No. 21A245

In the Supreme Court of the United States

PHILLIPS MANUFACTURING & TOWER COMPANY, ET AL.,
Applicants

V.

DEPARTMENT OF LABOR, OSHA, ET AL.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR INJUNCTION PENDING CERTIORARI REVIEW

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INTRODUCTION

Due to the absence of an administrative stay, the January 10 compliance deadline hangs over Applicants like an axe. Unless this Court immediately enjoins or stays the Emergency Temporary Standard (ETS), Applicants will have no choice but to fully comply with this unlawful measure. Indeed, each day that passes imposes new irreparable harms as Applicants expend significant resources in preparation for the January 10 compliance deadline. This Court must act immediately lest Respondents succeed in enacting one of the most expansive federal regulations ever without the opportunity for pre-enforcement judicial review.

In just days, Applicants will be subject to penalties for noncompliance with the Mandate.[1] At the very least, the Court should implement an administrative stay immediately. If it waits until oral argument on January 7, it may already be too late. *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 685-86 (2d Cir. 1966), *aff'd sub nom.* 387 U.S. 158 (1967), *and aff'd*, 387 U.S. 167 (1967) (Friendly, J.) (regulations are "immediately reviewable" when they "operate[] 'to control the business affairs' of the plaintiff and ma[k]e it impossible to 'cogently plan its present or future operations' so long as their validity remained undetermined ... even though review might have been obtained by provoking an adverse administrative order").

[1] Although the Respondents note (at 15) that OSHA has announced that it is "exercising enforcement discretion" and thus will not "not issue citations for noncompliance with the standard's testing requirements before February 9," this discretion is restricted only to those employers who satisfy OSHA that they are "exercising reasonable, good faith efforts to come into compliance with the standard." *Id.* at n.2. And all other aspects of the policy are still scheduled to take effect on January 10. *Id.*

I. An Injunction or Stay is Urgently Needed.

Applicants are facing down a compliance deadline of Monday, January 10. Applicants must take significant steps over the next week to prepare to comply with the January 10 deadline including collecting employee information, promulgating written policies, holding employee information sessions, and informing employees that they should prepare themselves to submit to the Mandate. Unless this freight train is stopped immediately, these injuries are unavoidable, compounding, and irreparable. Respondents' cursory attempt to dismiss the gravity and imminence of these harms fail.

First, Respondents (at 78) blithely dismiss Applicants' concerns about labor shortages as "speculation." But Applicants have submitted detailed declarations that demonstrate both the existing labor shortage and the likelihood, based on first-hand representations, that their employees would quit rather than comply with the Mandate. The Mandate would substantially exacerbate Applicants' existing labor shortage both by causing them to lose current employees and by making it harder to hire new employees. Moreover, it would undermine the ability of companies like Phillips, with just over 100 employees, to compete for labor with companies who have fewer than 100 employees.

If the Occupational Safety and Health Administration (OSHA) had taken the time to do notice and comment rather than rushing to issue an ETS that it knew would be tied up in litigation for the equivalent time of a full comment period, it would have known these particularized consequences of the Mandate. Instead, Respondents

(at 78) focus entirely upon generalized "empirical data" to counter the detailed evidence of harm submitted by Applicants. But in awarding interim injunctive relief, Applicant need only show that *they will suffer irreparable harm*, not that the entire industry will. *See Smith v. Ritchey*, 89 S. Ct. 54, 54 (1968) (Douglas, J., in chambers) ("[I]t is a federal policy to grant stays where a substantial question is presented and denial of the stay will do irreparable harm to the applicant."); *see also, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J. in chambers).

The Applicants have presented evidence of irreparable harm and Respondents have presented no countervailing evidence rebutting the harm *to the applicants*. The "empirical" data referenced time and again by Respondents is conclusively rebutted by the on-the-ground realities faced by Applicants.

