IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILLIPS MANUFACTURING & TOWER COMPANY and SIXARP, LLC, Petitioners, v. UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; MARTY WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR; DOUGLAS L. PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, Respondents.	Case No. 21-4028

MOTION FOR EMERGENCY STAY

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Petitioners, Phillips Manufacturing & Tower Company and Sixarp, LLC, respectfully move this Court pursuant to Federal Rule of Appellate Procedure 18, 28 U.S.C. §2112, and 29 U.S.C. §655(f) to enter an emergency stay of the Occupational Safety and Health Administration's "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61402 (Nov. 5, 2021) ("Vaccine Mandate").

The Vaccine Mandate is one of the most significant regulatory actions ever taken by the Federal Government. Yet OSHA can locate no clear source of statutory authority. Moreover, even if Congress authorized the Mandate by statute, doing so would violate both the Nondelegation Doctrine and Commerce Clause. Setting aside these constitutional issues, the Occupational Safety and Health Act, relied upon by OSHA, provides no authority to impose a sweeping mandate on all American businesses, regardless of their nature or relative risk of infection in the workplace, to combat a communicable disease. And OSHA's pretextual statement of reasons is nowhere near sufficient to establish an adequate justification for the extraordinary measure of an Emergency Temporary Standard (ETS).

Petitioners recognize the seriousness of the pandemic, and do not dispute that the state and federal governments may take a variety of lawful and reasonable responses to protect the public from infectious disease. But the proposed ETS is neither lawful nor reasonable. Because the proposed ETS will irreparably harm Petitioners' businesses and the public interest is served when the federal agencies follow the Constitution, this Court should issue an immediate stay of the Vaccine Mandate's effective date.

BACKGROUND

I. OSHA's ETS Authority.

Congress enacted the Occupational Safety and Health Act (OSH Act) "to assure safe and healthful working conditions for the nation's work force and to preserve the nation's human resources." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 417 (5th Cir. 1984) (citing 29 U.S.C. §651). The OSH Act empowers the Secretary of Labor to promulgate rules governing occupational health and safety through a notice and comment process. 29 U.S.C. §655(b). "The Act also allows the Secretary to by-pass these normal procedures in favor of promulgating an ETS to take effect immediately upon publication in the Federal Register if he 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 also determines 'that such emergency standard is necessary to protect employees from such danger.'" *Id.* (quoting 29 U.S.C. §655(c)(1)).

OSHA has sparingly used its extraordinary power to promulgate emergency temporary standards. Indeed, between the OSH Act's enactment in 1971 and 1983, OSHA issued only nine ETS Rules. And of those nine, six were challenged. And of those six, only one survived judicial review. *See* Cong. Research Serv., *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, R46288, at 27 (Sept. 13, 2021). And even the one ETS to survive judicial review was immediately stayed to allow for full stay motion briefing. *See Vistron v. OSHA*, No. 78-

3026, 6 OSHC 1483 (6th Cir. Mar. 28, 1978). Anticipating heightened judicial scrutiny,[1] OSHA did not issue another ETS until July 2021, when it sought to impose various COVID-related requirements on the healthcare industry. 86 Fed. Reg. 32376 (June 21, 2021). Notably, this ETS did not require vaccination and instead addressed working-condition requirements such as personal protective equipment.

II. The COVID-19 Pandemic.

The COVID-19 Pandemic has impacted the United States since at least March 2020. Three vaccinations have been in widespread distribution in the U.S. for several months and approximately 70% of the population has received at least one dose of a vaccine. *See* CDC, *Covid Vaccinations in the United States*, https://bit.ly/3aeINgQ. Studies show that the number of deadly cases of COVID-19 are plummeting. *See* Madeline Holcombe, "CDC predicts continued declines in Covid-19 hospitalizations and deaths over next 4 weeks," CNN (Oct. 14, 2021), https://cnn.it/3DUqxGm; Johns Hopkins Coronavirus Resource Center, "COVID-19 Dashboard" (last updated Nov. 5, 2021), https://bit.ly/2Z2MODj. Additionally, scientists have been able to isolate individuals in age groups that are not at high risk from COVID-19. *See* CDC, *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, https://bit.ly/3lkVGfR; *see also Journal of Hospital Medicine, Trends in COVID-19 Risk-Adjusted Mortality Rates* (Feb. 16, 2021), https://bit.ly/3Fto8Uy. And studies have

[1] Gov't Accountability Office, *WORKPLACE SAFETY AND HEALTH: Multiple Challenges Lengthen OSHA's Standard Setting*, GAO-12-330 (Apr. 2012).

demonstrated that natural immunity confers longer lasting and stronger protection against infection by COVID-19, including the Delta Variant, than any of the currently available COVID-19 vaccines. *See, e.g.*, Medrxiv, "Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections" (Aug. 25, 2021), https://bit.ly/3DnKzIZ. Many large companies have voluntarily implemented COVID-19 vaccination mandates on its employees, *see, e.g.*, NBC News, "From McDonald's to Goldman Sachs, here are the companies mandating vaccines for all or some employees" (Aug. 3, 2021), https://nbcnews.to/3uSkPSa, as have local government bodies, *see*, *e.g.*, City of New York, "Vaccination Proof for Indoor Activities," https://on.nyc.gov/3BufsLw.

III. Governmental responses to pandemics.

Although COVID-19 is novel, pandemics are not. Since the Founding, pandemic response has been treated as a State and local issue. *See, e.g.*, *State v. Becerra*, 2021 WL 2514138, at *11 (M.D. Fla. June 18, 2021) (citing CDC, *History of Quarantine* (Feb. 12, 2007)) ("In the early years of the republic, the federal role in curbing infectious disease extended to little more than support for the effort of local government."). To the extent Congress has attempted to address communicable diseases at the federal level, it has been through the Centers for Disease Control, Food and Drug Administration, and the Department of Health and Human Services, not OSHA. *See, e.g.*, 42 U.S.C. §264; 21 U.S.C. §360bbb-3. But even here, CDC has been checked twice by Federal courts for overreaching on COVID-19. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*,

2021 WL 3783142 (U.S. Aug. 26, 2021) (Eviction Moratorium); *State v. Becerra*, 2021 WL 2514138 (cruise ship halt order).

IV. The Vaccine Mandate ETS.

On September 9, 2021, President Biden announced that the Department of Labor was developing an emergency rule to "require all employers with 100 or more employees, that together employ over 80 million workers, to ensure their workforces are fully vaccinated or show a negative test at least once a week." The White House, "Remarks by President Biden on Fighting the COVID-19 Pandemic" (Sept. 9, 2021), https://bit.ly/3oI0pKr. This requirement was part of the President's broader plan to "increase vaccinations among the unvaccinated with new vaccination requirements." *Id.*; *see also* The White House, *Path Out of the Pandemic: President Biden's Covid-19 Action Plan*, https://bit.ly/3adkMXx.; The White House, *Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy* (Oct. 7, 2021), https://bit.ly/3lorbp0.

On November 5, 2021, OSHA relied upon its §655(c) authority to publish an ETS, effective immediately, mandating employees at a business employing 100 or more people get vaccinated or be subjected to weekly testing. As the White House's statements make clear, this mandate is part of broader Biden Administration efforts to vaccinate as much of the American population as possible. As the President's own Chief of Staff retweeted, "OSHA doing this vaxx mandate as an emergency workplace safety

rule is the ultimate work-around for the Federal govt to require vaccinations."

