constantly moving target and fully contingent upon subjectivity and inconsistency between administrations and regions.<sup>4</sup> As identified by OIG, OSHA needs to identify outcome measures to evaluate the actual effectiveness of safety and health programs. A reasonable approach would be to analyze a State Plan's outcome measures associated with injuries, illnesses, and fatalities. Given that the goal of the OSH Act is to provide safe and healthful employment and places of employment, this approach is the most appropriate way to determine the effectiveness of any State Plan or Federal safety and health program.

Arizona is the second-fastest growing state in the nation, with a percent growth of 1.78%. [www.worldpopulationreview.com/state-rankings/fastest-growing-states](http://www.worldpopulationreview.com/state-rankings/fastest-growing-states) (last visited June 13, 2022). While Arizona is home to large employers, small companies account for 99.4% of all businesses in the state – 592,485 of the 595,764 businesses in Arizona are small companies (under 500 employees)—and employ almost half of Arizona's 2.9 million workers. *See* <https://chamberbusinessnews.com/2020/12/16/asba-w-graphic/> (last visited June 13, 2022). Of

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<sup>4</sup> One need only spend a short time analyzing past FAME reports across all the State Plans to discern that OSHA will, on any particular topic, issue findings to one State Plan, observations to another, or completely ignore the issue for others. This is arbitrary and capricious and demonstrates that OSHA does not have objective criteria against which to evaluate State Plans for effectiveness and is unable or unwilling to treat State Plans in a consistent and unbiased manner. *See generally* <https://www.osha.gov/stateplans/famereport>.



these small companies, about 486,000 are self-employed operators. *Id.* Commendably, Arizona consistently outranks most OSHA states in injury and fatality rates. In 2020, Arizona's fatal rate was 3.1, as compared to the national average of 4.1 and 3.8 in federal states. *See* <https://www.bls.gov/iif/oshstate.htm#AZ> (last visited June 13, 2022).

A driving force behind its low rates is that Arizona fundamentally understands the hazards associated with the industries and companies located within its state. Over the past 50 years, ADOSH has played an integral part in ensuring compliance with occupational safety and health standards in every corner of the state. ADOSH's approach in building collaborative partnerships and alliances, routinely providing information and training on safety and health requirements, encouraging participation in partnership programs such as the VPP, and quickly resolving enforcement matters has consistently resulted in Arizona ranking among the lowest in workplace fatality, injury, and illness rates.

Despite its demonstrated commitment to the safety and health of every working Arizonan, OSHA claims that Arizona routinely fails in this commitment by not: (1) timely implementing ALAE residential construction fall protection standards; (2) timely adopting rules and emphasis programs; (3) matching the OSHA civil penalty increases; and (4) adopting the COVID-19 Healthcare ETS. For the reasons discussed below, each of OSHA's allegations lack merit and cannot justify the severe process of reconsideration and revocation. Moreover, as DOL's OIG found over a decade ago, these measures are all process-based and do not effectively measure performance outcomes. Finally, OSHA's lack of defining when—in advance—a State Plan would be considered a performance failure sufficient to support Section 18(e) revocation makes OSHA's proposal arbitrary and capricious.

#### IV. ARIZONA'S ENFORCEMENT OF FALL PROTECTION IS ALAE AS OSHA STANDARDS

The complete history of fall protection enforcement in Arizona is long and the ICA will not recite all of it here, but incorporates by reference its response to OSHA's 2014 notice to reconsider and revoke Arizona's 18(e) status. *See* Arizona State Plan for Occupational Safety and Health, 79 Fed. Reg. 49465 (Aug. 21, 2014), Docket No. OSHA-2014-0019-0014, *available at* <https://www.regulations.gov/comment/OSHA-2014-0019-0014>. The ICA will address the procedural history, which is important here.

OSHA claims that it first became concerned with Arizona's State Plan in 2012. Its concern pertained to the Arizona State Legislature's passage of SB 1441, which implemented Arizona-specific residential construction fall-protection standards, effective May 25, 2012. As required, Arizona submitted the new residential construction fall-protection standards to OSHA in 2012, as a proposed State Plan Change. While Arizona's new requirements were not identical to OSHA's residential construction fall-protection standards in Subpart M at 29 C.F.R. § 1926.501(b)(13), Arizona had some different and additional requirements that Subpart M did not have - requirements that Arizona believed were ALAE as the federal standards. The crux of the issue between OSHA and Arizona related to the trigger height of the fall-protection requirements. OSHA alleged that Arizona's approach "require[d] very limited, if any, fall protection for employees working between 6 and 15 feet, whereas OSHA's standard for construction fall protection requires use of conventional fall protection (fall arrest systems, nets, or guardrails) at a height of 6 feet." Letter from OSHA Assistant Secretary of Labor Dr. David Michaels to ICA Director Laura McGrory, p. 1 (Mar. 19, 2014). The ICA disagreed with OSHA's characterization as requiring "limited, if any" fall protection for employees working between 6

and 15 feet. It asserted that Arizona’s approach involved a comprehensive approach to fall protection, which included the use of conventional fall protection on walking/working surfaces above six feet, conventional fall protection in other instances regardless of height, work practices that reduce employee exposure to fall hazards, and extensive use of written fall protection plans. In fact, Arizona required *every* employer with employees engaged in residential construction activities six feet or more above lower levels to have a competent person prepare and supervise the implementation of a written fall protection plan so that it “reduces or eliminates fall hazards for employees engaged in residential construction activities six feet or more above lower levels.” A.R.S. § 23-492.07. These requirements were beyond the requirements in Subpart M.

In a letter dated December 11, 2012, OSHA notified Arizona that it did not find the new standards to be ALAE as the federal standards. In response, Arizona met with OSHA officials to discuss the effectiveness of its approach. Since the State Plan’s initial approval, Arizona has had significant experience and success with written fall-protection plans in addressing fall-protection hazards. As for construction, Arizona had one of the lowest nonfatal injury and illness incident rates for construction at 3.6. The fatal injury rate also ranked among the lowest for all states, both federal and State Plans. These accomplishments were highlighted in the 2009, 2010, and 2011 FAME Reports. In its discussions with OSHA, Arizona drew upon that experience and explained how its new standards would be more protective. Surprisingly, OSHA did not agree.

To specifically address OSHA’s concerns, the Arizona State Legislature passed new legislation—SB 1307 (“Amended Article 13”)—related to residential construction fall protection. On April 22, 2014, Governor Brewer signed SB 1307 into law. As the Arizona

Legislature does not meet year-round,<sup>5</sup> Arizona worked quickly to address OSHA's concerns. Amended Article 13 also included conditional repeal language pertaining to Arizona's fall-protection requirements. Under this language, the Arizona fall-protection requirements would be repealed by operation of law

if the federal occupational safety and health administration publishes in the federal register pursuant to 29 Code of Federal Regulations section 1902.23 a final decision rendered under 29 Code of Federal Regulations section 1953 to reject the changes to this state's occupational safety and health plan prescribe in section 23-492-01, Arizona Revised Statutes, and that results in the exclusion of the changes from this state's federally approved occupational safety and health plan.