Specifically, at least 47 of Applicant Phillips's employees are not vaccinated and 17 have said unequivocally that they will not get the vaccine, even if it meant losing their job at Phillips. *See* Doc. 4-2 ¶8, *Phillips Manufacturing & Tower Co. v. OSHA*, 21-4028 (6th Cir.) (attached as Appendix A). Phillips already has 7 openings that it cannot fill and its employees are working overtime to keep pace. *Id.*¶9. The Mandate will greatly exacerbate this shortage. And Phillips's analysis has indicated that the Mandate will cost the company at least $818,635.30 annually in recuring, training, additional overtime, and other costs. *Id.* ¶11. These costs do not even factor in the harm the resulting labor shortage will do to Phillips's ability to meet its

contractual production targets. Failure to meet such targets carries penalties up to $25,000 per hour that the purchaser is without the product. *Id.* ¶13.

Respondents also have failed to address Applicant Sixarp's irreparable losses. Sixarp is already suffering a labor shortage, with over 30 positions that it is attempting to fill. Doc. 4-3 ¶8, *Phillips Manufacturing & Tower Co. v. OSHA*, 21-4028 (6th Cir.) (attached as Appendix B). 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 such a Mandate. *Id.* ¶¶7, 8, 10.

Respondents' silence in the face of Applicant Oberg's immediate losses is especially deafening given that its $22 million in lost revenue due to the Mandate was the centerpiece of Judge Larsen's discussion of irreparable harm imposed on business. App. 55-56 (Larsen, J., dissenting) ("The vaccinate-or-test mandate will exacerbate these shortages, with Oberg estimating that it will lose '200 employees—approximately 30% of its existing workforce.'"). *See also In re MCP No. 165*, Doc. 328-2 ¶13 (attached as Appendix C). 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.*

Respondents' empirical data does nothing to rebut these demonstrated labor shortage harms *to the Applicants*. Indeed, Respondents do not even attempt to rebut

Respondents' claims of harm to their business. Accordingly, it is undisputed that *these Applicants* will suffer irreparable harm.[2]

Second, Respondents (at 78) claim that compliance costs are "avoidable because the Standard permits employers to adopt a mask-and-test policy instead of requiring vaccination." But Applicants have submitted detailed data on the costs of testing requirements. *See, e.g.*, Appendix C ¶13 ("[W]e anticipate that testing our 286 unvaccinated employees could cost more than $32,000 per week, or up to $1.7 million annually. And this does not account for the lost employee time necessary to accomplish the testing."); Appendix A ¶12 (citing to economic analysis performed for Phillips for conclusion that "annual testing for Phillips will cost an additional $96,200 annually"); Appendix B ¶11 (estimating "more than $44,000 weekly across the company" for testing costs). These costs are overwhelming—even before the current test kit supply shortage—and will be borne by the companies because they are not willing to lose even more of their workforce by passing on testing costs to their employees. Moreover, a testing-only requirement will still exacerbate labor shortages. For example, Oberg estimates that it will lose "seven additional employees in the event [it] mandated only testing." Appendix C ¶11.

[2] Respondents' contention that these costs will be "offset" in theory is both irrelevant and directly contradicted by the experience of the Applicants. The irreparable harm inquiry focuses on actual harms caused by the challenged measure—not the ability of a party to offset such harms. *Cf. Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (holding in the standing context that "[w]eighing [] costs and benefits is precisely the type of 'accounting exercise,' in which we cannot engage. [Plaintiff] has shown injury.").

Third, Respondents (at 79) remarkably claim that Applicants' costs are "routine." But Applicants have shown in detail the disastrous effects of these costs. *See, e.g.*, *id.* ¶12 ("Given the difficulty of filling existing openings, the anticipated losses associated with these Vaccine Mandate would be economically crippling to Oberg, endangering its ability to fulfill existing orders."); Appendix A ¶13 (noting the as a result of the Mandate, "Phillips could be subjected to significant penalties" caused by labor shortages of up "$25,000 per hour" that Phillips's customer are without the product); Appendix B ¶11 (nothing that the ETS "imposes millions of dollars of potential annual additional costs to Sixarp"). Respondents' one-size-fits all data generalizations are no substitute to the actual accountings of Applicants. Appendix C ¶14 ("These costs are economically unsustainable for Oberg, and would force us to curtail operations and ultimately eliminate jobs."); Angela Phillips, *I Am Challenging the Vaccine Mandate to Protect My Workers' Jobs*, Real Clear Policy (Nov. 11, 2021), https://bit.ly/31hYrXS ("Complying with OSHA's vaccine mandate and testing requirements risks catastrophic financial consequences. It also means firing qualified, well-trained, hardworking employees who rely on their jobs at Phillips Manufacturing & Tower Company to feed their families and pay their mortgages — for no reason other than to avoid draconian federal fines."). Applicants know precisely how much this will cost their businesses—generalized data does nothing to rebut these showings. Moreover, 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).

