No. __-___

In the Supreme Court of the United States

IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 4, 2021.

EMERGENCY APPLICATION FOR INJUNCTION PENDING CERTIORARI REVIEW

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Phillips Manufacturing & Tower Company, Sixarp, LLC, and Oberg Industries, LLC. Applicants were petitioners in the U.S. Court of Appeals for the Sixth Circuit.

Respondents are the Occupational Safety & Health Administration (OSHA); Douglas L. Parker, in his Official Capacity as Assistant Secretary of Labor for Occupational Safety and Health Administration; James Frederick, in his official capacity as Deputy Assistant Secretary of Labor for Occupational Safety and Health Administration; Martin J. Walsh, in his official capacity as Untied States Secretary of Labor; Joseph R. Biden, in his official capacity as President of the United States; and the United States of America.

The proceedings below were:

1. *In re: MCP No. 165, Occupational Safety and Health Administration, Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61402, Issued on November 4, 2021*, No. 21-7000 (6th Cir.).

2. *Phillips Manufacturing and Tower Company v. OSHA*, No. 21-4028 (6th Cir.), *consolidated with* No. 21-7000 (6th Cir.).

3. *Oberg Industries LLC v. OSHA*, No. 21-3159 (3d Cir.), *consolidated with* No. 21-7000 (6th Cir.).

4. *BST Holdings v. OSHA*, No. 21-60845 (5th Cir.), *consolidated with* No. 21-7000 (6th Cir.).

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, Applicants each represent that they do not issue stock. Applicant Phillips's parent company is Phillips Tube Group, Inc. Applicant Sixarp's parent company is Praxis Group Holdings, LLC. Applicant Oberg's parent company is Oberg Holding Company, LLC.

Respectfully submitted,

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Dated: December 17, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

There is no dispute among the parties about the common desire to end the scourge of the COVID-19 pandemic. Yet "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021). That is what is happening here. The arguments advanced by the Executive Branch admit to no cognizable limits on federal executive power. Frustrated with a minority of Americans' medical choices, the Executive Branch has attempted to control and surveil the vaccination schedules of enormous swaths of the country's population. This case concerns its most sweeping mandate, which a panel of the Sixth Circuit has just made effective immediately. Because the Occupational Safety and Health Administration's Vaccine Mandate exceeds OSHA's authority, fails to meet the statutory standard for an Emergency Temporary Standard (ETS), and raises grave constitutional concerns, this Court should enjoin the Mandate.

The Vaccine Mandate requires employers with over 100 employees to force all of their employees—some 80 million in all—to become "fully vaccinated" or submit to a weekly-test-and-mask alternative. Promulgated without notice or comment, the Vaccine Mandate imposes a now-passed December 6, 2021, deadline for those employers to collect detailed personal medical data on their employees, subject to anytime review by federal agents. It also imposes a January 4, 2022, deadline for those employers to begin removing from the workforce all employees who do not submit to the vaccination or mask-and-test requirements.

As a majority of lower court judges have recognized, such a broad and unprecedented exercise of power at least requires a clear statement of authority from Congress. But OSHA instead has promulgated the Vaccine Mandate pursuant to a rarely used and narrowly limited emergency authorization that covers only workplace-specific hazards, permits only workplace-specific safety measures, and applies to only "necessary" and "temporary" provisions that address "grave" and "emergency" situations. But even if the OSH Act authorized the Mandate, such an authorization would raise grave concerns about the constitutionality of the OSH Act itself, and the derivative Mandate. See *infra*, Sec. II.D & E.

For these reasons, the Fifth Circuit correctly stayed the Vaccine Mandate in a unanimous decision. After the Fifth Circuit entered the stay, a statutory lottery process assigned the consolidated challenges to the Sixth Circuit. *See* 28 U.S.C. §2112. Eight judges on the Sixth Circuit agreed, in Judge Sutton's words, that the "extraordinary procedure" of initial en banc review was warranted to maintain the stay pending appeal. Judge Sutton compared the Executive Branch's conduct here to its infamous overreach that this Court rejected in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Nonetheless, a Sixth Circuit panel soon lifted the stay, over Judge Larsen's dissent, allowing the Mandate to go into effect immediately. Applicants—employers subject to the Vaccine Mandate and facing the decimation of their workforces in a tight labor market—respectfully ask this Court to restore the stay pending appeal.