But the Vaccine Mandate offers a different rationale. Attempting to fit the Administration's goal of full societal vaccination into the OSH Act, OSHA justifies the Vaccine Mandate as a workplace-safety provision to protect workers from the virus that causes COVID-19 while on the job. 86 Fed. Reg. at 61404-07. The Vaccine Mandate finds that COVID-19 is a "harmful physical agent" and "new hazard" under the OSH Act that poses a "grave danger" to employees. *Id.* at 61424. OSHA goes on to find that a vaccine or testing requirement is necessary to prevent this grave danger. *Id.* at 61429. But the Vaccine Mandate includes several exceptions. Most notably, the Vaccine Mandate applies only to employers with 100 or more employees and exempts employees who "work exclusively outdoors" or from home. *Id.* at 61419.

V. The Petitioners.

Phillips Manufacturing & Tower Company manufactures welded steel tube and has 104 employees. *See* Affidavit of Angela R. Phillips, Ex. A ¶4. Phillips is thus directly regulated by the ETS. Moreover, Phillips has invested in antibody testing for its workforce to determine whether they have natural immunity. *Id.* ¶6. Those results indicated that 44 employees tested positive for COVID-19 antibodies. *Id.* ¶6. And most of the company's workers are necessarily separated in the manufacturing process. Management has further encouraged 6-foot social distancing since the COVID-19 pandemic began. *Id.* ¶7.

Many of Phillips's employees have declined the vaccine and are unlikely to get it

even if it means the loss of their job. Despite extensive recruiting efforts, Phillips currently has 7 openings that it cannot fill, due to general labor shortages in the local area. *Id.* ¶9. As a result, Phillips's employees are already working overtime shifts, averaging 10-hours shifts, 6 days a week. *Id.* The vaccination mandate (or its alternative of weekly daily testing) will make it even more difficult to fill the open positions, let alone the new positions that will become vacant due to the workforce's reaction to the mandate. Indeed, based upon employee responses to a survey and their own costs of doing business, Phillips estimates that the ETS mandate will cost the company more than $818,635 in additional recruiting, training, overtime, and other costs. *Id.* ¶11. Furthermore, Phillips also has a number of contracts with customers that impose substantial penalties—reaching tens of thousands of dollars—in the event Phillips is not productive enough to fill its orders due to the hurdles imposed by the Vaccine Mandate. *Id.* ¶13.

Petitioner Sixarp is a full-service contract packaging company specializing in secondary packaging operations for a number of industries. Declaration of Rick King, Ex. B ¶1. Like Phillips, Sixarp has been following the promulgation of the Vaccine Mandate and has studied the Mandate's effects on its business. *Id.* ¶3. Sixarp employs more than 600 people and would not otherwise impose a vaccine mandate or testing requirement but for the Vaccine Mandate. *Id.* ¶¶4, 5. At least 60 Sixarp employees have had COVID-19 and thus have natural immunity. *Id.* ¶7. Additionally, like Phillips, Sixarp has over 30 open positions that it is struggling to fill. *Id.* ¶8.

JURISDICTION & VENUE

This court has jurisdiction to review the ETS under 29 U.S.C. §655(f). Venue is appropriate because Petitioners' principal places of business are located within this Circuit. *Id.* This Court is authorized to stay the ETS rule by Federal Rule of Appellate Procedure 18,[2] 28 U.S.C. §2112(a)(4), and 29 U.S.C. §655(f).

STANDARD OF REVIEW

Courts considering a motion to stay an agency action pending review examine four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *State of Ohio ex rel. Celebrezze v. Nuclear Regul.*

[2] Because the ETS immediately takes effect and Petitioners must immediately begin to build the compliance framework, it would be impracticable to petition the agency first. *See Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (because "[i]n-person instruction ... is expected to resume at religious schools in the Commonwealth this coming Monday[,] [m]oving first in the district court would ... have been impracticable"); *see also Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021) ("the tight timeframe present here renders prior recourse to the district court sufficiently impracticable"); *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983) ("Rule 18 ... is not intended to apply in a case where the application would be an exercise of futility."). *Gonzalez ex rel. Gonzalez v. Reno*, 2000 WL 381901, at *4 (11th Cir. Apr. 19, 2000) (same); *Prometheus Radio Project v. F.C.C.*, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (same). Moreover, it is not clear that Rule 18 applies here because Congress created a specific procedure allowing any person adversely affected by an ETS to file suit immediately without reference to exhausting administrative procedures before the agency. *See* 29 U.S.C. §655(f). And existing OSHA procedures provide for a stay only in the case of individual citations, 29 C.F.R. §2200.63, rather than ETS Rules.

Comm'n, 812 F.2d 288, 290 (6th Cir. 1987). Courts apply these "four criteria to [an] application for stay pending review of an OSHA ETS." *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 418.

ARGUMENT

OSHA has issued one of the most significant rules in American history without authorization from Congress and in contravention of the Constitution. OSHA's ETS violates the constitutional separation of powers, Commerce Clause, Tenth Amendment, Occupational Health and Safety Act, and Administrative Procedure Act. It will cause substantial and irreparable harm to Petitioners. It violates the public interest in a government of laws, not bureaucratic work-arounds. And the Federal Defendants suffer no harm by having to act in accordance with the Constitution and laws enacted by Congress. This case demonstrates the Founders' wisdom of creating an independent judiciary. The private rights of individuals are being disparaged by a federal agency claiming authority that is generally left to the States and which has not been authorized by Congress. The Judiciary was created to defend the rights of individuals against such lawless usurpation.

I. Petitioners Are Likely to Succeed on the Merits.

A. The Vaccine Mandate violates the major questions doctrine.

The Vaccine Mandate is one of the most far-reaching and invasive rules ever promulgated by the Federal Government. It fundamentally alters federal-state relations and pushes Congress's authority beyond its outer limits. Yet OSHA can cite to no clear

statutory authorization for the Mandate. The only statue OSHA does cite for authority, §655(c)—a workplace safety provision—contains no explicit authority to mandate vaccination for an extensive portion of the American people. Indeed, the Supreme Court and this Circuit have just recently rejected a substantively indistinguishable attempt to rely on ambiguous-at-best statutory authority to impose a nationwide eviction moratorium to stop the spread of COVID-19.

The Supreme Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). And courts will not construe statutes to allow agencies to test constitutional limits if a narrowing construction is available. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001).

"In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari) (citation omitted); *FDA v. Brown &*

Williamson Tobacco Corp., 529 U.S. 120 (2000); *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218 (1994); Stephen A. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986)). The Executive cannot "bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp.* 573 U.S. at 324; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 159.

The Vaccine Mandate is the quintessential example of a situation where Congress must go first. It is one of the most high-profile regulatory actions in the nation's history.[3] It affects an estimated 80 million individual Americans and a myriad of businesses. *See* The White House, *Path Out of the Pandemic: President Biden's Covid-19 Action Plan*, https://bit.ly/3adkMXx. It reaches into a sphere that since the Founding has been the undisputed domain of the States. *See Hillsborough Cty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985). And it fundamentally reorders the relationship between citizens and the Federal Government by compelling them to act. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012) ("*NFIB*") ("Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation,

[3] Further demonstrating the mandate's significance, it has been deemed a "major rule" meaning it will have over a $100 million impact on the economy. *See* 86 Fed. Reg. at 61504; *cf. State v. Becerra*, 2021 WL 2514138, at *21 (M.D. Fla. June 18, 2021) ("In light of CDC's unprecedented assertion of power and the conditional sailing order's broader economic implications, a predominant doubt remains that Congress would convey such formidable authority by the vague terms of Section 264(a).").

and—under the Government's theory—empower Congress to make those decisions for him."). Neither the President nor OSHA dispute that this is an issue of massive public importance. Accordingly, the major questions doctrine applies and OSHA must point to an unambiguous statutory authorization for the Vaccine Mandate. OSHA fails to identify any such authority.

OSHA asserts that its statutory authority stems from an obscure provision of the OSH Act that had largely fallen into desuetude until the COVID-19 pandemic. Section 6(c) of the Act provides the Secretary of Labor with authority to promulgate an "emergency temporary standard to take immediate effect" if he finds "such emergency standard is necessary to protect employees from" a "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. §655(a).