Although SB 1307 became law on July 24, 2014, OSHA still moved forward with an unjustified proposal to revoke Arizona's 18(e) status just one month later on August 21, 2014. But when OSHA published a formal rejection of Arizona's fall protection requirements on February 6, 2015, the Arizona-specific fall protection statutes (Arizona Revised Statutes, Title 23, Chapter 2, Article 13) were automatically repealed and ADOSH reverted to enforcement of Subpart M. Thus, it is misleading and inaccurate for OSHA to state in the Federal Register that "Arizona did not remedy this issue until after OSHA initiated revocation proceedings in 2014 and formally rejected Arizona's fall protection requirements in 2015." Arizona remediated the issue before OSHA even began the revocation process by including the conditional repeal language in SB 1307.

As a result of the repeal of Arizona's fall protection statute following OSHA's formal rejection of the same, OSHA deferred a final decision on the revocation proposal to allow it time

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<sup>5</sup> For example, this year's Arizona legislature convened on January 10, 2022, and adjourned on June 25, 2022; and in 2021, the Legislature convened from January 11, 2021, to June 30, 2021. Thus, proposed legislation and amendments may take longer to reach consensus and be codified into law.

to “monitor” Arizona’s implementation and enforcement of OSHA’s Subpart M. As OSHA noted in the 2015 FAME for Arizona’s State Plan:

### Fall Protection in Residential Construction

On February 7, 2015, the State Plan-Initiated change for residential fall protection was rejected by OSHA. As a result, Arizona Revised Statutes on residential fall protection (ARS § 23-492) was repealed and the federal regulation, 29 CFR 1926.501(b)(13) was enforced. Additional monitoring was conducted to ensure effective enforcement of the regulation. A plan of action to perform outreach, training and education was initiated to ensure the public was given ample notice of the change. Through the combination of on-site monitoring, review of enforcement data and discussions at the quarterly meetings, ADOSH was able to immediately implement effective enforcement utilizing OSHA standards. ADOSH’s activity was also examined by OIS data reports. These reports illustrated that in residential construction, following the reimplemention of OSHA standards in Arizona, ADOSH cited 52 serious, willful, or repeat violations of the residential fall protection standard (29 CFR 1926. 501 (b)(13)), 140 serious, willful, or repeat violations of “Unprotected Sides and Edges” (29 CFR 1926.501(b)(1)), and 65 serious, willful, or repeat violations of “Low Slope” or “Steep Roofs” (29 CFR 1926.501 (b) (10) or (11)). ***OSHA has concluded that by the end of FY 2015, ADOSH commenced fall protection enforcement that was at least as effective as federal OSHA’s.***

FY 2015 Comprehensive FAME Report-ADOSH, p. 22, OSHA-2021-0012-0009 (emphasis added). Thus, by the end of FY 2015, OSHA found Arizona’s State Plan ALAE in the area of fall protection enforcement. In addition, the FY 2015 FAME in Appendix B for Observations Subject to New and Continued Monitoring, OSHA considered the fall protection issue “closed.” *See id.* at p. 24, App. B. Following OSHA’s favorable evaluation of ADOSH’s enforcement of Subpart M in the 2015 FAME, OSHA should have withdrawn its proposed reconsideration of Arizona’s 18(e) status in the Federal Register. Yet OSHA failed to timely do so, potentially the result of administrative oversight. On February 1, 2019, ICA Director James Ashley sent a letter to OSHA to alert the agency that it had not resolved the 2014 Federal Register notice and to request formal withdrawal of that notice. OSHA responded on February 22, 2019, stating that Arizona had

provided persuasive evidence that it had successfully implemented Subpart M (OSHA had also previously made that determination) and agreed to withdraw the Federal Register notice to revoke Arizona's 18(e) status. Five months later, on July 26, 2019, OSHA *formally* withdrew its proposed revocation of the Arizona State Plan's final approval status in the Federal Register. *See* Arizona State Plan for Occupational Health, 84 Fed. Reg. 35989 (July 26, 2019).

Since OSHA's acknowledgment in 2015 and formal withdrawal three years ago, Arizona has continued to maintain rigorous enforcement, compliance assistance, and consultative programs for fall protection—and *OSHA does not assert otherwise*. Between May 1, 2019, and May 10, 2022, ADOSH conducted 439 fall-related inspections and many more consultation visits, resulting in the observation and correction of over 1800 hazards. ADOSH has entered numerous formal and informal partnerships to promote regular consultation inspections and to answer compliance questions with home builders across the state through various home builder associations. ADOSH also collaborates with various associations to ensure that workers engaged in residential construction receive proper fall protection safety training, such as new roofers. Impressively, since 2016, ADOSH has met monthly with the ICA Chairman's Roofers Alliance, even throughout COVID-19 to promote adherence to fall protection standards. On average, 30 different companies were represented at these meetings.

These measures, along with below average injury and fatality rates, definitively show that Arizona's State Plan is not only ALAE, but far more effective than OSHA in the area of fall protection. It is puzzling why OSHA sought to revoke Arizona's 18(e) status in 2014 *after* the Arizona Legislature had adopted an amendment to automatically repeal Arizona's fall protection statute if OSHA formally rejected it, but it seemed punitive. And for OSHA to now use that same

resolved issue, *mooted 7 years ago*, again as the basis, in part, for 18(e) revocation, is deeply troubling. Even more so are OSHA's factual omissions in the timeline on why it took four years to withdraw the Federal Register notice from 2014 once it had specifically found Arizona's enforcement of Subpart M to be ALAE as OSHA. These actions are counterproductive to working collaboratively with Arizona's State Plan to ensure the safety and health of all Arizonans in the workplace, a common goal for both agencies. The decision to include this as the first issue that would justify 18(e) revocation appears pretextual and raises significant due process issues.

## **V. ANY UNTIMELY ADOPTION OF STANDARDS OR NEPS HAS NOT MADE ARIZONA'S STATE PLAN LESS EFFECTIVE THAN OSHA**

As previously addressed, State Plans do not have to be identical to OSHA. The OSH Act contemplates that there will and *should be* differences between state and federal OSH programs. As OSHSPA noted in written testimony submitted to the 2011 Congressional Hearing on the 2011 DOL OIG Audit, states are in a better position to address unique hazards more prevalent in certain states, develop targeting systems directly linked to state workers' compensation databases, and create special emphasis programs tailored to the hazards unique to the industries operating in particular states. *Is OSHA Undermining State Efforts to Promote Workplace Safety?: Hearing Before the Subcomm. on Workforce Protections Comm. of the House Comm. on Educ. and the Workforce, 112<sup>th</sup> Cong. 34 (2011) (prepared statement of Kevin Beauregard, Chair of OSHSPA)*. Additionally, there may be NEPs that OSHA wants the State Plans to adopt that address hazards or industries not present or a significant concern in certain states, and which divert scant resources. *Id.* at 38.

The standards and NEPs OSHA claims Arizona was late to adopt did not adversely impact the State Plan's effectiveness. Even before standards and NEPs are adopted in Arizona, ADOSH

conducts compliance outreach and training on these compliance areas. Importantly, the standards and NEPs referred to by OSHA were either the subject of litigation and not being enforced by OSHA, or were minor revisions to existing standards in place and being enforced by ADOSH. While adoption paperwork may not have been formally submitted to the local or regional offices, OSHA can and does pull reports from the OSHA Information System (“OIS”) to see whether ADOSH or any State Plan is conducting inspections under particular NEPs or is citing specific standards in practice, whether or not SPA entries are up to date.