The All Writs Act authorizes this Court's relief in just these circumstances. The Vaccine Mandate, if allowed to stay in effect, will cause critical and exigent harm to tens of millions of employees forced to submit to a medical procedure, pay for and endure testing and masking, or lose their jobs; to employers who will lose employees and suffer unrecoverable compliance costs; and to States whose valid laws will be preempted by compliance with the illegal Mandate. The Applicants have an indisputably clear right to relief in light of the extraordinary and unilateral nature of the power asserted and the lack of corresponding statutory authorization. Judge Sutton concluded that "the resolution of this conflict between existing law and the Secretary's proposed policy is not particularly hard." *In re MCP No. 165*, 2021 WL 5914024, *2 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting). And injunctive relief would aid this Court's jurisdiction because this Court is likely to ultimately review the legality of the Vaccine Mandate. Judge Sutton predicted that the Sixth Circuit panel that vacated the stay of the Mandate would "not be the final decisionmakers in this case, given the prospect of review by the U.S. Supreme Court." *Id.* at *4. A stay ordered by this Court will ensure that this Court's review, when it does come, will proceed in an orderly manner.[1]

OPINIONS BELOW

The Sixth Circuit's order dissolving the Fifth Circuit's stay is not yet reported, but is reproduced at App. 1-58. The Fifth Circuit's opinion granting a stay of the

[1] Alternatively, this Court may elect to treat this filing as a petition for certiorari and grant expedited briefing and argument. *See Whole Woman's Health v. Jackson*, 2021 WL 4928617 (U.S. Oct. 22, 2021); *Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (2019).

Vaccine Mandate is reported at *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604 (5th Cir. 2021). The Vaccine Mandate is published in the Federal Register at 86 Fed. Reg. 61402 (Nov. 5, 2021).

JURISDICTION

This Court has jurisdiction over this Application and authority to grant relief under the All Writs Act, 28 U.S.C. §1651, Administrative Procedure Act, 5 U.S.C. §705, and 28 U.S.C. §§1254(1), 2101. This authority includes the ability to stay or enjoin administrative actions. *See, e.g.*, *W. Virginia v. E.P.A.*, 577 U.S. 1126 (2016).

BACKGROUND AND PROCEDURAL HISTORY

A. 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, from the OSH Act's enactment fifty years ago until this year, OSHA issued only nine ETS Rules. And of those nine, six were challenged. And of those six that were challenged, only one was not enjoined within six months. *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 not permanently enjoined 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). After issuing an ETS in 1983, OSHA did not issue another ETS until June 2021, when it sought to impose various COVID-related requirements on the healthcare industry. 86 Fed. Reg. 32376 (June 21, 2021). Notably, the June ETS did not require vaccination and instead addressed working-condition requirements such as personal protective equipment.

B. 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 nearly a year, and approximately 85% of the population aged 18 or older has received at least one dose of a vaccine. *See* CDC, *Covid Vaccinations in the United States*, https://bit.ly/3aeINgQ. 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 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 their 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.[2]

C. 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.*, *In re MCP No. 165*, 2021 WL 5914024, *19-20 (Bush, J., dissenting) (collecting sources); *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 Department of Health and Human Services, not

[2] There are also promising advances in COVID-19 treatment pills that reduce death and hospitalization. *See* Michael Nedelman, "Final data on pills to treat Covid-19 holds strong against hospitalization and death, Pfizer says," CNN Health (Dec. 14, 2021), https://cnn.it/3F1Rmt4.

OSHA. *See, e.g.*, 42 U.S.C. §264; 21 U.S.C. §360bbb-3. However, the CDC has already been checked twice for overreaching on COVID-19 regulatory actions. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (Eviction Moratorium); *State v. Becerra*, 2021 WL 2514138 (cruise ship halt order). And other federal vaccine mandates have been enjoined in light of the probable lack of statutory authority and irreparable harm to individuals and businesses if those mandates were allowed to go into force while litigation was pending. *See Louisiana v. Biden*, No. 1:21-cv-3867 (W.D. La. Dec. 16, 2021) (Contractor Mandate); *Georgia v. Biden*, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021) (same); *Kentucky v. Biden*, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021) (same); *Louisiana v. Becerra*, 2021 WL 5609846 (W.D. La. Nov. 30, 2021) (CMS Mandate); *Missouri v. Biden*, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021) (same).

D. 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 mandating employees who work at a business employing 100 or more people get vaccinated or be subjected to weekly testing and compulsory masking. As the White House's statements make clear, this mandate is part of broader federal 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." Callie Patteson, "Biden Chief Apparently Admits Vaccine Mandate 'Ultimate Work-Around'", N.Y. Post (Sept. 10, 2021), https://bit.ly/3s6lXCg.

But the Vaccine Mandate offers a different rationale. Attempting to fit the Administration's goal of full societal vaccination into the OSH Act, OSHA pretextually 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; *cf. Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019). The Vaccine Mandate states 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 some 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.