This case thus poses a now familiar question—whether the term "necessary" authorizes a novel measure of vast economic and social significance that would intrude into a traditional domain of State police power and test Congress's powers under the nondelegation doctrine and Commerce Clause. In a recent case addressing federal authority in the COVID context, this Court applied the major questions doctrine and held that the term "necessary" cannot bear such weight. *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 671 (6th Cir. 2021).

Moreover, §655(c) authorizes an ETS for only "substances or agents determined to be toxic or physically harmful or from new hazards." OSHA asserts that the virus

causing COVID-19 fits this definition. But the structure of the OSH Act, OSHA's longstanding practice, and Congress's allocations of authority across agencies belies this contention. Read in the context of §655, the terms "substances," "agents," and "hazards" clearly refer to only those that occur in the "employment" context or in "places of employment." 29 U.S.C. §655(d). Section 655(c)'s grant of ETS setting authority is not a standalone provision. Rather, an ETS must eventually lead to a permanent standard in line with §655(b). 29 U.S.C. §655(c)(3) ("Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b), and the standard as published shall also serve as a proposed rule for the proceeding."). But under §655(b), it is clear that standards can be promulgated only for substances encountered specifically in the workplace. *See, e.g.*, 29 U.S.C. §655(b)(5). And the plain meaning of the terms "toxic materials" and "harmful physical agents" do not include viruses. *See, e.g.*, Paul J. Larkin & Doug Badger, *The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for COVID-19 Vaccinations*, at 9-11 & n. 50-58, https://bit.ly/3Dok06C (collecting definitions to conclude that "a 'virus' is a communicable pathogen with a protein coat encapsulating an RNA or DNA genetic material that replicates within a host or dies. A 'toxin' is different" and "[t]he natural reading of the term 'physical agent' does not include viruses").

The structure of the OSH Act beyond §655 also confirms that OSHA's authority does not extend to communicable diseases like COVID-19. *See, e.g.*, 29 U.S.C. §675

(listing toxic substances as those "in industrial usage"); 29 U.S.C. §671a(c)(1)(A) (focusing on "issues related to the contamination of workers' homes with hazardous chemicals and substances, including infectious agents, transported from the workplaces of such workers"). And Congress's findings justifying the OSH Act refers to "personal injuries and illnesses *arising out of work situations*." 29 U.S.C. §651(a) (emphasis added). Thus, "the entirety of the OSH Act shows that Congress did not grant OSHA authority to impose a vaccination requirement by virtue of the terms in the ETS provision that make no mention of viruses." Larkin & Badger, *supra*, at 12.

OSHA's longstanding ETS practice confirms this interpretation. OSHA has traditionally interpreted this term to apply to substances found in particular workplaces like benzene, 42 Fed. Reg. 22515 (May 3, 1977), pesticides, 38 Fed. Reg. 10715 (May 1, 1973), asbestos, 48 Fed. Reg. 51086 (Nov. 4, 1983), and vinyl cyanide, 43 Fed. Reg. 2585 (Jan. 17, 1978). *See also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642-43 (1980) (noting that the OSH Act "empowers the Secretary to promulgate standards, not for chemicals and physical agents generally, but for 'toxic materials' and 'harmful physical agents'"). *See also Am. Dental Ass'n v. Martin*, 984 F.2d 823, 843 (7th Cir. 1993) (Coffey, J., concurring in part, dissenting in part). Indeed, until 2021, OSHA had never attempted to employ its ETS authority to regulate an airborne virus. And it has never "previously construed the OSH Act as granting OSHA the authority to impose a vaccine mandate as a workplace safety condition." Larkin & Badger, *supra*, at 18.

Additionally, when Congress intends for an agency to address a communicable disease such as COVID-19, it knows how to do so. For example, Congress specifically empowered CDC to address "the introduction, transmission, or spread of communicable diseases" in certain circumstances. 42 U.S.C. §264(a). And Congress empowered the FDA to address the approval of vaccines, including requiring individuals to be informed of the "option to accept or refuse administration of" an emergency approved vaccine. 21 U.S.C. §360bbb-3. Significantly, Congress specifically provided in the OSH Act that OSHA's standard-setting authority did not displace the authority of other federal agencies such as HHS regarding their "exercise [of] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. §653(b)(1). OSHA's Vaccine Mandate directly usurps HHS's authority over workplace vaccination in contravention of this express statutory restriction.

Congress has consistently treated viruses and occupational health standards as separate issues and empowered different agencies to address them under different grants of statutory authority. In the Federal Food Drug and Cosmetic Act of 1938, Congress granted authority over "biologics" and "drugs," which includes vaccines, to the Commissioner of Food and Drugs. 21 U.S.C. §321(g); 42 U.S.C. §262(i)(1). The OSH Act specifically does not displace this authority. 29 U.S.C. §653(b)(1). Indeed, Congress has before addressed the transmission of bloodborne pathogens in the workplace context before by requiring OSHA to adopt regulations to prevent the

workplace transmission of Hepatitis B. *See* Needlestick Safety and Prevention Act, Pub. L. 106-430, 114 Stat. 1901 (2000). But Congress did not authorize a vaccination requirement. *Id.* Congress knows how to specifically empower an agency to address the spread of communicable diseases like COVID-19 but it has failed to grant any such authority to OSHA. *Cf. W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991); *see also* Larkin & Badger, *supra*, at 18 ("Congress' failure to impose a vaccination requirement, while not dispositive, is powerful evidence that Congress wanted the FDA and CDC, not OSHA, to make vaccination decisions for Americans—and even those agencies lack the authority to require a vaccination.").

The Supreme Court has long been on guard against expansive interpretations of the OSH Act, and §6 in particular. In *Industrial Union*, the Court noted that the Act was crafted around congressional concerns "about allowing the Secretary to have too much power over American industry." 448 U.S. at 651-52. To avoid such unilateral power, the Court noted that the OSH Act "narrowly circumscribe[s] the Secretary's power to issue emergency standards." *Id.* Indeed, the Court noted that such narrowing of the Secretary's power to promulgate standards was necessary to avoid concerns about the OSH Act's constitutionality. *See id.* at 646 ("A construction of the statute that avoids this kind of open-ended grant should certainly be favored.").

OSHA's expansive interpretation of this narrowly circumscribed power thus has no basis in the text of the OSH Act—much less the exceedingly clear authorization needed to press constitutional boundaries. Accordingly, OSHA has not provided the

clear statutory authority for its novel foray into COVID-19 regulation. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."). As in *Industrial Union*, "[i]n the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view" of its statutory authority. 448 U.S. at 645. And recent precedents of the Supreme Court and this Court put OSHA's overreach beyond question.

The Supreme Court's holding in *Alabama Association of Realtors* and this Court's holding in *Tiger Lily* are dispositive. In *Alabama Association of Realtors*, the Court considered the Public Health Service Act's (PHSA) authorization to the Surgeon General to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." 2021 WL 3783142, at *1 (quoting 42 U.S.C. §264(a)). The Court relied on the major questions doctrine as an independently sufficient reason to reject the government's argument that the term "necessary" authorized an eviction moratorium to prevent the spread of COVID-19. *See id.* at *3. The Court reasoned that even if the PHSA's necessity standard "were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation." *Id.*

That holding decides this case. The Vaccine Mandate is an even broader measure

than the Eviction Moratorium, because it potentially reaches every working-age American who is currently or could at some point work for a company with 100 employees, while the Moratorium affected only landlords and tenants in existing landlord-tenant relationships. And the OSH Act provides a far thinner reed for the Vaccine Mandate than the PHSA did for the Moratorium. The OSH Act speaks of toxic agents and potentially harmful substances, things that are tied to workplace safety. But the PHSA specifically authorized CDC to address "the introduction, transmission, or spread of communicable diseases," which unmistakably includes COVID-19. Even more so than CDC's interpretation of the PHSA, OSHA's "read[ing] of §[655(c)] would give [OSHA] a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside [OSHA's] reach." 2021 WL 3783142, at *3. As in *Alabama Association of Realtors*, the government has "identified no limit in §[655(c)] beyond the requirement that [OSHA] deem a measure 'necessary.'" *Id.* And like CDC's Eviction Moratorium, OSHA's "claim of expansive authority under §[655(c)] is unprecedented." *Id.* at *4. It takes more than the "wafer-thin reed" of the term "necessary" to authorize one of the most significant governmental actions in American history.