A. Beryllium Standard for Construction and Shipyards

The ICA is in the final stage of the rulemaking process for adoption of a beryllium standard largely identical to the OSHA standard.<sup>6</sup> One notable difference, however, is that Arizona does not have any ship building industry or shipyards and must tailor the federal standard to the applicable industries in Arizona. This is also stated on OSHA’s State Plan Webpage for Arizona’s State Plan, which provides excluded jurisdictions: “Maritime employment, including shipyard employment, marine terminals, and longshoring.” <https://www.osha.gov/stateplans/az>

The Arizona Secretary of State published the Notice of Proposed Rulemaking for the Beryllium updates on March 4, 2022, in the Arizona Administrative Register. A.A.R. Vol. 28, Issue 9 (Mar. 4, 2022). This rulemaking amends Arizona Administrative Code R20-5-601 and R20-5-602 to incorporate by reference updates to the federal Beryllium Standard in the construction industry and the general industry. The amendment makes Arizona’s Beryllium Standard consistent with the federal beryllium standard. A public hearing was held on June 20,

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<sup>6</sup> Arizona adopted the Beryllium standard in February 2020. The rule pertaining to construction and shipyards merely represent updates for those specific industries. Arizona does not have shipyards and is not required to adopt those particular updates.



2022. On June 23, 2022, the rule was submitted to the Attorney General’s office and, thereafter, will be sent to the Secretary of State for publication in the Arizona Administrative Register, whereupon it will take immediate effect.

While OSHA asserts that Arizona should have adopted the “Beryllium Standard for Construction and Shipyards” by February 21, 2021, it conveniently glosses over the highly contentious regulatory process that led Arizona to wait to adopt the standard. On January 9, 2017, OSHA published a final rule on Occupational Exposure to Beryllium and Beryllium Compounds (“2017 Final Rule”) that created health standards for beryllium exposure in the general industry, 29 C.F.R. § 1910.1024, construction, 29 C.F.R. § 1926.1124, and shipyard, 29 C.F.R. § 1915.1024, sectors. *See* 82 Fed. Reg. 2470. The 2017 rule met fierce opposition from the regulated industries. In response, the challenges were bifurcated between the general industry sector and then the construction and shipyard sectors.

To address the concerns raised by the construction and shipyard sectors, OSHA published a final rule entitled “Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors” on September 30, 2019 (“2019 Final Rule”). *See* 84 Fed. Reg. 51377 (Sept. 30, 2019). OSHA notified the regulated community that it would be publishing a new proposal for the construction and shipyard beryllium standards to seek comments on different changes it was considering. *Id.* While OSHA was finalizing the new proposal, it confirmed that it would delay the compliance deadlines for nearly all provisions of the 2017 Final Rule. *Id.* Up through September 30, 2020, OSHA was only enforcing the permissible exposure limits (“PELs”) and short-term exposure limits (STELs) in the construction and shipyard standards at 29 C.F.R. § 1926.1124(c) and § 1915.1024(c), respectively, and not the other provisions.

On July 14, 2020, OSHA published a final rule entitled, “Revising the Beryllium Standard for General Industry.” *See* 85 Fed. Reg. 42582 (July 14, 2020), *available at* <https://www.federalregister.gov/documents/2020/07/14/2020-10678/revising-the-beryllium-standard-for-general-industry>. About six weeks later, on August 31, 2020, OSHA published its new final rule entitled “Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors” (“2020 Final Rule”), effective September 30, 2020. *See* 85 Fed. Reg. 53910 (Aug. 31, 2020), *available at* <https://www.federalregister.gov/documents/2020/08/31/2020-18017/occupational-exposure-to-beryllium-and-beryllium-compounds-in-construction-and-shipyard-sectors>. The 2020 Final Rule made various changes to the Beryllium Standards for the construction and shipyard industries. OSHA stated that the changes aimed to accomplish three goals: (1) to more appropriately tailor the requirements of the construction and shipyard standards to the particular exposures in these industries given partial overlap between the beryllium standards’ requirements and other OSHA standards; (2) to aid compliance and enforcement across the beryllium standards by avoiding inconsistency, where appropriate, between the shipyards and construction standards and recent revisions to the general industry standard; and (3) to clarify certain requirements with respect to materials containing only trace amounts of beryllium. *Id.* And on February 24, 2021, OSHA again revised the Final Beryllium Rule in the construction and shipyard sectors. *See* Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors: Correction, 86 Fed. Reg. 11119 (Feb. 24, 2021).

OSHA asserts that Arizona failed to implement the 2020 Final Rule within six months, by February 21, 2021. But besides the continuous amendments to the Beryllium Standard, many

pending lawsuits challenging the standards were still ongoing and the standard changing yet again through the end of February 2021. Like many State Plans, Arizona tracked the developments of the ongoing beryllium litigation and anticipated adoption of the amendments to the standard once final. As a practical matter, while the 2020 Final Rule was in litigation, it was not being enforced. Even if Arizona did not timely adopt the Beryllium Standard for Construction and Shipyards, there are few issues with Beryllium in construction in Arizona, and Arizona does not have a shipbuilding industry. Importantly, the fact that ADOSH waited for the 2020 Final Rule for construction and shipyards to truly be final before adopting does not mean that ADOSH was not otherwise addressing exposure to beryllium hazards in the interim. The ICA just preferred to leverage its resources to advance the final version of the Beryllium Standard.

After four years of litigation, OSHA entered into a settlement agreement on May 26, 2021, that resolved all pending lawsuits and issues related to the Beryllium Standard. OSHA had 30 days after that to implement the agreed-upon changes to the Beryllium Standard. After this time, Arizona began the rulemaking process, including publication in the Arizona Administrative Register by the Secretary of State, public hearing, submission of final rule to the Attorney General for review, which can take up to 60 days, before the final rule gets filed with the Secretary of State. *See* A.R.S. §§ 41-1001, *et seq.*; 41-1044, 41-1057. The Arizona Beryllium Rule was filed with the Attorney General's office on June 23, 2022. Once approved by the Attorney General, the updated rule will take immediate effect upon publication in the Arizona Administrative Register. The ICA anticipates the completion of this rulemaking in July 2022.

## B. SIP-IV

OSHA's SIP-IV Final Rule is not a new rule per se, but simply removes or revises outdated, duplicative, unnecessary, and inconsistent requirements in OSHA's safety and health standards. *See* 84 Fed. Reg. 21416 (May 14, 2019). The fourteen revisions addressed in the SIP-IV rule are administrative, not substantive, in nature. *Id.* at 21416 – 21598. The ICA is nearing completion of the process to adopt SIP-IV. The proposed adoption was published by the Secretary of State in the Arizona Administrative Register (along with the Beryllium updates, discussed above) on May 13, 2022, and are both pending with the Attorney General. *See* A.A.R. Vol. 28, Issue 19 (May 13, 2022).

Even though it is true that Arizona has not yet adopted the SIP-IV Final Rule, as it is currently in the regulatory adoption process in Arizona, it is an overreach for OSHA to rely on this as a supporting factor in revoking Arizona's 18(e) status. While Arizona can appreciate the SIP-IV's primary goal of reducing regulatory burden, it cannot fathom how this renders the entire State Plan not ALAE or that it warrants the revocation of its final approval. This is particularly true when other State Plans also have not yet adopted the SIP-IV or were also untimely in their adoption.