E. The Applicants.

Phillips Manufacturing & Tower Company manufactures welded steel tube and has 104 employees. *See* Doc. 4-2 ¶4, *Phillips Manufacturing & Tower Co. v. OSHA*, 21-4028 (6th Cir.). Phillips is thus directly regulated by the ETS. Moreover, Phillips has invested in antibody testing for its entire workforce to determine whether its employees have natural immunity. *Id.* ¶6. Those results indicated that 44 employees had COVID-19 antibodies. *Id.* Most of the company's workers are physically separated in the manufacturing process. Management has further encouraged 6-foot social distancing since the COVID-19 pandemic began. *Id.* ¶7.

Many Phillips employees have declined to receive 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 existing employees are already working overtime, averaging 10-hours shifts, 6 days per week. *Id.* The vaccination mandate (or its alternative of weekly testing) will make it even more difficult to fill the current open positions, let alone the new positions that will become vacant due to the workforce's reaction to the Vaccine Mandate. Indeed, based upon employee responses to a company-wide survey and its 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 in their first year alone. *Id.* ¶11. Furthermore, Phillips also has contracts with customers that would impose substantial penalties—reaching tens of thousands of dollars—in the event Phillips cannot fulfill its orders for those customers. *Id.* ¶13.

Applicant Sixarp is a full-service contract packaging company specializing in secondary packaging operations for a variety of industries including critical medical supplies. Doc. 4-3 ¶1, *Phillips Manufacturing & Tower Co. v. OSHA*, 21-4028 (6th Cir.). 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 already tested positive for COVID-19 and thus have natural immunity. *Id.* ¶7. Additionally, Sixarp has more than 30 open positions that it is struggling to fill. *Id.* ¶8.

Applicant Oberg is a metals contract manufacturer founded in 1948 that produces products for the medical, food & beverage, commercial, consumer products, defense, energy, and automotive sectors. *In re MCP No. 165*, Doc. 328-2. Oberg will incur immediate losses—more than $22 million in lost revenue per year—as a result of the Vaccine Mandate. *Id.* Moreover, the Mandate will imperil Applicant's business given significant labor market shortages. *Id.* Oberg has 21 open positions across the company that it cannot fill. *Id.* Based upon Oberg's communications with its employees, the company estimates that the Mandate could lead to the loss of 200 employees—approximately 30% of its existing workforce. *Id.*

F. Proceedings Below.

Applicants immediately petitioned the Sixth Circuit for review of the Vaccine Mandate. Applicants also promptly moved for a stay of the Mandate pursuant to Federal Rule of Appellate Procedure 18, 28 U.S.C. §2112, and 29 U.S.C. §655(f).

Applicants here, however, were not the only ones to do so. OSHA's Vaccine Mandate set off an unprecedented wave of challenges across nearly every circuit court in the country, with dozens of parties filing petitions for review and many of those petitioners also seeking stays pending appeal.

The Fifth Circuit granted a group of petitioners' motions for immediate stay of the Vaccine Mandate. *BST Holdings*, 17 F.4th at 619. In an exhaustive published opinion, that court determined that the Mandate was likely contrary to law and the Constitution, petitioners would suffer irreparable harm, and the balance of harms and public interest favored granting a stay. *First*, the Fifth Circuit held that "Texas makes a compelling argument that § 655(c)(1)'s neighboring phrases 'substances or agents' and 'toxic or physically harmful' place an airborne virus beyond the purview of an OSHA ETS in the first place." *Id.* at 9. *Second*, the Fifth Circuit held "that it remains unclear that COVID-19—however tragic and devastating the pandemic has been—poses the kind of grave danger § 655(c)(1) contemplates." *Id.* at 613. *Third*, the Fifth Circuit held that the ETS could not meet §655(c)'s necessity prong because it is both "staggeringly overbroad" and "underinclusive." *Id.* at 615-16. *Fourth*, the court held that the ETS "raises serious constitutional concerns." *Id.* For one, the ETS "likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity." *Id.* at 617. Additionally, "concerns over separation of powers principles" counseled against the ETS's "assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation." *Id.* In light of the likely unconstitutionality of §655(c) as interpreted by OSHA, the court

rejected OSHA's statutory basis for the ETS. *Id.* at 617-18. *Fifth*, the court held that the ETS causes irreparable harm. *Id.* at 618 ("[T]he Mandate threatens to substantially burden the liberty interests of reluctant individual recipients. ... [T]he companies seeking a stay in this case will also be irreparably harmed in the absence of a stay."). Finally, the Fifth Circuit found that the balance of harms heavily favored a stay. *Id.* at 618-19.

After the Fifth Circuit entered the stay, 28 U.S.C. §2112's lottery process selected the Sixth Circuit to hear the consolidated challenges to the Vaccine Mandate. On December 15, 2021, in an evenly divided vote, the Sixth Circuit denied several petitioners' applications for initial hearing en banc. App. 58. Chief Judge Sutton, writing for eight total judges, and Judge Bush writing separately dissented from denial of initial hearing en banc. App. 90. Two days later, the Sixth Circuit issued an opinion dissolving the Fifth Circuit's stay, accepting the arguments Respondents made in their motion.