In *Tiger Lily*, this Court also relied on the major questions doctrine to determine that the Eviction Moratorium was unlawful. In focusing on the statutory terms "necessary" and "other measures," this Court concluded that this "broadly worded statute" did not "supersede state landlord-tenant law" because, broad as these phrases

are, "Congress must 'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Tiger Lily, LLC*, 5 F.4th at 671. Moreover, like the Supreme Court, this Court noted that CDC's interpretation would authorize "the CDC [to] do anything it can conceive of to prevent the spread of disease." *Id.* at 672. So too here. And as with the Eviction Moratorium, "[s]uch unfettered power would likely require greater guidance than" the analogous necessity standard of §655(c). *Id.*[4]

The Government likely will attempt to draw sophistical distinctions between *Alabama Association of Realtors*, *Tiger Lily*, and this case. A few simple points demonstrate that those holdings are dispositive to this case. First, the Vaccine Mandate—a positive injunction—impacts more individuals and businesses and is more intrusive on State power and individual liberty than the Eviction Moratorium—a negative prohibition affecting a subset of the population in landlord-tenant relationships. Second, the

[4] A federal court also recently relied upon the major questions doctrine to enjoin CDC's claim of authority to halt the commercial cruise industry. The court noted that "the federal government's role in quarantine regulation throughout American history … confirms CDC's historically limited application of inspection, sanitation, and isolation." *State v. Becerra*, 2021 WL 2514138, at *20. The court found that "the expansive breadth of authority asserted by the conditional sailing order to microscopically regulate a multi-billion-dollar industry is breathtaking," an "unprecedented assertion of power" for which "predominant doubt remains that Congress would convey such formidable authority by the vague terms of Section 264(a). *Id.* *20-21. There, too, CDC was acting under arguably clearer authority than OSHA because the statute at issue specifically provides authority to address "communicable diseases." *Id.* And OSHA's order here is not targeted at a specific industry, but at *all* business. 86 Fed. Reg. at 61434 ("this rule encompasses all industries covered by the OSH Act").

Eviction Moratorium was focused on one industry, while the Vaccine Mandate impacts *all American industries*. Third, both cases are fundamentally about the term "necessary" and §655(c) of the OSH Act provides far less clear authority to OSHA to address COVID-19 than §361(a), which specifically addresses communicable diseases, provided to CDC. Fourth, OSHA, like CDC, identifies no limiting principle whatsoever. *See Ala. Ass'n of Realtors*, 2021 WL 3783142, at *3 ("It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in §361(a) beyond the requirement that the CDC deem a measure 'necessary.' 42 U.S.C. §264(a); 42 C.F.R. §70.2. Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?").

If Congress wishes to authorize the President to implement a Vaccine Mandate—and test the limits of the Executive's power under the nondelegation doctrine and the Federal Government's power under the Commerce Clause and Tenth Amendment—it must do so clearly. *See Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172-73 ("Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984). Section 655(c)'s ambiguous-at-best authority does not

come close to providing the absolutely clear authorization needed to displace "the background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.'" *Bond v. United States*, 572 U.S. 844, 862 (2014).

B. Section 655(c) does not empower OSHA to promulgate the Vaccine Mandate.

Even aside from the major questions doctrine, nothing in the text of §655(c) authorizes the Vaccine Mandate. Section 655(c) requires two specific findings before the promulgation of an ETS. First, the Secretary must determine "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. §655(c)(1). Second, the Secretary must determine "that such emergency standard is necessary to protect employees from such danger." *Id.* Courts carefully monitor OSHA's compliance with these standards to prevent agency circumvention of the APA's notice and comment procedures. *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 422 ("[T]he ETS statute is not to be used merely as an interim relief measure, but treated as an extraordinary power to be used only in 'limited situations' in which a grave danger exists, and then, to be 'delicately exercised.'"); *Dry Color Mfrs. Ass'n, Inc. v. Dep't of Lab.*, 486 F.2d 98, 105 (3d Cir. 1973) ("The courts should not permit temporary emergency standards to be used as a technique for avoiding the procedural safeguards of public comment and hearings required by subsection 6(b). Especially where the effects of a substance are in sharp dispute, the promulgation of

standards under subsection 6(b) is preferable since the procedure for permanent standards is specifically designed to bring out the relevant facts."). Moreover, courts have been clear that OSHA "cannot use its ETS powers as a stop-gap measure" because "[t]his would allow it to displace its clear obligations to promulgate rules after public notice and opportunity for comment in any case, not just in those in which an ETS is necessary to avert grave danger." *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 422. In light of these concerns, Courts "must take a 'harder look' at OSHA's action than [they] would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act." *Id.* at 421.

1. OSHA Has Not Demonstrated a Grave Danger.

There is no question that COVID-19 poses a grave danger to some (especially the elderly and those with compromised immune systems). But that is not the inquiry required under §655(c)(1). Instead, the Court must "evaluate both the nature of the consequences of exposure, and also the number of workers likely to suffer those consequences." *Id.* at 424. And, as explained above, the exposure risk must be *unique to the workplace*, rather than a risk inherent in everyday life. *Indus. Union*, 448 U.S. at 642 ("There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment."). The OSH Act is not an "open-ended grant" of authority to OSHA to regulate all dangers in society. *Id.* at 645. Rather, OSHA's jurisdiction is confined to risks unique to

the workplace rather than prevalent throughout everyday life. *See id.*; *see also* 29 U.S.C. §651(a), (b)(1), (b)(4) (OSH Act designed to reduce "personal injuries and illnesses arising out of work situations" and provide "safe and healthful working conditions"). By contrast, the COVID-19 pandemic "exposes everyone everywhere to a pathogen, not merely industrial workers at a petroleum refinery or similar lines of business." Larkin & Badger, *supra* at 12.

A "grave danger" represents a risk greater than the "significant risk" that OSHA must show in order to promulgate a permanent standard under section 6(b) of the OSH Act, 29 U.S.C. 655(b). *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am., UAW v. Donovan*, 590 F. Supp. 747, 755-56 (D.D.C. 1984), *adopted*, 756 F.2d 162 (D.C. Cir. 1985); *see also Indus. Union Dep't, AFL–CIO*, 448 U.S. at 640 n.45 (noting the distinction between the standard for risk findings in permanent standards and ETSs). The findings of grave danger and necessity must be based on evidence of "actual, prevailing industrial conditions," *see Int'l Union*, 590 F. Supp. at 751, and thus requires more than the outdated, more generalized information contained in the ETS findings, *cf. Fla. Peach Growers Ass'n, Inc. v. U. S. Dep't of Lab.*, 489 F.2d 120, 131 (5th Cir. 1974); *see also Dry Color Mfrs. Ass'n, Inc.*, 486 F.2d at 105.