## C. NEP on Crystalline Silica

Arizona provided notice of intent to adopt and also adopted the Respirable Silica NEP on June 25, 2020. Arizona also timely notified OSHA of its intent to adopt the CPL for Inspection Procedures for Respirable Crystalline Silica on August 24, 2020, and adopted it a week later. Although it is true that Arizona inadvertently did not send the NEP implementation documentation to OSHA until April 20, 2022, this is a paperwork issue, and emphasizes form over

substance. This does not make Arizona's State Plan less effective than OSHA. When the NEP and the standard were released by OSHA, ADOSH quickly established a working group with the local AGC and ABA to establish a Silica Task Force team. The team consisted of safety and health professionals from JE Dunn, Sunland Asphalt, Haydon Building Corp, Willmeng, and Hensel Phelps. The goals for the team were to provide training and guidance to both contractors and inspectors to understand the regulation and compliance requirements, preparation for a safe workplace that is silica free or below the PEL, and identification of best practices. The task force accomplished these goals and created an Arizona-specific Guide to Prevent Silica Exposure in the Workplace.

D. NEP Trenching and Excavation

OSHA uses the NEP on Trenching and Excavation as an example of a late adoption by Arizona to prove the State Plan is not ALAE. OSHA complains that, although the State Plan had advised OSHA that it had adopted this NEP, OSHA's records show that the adoption was completed after the deadline of April 5, 2019. OSHA references the FY 2020 Follow-up FAME Report in which it noted that the State Plan did not provide a formal transmittal, updated web links, or SPA updates to close out any Federal Program Change during FY 2020.

OSHA seems to be more concerned with paperwork and documentation than proof of actual adoption through enforcement of the NEP. An OIS report of NEP inspections from May 1, 2019, through April 30, 2022, conducted by ADOSH in Trenching and Excavations, Falls, SST, Amputations, and COVID-19, proves that ADOSH was, in fact, conducting inspections under the NEP on Trenching and Excavation as early as May 7, 2019. *See* ADOSH OIS NEP Spreadsheet. This data unequivocally demonstrates that the State Plan adopted and was

implementing the NEP within a month of OSHA's deadline. During this period, ADOSH conducted 112 inspections under the NEP for Trenching and Excavation. OSHA has access to the same reports as the State Plans.

E. NEP on Amputations

OSHA also claims Arizona failed to timely adopt the NEP on Amputations in Manufacturing Industries by June 10, 2020. OSHA published this NEP on December 10, 2019. This NEP superseded a previous version that had been in effect for five years—CPL 03-00-019, NEP on Amputations (Aug. 13, 2015)—to make changes such as updating the coding requirements in OIS, revising targeting methodology, and updating NAICS codes for targeting. Although Arizona did not adopt the updated NEP until April 20, 2022, ADOSH was conducting amputation inspections and enforcing standards relevant to amputations using the previous NEP on Amputations in Manufacturing Industries until it adopted the updated version. From July 12, 2019, through June 28, 2022, ADOSH conducted 19 inspections under the NEP for Amputations, based on the coding of the inspection in OIS as instructed by the NEP. *See* OIS NEP Spreadsheet. Again, OSHA has access to this data, but omitted it in the Federal Register notice.

F. OSHA's Pervasive Errors in FAME Reports Cannot Support Revocation of Arizona's 18(e) Status

OSHA claims that "in every FAME report since FY 2015, OSHA has issued a finding regarding Arizona's failure to respond to and/or adopt standards or directives in a timely manner" and that this is a basis for revocation of Arizona's 18(e) status. Such a claim might be persuasive if OSHA's FAME reports were factually accurate. They are not. OSHA's FAME reports for

Arizona are replete with errors related to adoption deadlines, incorrect adoption dates, and incorrect adoption requirements. Examples include, but are not limited to:

- 2015 and 2016 FAME reports include incorrect adoption due dates for federal standards.
- 2017 FAME indicates Arizona did not adopt the rule on Confined Spaces in Construction, however, Arizona adopted the rule on May 10, 2016.
- 2017 FAME indicates Arizona did not adopt the rule on Cranes and Derricks in Construction - Operator Certification, however, Arizona adopted the rule on May 10, 2016.
- 2017 FAME indicates Arizona did not timely adopt OSHA's CPL on Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, CPL on FOM 160, CPL Alternative Dispute Resolution Process for Whistleblower Protection Program, the TED on OSHA Alliance Program Directive, and the TED on SGE Program Policies and Procedures for the OSHA VPP Directive, but adoption of these was only "encouraged" so they could not have been late. Moreover, several of these Directives had been adopted in 2015 or 2016.
- 2017 FAME indicates that Arizona failed to adopt an NEP on Shipbreaking, however, adoption is not required in Arizona because it has no maritime standards as there is no shipyard industry.
- 2018 FAME indicates that Arizona untimely adopted the Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment

Standard on July 23, 2018, however, Arizona adopted it nearly two years earlier on March 16, 2016.

- 2018 FAME indicates that Arizona adopted the Occupational Injury and Illness recording and Reporting Requirements - NAICS Update and Reporting Revisions on July 23, 2018, when it was adopted on March 16, 2016.
- 2019 FAME states that Arizona had “not yet adopted” Occupational Exposure to Respirable Crystalline Silica; Confined Spaces in Construction; Cranes and Derricks in Construction - Operator Certification; and Electrical Power Generation, Transmission, and Distribution—Electrical Protective Equipment, yet Arizona had adopted these standards on July 23, 2018, May 10, 2016, May 10, 2016, and March 16, 2016 (respectively).
- 2019 FAME indicates that Arizona had “not yet adopted” the NEP on Amputations (CPL 03-00-019), yet Arizona adopted the NEP on January 15, 2016.
- 2019 FAME indicates that Arizona had “not yet adopted” a revision to the NEP for Primary Metal Industries, but it was previously adopted in 2015, and the adoption was recognized in the 2017 FAME report.
- 2019 FAME indicates Arizona failed to adopt three separate NEPs related to Shipyard Employment, but Arizona has no shipyard industry and Arizona’s non-adoption should not have even been mentioned in the FAME.
- 2019 FAME indicates that Arizona had “not yet adopted” a Mandatory Training Program for Whistleblower investigators and “awaiting a Plan Change



Supplement,” but it was adopted in 2016 and a State Program Change was submitted on April 13, 2016.

- 2019 FAME indicates that Arizona had “not yet adopted” three CPLs (Inspection Procedures for the Hazard Communication Standard; Enforcement Procedures and Scheduling for Occupational Exposure to TB; and Compliance Directive for Cranes and Derricks in Construction), yet adoption of each was completed in 2015 or 2016 and the adoptions were previously recognized in the 2015 or 2017 FAME reports.
- 2019 FAME indicates Arizona did not timely adopt OSHA’s CPL on Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, yet adoption of this Directive was “encouraged” so it could not have been late.
- 2019 FAME indicates Arizona did not adopt OSHA’s Directive on Site-Specific Targeting and had not provided a State Plan Change, but identical adoption was completed in 2018.
- 2020 FAME indicates that Arizona had “not yet adopted” seven standards (Occupational Exposure to Beryllium; Cranes and Derricks in Construction: Operator Qualifications; Walking Working Surfaces and Personal Protective Equipment; Occupational Exposure to Respirable Crystalline Silica; Confined Spaces in Construction; Cranes and Derricks in Construction—Operator Certification; and Electrical Power Generation, Transmission, and Distribution Electrical Protective Equipment), when all seven standards had been adopted when the 2020 FAME was issued—three were adopted in 2016, one in 2018, and three in February 2020.