Fourth, Respondents (at 79) claim that Applicants must risk enforcement actions to obtain judicial review. But this is simply not the law. This Court has long been clear that regulated parties need not risk enforcement actions in order to challenge a measure. *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 600 (2016). Applicants need not wait for OSHA to "'drop the hammer' in order to have their day in court." *Id.*; *see also Toilet Goods Ass'n*, 360 F.2d at 685 (rule reviewable when its "very promulgation demands conformity and poses, for the plaintiff or others with whom he must deal, the alternatives of compliance or severe penalties of forfeiture of disruption of business operations").

Fifth, Respondents (at 83-84) suggest the Court enjoin "only the portion of the ETS concerning a vaccination requirement." But the testing requirement itself imposes massive costs. *See, e.g.*, Appendix A ¶12 (citing to economic analysis performed for Phillips for conclusion that "annual testing for Phillips will cost an additional $96,200 annually"); Appendix B ¶11 ("We have been advised that imposing weekly testing for COVID-19 could cost $27,600 weekly for the primary Grand Rapids facility alone, and more than $44,000 weekly across the company."). Applicants must begin planning for the testing requirement now including by promulgating written policies, locating test-kit suppliers, and preparing their workforce. *Id.* ¶12 ("Preparing to impose the Vaccine Mandate, including the alternative testing protocols, will require us to devote time and substantial costs immediately, as that

ramp-up will take place in the coming weeks and over the Holidays."). Applicants are entitled to immediate judicial review on this ground alone. *Toilet Goods Ass'n*, 360 F.2d at 685-86. Allowing the testing requirement to go into effect would irreparably harm Applicants.

Sixth, Respondents (at 84) are correct that the purpose of "interim equitable relief is not to conclusively determine the rights of the parties" and "'mold [any] decree to meet the exigencies of the particular case.'" But that is precisely what they are asking the Court to do. Because the baseline is no Mandate, the ETS irrevocably alters the status quo. Non-intervention would conclusively determine the rights of parties because the requirements (except testing) go into force on January 10. Applicants seek only the normal process—an opportunity to have their day in court to challenge an administrative measure before it is actually enforced against them. Absent a stay, they will have to risk enormous enforcement penalties or comply with the Mandate. This Court should grant a stay to allow full judicial review. *See id.* at 687 ("The sooner the industry's claims as to the coverage of the Act in these respects are determined, the better for everybody.").

II. Applicants Have an Indisputably Clear Right to Relief.

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

Respondents' statutory arguments all rest on the fundamentally flawed assumption that the major questions doctrine does not apply to the Vaccine Mandate. That assumption is absurd. The Mandate is one of the most far-reaching, invasive, and controversial regulatory actions in American history and it is beyond doubt that the Mandate triggers the major question doctrine's clear statement rules: "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." App. 116-17; *see also* App. 52 (Larsen, J., dissenting) ("Now the Secretary claims authority to impose a vaccinate-or-test mandate across 'all industries' on 84 million Americans (26 million unvaccinated) in response to a global pandemic that has been raging for nearly two years."); App. 69 (Sutton, C.J., dissenting) ("The Secretary claims authority to require 80 million Americans—in virtually every type of American business there is—to obtain a COVID-19 vaccine or, in the alternative, to undertake a weekly COVID-19 test and wear a mask throughout each workday.").

Respondents' discussion (at 55-56) of *Little Sisters of the Poor v. Pennsylvania* demonstrates their fundamental misunderstanding of government power under the Constitution. That case involved the government's discretion to a grant religious *exemption* from a federal mandate. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 (2020). This case involves the governments' attempt to impose a new *mandate* on private parties. This distinction matters because "an 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 the major questions doctrine applies when an "agency suddenly discovers 'in a long-extant statute an unheralded power to regulate a significant portion of the American

economy.'" App. 52 (Larsen, J., dissenting) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see also* App. 70 (Sutton, C.J., dissenting) ("[T]he federal courts 'expect Congress to speak clearly when authorizing an agency to exercise powers' over large numbers of Americans with respect to contested public policy choices of vast significance.") (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021)). Because the federal government is one of limited and specifically enumerated powers and does not possess a general police power, the major questions doctrine ensures that agencies do not impose new obligations of "vast 'economic and political significance'" upon private parties unless Congress "speaks clearly." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014). To be sure, *Little Sisters* involved a highly controversial issue—but unlike the ETS, it did not involve an expansion of federal *power*—the heart of the major questions doctrine. *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020) ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.").[3]