OSHA's central mistake stems not from an exercise of fact-finding or agency expertise, but from an error of law. OSHA asserts jurisdiction over "hazards which might occur outside of the workplace as well as within." 86 Fed. Reg. at 61407. This is an unlimited assertion of authority that, for the reasons discussed above, cannot be

squared with the text of the OSH Act nor the major questions doctrine. *Indus. Union*, 448 U.S. at 642-45. OSHA's interpretation of §655 to allow for the regulation of non-workplace specific hazards would allow it to regulate employee eating habits, recreational activities, or (here) to mandate vaccines, turning its limited ETS powers into precisely the "open-ended grant" of authority that the Supreme Court rejected. *Id.* This blatant error of law is not entitled to deference and underlies OSHA's entire grave danger analysis.

Reflecting this legal error, the Vaccine Mandate makes no particularized findings that differentiate workplace COVID risk from any other everyday COVID risk—an important distinction from the healthcare ETS. *See* 86 Fed. Reg. 32376 (June 21, 2021). It thus identifies no grave danger *stemming from employment*. For that matter, the ETS also fails to distinguish among workplaces that might entail significantly different levels of risk. Some employees no doubt face a greater risk due to substantial exposure from customers or members of the public—such as emergency room employees, a bartender at a busy nightclub, or ushers at a concert. On the other hand, workers who are relatively spaced out in a factory and who do not interact with non-employees in their workplace, like employees who work for Phillips, surely face less risk of exposure at work. But the ETS baselessly assumes any employee of a business with 100 or more workers faces grave danger—reinforcing the fact that the ETS is intended not to regulate risk in workplace risk but instead societal vaccination rates via individual vaccination decisions—something well beyond the authority of OSHA.

OSHA argues that it has authority to impose the Vaccine Mandate because there is nothing in the OSH Act affirmatively prohibiting it from doing so. 86 Fed. Reg. at 61407 ("there is nothing in the Act to suggest that its protections do not extend to hazards which might occur outside of the workplace as well as within"). But this gets the inquiry backward. Agencies have only the authority granted by Congress and this grant must be "exceedingly clear" when an agency seeks to regulate in an area of immense political and economic significance that alters the federal-state balance of power. *USFS v. Cowpasture River Preservation*, 140 S.Ct. 1837, 1850 (2020). Moreover, the cases OSHA cites merely prove this point: the Fourth Circuit's upholding of OSHA's authority to regulate workplace noise was specifically premised on its holding that the regulation was specifically "directed toward abating workplace noise" and the "industrial cause and effect of hearing loss." *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1443 (4th Cir. 1985). Similarly, OSHA's hepatitis and HIV rule was premised on the specific workplace risk from the "blood of patients," *Martin*, 984 F.2d at 824, and it ultimately took congressional action to get this measure across the finish line, *see* Needlestick Safety and Prevention Act, Pub. L. 106-430, 114 Stat. 1901 (2000).

The ETS also fails to consider that the danger is not from lacking the vaccine, but lacking immunity. OSHA must articulate a precise link between the danger and the remedy. "The Act requires determination of danger from exposure to harmful substances, not just a danger of exposure; and, not exposure to just a danger, but to a grave danger; and, not the necessity of just a temporary standard, but that an emergency

standard is necessary." *Fla. Peach Growers Ass'n*, 489 F.2d at 130. The danger arises not from lacking a vaccine, but from lacking immunity. Medrxiv, "Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections" (Aug. 25, 2021), https://bit.ly/3DnKzIZ ("This study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity. And it is unclear if vaccination of an individual who has natural immunity will provide any perceptible benefit in fighting future infection."). The largest such study conducted to date definitively concluded that natural immunity provides equal or better immunity than that induced by vaccination. Yair Goldberg, et al., *Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel*, Medrxiv (Apr. 24, 2021), https://bit.ly/3n8uXTe; *see also, e.g.*, Martin Kuldorff and Jay Bhattacharya, "The ill-advised push to vaccinate the young," THEHILL.COM (June 17, 2021), https://bit.ly/2Z2ZpX6.[5] Indeed, to the extent data exists, it shows that vaccinating a recently recovered COVID patient is not appropriate.

[5] The ETS dismisses these and similar studies as somehow flawed because of "their exclusion of asymptomatic infections." 86 Fed. Reg. at 61423. But this mischaracterizes the evidence. For example, the Gazit study included any person with a recorded positive test during the relevant period—symptomatic or not—and simply noted the *possibility* that "we might be underestimating asymptomatic infections[.]" *See* https://bit.ly/3DnKzIZ; *see also Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 420 (due to the extraordinary context of an ETS, including its lack of public comment, courts look to evidence outside of the administrative record).

R. R. Goel et al., Science 10.1126/science.abm0829 (Oct. 14, 2021), https://bit.ly/3DXLS1K ("[B]oosting of pre-existing immunity from prior infection with mRNA vaccination mainly resulted in a transient benefit to antibody titers with little-to-no long-term increase in cellular immune memory.").

These studies show that the risks from COVID-19—which are no doubt serious for some individuals—comes from the lack of immunity, not lack of a vaccine. Those who have natural immunity are not at a grave risk of harm as that term is used in the OSH Act. The Court's holding in *Industrial Union* is again useful on this point. That case involved §655(b)'s "significant risk of harm" standard, which is less demanding than §655(c)'s grave danger standard. The Court held that under §655(b),

> the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe." Similarly, a workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.

448 U.S. at 642. Although those with immunity may still have some risk of contracting COVID-19, they are at less risk than those who are vaccinated. Section 655(c)'s grave danger standard does not give OSHA a blank check to demand absolute safety. *Id.* at 641 ("[W]e think it is clear that the statute was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible to do so, so long as the cost is not great enough to destroy an entire industry.").

Because OSHA has failed to demonstrate a grave danger unique to workplaces,

has failed to substantiate its 100-employee standard, and has misidentified the risk as unvaccinated individuals rather than lacking immunity, the Vaccine Mandate must fail.

2. OSHA Has Not Demonstrated that the Vaccine Mandate is Necessary.

OSHA bears a heavy burden to prove that "the ETS, OSHA's most dramatic weapon in its enforcement arsenal, is 'necessary' to achieve the projected benefits." *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 426. "[A]n ETS must, on balance, produce a benefit the costs of which are not unreasonable. The protection afforded to workers should outweigh the economic consequences to the regulated industry." *Id.* at 423. "[I]t is expected that even an emergency temporary standard not overlook those obvious distinctions among the chemicals to be regulated, uses and plant practices that make certain regulations that are appropriate in one category of cases entirely unnecessary in another." *Dry Color Mfrs. Ass'n, Inc.*, 486 F.2d at 105.

OSHA's grossly overbroad, one-size-fits-all approach comes nowhere close to the careful tailoring required by §655(c) and longstanding judicial interpretations. Petitioner Phillips has demonstrated precisely how a more tailored approach could work by testing for natural immunity and making decisions based on *immunity status* rather than *vaccination status*. This obvious alternative alone prevents OSHA from meeting the exacting necessity standard. When using its most potent weapon, OSHA must tailor its response to the cause of the grave danger. *Fla. Peach Growers Ass'n*, 489 F.2d at 130. The availability of obvious alternatives and a gross mismatch between the danger (lack of

immunity) and the means (vaccinating those with immunity) preclude a finding of necessity. Indeed, OSHA itself has recognized in the past that vaccination is unnecessary when "antibody testing has revealed that the employee is immune." 29 C.F.R. §1910.1030(f)(2)(i) (applying to hepatitis vaccination).

The Vaccine Mandate ETS is also overbroad in its application to all industry, regardless of the actual risks of exposure. OSHA's selection of a 100-employee standard is obviously arbitrary. It could have tailored to specific industries based on the dangers to each industry. It could have tailored to specific types of workplaces (poorly ventilated, close quarters, etc.), but instead applied to all workplaces indiscriminately. As the healthcare COVID ETS demonstrated, an ETS must carefully examine the particular conditions of the industry it regulates.