- 2020 FAME continued to mention the same alleged CPL and TED deficiencies from the 2019 FAME which were not, in fact, deficiencies.

OSHA's reliance on demonstrably inaccurate FAME reports as a basis for proposed revocation is inappropriate and evidences the inherent problems with the lack of objective criteria for evaluating State Plans and the inconsistency and lack of adequate oversight in the FAME process. Arizona formally requests that OSHA correct these errors in prior FAME reports and take steps to ensure that FAME reports prepared by local and regional offices are adequately reviewed going forward to ensure accuracy.

## **VI. ARIZONA'S CIVIL PENALTY STRUCTURE IS AS AT LEAST AS EFFECTIVE AS THE OSHA PENALTY STRUCTURE**

One of the proposed bases for revocation of Arizona's State Plan is that Arizona has not yet increased its penalty levels to match OSHA's. Arizona was just one of about ten states that had not adopted the penalty increases to align with current OSHA penalty levels, yet Arizona is the *only* State Plan OSHA is targeting.

The ICA disagrees that it must adopt identical penalties to OSHA to be ALAE, as the law relied on by OSHA applies to penalties issued by *federal agencies* and not State Plans that state governments administer. That said, as a show of good faith and in the spirit of continued collaboration with OSHA on worker protections in Arizona, the ICA has worked diligently with the Arizona Legislature to pass a bill to amend Arizona's statutory penalty levels to be tied to OSHA's penalty levels, with inflationary increases each year. Arizona HB 2120 (2022), which amends A.R.S. § 23-418, specifically provides for "a civil penalty . . . of not more than the maximum civil penalty, but not less than the minimum civil penalty" for each classification of statutory violation "adopted by the Occupational Safety and Health Administration pursuant to the

Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.” Arizona HB 2120, An Act Amending Sections 23-414, 23-418, 23-908 and 23-963.01, Arizona Revised Statutes: Relating to Workers’ Compensation and the Division of Occupational Safety and Health (2022). The bill passed both the Arizona Legislature House and Senate and has been sent to the Governor for signature. As a result of this law, the ADOSH maximum penalties will soon be fully aligned with the OSHA maximum and minimum penalty levels and will be adjusted automatically each year without further action from the ICA, ADOSH, or the Arizona Legislature.

A. Background on Maximum and Minimum Penalty Levels

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“2015 Act”) (Pub. L. No. 114-74, Sec. 701), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (“Inflation Adjustment Act”) (Pub. L. No. 101-410) was enacted on November 2, 2015. Each year, the 2015 Act requires *federal* agencies to:

- 1) adjust the level of civil monetary penalties for inflation; and
- 2) report inflation adjustments in the Agency Financial Reports (AFRs) as directed by OMB Circular A-136, or any successor thereto.

The 2015 Act provided that the mandatory annual adjustments for inflation should be completed no later than January 15, 2020. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701(b)(1)(A) (codified as amended at 28 U.S.C. § 2461 note).

The United States Department of Labor published an interim final rule to increase the civil penalties assessed or enforced by its regulations in the Federal Register on Friday, July 1, 2016. Fed. Reg., Vol. 81, No. 127, 43430. Because the 2015 Act applies to federal agencies and not State Plans, the DOL also published a separate rule change to 29 C.F.R. § 1902.4, State Plan

Indices of Effectiveness, to cross reference 29 C.F.R. § 19013.15, where OSHA implemented the penalty adjustments per the 2015 Act.

Under Section 18 of the OSH Act, 29 U.S.C. § 667, which pertains to State Jurisdiction and State Plans, the Secretary of Labor has the authority to approve Plans if the plans submitted comply with the criteria set forth in paragraph (c) of Section 18, 29 U.S.C. § 667(c). Section 18(c)(2) requires that a State Plan develop and enforce safety and health standards “which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6, 29 USC § 655, which relate to the same issues.” OSHA claims that under section 18(c)(2), State Plans must have maximum and minimum penalty levels that are ALAE as OSHA’s penalty levels. *See* 29 U.S.C. § 667(c)(2); 29 C.F.R §§ 1902.4(c)(2)(xi); 1902.37(b)(12).

In 2016, OSHA informed Arizona and the other State Plans that they must have penalty levels that are ALAE as OSHA’s penalty levels according to the codified factors for determination. *See* 29 C.F.R. § 1902.37(b)(12). That code section requires State Plans to “propose[] penalties in a manner at least as effective as under the Federal program, including the proposing of penalties for first instance violations and the consideration of factors comparable to those required to be considered under the Federal program.” *Id.*

B. Arizona’s Maximum and Minimum Penalty Levels for Safety and Health Violations

In Arizona, maximum and minimum penalty levels for occupational safety and health standards are largely codified in Arizona statute. *See* A.R.S. § 23-418. Thus, the ICA and ADOSH lack authority to amend these penalty levels. Only state legislators can sponsor and introduce a

bill to begin the legislative process in Arizona. The minimum penalties for serious and non-serious violations, however, are not codified and can be modified by the ICA.

1. *Maximum and Minimum Penalty Levels Codified in A.R.S. § 23-418*

As discussed above, the ICA has been committed to working with the Arizona Legislature on the issue of increasing statutory maximum penalty levels. To that end, on September 29, 2021, *prior to* the Federal Register notice to reconsider and revoke Arizona's State Plan, the ICA sent OSHA a letter explaining that the ICA did not have legal authority to amend A.R.S. § 23-418 to change the penalty levels codified there, but that it would continue to work with the Arizona Legislature to do so. On June 23, 2022, the Arizona Senate passed HB 2120, amending the statutory ADOSH penalty levels to align with OSHA's penalty levels. Thus, the ICA and the Arizona Legislature have effectively addressed OSHA's concerns about penalty levels.

2. *Minimum Penalties Not Codified in A.R.S. § 23-418*

Unlike maximum penalties, minimum penalties for serious and non-serious citation items are not codified in A.R.S. § 23-418. Thus, increasing the minimum penalties for serious and non-serious violations was something that the ICA could do without legislation. The ICA took this action in October 2021, adjusting the minimum penalties for serious and non-serious citations to \$975.00 and \$0.00, respectively. *See* October 21, 2021 Minutes of Meeting of the ICA. On October 25, 2021, Arizona submitted State Initiated Change 139 to immediately adopt OSHA's minimum penalty levels for serious and non-serious violations. ADOSH also updated its FOM to reflect the change. The ICA and ADOSH did this *well before* OSHA published this Federal Register notice to reconsider and revoke Arizona's 18(e) status. OSHA omitted this fact in the Federal Register notice.

C. Arizona's Civil Penalty Structure is as Effective as the Federal Penalty Structure

Arizona has now passed legislation to increase the statutory maximum and minimum penalty levels to match OSHA's penalty levels, however, the OSH Act does not explicitly require that State Plans have the identical or equivalent maximum and minimum penalty levels as OSHA. Although an important element of an effective enforcement plan, the assessment of penalties has been and must continue to just be one of many factors considered in determining the effectiveness of a state's enforcement activities. Notably, there are about 10 states that have not matched OSHA penalty levels, yet OSHA has chosen to only pursue Arizona for reconsideration and revocation of final approval. This only highlights the arbitrary nature of OSHA's actions against Arizona and the fact that OSHA lacks any objective criteria or a reasoned basis for determining when reconsideration and revocation should be pursued.