Respondents still can point to no unambiguous grant of authority to issue the Mandate. The OSH Act's emergency temporary standard provisions simply cannot bear the weight of one of the most significant expansions of federal power in American history. Accordingly, its imposition on Applicants is exceeds the authority granted to

[3] The American Rescue Plan Act of 2021, relied upon by Respondents (at 56), demonstrates that Congress is aware of COVID-19, has legislated about it, but was unable to garner enough votes to mandate vaccination.

OSHA by Congress and Applicants have a clear right to relief. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

B. The Grave Danger Provision Does Not Unambiguously Authorize OSHA to Impose a Vaccine Mandate.

Section 655(c)(1)'s grave danger requirement is not the clear statement of authority OSHA requires to issue the Mandate. And OSHA's finding that COVID-19 poses grave 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, to qualify as a grave danger, the exposure risk must be *unique to the workplace*, rather than a risk inherent in everyday life. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642-43 (1980) ("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."). OSHA cannot meet this fundamental standard to invoke its OSH Act authority.

Respondents attempt (at 24-25) to establish grave danger by pointing to broad data concerning the dangers of COVID-19 in general. But OSHA's reasoning regarding the 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 is not the affirmative finding of grave danger required by the OSH Act's exacting standards. *See id.* at 653; *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."). Moreover,

Respondents continue to ignore that a majority of the workforce is vaccinated and thus not at grave risk of complications from COVID-19 infection. *See* App. 110 ("And of course, this all assumes that COVID-19 poses any significant danger to workers to begin with; for the more than seventy-eight percent of Americans aged 12 and older either fully or partially inoculated against it, the virus poses—the Administration assures us—little risk at all."). And they also ignore the variability in the danger posed by COVID-19 to different age groups. *See* App. 49 (Larsen, J., dissenting) ("So an unvaccinated 18-year-old bears the same risk as a vaccinated 50-year-old. And yet, the 18-year-old is in grave danger, while the 50-year-old is not. One of these conclusions must be wrong; either way is a problem for OSHA's rule.").

C. OSHA Failed to Establish Necessity.

Respondents' discussion (at 30-44) fails to provide a basis for OSHA's flawed conclusion that the Mandate is necessary.

First, Respondents' discussion is grounded in the central fallacy that the necessity standard is akin to a reasonableness standard. But it is well established that 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. v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984); *see also Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Lab.*, 489 F.2d 120, 130 (5th Cir. 1974). As Chief Judge Sutton and Judge Larsen exhaustively demonstrate, under the OSH Act, an "emergency measure must ... be more than 'reasonably' needful; it must be closer to 'indispensable.'" App. 44-45 (Larsen, J., dissenting); App. 76-77 (Sutton, C.J.,

dissenting) ("Once connected, the reference to 'necessary' powers to address 'grave' dangers in an 'emergency' clarifies that 'necessary' has the narrower meaning. It refers only to indispensable or essential measures, not to whatever the Secretary determines is useful or beneficial."). This error of law infects the Sixth Circuit's decision to vacate the stay below, and OSHA and Respondents' attempt to establish necessity.

Second, 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. Respondents continue to fail to address that 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." App. 112.

Third, Respondents cannot establish necessity because OSHA failed to consider the variability in danger posed by COVID-19 to different age groups and industries. 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." App. 112; *see also* App. 47 (Larsen, J. dissenting) ("The government's own data show that unvaccinated workers between the ages of 18 and 29 bear a risk roughly equivalent to vaccinated persons between 50 and 64."); App. 78 (Sutton, C.J., dissenting) ("The Secretary could create exemptions for those least at risk, say cohorts from age 18 to 49, a population range that faces healthcare risks from COVID-19 at roughly the same level as the Secretary's own assessment of what is not a grave risk, with some slightly above and some slightly below."). Moreover, "OSHA acknowledge[d] that death rates are higher in '[c]ertain occupational sectors,' [] yet its rule never considers what results would obtain from targeting those sectors alone." App. 47 (Larsen, J., dissenting). These failures preclude a finding that OSHA tailored its standard to the purported grave danger. *Fla. Peach Growers Ass'n, Inc.*, 489 F.2d at 130.