ARGUMENT

The All Writs Act, 28 U.S.C. §1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312-14 (1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) ("The applicants have clearly established their

entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest.").

The Court also has discretion to issue an injunction "based on all the circumstances of the case," without its order "be[ing] construed as an expression of the Court's views on the merits" of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014). This Court has previously granted injunctive relief under the All Writs Act when "[t]he Circuit Courts have divided on whether to enjoin" a disputed federal requirement. *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014).

Additionally, a Circuit Justice or the full Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a "fair prospect" of reversal). Finally, under the APA, this Court "may issue all necessary and appropriate process to postpone the effective date of an agency action." 5 U.S.C. §705.

I. APPLICANTS FACE CRITICAL AND EXIGENT CIRCUMSTANCES.

This case presents an issue of nationwide importance and Applicants require relief now to avoid the irreparable harms caused by the Vaccine Mandate. As an initial matter, "complying 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).

Applicant Phillips will incur significant and immediate losses—more than $818,000 in the first year alone—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 the company has sought to fill but cannot. And studies show that at least seven million workers covered by the mandate 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 its work force. In a survey of Phillips's employees, 17 said they will not get the vaccine or submit to weekly testing, even if it means losing their jobs. Another 27 employees will not get the vaccine, but would submit to weekly testing so long as it was paid for by the company. *See* Doc. 4-2 ¶4, *Phillips Manufacturing & Tower Co. v. OSHA*, 21-4028 (6th Cir.). Any loss of Phillips's current employees would imperil the company's ability to conduct business, and could lead to enormous and devastating financial losses from contractual 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.").

Applicant Sixarp will also suffer substantial and immediate losses from the Vaccine Mandate. Sixarp is similarly already suffering due to labor shortages, with over 30 positions that it is attempting to fill. Doc. 4-3 ¶8, *Phillips Manufacturing & Tower Co. v. OSHA*, 21-4028 (6th Cir.). The Vaccine Mandate will significantly exacerbate this labor shortage as many Sixarp employees have indicated they would quit or be terminated rather than be subjected to the Vaccine Mandate, and many employees would not work for a company that subjected them to a Vaccine Mandate. *Id.* ¶¶7, 8, 10. In the absence of a stay, Sixarp must immediately begin to prepare for the Vaccine Mandate and begin expending significant time and cost now to begin the multi-step process of setting up a system to ensure compliance. *Id.* ¶12.

Applicant Oberg will also incur immediate losses—more than $22 million in lost revenue per year. *In re MCP No. 165*, Doc. 328-2. Judge Larsen's dissent from the Sixth Circuit's dissolution of the stay relied principally upon Oberg's losses to demonstrate the irreparable harms imposed on businesses. *See* App. 55-56. As Judge Larsen emphasized, Oberg has 21 open positions across the company that it already cannot fill. *Id.* The Mandate will significantly exacerbate these shortages, imperiling Oberg's business. Based on Oberg's communications with its employees, it estimates that the Mandate could lead to the loss of 200 employees—approximately 30% of its existing workforce. *In re MCP No. 165*, Doc. 328-2. And even if only testing were mandated, Oberg stands to lose at least seven additional employees. *Id.* Such loses—

either from a vaccine mandate, testing mandate, or both—would be crippling to Oberg and endanger its ability to fulfill existing orders. *Id.* Finally, in the absence of a stay, Oberg would have to immediately begin to prepare for the Vaccine Mandate and expend significant time and money to begin the multi-step process of setting up a system to ensure compliance. *Id.*

And as Judge Larsen concluded, "[t]here is no question that if these harms occur, they will be irreparable." App. 56. They are irreparable for several reasons. First, Applicants' 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 this Court—have found irreparable harm due to compliance with analogous COVID mandates. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("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

Applicants' businesses 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.'").

The Vaccine Mandate is also of critical importance to Applicants, the nation, and the rule of law. OSHA has issued one of the most significant rules in American history without authorization from Congress and in contravention of the Constitution. 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 no clear statutory authorization for the Vaccine Mandate. The only statute 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, this Court has 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 validity of the Vaccine Mandate is of enormous constitutional and public importance. As the Fifth Circuit recognized, if OSHA's interpretation of the OSH Act is upheld, there is no limit to the federal government's authority in pandemics. *See BST Holdings*, 17 F.4th at 617 ("[C]oncerns over separation of powers principles cast doubt over the Mandate's assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation."). This case raises fundamental questions about the relationship between citizen and the government, between the branches of the federal government, and between the federal government and the States. Additionally, the Mandate reaches *all* private business in *all* sectors of the economy with 100 or more employees. Moreover, because the Mandate is effective immediately, it threatens to impose mass damage across the entire American economy including further hobbling already strained supply chains. It is of critical importance that this Court immediately prevent the Vaccine Mandate's implementation and the resulting devastating consequences.