OSHA asserts that Arizona's failure to adopt OSHA's penalty levels demonstrates that Arizona's State Plan is not ALAE. Yet OSHA provides no substantive data to support its contention that increasing the penalty rates will, in fact, increase the effectiveness of its enforcement of its safety and health standards and positively impact workplace safety and health. In fact, OSHA does not even consider whether penalties currently being assessed by Arizona's State Plan provide an effective deterrent to violations of the safety and health standards and has offered no data or analysis to support its apparent conclusion that increasing its maximum penalties will somehow result in more effective enforcement. The assessment of penalties is not a measure of equivalent effectiveness. This "one size fits all" approach ignores the size distribution of businesses in Arizona, the frequency of violations in Arizona, the retention of assessed penalties in settlement, and the overall safety rates in Arizona.

As stated earlier, the fact that Arizona’s workplace fatality, injury, and illness rates remain low despite exponential growth in the State speaks volumes about the ADOSH program. Increasing penalty levels does not necessarily translate to a more effective OSH program. In response to increased Mine Safety and Health Administration penalties under the Mine Act following several mine tragedies in 2005 and 2006, mine owners tripled the number of violations they appealed and litigated 67% of all penalties. *See* Reducing the Growing Backlog of Contested Mine Safety Cases, Hearing Before the Comm. on Educ. And Labor, 111<sup>th</sup> Cong. 2-3 (Feb. 23, 2010), *available at* <https://www.govinfo.gov/content/pkg/CHRG-111hhrg54828/pdf/CHRG-111hhrg54828.pdf>. Time spent litigating cases over excessive penalties will take Compliance Officers out of the field, decreasing their presence, and harm occupational safety and health.

OSHA’s own reports and investigations prove the effectiveness of Arizona’s current penalties. Data in Appendix D of Arizona’s FAME reports<sup>7</sup> show that the average penalty retention rate during informal conferences in Arizona is *significantly* higher than the national average, as represented by the Further Review Level (“FRL”).

- In 2020, Arizona retained 86.91% of the assessed penalties as compared to the national average range of 57.38% to 77.64%,
- In 2019, Arizona retained 85.57% of the assessed penalties as compared to the national average range of 56.42% to 76.33%

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<sup>7</sup> Appendix D presents ADOSH’s State Activity Mandated Measures Report and includes FRLs for each measure. FRLs can be represented by either a single number or a range of numbers above and below the national average.

- In 2018, Arizona retained 80.6% of the assessed penalties as compared to the national average range of 56.79% to 76.83%.

OSHA also positively noted in these FAME reports that ADOSH supervisors include detailed explanations about any penalty reductions that may be given at the informal conference. Additionally, in 2021, OSHA investigated a Complaint About State Program Administration (“CASPA”), alleging, among other things, that citations issued to larger employers are granted more reductions, groupings, and deletions, than those issued to smaller employers. The CASPA also alleged that citations are frequently deleted or have their penalties lowered below \$2,500 and that the Arizona FOM and probability factors’ worksheet is not applied consistently. *See* AZ CASPA 2021-01. On October 20, 2021, following a long investigation that analyzed 69 case files, OSHA issued a report, stating that it had *no* findings and *no* recommendations for these two complaint items. *See* OSHA Response to CASPA 2021-01 (Oct. 20, 2021).

D. OSHA Lacks the Authority to Require States to Enact Identical Maximum and Minimum Civil Penalty Levels

Section 18 of the OSH Act does not require states to enact the same or similar maximum and minimum penalty levels for their enforcement programs to be considered ALAE. Tellingly, 29 C.F.R. § 1902.4(c)(2)(xi) only requires that State Plans “provide effective sanctions against employers who violate State standards and orders, such as those set forth in the Act, and in 29 C.F.R. § 1903.15(d). The 2015 Act did not authorize changes to the State Plan Indices of Effectiveness and yet OSHA changed the Indices without engaging in proper rulemaking under the Administrative Procedure Act. *See* 2015 Act, Pub. L. No. 114-74, Sec. 701; 5 U.S.C. § 553.



Thus, OSHA’s position on this issue for reconsideration and revocation is contrary to law, and should not be a basis for 18(e) reconsideration and revocation.

## **VII. NON-ADOPTION OF THE HEALTHCARE COVID-19 ETS DID NOT MAKE ARIZONA’S STATE PLAN LESS EFFECTIVE THAN OSHA**

### **C. Process for Adoption of an Emergency Temporary Standard under Current Arizona Law**

Arizona law provides that the ICA “may provide for emergency temporary standards or regulations to take immediate effect upon filing with the secretary of state, if *it* determines that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards and that such emergency standard or regulation is necessary to protect employees from such danger.” *See* A.R.S. § 23-414(A) (emphasis added). Under current law, the determination of what constitutes a risk worthy of emergency Commission action—action that would deprive Arizona citizens of fair notice of a proposed standard and an opportunity to comment is a policy consideration that belongs with the ICA Commissioners. Under this law, neither the ICA nor ADOSH have an alternative process for adopting emergency standards. This law was enacted in 1972 and existed at the time OSHA granted Arizona’s State Plan initial and final approval. *In nearly 50 years*, it had never been an issue or concern for OSHA—until the COVID-19 Healthcare ETS.

OSHA specifically requested that Arizona comment on how its state law complies with OSHA’s requirement that a State Plan adopt an OSHA ETS within 30 days of its promulgation and to include an explanation of why that process was not followed here. Arizona firmly disputes this characterization by OSHA. Under existing Arizona law, it is possible to adopt an ETS within 30 days. The ICA and ADOSH *did follow* the Arizona procedures, but the ICA Commissioners

did not find there was grave danger to justify enacting the ETS on an emergency basis and thereby deprive citizens the protections of notice and comment rulemaking.<sup>8</sup> Instead, the Commissioners approved adoption of the ETS through the normal rulemaking process. Further, as will be shown below, ADOSH did not submit the ETS to the ICA Commissioners until October 2021, a result of OSHA's 2-month delay in responding to Arizona's submission of a Federal Program Change ("FPC") for certain provisions of the ETS. Importantly, though, this is the first time in the State Plan's 50-year history that OSHA has ever identified any concern with Arizona's statutory procedures for ETS adoption.

To address OSHA's concerns, the ICA has been working diligently and successfully on a legislative solution to amend Arizona law to allow adoption of an ETS based on *either a Commission or OSHA* finding of "grave danger." That said, OSHA was well aware of the current process, which had been codified for two years in Arizona Revised Statutes before OSHA granted Arizona initial State Plan status in 1974. Thus, it is unreasonable and violates Arizona's due process for OSHA to now rely on this same approved process to reconsider and revoke Arizona's 18(e) status without giving Arizona a fair opportunity to address OSHA's concerns.