Fourth, Respondents continue to utterly ignore their prior position that a one-size-fits-all-industries mandate is inappropriate. The Fifth Circuit recognized that OSHA itself specifically found that such an approach is inappropriate. *See* App. 112 (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)); *see also* App. 113 ("[A]n ETS meant to broadly cover all workers with potential exposure to COVID-19—effectively all workers across the country—would have to be written at such a general level that it would risk providing very little assistance at all."). Nothing has

changed in the world since these previous agency findings that make a uniform standard for all industries appropriate. *Cf. F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). OSHA's prior position continues to go unaddressed. *See* App. 113-14 ("[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)).

D. The Mandate Raises Grave Constitutional Concerns.

Respondents implausibly insist that what is arguably the most significant expansion of federal authority over the States, private business, and private citizens has precisely no constitutional implications.

Respondents (at 68-69) 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. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012). 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," App. 115. 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 still 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." App. 115. 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." App. 116 (quoting *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring)). Accordingly, the Vaccine Mandate exceeds the federal government's authority under the Commerce Clause. App. 116 ("[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.").

Respondents (at 71-72) also fail to assuage nondelegation concerns. By continuing to assert that §655(c) is not limited to workplace-specific dangers, Respondents have waived 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." App. 105. Accordingly, to avoid this unconstitutional result, this Court should reject Respondents' unbounded interpretation of OSHA's powers. App. 117 ("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."); *see also* App. 55 ("Here, the Secretary asks for maximum authority and maximum discretion; he wants to issue a rule of national import, covering two-thirds of American workers, and he wants to do it without clear congressional authorization, without even public notice and comment, and with a capacious understanding of necessity."); *see also* App. 81-82 ("Because our interpretation of the relevant statutes avoids these constitutional claims and any others, we need not address them. [] By contrast, anyone who takes the view that the Fifth Circuit's stay should be lifted must come to grips with each of the statutory imperatives, each of the clear statement requirements, and all of the constitutional claims.").

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 an administrative stay of the Mandate to ensure Applicants do not need to continue expending unrecoverable resources before the Mandate's legality is determined.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILLIPS MANUFACTURING & TOWER COMPANY, Petitioner, v. UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; MARTY WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR; JAMES FREDERICK IN HIS OFFICIAL CAPACITY AS ACTING ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, Respondents.	Case No. _____

DECLARATION OF ANGELA R. PHILLIPS

I, Angela R. Phillips hereby declare as follows:

1. I am the Chief Executive Officer of Phillips Manufacturing & Tower Company ("Phillips"). Phillips is a 54-year-old company specializing in the manufacture of specialty welded steel tubing for automotive, RV, appliance, and construction industries.
2. I have been the CEO of Phillips for 12 years and I directly oversee day to day operations. Based on my position, I have personal knowledge and

experience to understand the effects of the OSHA "COVID-19 Vaccination and Testing; Emergency Temporary Standard" ("Vaccine Mandate") on Phillips.

3. Because of its potential impact on Phillips, I have been monitoring the emergency temporary standard Vaccine Mandate process since President Biden's September 2021 announcement.

4. Phillips has 104 employees. It is my understanding that the Vaccine Mandate applies to businesses with 100 or more employees and would thus apply to Phillips.

5. Phillips would not impose a vaccine mandate or testing requirement but for the Vaccine Mandate.

6. I have invested in antibody testing for Phillips's workforce to determine if they have immunity to COVID-19. While a survey conducted of Phillips employees ("Survey") indicates that 28 employees are fully vaccinated, the results of the antibody tests indicate that 44 employees tested had COVID-19 antibodies and thus possess immunity to COVID-19. Accordingly, a substantial number of Phillips employees (approximately 16 employees) possess natural immunity as of the time of the antibody testing.

