IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: 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.	Nos. 21-7000 (lead), 21-4027/4028/4031/4032/4033, 21-4080, 21-4091/4090, 21-4093/4088/4101/4096, 21-4097/4102/4083 MCL No. 165

MOTION TO COMPEL PRODUTION OF A COMPLETE ADMINISTRATIVE RECORD

Petitioners Phillips Manufacturing and Tower Company and Sixarp LLC join the State coalition motion to compel production of a complete administrative record in full. *See* Doc. 225. Petitioners briefly emphasize that disclosure of White House communications is particularly appropriate in light of this case's record, the findings of the Fifth Circuit, and recent developments in caselaw applying the Supreme Court's holding in *Department of Commerce v. New York*.

Judicial review is reduced to an "empty ritual" without a complete administrative record. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019). That is particularly true when an agency has relied upon pretextual reasons for its decision. This petition

presents quite possibly the clearest case yet of a "significant mismatch" between the reasons given in the regulatory decision and the actual reasons for the action. *Id.* at 2575.

As the State coalition extensively documents, Doc. 225 at 3-5, the Administration itself has admitted that the worker protection rationale—the purported sole basis of OSHA's Vaccine Mandate—is pretextual. Indeed, the Administration itself has admitted not only that the true purpose is achieving full vaccination, but also that reliance on the OSH Act is a "work-around" to pursue the Administration's goal of achieving full vaccination in society at large. Callie Patteson, "Biden chief apparently admits vaccine mandate 'ultimate work-around'," N.Y. Post (Sept. 10, 2021), https://bit.ly/2ZKIcSA.

White House Chief of Staff Ron Klain's retweet is not the only evidence of pretext. The Administration has not been shy about the true reason for the Mandate. 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—even *once*—in his remarks. 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, contrary to all public statements by the White House, it attempts to reimagine

this goal as 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, as mentioned above, 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. Given that all the formal and informal public communications issued by the White House provide only one reason for the mandate—increasing individual vaccination rates—it therefore is implausible to suggest that there are no communications between the White House and OSHA expressing individual vaccination rates as a justification for the ETS. Any communications from the White House further demonstrating such pretext are part of the decisionmaking record before OSHA, and must be included in the administrative

record.

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.* Accordingly, the administrative record is not complete until White House communications regarding the instigation and development of the Vaccine Mandate are disclosed. *See In re United States Dep't of Def. & United States Env't Prot. Agency Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, 2016 WL 5845712, at *1 (6th Cir. Oct. 4, 2016); *see also Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981) (Higginbotham, J.) ("The 'whole' administrative record, [] consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.").

The Fifth Circuit's published stay opinion also demonstrates the need for disclosure of White House communications. In *BST Holdings v. OSHA*, the Fifth Circuit traced the history of the Vaccine Mandate and specifically highlighted Klain's endorsement of the idea that using the OSH Act is a "work-around." 17 F.4th 604 (5th Cir. 2021) ("After the President voiced his displeasure with the country's vaccination rate in September, the Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate."). On this basis as well as the Mandate's abrupt change of course, months of delay, and the President's public statements, the Fifth Circuit found that OSHA's rationale for the Vaccine Mandate "strains credulity," is a "pretextual basis," and thus bears "hallmarks of unlawful agency actions." *Id.* It is clear that political considerations stemming from the White House were at the very least indirectly considered by OSHA in promulgating the Vaccine Mandate. Accordingly, White House communications must be included in the administrative record.

Finally, the need for White House communications is buttressed by the Administration's actions in other areas such as oil and gas leasing. Just weeks ago, the Western District of Louisiana found that the Biden Administration submitted an incomplete administrative record regarding the President's executive order imposing an oil and gas leasing moratorium. *See Louisiana v. Biden*, 2021 WL 5370101, at *1 (W.D.

La. Nov. 17, 2021)[1] ("Finding the Administrative Record ('AR') INCOMPLETE, IT IS ORDERED that Government Defendants complete the AR in accordance with this ruling within 45 days from the date of this Order."). The court specifically found that the Administration's basis for withholding White House documents was erroneous as a matter of law: "The President is not an agency, but the Department of the Interior ("Interior"), the BLM, the BOEM and the Bureau of Safety and Environmental Enforcement ("BSEE") are agencies. Any documents and materials directly or indirectly considered by these government agencies, including documents and materials from the White House, are subject to judicial review and are to be filed in the AR." *Id.* at *5. The court thus ordered the record to be supplemented with "correspondence, text messages, phone calls, and other means of communication ... if such items were directly or indirectly relied on" by the agencies. *Id.* In light of this Administration's demonstrated erroneous view of the need to disclose White House communications

[1] The court also ordered the disclosure of *ex parte* communications with outside groups:

> As both parties are aware, after Lease Sale 257 was being reset, several environmental groups filed a Complaint (in another court) to halt Lease Sale 257 based upon alleged environmental issues. It is important in this case for this Court to review those items in order to determine whether there was improper influence, whether there was collusion, and/or whether the postponement or cancellation of these Lease Sales are pretextual. Therefore, the Government Defendants are required to produce all documents and materials directly or indirectly considered by agency decisionmakers, including documents, materials, correspondence, text messages, phone calls, and other means of communication.

Louisiana v. Biden, 2021 WL 5370101, at *5.

and *ex parte* communications in analogous challenges, this Court should order the production of a complete administrative record now.

CONCLUSION

For the foregoing reasons, this Court should order the production of the full administrative record.

Respectfully Submitted,

/s/ Robert Alt
Robert Alt (0091753)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org

Patrick Strawbridge
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
patrick@consovoymccarthy.com

Jeffrey M. Harris
Daniel Shapiro
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com
daniel@consovoymccarthy.com

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume requirements and contains 1,850 words. See Fed. R. App. P. 27(d)(2)(A). I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14- point Garamond font.

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2021, I caused the foregoing Motion For Stay Pending Review to be served via the Court's CM/ECF system on all registered counsel.

/s/ Robert Alt
Robert Alt (0091753)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org