II. APPLICANTS HAVE AN INDISPUTABLY CLEAR RIGHT TO RELIEF.

A. The Vaccine Mandate Exceeds the Executive's Authority.

The Mandate is one of the most far-reaching, invasive, and controversial regulatory actions in American history and it is beyond doubt that it triggers the major questions doctrine's clear statement rules. *See BST Holdings*, 17 F.4th at 617 ("The Mandate derives its authority from an old statute employed in a novel manner, imposes nearly $3 billion in compliance costs, involves broad medical considerations

that lie outside of OSHA's core competencies, and purports to definitively resolve one of today's most hotly debated political issues."). The Mandate is a "monumental policy decision," that must be made by Congress itself or delegated to an agency through a crystal clear statement of authority. *Id.* at 617 n.20 ("hard hats and safety goggles, this is not"). Indeed, OSHA itself recognized the importance of the Mandate by labelling it a "major rule," acknowledging that it would have over a $100 million impact on the economy. *See* 86 Fed. Reg. at 61504; *cf. State v. Becerra*, 2021 WL 2514138, at *21 ("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).").

The Vaccine Mandate is the quintessential example of a situation where Congress must go first. *See In re MCP No. 165*, 2021 WL 5914024, *12 (Sutton, C.J., dissenting) ("It is hard to think of a better example of the need for a clear statement of congressional authority than this one."). It is one of the most high-profile regulatory actions in the nation's history. It affects an estimated 80 million individual Americans and a myriad of businesses across all industries and sectors of the economy. *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 individual action

squarely in the absence of commercial activity. *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, 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" upon a finding that "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).

Section 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); *see also In re MCP No. 165*, 2021 WL 5914024, *2 (Sutton, C.J., dissenting) ("The Act does not clearly give the Secretary power to regulate all health risks and all new health hazards, largely through off-site medical procedures, so long as the individual goes to work and may face the hazard in the course of the workday.").

The plain meaning of the terms "toxic materials" and "harmful physical agents" does not include viruses. *See BST Holdings*, 17 F.4th at 613 ("Texas makes a compelling argument that § 655(c)(1)'s neighboring phrases "substances or agents" and "toxic or physically harmful" place an airborne virus beyond the purview of an OSHA ETS in the first place. To avoid 'giving unintended breadth to the Acts of Congress,' courts 'rely on the principle of noscitur a sociis—a word is known by the company it keeps.' [] Here, OSHA's attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life-threatening to a vast majority of employees into a neighboring phrase connoting *toxicity* and *poisonousness* is yet another transparent stretch."). And the COVID-19

virus is neither a "hazard" as that term is used in the OSH Act nor "new." *See Id.* ("Any argument OSHA may make that COVID-19 is a 'new hazard[ ]' would directly contradict OSHA's prior representation to the D.C. Circuit that '[t]here can be no dispute that COVID-19 is a recognized hazard.'") (quoting Department of Labor's Resp. to the Emergency Pet. for a Writ of Mandamus at 25, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020)); *see also In re MCP No. 165*, 2021 WL 5914024, at *7 (Sutton, C.J., dissenting) ("Throughout the Act, it speaks to hazards facing employees in work-specific contexts and to occupational risks faced due to work.") (citing 29 U.S.C. §§651(a), (b); 653(a); 657(c)(2)).

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." Paul J. Larkin & Doug Badger, *The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for COVID-19 Vaccinations*, at 12, https://bit.ly/3Dok06C.

OSHA's longstanding ETS practice confirms this interpretation. OSHA has traditionally interpreted §655 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; *see also In re MCP No. 165*, 2021 WL 5914024, at *8 (Sutton, C.J., dissenting) ("The agency's regulations reflect this understanding too.").

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 express 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 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, yet 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."). And, as Judge Sutton aptly noted, the rule adopted to address bloodborne pathogens is different in kind from the Vaccine Mandate: it "narrowly targeted health care workers for protection from viruses, particularly those causing Hepatitis B and AIDS, that can be transmitted in the blood of patients;" "it did not regulate all American businesses, no matter the nature of the industry, product, or service, so long as 100 employees or more work there;" "it was promulgated after a protracted notice-and-comment rulemaking proceeding;" "and it appreciated the personal nature of the decision whether to get a vaccine—that a truly voluntary program, in OSHA's words, would 'foster greater employee cooperation and trust in the system.'" *In re MCP No. 165*, 2021 WL 5914024, at *12 (cleaned up). In sum, "[i]t did not pressure or coerce unvaccinated employees by imposing significant costs and burdens on them alone." *Id.*

This 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.