OSHA makes no effort to do so in the Vaccine Mandate or to explain the counterintuitive conclusion that vaccination was not necessary to the healthcare industry—at the highest risk of exposure—but it is now necessary to all industry. Indeed, under the Vaccine Mandate, a sales company with 101 employees working across several offices will have to require vaccination, but a healthcare provider (that does not receive Medicaid or Medicare funds) with 99 employees working in a single location and in close contact with COVID patients will not have to require vaccination. The Vaccine Mandate arbitrarily applies to companies with 100 or more employees for purposes of administrative convenience. Yet the Mandate fails to consider that a company with 104 employees has much more in common when it comes to

administrative compliance structures with a company of 98 employees than it does with a company of 500 or more.

Such are the absurd results of blanket standards—justifying Congress's "repeatedly expressed ... concern about allowing the Secretary to have too much power over American industry," and demonstrating its wisdom in specifically withholding from OSHA "unprecedented power over American industry." *Indus. Union*, 448 U.S. at 651. Indeed, OSHA's 100-employee standard is clearly the result of political pressure rather than agency expertise. The White House, "Remarks by President Biden on Fighting the COVID-19 Pandemic" (Sept. 9, 2021) (dictating 100-person standard to OSHA).

Ultimately, the ETS's justifications come nowhere close to satisfying the OSH Act's stringent requirements. OSHA's indiscriminate nationwide Vaccine Mandate cannot be promulgated through the narrow and extraordinary ETS procedure.

C. The Vaccine Mandate violates the Congressional Review Act.

The Congressional Review Act requires all rules to be submitted to Congress to allow it an opportunity to pass a resolution disapproving the rule. A "major rule" must also receive a report from the Government Accountability Office and its effective date must be delayed. OSHA concedes that the Vaccine Mandate is a "major rule" for purposes of the CRA. Yet it relies on the CRA's "limited exception[]" for rules which "an agency for good cause finds (and incorporates the finding and a brief statement of

reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §808; 86 Fed. Reg. at 61504. Yet OSHA's cursory dismissal of the CRA in a matter of sentences and rubber-stamp finding of good cause comes nowhere close to meeting the exacting standards allowing a major rule to avoid the CRA. *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("Deference to an agency's invocation of good cause—particularly when its reasoning is potentially capacious, as is the case here—would conflict with this court's deliberate and careful treatment of the exception in the past."); *see also* OMB, *Guidance on Compliance with the Congressional Review Act*, M-19-14 (Apr. 11, 2019) (noting APA good cause standard applies in CRA context).

D. The Vaccine Mandate's statement of reasons is pretextual.

OSHA's statement of reasons must "form the actual basis for the Agency's Actions." *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 425. OSHA cannot offer a pretextual reason for the ETS. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) ("*Census Case*"). But that is precisely what has occurred.

The Administration has not been coy about the purpose of the Vaccine Mandate: increasing the number of individual Americans who are vaccinated. The Vaccine Mandate was announced as a component of a "new plan to require more Americans to be vaccinated, to combat those blocking public health." The White House, "Remarks by President Biden on Fighting the COVID-19 Pandemic" (Sept. 9, 2021). The

President was clear that the ETS is a "new vaccination requirement" intended to "increase vaccinations among the unvaccinated." *Id.*

This rationale is also echoed by the White House's "Path Out of the Pandemic: President Biden's COVID-19 Action Plan." The President's Action Plan is clear that the Vaccine Mandate is part of "a six-pronged, comprehensive national strategy." The White House, *Path Out of the Pandemic: President Biden's Covid-19 Action Plan*. The ETS is part of the "Vaccinating the Unvaccinated" prong, which seeks to "reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements" with the goal of "full[] vaccinat[ion]" without reference to workplace safety. *Id.*

On October 7, 2021, President Biden gave another speech in which he made clear that the ETS's rationale is to vaccinate as many Americans as possible: "I've had to move toward requirements that everyone get vaccinated .... The Labor Department is going to shortly issue an emergency rule — which I asked for several weeks ago, and they're going through the process — to require all employees [employers] with more than 100 people ... to ensure their workers are fully vaccinated or face testing at least once a week." The White House, "Remarks by President Biden on the Importance of COVID-19 Vaccine Requirements" (Oct. 7, 2021), https://bit.ly/3BrCMte. The President does not mention workplace safety. Similarly, in a report issued on October 7, the White House stated that the ETS was part of the Administration's attempt to address the "pandemic of the unvaccinated." The White House, *Vaccination Requirements*

Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy (Oct. 7, 2021), https://bit.ly/3lorbp0.

These rationales are completely missing from the Vaccine Mandate's statement of reasons. It nowhere mentions the goal of increasing public, societal vaccination rates. Instead, it attempts to jam this goal into an occupational safety statute. OSHA's justification based on workplace safety is thus clearly contrived to further the President's overall individual vaccination rate goal. *New York*, 139 S. Ct. at 2575 ("[U]nlike a typical case in which an agency may have both stated and unstated reasons for a decision, here ... the sole stated reason [] seems to have been contrived."). Indeed, this is an even stronger case of pretext than the *Census Case*. There, the incongruity of reasoning was implied from the "significant mismatch between the Secretary's decision and the rationale he provided." *Id.* at 2575. As explained above, such a mismatch is apparent from the record here as well. But here the pretext is even more apparent. No implication is needed—the White House has given one and only one reason for the ETS—increased vaccination of the population at large—while OSHA has given one and only one reason for the ETS—workplace safety. Indeed, the President's own Chief of Staff went so far as to retweet a statement that "OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations." In administrative law, a "work-around" is called pretext. And what is being "worked around" are the legitimate statutory and constitutional limits on executive power.

The ETS itself doesn't make sense as a workplace safety rule, but is more coherent as an attempt to increase individual vaccination rates. Thus, the fact that the ETS doesn't increase workplace safety for workers who already possess robust natural immunity, and does precious little for workplaces (within a larger company) with a small number of socially-distanced employees suddenly makes sense as a regulatory matter when the true goal of increasing individual vaccination rates is understood. Of course, OSHA's authority only extends to regulating safe workplaces, not individual health decisions. Hence the need for a work-around.

This Court "cannot ignore the disconnect between the decision made and the explanation given." *New York*, 139 S. Ct. at 2575. If increasing individual vaccination rates was the true justification, the agency was required to frankly say so and defend its lawfulness on those grounds. The "reasoned explanation requirement of administrative law ... is meant to ensure that agencies offer *genuine* justifications of important decisions." *Id.* at 2575-76 (emphasis added); *accord Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 425 (statement of reasons must contain the "actual basis" for an ETS). As the President, the White House, and the Chief of Staff's public statements demonstrate, *see supra*, the Administration itself has admitted that the ETS's reliance on the workplace safety provisions of §655(c) is a "distraction" from the President's stated goal to increase individual vaccination rates, *New York*, 139 S. Ct. at 2576. Accepting OSHA's "contrived reasons would defeat the purpose" of judicial review. *Id.*

E. The Vaccine Mandate exceeds the Federal Government's authority under the Commerce Clause.

Interpreting §655(c) to authorize the Vaccine Mandate would create grave constitutional doubts about that provision under the Commerce Clause. The Vaccine Mandate far exceeds the Federal Government's power under its only possible source of authority—the Commerce Clause. "Congress has never attempted to rely on [the Commerce] power to compel individuals not engaged in commerce to purchase an unwanted product," much less their decision not to inject an unwanted substance into their bodies or be subjected to unwanted and invasive weekly testing. *NFIB*, 567 U.S. at 549. Although "there is a first time for everything ... sometimes 'the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent' for Congress's action." *Id.*

The Supreme Court has "always recognized that the power to regulate commerce, though broad indeed, has limits." *Id.* at 554. Among such limits is the need for actual commercial activity to regulate. The Court's Commerce Clause analysis invariably has employed a "class of activities" test when assessing the constitutionality of statutes and regulations purporting to regulate interstate commerce. *See, e.g.*, *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968) (explaining that courts may not "excise, as trivial, individual instances falling within a rationally defined class of activities"); *Perez v. United States*, 402 U.S. 146, 152-153 (1971) (describing *United States v. Darby* as deciding whether "a *class of activities* was held properly regulated by Congress"; and explaining that in *Heart*

of Atlanta Hotel v. United States and *Katzenbach v. McClung*, "[i]t was the 'class of activities' test which we employed . . . to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests"). Under the Court's more recent Commerce Clause jurisprudence, the ETS Rule cannot be understood to substantially affect interstate commerce inasmuch as the regulated activity—an employee's decision not to inject a substance—is not commercial activity and therefore the Mandate cannot survive the class of activity test. Just as the "individual mandate's regulation of the uninsured" at issue in *NFIB* was "particularly divorced from any link to existing commercial activity," so too is the Vaccine Mandate here. *NFIB*, 567 U.S. at 556.