## B. ADOSH Took Appropriate Action to Adopt the Healthcare COVID-19 ETS

Although many other states were also late in their notification of intent to adopt the ETS as well as in their adoption of the ETS, Arizona is again the only state OSHA is pursuing for reconsideration and revocation. In July 2021, the ICA notified OSHA in the SPA that Arizona

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<sup>8</sup> Although OSHA requested an explanation from Arizona as to why it did not follow its process for adoption of an ETS, OSHA should not attempt to revoke Arizona's 18(e) status without explaining why it is suddenly rejecting a process it had approved for fifty years. At no point prior to the Federal Register notice did OSHA request Arizona amend its law to change the ETS adoption process. Arizona independently chose to take that action as a show of good faith.

intended to adopt the COVID-19 Healthcare ETS with modifications. On July 16, 2021, pursuant to 29 C.F.R. § 1953.5(B)(1), the ICA submitted to OSHA an FPC with information to demonstrate that certain provisions of the ETS pertaining to paid leave and discrimination/retaliation were already adequately addressed under existing Arizona state law. Although the ICA anticipated prompt approval of the proposal, OSHA delayed a formal response until September 16, 2021—two months after the request was made. Consistent with OSHA’s desire for all State Plans to be identical to OSHA, OSHA rejected these minor deviations from the ETS as written and did not ask the ICA to move forward with adoption of the remaining parts of the ETS while it reviewed the ICA’s requested changes.<sup>9</sup> Following receipt of OSHA’s September 16, 2021 letter denying the requested changes to Arizona’s adoption of the ETS, ADOSH promptly notified OSHA’s Acting Regional Administrator that it would move forward with the rulemaking process and would be presenting OSHA’s ETS findings at the very next Commission meeting. *See* September 21, 2021 Letter from ADOSH to OSHA Acting Regional Administrator, 2021-0012-0018.

On October 7, 2021, the ICA Commissioners convened a meeting at which the ICA presented OSHA’s findings on grave danger. Representatives from stakeholders—including members of National Nurses United (“NNU”) and the Arizona Hospital and Healthcare Association—were heard. *See* ICA October 7, 2021 Meeting Minutes, p. 7, 2021-0012-0016. Chairman Schultz asked the two OSHA officials present if there were any updates on the status of the ETS becoming a final rule, but they had no information to share. *Id.* at 5. Ultimately

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<sup>9</sup> OSHA’s September 16, 2021 Letter to ADOSH, 2021-0012-0022, misstates that ADOSH agreed that the provisions of the Arizona Revised Statutes identified in its July 16, 2021 FPC request do not provide the same level of protection extended to workers in OSHA’s COVID-19 Healthcare ETS and therefore are not ALAE with the corresponding provisions in the COVID-19 Healthcare ETS. *See* October 21, 2021 Letter from the ICA to Assistant Secretary Frederick.

the Commissioners did not find sufficient evidence to support the grave danger requirement for an ETS, but approved adopting the ETS through the normal rulemaking process. *Id.* at 6, 8.

The proposed rulemaking to adopt the standard by reference was filed with the Arizona Secretary of State on October 15, 2021. *See* R21-195, *available at* [https://apps.azsos.gov/public\\_services/register/2021/Notice\\_Archive/R21-195.pdf](https://apps.azsos.gov/public_services/register/2021/Notice_Archive/R21-195.pdf). On December 9, 2021, the Commissioners authorized the filing of the final proposed rule adopting the ETS with the Arizona Attorney General for certification. However, on December 21, 2021, the ETS expired without being supplanted by a permanent standard. OSHA officially withdrew the non-recordkeeping/reporting portions of the ETS in a statement released on December 27, 2021, alleging that it could not complete a final rule within the six months contemplated by the OSH Act (even though OSHA expects State Plans to adopt rules within only 30 days). OSHA also announced that the COVID-19 log and reporting provisions, 29 C.F.R. §§ 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r), remain in effect as they were adopted under a separate provision of the OSH Act and OSHA had found good cause to forgo notice and comment. *See* <https://www.osha.gov/coronavirus/ets>. Accordingly, ADOSH deleted the withdrawn portions of the ETS as part of its rulemaking in a letter submitted to the Arizona Attorney General on January 20, 2022. The COVID-19 log and recordkeeping provisions of the ETS were adopted in Arizona on February 17, 2022, *before* the deadline set by OSHA for the State Plans to adopt.

### C. ADOSH's Enforcement Efforts Related to COVID-19 in Healthcare

As discussed in Section II, ADOSH works extensively with stakeholders through partnerships and alliances to provide outreach and training on current and upcoming OSHA rules

and standards. At the onset of the pandemic, ADOSH took many actions to help keep Arizonans safe from the hazard of COVID-19. These actions included:

- ADOSH quickly adopted OSHA’s COVID-19 Enforcement Guidance in March 2020, soon after it was published by OSHA.
- ADOSH provided regular training to Compliance Officers on the COVID-19 hazards and enforcement guidance.
- In April 2020, ADOSH developed the COVID-19 Task Force. That team consisted of Compliance, Compliance Assistance, and Consultation managers, supervisors, and consultants who fielded calls and email questions from employers and employees. The team also provided compliance assistance and consultation services to employers and conducted inspections.
- Developed a PowerPoint in English and Spanish to address employer’s and employee’s questions about COVID-19.
- Developed sample COVID-19 workplace plans using the OSHA standards and best practices the CDC provided which were then used by employers throughout Arizona.
- Compiled resources to encourage all employers and employees to follow current COVID-19 guidance from the Arizona Department of Health Services, CDC, and OSHA, including a list of electronic guidance documents from OSHA.
- Provided training to stakeholders, including holding a class at Arizona State University which included topics such as general OSHA updates from OSHA’s regulatory agenda and COVID-19 (“where are we now”).

*See, e.g.,* ADOSH PowerPoint used at ASU Stakeholder training for Q3 2021.

In addition, Arizona voluntarily adopted OSHA's NEP for COVID-19 even though it was listed as not required in the SPA. Although ADOSH did not update its notice of intent to adopt the COVID-19 NEP until May 12, 2021, ADOSH adopted it well before then.<sup>10</sup> Data in OSHA's OIS system shows that ADOSH conducted a COVID-19 inspection under the NEP as early as May 10, 2021. The NEP mainly targeted healthcare industry employers. And later in 2021, ADOSH was conducting COVID-19 inspections in healthcare even though it had not yet adopted the ETS. However, of the inspections or investigations conducted between June and December 2021, during the life of the COVID-19 Healthcare ETS, ADOSH did not conduct any inspections that found violations of the general duty clause or any other standard that could have been used to cite a violation of the COVID-19 Healthcare ETS. Of note, the OIS does not show that many State Plans, excluding a few outliers, were conducting COVID-19 inspections during the time of the Healthcare ETS (June 21, 2021 – December 21, 2021), let alone issuing citations under the Healthcare ETS. And of the few states that issued ETS citations, they appear to be non-serious recordkeeping citations.

As found by the ICA Commissioners in the October 7, 2021 meeting, by the Fall of 2021, the country and Arizona in particular were in a very different place with COVID-19. In healthcare especially, large percentages of employees were vaccinated and healthcare employers were following CDC and other infection control guidance. OSHA has never shown that healthcare workers were contracting COVID-19 at higher rates than the general population and these workers were likely better protected at work than others at other types of employment or the community at

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<sup>10</sup> The SPA system only allows you to use the date of entry of the data as the current date. So ADOSH could not enter the information on May 12, 2021, to enter a date of adoption before that date.

large. And large healthcare systems in Arizona that also had locations in federal jurisdiction states were following the provisions of the ETS in Arizona. Although OSHA has omitted these facts, they are important to understand the context of the hazard and employee exposure to it to even evaluate whether Arizona's State Plan was less effective than OSHA with its response to COVID-19. By not considering these facts, OSHA cannot reasonably find that Arizona's State Plan was not ALAE.