This Court's recent holding in *Alabama Association of Realtors v. Department of Health & Human Services* puts this case beyond question. There this 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." 141 S. Ct. at 2487 (quoting 42 U.S.C. §264(a)). The Court relied upon 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.* 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.* at 2489.

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 or more 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." 141 S. Ct. at 2489. 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.* It takes more than the "wafer-thin reed" of the term "necessary" to authorize one of the most significant governmental actions in American history. *See id.*; *In re MCP No. 165*, 2021 WL 5914024, at *6 (Sutton, C.J., dissenting) ("As with the eviction moratorium created by the federal Center for Disease Control and invalidated by the Supreme Court, today's 'claim of expansive authority' under this provision 'is unprecedented.'").

The Government likely will attempt to draw sophistical distinctions between *Alabama Association of Realtors* and this case. A few simple points demonstrate that that holding is 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 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*, 141 S. Ct. at 2489 ("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.' [] 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?"). In other words, "[i]f federal courts have been skeptical when a medically based agency (the CDC) issues broad mandates with respect to housing," then it follows that "they should be equally skeptical when a workplace agency (OSHA) issues broad mandates

with respect to medical procedures." *In re MCP No. 165*, 2021 WL 5914024, *6 (Sutton, C.J., dissenting).

Respondents still have not identified any limiting principle on federal power under §655(c). *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Respondents' purported limitation in litigation below to "acute workplace hazard[s]" is no limit at all. OSHA could cite the "hazard" of unhealthy employee lunch habits to mandate that employers provide healthy food in the workplace. It could cite gun violence statistics to require employers to regulate employee gun ownership to prevent the grave risk of workplace violence. *Cf. In re MCP No. 165*, 2021 WL 5914024, *7 (Sutton, C.J., dissenting) ("Whatever the health and safety challenges of today (air pollution, violent crime, obesity, a virulent flu, all manner of communicable diseases) or tomorrow (the impact of using the internet on mental health), the Secretary does not have emergency authority to regulate them all simply because most Americans who face such endemic risks also have jobs and simply because they face those same risks on the clock."). Moreover, there is no time limit to the continuing authority OSHA claims—annual flu and COVID ETS Rules would become the norm. "Such unfettered power would likely require greater guidance than" §655(c). *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021).

If Congress wants 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. v. U.S.*

Army Corps of Engineers, 531 U.S. 159, 172-73 (2001) ("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) does not come close to providing the 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. OSHA Failed to Demonstrate Grave Danger.

OSHA's finding that COVID-19 poses a grave workplace danger for purposes of the OSH Act is arbitrary and unsupported by the record. Because the OSH Act is not an "open-ended grant" of authority to OSHA to regulate all dangers in society, *Indus. Union*, 448 U.S. at 645, to qualify as a grave danger, the exposure risk must be *unique to the workplace*, rather than a risk inherent in everyday life. *Id.* 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.").

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). 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.* at 642; *see also In re MCP No. 165*, 2021 WL 5914024, *7 (Sutton, C.J., dissenting) (collecting cases); *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 the pathogen. *In re MCP No. 165*, 2021 WL 5914024, *7 (Sutton, C.J., dissenting) ("The language of the Act covers dangers arising out of work, say a chemical used to make a plastic product or the heat generated at a steel foundry, not any risk facing the country and every citizen in it. Any other approach would facilitate a breathtaking expansion of the Secretary of Labor's power.").

OSHA's central mistake stems from a basic error of law. OSHA asserts jurisdiction over "hazards which might occur outside of the workplace as well as within." 86 Fed. Reg. at 61407. But this unlimited assertion of authority, 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 this Court previously rejected. *Id.*

Reflecting this legal error, the Vaccine Mandate makes no particularized findings that differentiate workplace COVID risk from any other everyday COVID risk. It identifies no grave danger *stemming from employment*. For that matter, the

ETS also fails to distinguish between workplaces that might entail significantly different levels of risk.

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 assertion gets the inquiry backward. "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986). And Congress's grant of authority 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).

Finally, even accepting OSHA's interpretation, its reasoning regarding the Vaccine Mandate ultimately boils down to saying that there is a *lack* of evidence that workers, particularly those with natural immunity, are *not* in grave danger. This flaccid claim is not the affirmative finding of grave danger required by the OSH Act's exacting standards. *See Indus. Union*, 448 U.S. at 653 ("[T]he burden was on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment."); *cf. Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 429 (D.C. Cir. 2020) ("[R]ational decisionmaking ... requires more than an

absence of contrary evidence; it requires substantial evidence to support a decision."). OSHA has failed to demonstrate a grave danger that is unique to the workplace, let alone to workplaces owned by corporate entities with 100 or more employees.