Moreover, the decision not to receive the mandated injection is even less of a federally regulable commercial activity than the uninsured's decision not to purchase health insurance in *NFIB*—because, unlike the mandated health insurance in *NFIB*, unvaccinated individuals are provided the vaccine for *free*. Thus, as between the unvaccinated employee and either the employer or the vaccine provider there is likely no commerce or exchange of goods for money for Congress or OSHA to regulate.

The Vaccine Mandate is unlike other run-of-the-mine occupational health regulations that regulate employers' interstate commercial activities and the workplace conditions in which those activities are conducted. Typical occupational health and safety regulations impose health and safety requirements upon employers to mitigate the risks created by the work itself and particular to the workplace. OSHA regulations mandating employers to require their employees to wear hard hats on construction sites,

for example, regulate risks associated with performing a particular commercial activity and those risks are intrinsic to that activity. At bottom, the Vaccine Mandate does not regulate commercial activity at all. It is a coercive enforcement mechanism[6] used in a transparent effort to transcend the judicially recognized limits of the Federal Government's enumerated powers and to regulate non-commercial, individual conduct that the Government may not otherwise regulate.

Unvaccinated people "for reasons of their own" may fail to do what the government thinks is "good for them or good for society," and this failure "joined with similar failures of others [] can readily have a substantial effect on interstate commerce." *Id.* at 554. Congress lacks "the same license to regulate what we do not do," which, if granted, would "fundamentally chang[e] the relation between the citizen and the Federal Government." *Id.* at 555. At its core, the Mandate works on businesses—preventing them from hiring or retaining individuals who are not vaccinated or willing to undergo onerous testing—and individuals—preventing them from working at companies with 100 employees or more unless they get vaccinated or undergo testing. Accepting OSHA's description of the Vaccine Mandate as just another workplace safety regulation requires this Court to "'exhibit a naiveté from which ordinary citizens are free.'" *Dep't*

[6] It is no answer that individuals could avoid the mandate by quitting their jobs. The right to refuse medical treatments derives from the "well established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807 (1997). And "the unconstitutional conditions doctrine … vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974).

of Com. v. New York, 139 S. Ct. at 2575-76. Indeed, the ordinary citizens subject to the Mandate will not have any trouble concluding that the ETS is a Vaccine Mandate, not just another workplace regulation.

OSHA's interpretation of §655 violates another limitation on federal power by acting as though there were a general federal police power. *See, e.g.*, 86 Fed. Reg. at 61508 (noting ETS "preempts even 'nonconflicting' State and local occupational safety and health requirements relating to the issues addressed by this standard"). But "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions." *NFIB*, 567 U.S. at 558. Instead, "[a]ny police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *Id.* The Federal Government has no power under the Commerce Clause to condition the right of an individual to work at a company with 100 employees on getting a vaccine or being subjected to onerous testing requirements. There is no 100-person exception to States' traditional police power.

Public health and vaccination in particular have long been recognized as an aspect of police power reserved to the *States*, not the Federal Government. *See, e.g.*, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 24 (1905); *see also Hillsborough Cty.*, 471 U.S. at 719 ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief) ("Our Constitution principally entrusts '[t]he safety and the health of the people"

to the politically accountable officials of the States 'to guard and protect.'"); *State v. Becerra*, 2021 WL 2514138, at *15 ("The history shows ... that the public health power ... was traditionally understood — and still is understood — as a function of state police power."). This makes sense; state governments are better equipped to analyze the economic conditions, relative risks, and other tradeoffs inherent in imposing mandates like the ETS. And if the people are unhappy with their local leaders' assessments, they can more easily effect a change in leadership. OSHA's reading would contract States' general police power to only individuals employed by companies with fewer than 100 employees. In other words, OSHA's interpretation of §655(c) would give the Federal Government a general police power over every American employed by a company with 100 or more employees. If the Federal Government can tell businesses what to require their individual employees to inject into their bodies merely because they work at such a company, there is no limit to OSHA's power under §655(c). This result is untenable under the Commerce Clause, which "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536.

Simply put, if the decision not to buy health insurance is not a class of activity regulable under the Commerce Clause, then neither is the decision to refuse a vaccine. To hold otherwise would warp the Commerce Clause into a plenary federal police power. Accordingly, this Court should hold §655(c) as interpreted by OSHA violates the Commerce Clause, or, alternatively, adopt a narrowing construction to save §655(c)'s constitutionality. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

F. As interpreted by OSHA, §655(c) violates the Nondelegation Doctrine.

If §655 authorizes OSHA to mandate vaccines for every citizen who is employed by a company with over 100 employees or face onerous testing requirements, §655 has no limiting principle and thus violates the nondelegation doctrine. "The Constitution confers on Congress certain 'legislative [p]owers,' Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government." *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (Alito, J., concurring in the judgment). When Congress vests decision-making authority in an agency, "*Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472.

OSHA's reading of §655(c) renders the statute standardless. By asserting that it is not limited to regulating workplace-specific dangers, OSHA eviscerates any congressionally-enacted restraint on its discretion. Both "the degree of agency discretion" and "the scope of the power congressionally conferred" must be limitless in order for OSHA to claim authority to use a workplace safety standard to mandate a personal health choice. *Id.* at 475. Indeed, OSHA's expansive interpretation of the OSH Act vindicates long held concerns about §655's delegation. *See, e.g.*, *Indus. Union*, 448 U.S. at 686 (Rehnquist, J., concurring in the judgment); *see also* Antonin Scalia & Bryan A. Garner, Reading Law 136-37 (2012) (noting potential nondelegation problems posed by the OSH Act).

As with the eviction moratorium, OSHA's interpretation allows it to "do anything it can conceive of to prevent the spread of disease" and grant the Administrator "near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries." *Tiger Lily*, 5 F.4th at 672. Congress lacks authority to delegate "unfettered power" over the American economy to an executive agency. *Id.*; *see also State v. Becerra*, 2021 WL 2514138, at *20, *37 (M.D. Fla. June 18, 2021) (noting similar agency interpretation of statutory term "necessary" is "unbounded" and "causes separation-of-powers problems"). Accordingly, Congress's "delegation to [OSHA] of authority to decide major policy questions" violates the nondelegation doctrine. *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Justice Kavanaugh respecting the denial of certiorari).

To avoid this serious constitutional issue, the Court must not adopt OSHA's expansive reading of §655(c). *See Tiger Lily*, 5 F.4th at 672 ("[T]o put 'extra icing on a cake already frosted,' the government's interpretation of § 264(a) could raise a nondelegation problem."); *State v. Becerra*, 2021 WL 2514138, at *37. However, if the Court agrees with OSHA that the text of §655(c) does grant it unbounded discretion to impose a Vaccine Mandate, §655(c) is unconstitutional under the nondelegation doctrine.