1. *OIG FY 2021 Report shows that Arizona was more effective than OSHA and half the states during 2020 in COVID-19 related enforcement*

On February 25, 2021, OIG's Office of Audit issued a report on OSHA's response to COVID-19 and its ability to protect the safety and health of workers from February 1, 2020, to October 26, 2020. OIG essentially found that OSHA State Plans were *more effective* in addressing COVID-19 than OSHA. Specifically, OIG found that OSHA issued 295 violations for 176 COVID-19 related inspections, while 1,679 violations for 756 COVID-19 related inspections were issued by State Plans. Office of Inspector General – Office of Audit, U.S. Dept. of Labor, Report No. 19-21-003-10-105, p. 3 (Feb. 25, 2021). For the review period, OIG evaluated the number of OSHA COVID-19 inspections and citations in both federal and state plan jurisdictions and the number of COVID-19 inspections and citations by State Plans. Among the 22 State Plan states, Arizona conducted more COVID-19 inspections and issued more COVID-19 related citations than half the states.<sup>11</sup> About a handful of states were outliers, conducting hundreds of inspections and issuing hundreds of citations. And ADOSH conducted more or did comparable inspections and issued more citations related to COVID-19 than both Texas and Florida, two very large OSHA

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<sup>11</sup> Hawaii is a State Plan state but is not listed on the charts for COVID-19 inspections for either OSHA or the State Plans.

jurisdictions. Texas had 6 inspections and 9 related citations, and Florida had only 5 inspections and 7 related citations. Not only are Texas and Florida large OSHA jurisdictions, but they are also the number 2 and 3 states in population, with Texas estimated at 30,097,526 and Florida at 22,177,977 people in 2022. *See* <https://worldpopulationreview.com/states> (last visited June 27, 2022). Arizona's population is estimated at 7,640,796, making Texas four times the size of Arizona in population and Florida three times the size of Arizona in population. *See id.* And when comparing business growth in those states in 2021, Arizona had 112,846 business applications, while Texas and Florida had 492,243 and 632,105, respectively. *See* <https://www.census.gov/econ/bfs/index.html> (last visited June 27, 2022). Thus even early on in the pandemic and before the COVID-19 Healthcare ETS, ADOSH's COVID-19 enforcement activity was comparatively greater than OSHA's two largest states in population, which also had more business growth than Arizona.

2. *OSHA found ADOSH ALAE in handling COVID-19 complaints and issuing COVID-19 related citations*

In March 2021, OSHA received a CASPA alleging that ADOSH was not ALAE in handling COVID-19 complaints and issuing related citations. OSHA investigated this complaint and found no merit to the allegation that ADOSH failed to investigate COVID-19 complaints in an effective manner. OSHA reviewed OIS and conducted interviews. OSHA noted that, between January 2020 and March 2021, ADOSH properly handled 519 COVID-19 related complaints.



OSHA reviewed OSHA Information System (OIS) data and conducted interviews to investigate this CASPA allegation. ADOSH received approximately 519 COVID-19 related complaints or referrals from January 2020 to March 2021. Of these, approximately 480 of the complaints and referrals were handled as phone/fax investigations, 49 were processed as non-valid due to lack of sufficient information or jurisdictional issues, and 33 resulted in COVID-19 related inspections. ADOSH implemented a state version of the “Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)” memo, dated May 26, 2020, which was similar to OSHA’s memo with the same name, to determine the courses of action to address COVID-19 related complaints and referrals. OSHA’s investigation found no evidence that ADOSH did not apply the AZ FOM or other internal guidance documents to its handling of complaints and referrals.

OSHA Response to AZ CASPA 2021-02 (Oct. 20, 2021). As a result of its review, OSHA made *no* findings and issued *no* recommendations. As to the allegation that ADOSH did not effectively issue COVID-19 related citations, OSHA’s only finding was that, for a single case of a failure to report a work-related fatality, ADOSH missed the statute of limitations for issuing the non-serious citation to the employer by two days. OSHA recommended that ADOSH develop and implement a tracking tool to ensure citations are timely issued within the six-month statute of limitations, which ADOSH did. *See id.*

D. ADOSH Was Still Conducting COVID-19 Enforcement Activity in 2021, Even Without the COVID-19 Healthcare ETS

Although Arizona had not adopted the COVID-19 Healthcare ETS, ADOSH was still investigating allegations of noncompliance under the ETS. For example, in October 2021, NNU filed two complaints with ADOSH about the same concerns outlined in the CASPA it filed with OSHA, which OSHA uses as documentation in support of reconsideration and revocation in the record. These complaints related to the one hospital system in Arizona that has unionized nurses with NNU. One complaint was treated as a formal complaint and ADOSH conducted an onsite inspection. The ADOSH Compliance Officer gathered documentation, inspected the worksite, and

interviewed employees. He tried to meet with union representatives, but no one showed up the several times he made himself available. Ultimately, the investigation did not support the allegations. The other complaint was an informal complaint and the employer was notified of the allegations, investigated, and provided a written response to ADOSH that was satisfactory and resulted in a closure of the complaint. This enforcement activity demonstrates that ADOSH was investigating COVID-19 complaints related to the COVID-19 Healthcare ETS, even though Arizona had not completed adoption. As explained by ADOSH to the NNU representative in email communications, ADOSH had at its disposal the general duty clause to address hazards associated with COVID-19 for the healthcare industry. *See* September 24, 2021 Email from Jessie Atencio to Sean Amil. In any event, ADOSH investigated the allegations, but did not support them. Thus, OSHA has not shown and cannot show that Arizona's State Plan was less effective than OSHA.

## **VIII. CONCLUSION**

For all the reasons outlined herein, the ICA ardently disagrees with OSHA's assertion that Arizona's State Plan is not ALAE and opposes OSHA's arbitrary proposal to reconsider and revoke Arizona's final 18(e) approval. Despite the objections, the ICA is committed to maintaining Arizona's State Plan and, to that end, Arizona: (1) has been diligently enforcing OSHA's Part 1926 Subpart M fall protection requirements since February 2015; (2) has updated its SPA entries to reflect adoption dates of NEPs and final rules; (3) is nearing the end of the rulemaking process for adopting the final OSHA rules for SIP-IV, Beryllium in Construction and Shipyards, and Cranes and Derricks in Construction: Railroad Roadway Work; (4) has increased the minimum penalty levels for serious and non-serious violations and has recently passed HB 2120, which aligns Arizona's statutory maximum and minimum penalty levels with OSHA's

penalty levels; (5) has made permanent the recordkeeping/reporting requirements of the withdrawn COVID-19 Healthcare ETS; and (6) passed HB 2120 to amend the process for ETS adoption based on a finding of grave danger by the ICA Commissioners *or* by OSHA. These efforts show Arizona's continued willingness to work in good faith to resolve any issues or concerns that may arise in the evaluation of the operation of Arizona's State Plan. The ICA believes that more effective communication and collaboration between the ICA and OSHA can resolve concerns that OSHA might have about the operation of Arizona's State Plan. Arizona remains willing to communicate and collaborate with OSHA and requests that OSHA take needed steps to reciprocate.

Based on the arguments outlined herein, Arizona's State Plan is ALAE as OSHA and there is no data or other reliable evidence to justify reconsideration and revocation of Arizona's 18(e) status. The ICA requests that OSHA end the reconsideration and revocation proceedings, withdraw the Federal Register notice, and find that Arizona is ALAE on all issues.

Respectfully,

*/s/ Melanie L. Paul*

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