C. OSHA Failed to Demonstrate Necessity.[3]

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. It failed to do so. *First,* the availability of obvious alternatives (antibody testing) and a gross mismatch between the danger (lack of immunity) and the means (vaccinating those with immunity) preclude a finding of necessity. *See BST Holdings*, 17 F.4th at 615. 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). Accordingly, the Fifth Circuit was right to hold that the Mandate does not meet the necessity standard because it "fails almost completely to address" the fact that "a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus." *BST Holdings*, 17 F.4th at 615. And Applicant Phillips demonstrates the feasibility and effectiveness of antibody testing and other mitigation measures short of vaccination. *See* No. 21-

[3] Respondents erroneously asserted below that extra-record materials cannot be used here. Because ETS Rules do not go through notice and comment, courts may consider extra-record evidence and need not accept agency scientific analysis as "uncritically" as they would "after public scrutiny, through notice-and-comment rulemaking, especially when the conclusions it suggests are controversial or subject to different interpretations." *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 426; *see also id.* at 420 n.12 ("Because of the extraordinary posture of the court reviewing an ETS ... we also considered the unfavorable reviews as well as the favorable ones.").

4028, ECF 4-2 ¶4. Phillips has invested in antibody testing for its workforce to determine whether its employees 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 physically separated in the manufacturing process. Management has further encouraged 6-foot social distancing since the COVID-19 pandemic began. *Id.* ¶7.

Second, OSHA failed to consider the variability in danger posed by COVID-19 to different age groups. Studies have isolated 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. Yet OSHA fails account for "what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to some employees than to other employees." *BST Holdings*, 17 F.4th at 615. This failure precludes a finding that OSHA carefully tailored its standard to the purported grave danger. *See Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Lab.*, 489 F.2d 120, 130 (5th Cir. 1974).

Third, OSHA's perfunctory discussion of industries on its way to implementing a one-size-fits-all-industries mandate is not the careful industry-by-industry tailoring required to issue an ETS. *See, e.g.*, *Dry Color Mfrs. Ass'n, Inc. v. Dep't of Labor*, 486 F.2d 98, 105 (3d Cir. 1973). Indeed, as the Fifth Circuit recognized, OSHA itself has given the best argument against a one-size-fits-all-industry standard: "setting rules

in stone through an ETS (and later a permanent rule) may undermine worker protection by permanently mandating precautions that later prove to be inefficacious." *BST Holdings*, 17 F.4th at 615 (quoting Department of Labor's Resp. to the Emergency Pet. for a Writ of Mandamus at 16, 17, 21, 26, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020)). Nothing has changed since these previous agency findings that would make a uniform standard for all industries appropriate. *Cf. F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency required to "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy"). The Fifth Circuit was right to find that the one-size-fits-all approach is not necessary to address the purported grave danger. *BST Holdings*, 17 F.4th at 616 ("[A]s OSHA itself has previously acknowledged, an ETS appears to be a 'poorly-suited approach for protecting workers against [COVID-19] because no standard that covers all of the Nation's workers would protect all those workers equally.'") (quoting Letter from Loren Sweatt, Principal Deputy Assistant Sec'y, OSHA, to Richard L. Trumka, President, AFL-CIO at 3 (May 29, 2020)).

In sum, the Fifth Circuit was exactly correct in holding that "the Mandate's strained prescriptions combine to make it the rare government pronouncement that is both overinclusive" and "underinclusive." *BST Holdings*, 17 F.4th at 611. It is overinclusive in that it applies "in virtually all industries and workplaces in America, with little attempt to account for the obvious differences between the risks facing, say, a security guard on a lonely night shift, and a meatpacker working shoulder to

shoulder in a cramped warehouse." *Id.* It is "underinclusive" in that it purportedly "save[s] employees with 99 or more coworkers from a 'grave danger' in the workplace, while making no attempt to shield employees with 98 or fewer coworkers from the very same threat." *Id.*

D. The Mandate Raises Grave Concerns Under the Commerce Clause & Encroaches Upon State Sovereignty.

Respondents have attempted to characterize the decision to forgo vaccination as economic activity. But this would mean that "the power to regulate commerce" has no limit. *NFIB*, 567 U.S. at 549. Just as the decision to forgo purchasing health insurance is noneconomic activity, *id.*, "[a] person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity," *BST Holdings*, 17 F.4th at 617. And Respondents ignore that 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." *NFIB*, 567 U.S. at 555.

Respondents also fail to identify any limiting principle to prevent their interpretation of the federal government's powers under the Commerce Clause from becoming a general federal police power. Vaccination has always been "squarely within the States' police power." *BST Holdings*, 17 F.4th at 617. If the federal government may exercise control over the unvaccinated in such a sweeping, indiscriminate way, there is truly no limit on federal police powers and no realm left to the exclusive authority of the States. But the courts "*always* have rejected readings of the Commerce Clause ... that would permit Congress to exercise a police power." *Id.* Accordingly, the Vaccine Mandate exceeds the federal government's authority

under the Commerce Clause. *Id.* ("[T]he Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power.").