II. The ETS Causes Petitioners Irreparable Injury.

The losses Petitioners allege are more than sufficient to satisfy the irreparable injury prong of the stay test. "[C]omplying with a regulation later held invalid almost

always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment). When determining whether injury is irreparable, "it is not so much the magnitude but the irreparability that counts...." *Enter. Int'l*, 762 F.2d at 472.

Petitioner Phillips will incur significant and immediate losses—more than $900,000 in the first year—in attempting to comply with the Vaccine Mandate. Moreover, the Mandate will imperil Phillips's business moving forward given significant labor market shortages. *Cf. Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995). Indeed, Phillips currently has 7 openings, which she has sought to fill but cannot. And studies show that at least seven million affected workers report that they definitely will not get the vaccine. *See* Goldman Sachs, *The Effect of the Biden Vaccine Mandate on Vaccination and Employment* (Sept. 13, 2021), https://bit.ly/3FkoPj4. These findings accord with Phillips's own study of her work force. In a survey of her employees, 17 employees have said that they will not get the vaccine or submit to weekly testing, even if it means losing their jobs. And another 27 employees will not get the vaccine, but will submit to weekly testing. *See* Declaration of Angela R. Phillips, Ex. A. Any loss to her current employee pool would imperil her ability to conduct business, and could lead to enormous financial losses from penalty clauses, if not the cancellation of customer orders altogether. *Cf. Texas v. United States Env't Prot. Agency*, 829 F.3d 405, 434 (5th Cir. 2016) ("Petitioners have raised threatened harms—including unemployment and the permanent closure of plants—that would

arise during the litigation if a stay is not granted, that are irreparable, and that are great in magnitude.").

Petitioner Sixarp will also suffer substantial and immediate losses from the Vaccine Mandate. Sixarp is suffering due to labor shortages, with over 30 positions that it is attempting to fill. Declaration of Rick King, Ex. B ¶8. The Vaccine Mandate will significantly exacerbate this labor shortage as many Sixarp employees have indicated they would quit rather than be subjected to a vaccine mandate and would not work for a company that subjected them to a Vaccine Mandate. *Id.* ¶¶7, 8, 10. Sixarp must immediately begin to prepare for the Vaccine Mandate and expend significant time and money now to begin the multi-step process of setting up a system to ensure compliance. *Id.* ¶12.

These loses are irreparable for several reasons. First, Petitioners' monetary harm is unrecoverable due to sovereign immunity. *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 599-600 (6th Cir. 2014) (injury irreparable because sovereign immunity may bar claim for money damages); *see also Texas v. United States Env't Prot. Agency*, 829 F.3d 405, 433-34 (5th Cir. 2016) ("No mechanism here exists for the power companies to recover the compliance costs they will incur if the Final Rule is invalidated on the merits."); *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996) (same); *State v. Becerra*, 2021 WL 2514138, at *47 (collecting cases). Second, courts have not hesitated to find irreparable harm from onerous ETS Rules. *Taylor Diving & Salvage Co. v. U. S. Dep't of Lab.*, 537 F.2d 819, 821 (5th Cir. 1976). Third, courts—including the Supreme Court—have

found irreparable harm due to compliance with analogous COVID mandates. *See Ass'n of Realtors*, 2021 WL 3783142, at *4 ("The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery."); *see also State v. Becerra*, 2021 WL 2514138, at *48. Fourth, the Vaccine Mandate directly and immediately imperils Petitioners' business and ability to function given their current labor shortage and the significant number of current employees who will refuse the vaccine. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("'loss of opportunity to pursue [Petitioner's] chosen profession'" including inability "to expand his business" "constitutes irreparable harm"). Finally, compliance with an unconstitutional standard is per se irreparable harm. *See, e.g.*, *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009) ("[T]he constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm."); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 950 (N.D. Ill. 2017) ("plaintiff established a 'constitutional injury' and irreparable harm 'by being forced to comply with an unconstitutional law or else face financial injury.'").

III. The Public Interest Supports a Stay.

OSHA has taken one of the most important regulatory actions in American history without notice and comment or clear congressional authorization. And even if such authorization existed, the ETS would violate the Constitution. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always

contrary to the public interest."). Although "the public has a strong interest in combating the spread of the COVID–19 Delta variant ... our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 2021 WL 3783142, at *4. As with the Eviction Moratorium, "[i]t is up to Congress, not [OSHA], to decide whether the public interest merits further action here." *Id.*

IV. The Balance of Harms Favor a Stay.

The balance of harms factor also favors a stay. Any harm to the government is "outweigh[ed] by the greater public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). And as with the Eviction Moratorium, "[a]s harm to the applicant[] has increased, the Government's interests have decreased" because of voluntary mandates freely imposed by companies. *Cf. Ala. Ass'n of Realtors*, 2021 WL 3783142, at *4. "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *see also Marysville Baptist Church v. Beshear,* 957 F.3d 610, 614-15 (6th Cir. 2020) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one.").

V. An Immediate Stay Accords With Past Precedent Reviewing ETS Rules.

Every court to consider a motion to stay an ETS Rule has granted emergency relief staying the ETS's effective date to allow for full stay briefing. *See Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 418 ("this court granted the stay but expedited full hearing on the merits"); *Vistron v. OSHA*, No. 78-3026, 6 OSHC 1483 (6th Cir. Mar. 28, 1978)

("this court promptly on receipt of a motion for stay pending judicial review, signed by petitioners, entered an order staying the emergency temporary standard temporarily 'until the court receives and considers the response and until this present order is superseded by an order of the court disposing of the motion for stay pending appeal'"); *Indus. Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965, 968 (D.C. Cir. 1977) ("the day before the standard was to take effect, Judge Morgan of that court granted an interim stay of its effectiveness"); *Taylor Diving & Salvage Co. v. U.S. Dep't of Lab.*, 537 F.2d 819, 820 (5th Cir. 1976) ("The Court on July 14, 1976, granted a temporary stay through and including August 14, 1976, to permit full consideration."); *Fla. Peach Growers Ass'n*, 489 F.2d at 126 ("The Growers immediately moved to stay that effective date. A panel of this Court issued a stay, pending further order of the Court.").

Industrial Union is particularly instructive because it implicated both the judicial review provisions of §655 and the transfer provisions of 28 U.S.C. §2112. In that case, separate petitions for review of a benzene ETS were filed in the D.C. Circuit and in the Fifth Circuit. The Fifth Circuit, before the §2112 transfer provisions kicked in, granted "an interim stay of" the ETS's effectiveness. *Industrial Union*, 570 F.2d at 968. Only after granting the stay, the Fifth Circuit "transferred th[e] proceeding to th[e D.C.] circuit pursuant to 28 U.S.C. §2112(a)." *Id.* The Fifth Circuit also "extended the stay pending the action of" the D.C. Circuit. *Id.* And the interim stay remained in effect while the D.C. Circuit determined, under §2112(a), that the case should be transferred back to the Fifth Circuit. *Id.*

Industrial Union thus demonstrates the correct order of operations in a petition to stay an ETS that implicates §2112. First, grant emergency stay relief. Second, allow the §2112 machinery to kick into gear. This allows for full stay briefing in the appropriate court and prevents irreparable harm during the §2112 process. *Cf. Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 74-75 (Kavanaugh, J., concurring) (noting proper course is "granting temporary injunctive relief until the Court of Appeals in December, and then [the Supreme] Court as appropriate, can more fully consider the merits").

CONCLUSION

For the foregoing reasons, this Court should immediately stay the effective date of the ETS pending full appellate review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, I caused the foregoing Motion For Stay Pending Review to be served via the Court's CM/ECF system on all registered counsel.

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