E. The Mandate Raises Grave Concerns Under the Nondelegation Doctrine.

OSHA's extraordinary emergency temporary standard does not fit into the mine run of delegations. By asserting that §655(c) is not limited to workplace-specific dangers, Respondents cast aside the only possible intelligible principle guiding OSHA's discretion. But the OSH Act cannot constitutionally "authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *Id.* at 611. Like the CDC's justification of the Eviction Moratorium, OSHA's claim of "near-dictatorial power for the duration of the pandemic" to "do anything it can conceive of to prevent the spread of disease" would read the OSH Act to violate the nondelegation doctrine. *Tiger Lily*, 5 F.4th at 672. Accordingly, to avoid this unconstitutional result, this Court should reject Respondents' unbounded interpretation of OSHA's powers. *Id.*; *see also BST Holdings*, 17 F.4th at 618 ("At the very least, even if the statutory language were susceptible to OSHA's broad reading—which it is not—these serious constitutional concerns would counsel this court's rejection of that reading.").

Section 655's provisions have long raised nondelegation concerns. *See, e.g.*, *Indus. Union*, 448 U.S. at 686 (Rehnquist, J., concurring in the judgment) ("Nor, as I think the prior discussion amply demonstrates, do the provisions at issue or their

legislative history provide the Secretary with any guidance that might lead him to his somewhat tentative conclusion that he must eliminate exposure to benzene as far as technologically and economically possible. ... the standard of 'feasibility' renders meaningful judicial review impossible."); *see also* Antonin Scalia & Bryan A. Garner, Reading Law 136-37 (2012) ("We agree that the prevision was textually ambiguous, and thus left its meaning to be determined by OSHA and the courts—leaving room for a determination that it was a delegation of legislative power."). The inherently legislative judgment of whether Americans employed by companies with 100 or more people must be vaccinated or subjected to daily testing cannot be delegated to an executive agency. To avoid this serious constitutional issue, this Court should not adopt OSHA's expansive reading of §655(c). *See Indus. Union*, 448 U.S. at 646 ("A construction of the statute that avoids this kind of open-ended grant should certainly be favored."); *cf. 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.") (quoting *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021)). 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 an unconstitutional delegation of legislative power.

III. INJUNCTIVE RELIEF WOULD AID THIS COURT'S JURISDICTION.

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not

then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and act "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after [a] final judgment.").[4]

Applicants will be irreparably injured if the Vaccine Mandate goes back into effect. Moreover, absent an injunction, industry will be forced to take irrevocable measures to comply with the Vaccine Mandate, including firing employees. Even if this Court were to later invalidate the Vaccine Mandate, Respondents would have achieved their goals—albeit through means determined to be unlawful. This outcome could create a temptation—and indeed provide a template—for future Executive actions which seek to "work around" constitutional and statutory limits on federal power. *See In re MCP No. 165*, 2021 WL 5914024, at *14 (Sutton, C.J., dissenting) ("Without an injunction, *status quo ante* will be permanently altered. The vaccinate-or-test mandate has costs for them that cannot be undone.").[5]

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[4] This Court's 2016 stay of the "Clean Power Plan" demonstrates the propriety of a stay of the Vaccine Mandate. *W. Virginia v. E.P.A.*, 577 U.S. 1126 (2016). As here, Applicants' argument in *West Virginia* relied heavily upon the major questions doctrine and harms resulting from the Clean Power Plan. This Court directly stayed the Clean Power Plan "pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for writ of certiorari, if such writ is sought." *Id.*

[5] The Benzene Rule saga presents a useful analogue: "Notably, OSHA initially attempted to issue the Benzene Rule as an emergency rule, but it abandoned that

The balance of harms and public interest also favor a stay. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 ("It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. [] It is up to Congress, not the CDC, to decide whether the public interest merits further action here."); *see also BST Holdings*, 17 F.4th at 618-19 ("From economic uncertainty to workplace strife, the mere specter of the Mandate has contributed to untold economic upheaval in recent months. ... The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps particularly, when those decisions frustrate government officials."). In sum, "[e]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68.

CONCLUSION

For the foregoing reasons, Applicants respectfully ask the Court to enter an injunction against OSHA during the pendency of this appeal, preventing the agency from implementing or enforcing the Vaccine Mandate. Alternatively, this Court should vacate the Sixth Circuit's order dissolving the Fifth Circuit's stay of the Vaccine Mandate. At a minimum, Applicants request a temporary injunction to allow for full briefing and consideration of this Application.

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approach in favor of notice-and-comment rulemaking after the Fifth Circuit stayed the rule. *In re MCP No. 165*, 2021 WL 5914024, at *5 (Sutton, C.J., dissenting).

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