7. Most of my employees are, and always have been, separated by at least six feet in the manufacturing process. In addition to this natural separation,

management has encouraged six-foot social distancing as a COVID-19 precaution.

8. The Phillips Survey indicates that at least 47 employees have decided not to get vaccinated. And of Phillips's unvaccinated employees, 17 employees have reported that they will not get the vaccine, even if it means losing their job. An additional 27 unvaccinated employees have indicated that they would not get vaccinated, but would participate in weekly testing if that were required to keep their jobs.

9. The Vaccine Mandate would have serious effects on Phillips. General labor shortages in the area have resulted in Phillips being understaffed. Phillips currently has 7 openings that it has been unable to fill. Due to this labor shortage, employees are already working overtime shifts, on average 10-hour shifts, 6 days a week.

10. The Vaccine Mandate will exacerbate this labor shortage. Based on my experience, requiring vaccination or onerous testing will make it even more difficult for Phillips to fill its currently open positions, let alone new vacancies created by the Vaccine Mandate.

11. As indicated by the supporting memorandum, the Vaccine Mandate will cost Phillips at least $818,635.30 annually in recruiting, training, additional overtime, and other costs.

12. As indicated by the supporting memorandum, annual testing for Phillips

will cost an additional $96,200 annually.

13. These costs assume that the Phillips will be able to meet existing product requirements to customers by using additional overtime from existing employees. However, if Phillips is unable to meet production requirements because the current labor shortage is significantly worsened by the Vaccine Mandate, then pursuant to contracts entered into between Phillips and some customers, Phillips could be subjected to significant penalties. One such contract has a damages provision requiring Phillips to pay $25,000 per hour that the customer is without the product. Accordingly, Phillips's potential losses from the Vaccine Mandate could be financially devastating.

14. Out of Phillips's 104 employees, 3 regularly work from home.

I declare under penalty of perjury that the foreguiding is correct. Executed on this 4th day of November, at Middletown, Ohio.

Angela R. Phillips

MEMORANDUM

To: Angela Phillips
CEO
Phillips Manufacturing & Tower Company

From: Michael E. Reed
Associate Economist
The Buckeye Institute

Re: Analysis of the Economic Impact of a Vaccine Mandate

The Occupational Safety and Health Administration (OSHA), at the direction of President Joe Biden, has promulgated an emergency regulation requiring all businesses of 100 or more employees to certify that all employees are vaccinated against COVID-19 or take weekly tests to determine infection. This brief explains the methodology behind calculations of immediate and continuous economic impact that the mandate will have upon your company, Phillips Manufacturing & Tower Company (Phillips).

Our analysis measures the regulation's immediate economic impact related to the anticipated loss of employees, and the continuous economic impact of costs incurred by weekly testing. Please note that this analysis does not include damages that could result if Phillips is unable to meet contractual delivery requirements to customers due to workforce losses. Phillips represents that some customers include contractual penalties for delivery failures, which could be substantial. Phillips could also incur legal costs and fees if disputes arise related to production schedules impacted by labor shortages.

Based upon survey responses from employees, Phillips expects 23 employees (22 percent of its existing workforce) to leave the company rather than comply with the new OSHA regulation. We calculate the economic impact of this loss under three time periods using assumptions and data provided by Phillips (see, *e.g.*, Phillips' survey). All calculations are based on maintaining existing company revenue.

- Time Period 1 – a four-week period in which the lost employees are not replaced, and the remaining employees replace lost productivity by working overtime.
- Time Period 2 – a four-week period in which replacement employees have been hired and earn wages, but as they train, they contribute zero to company revenue.
- Time Period 3 – a 22-week period in which replacement employees train and contribute to company revenue at a lower rate than remaining employees, and remaining employees replace lower productivity by working overtime.

Replacing the lost employees will require recruiting, interviewing, and initial training of new employees. Phillips estimates that this process will cost $6000 per new employee for an estimated total one-time cost of **$138,000**.

During Time Period 1, "lost hours" equals the number of lost employees (23) multiplied by the number of hours (60) worked per week by each employee for a total of 1,380 lost hours per week, which remaining employees must replace. For each lost employee, 40 hours per week are paid the average hourly wage ($33.10/hour) and the remaining 20 hours per week are paid the overtime rate (1.5*wage Mon-Sat, 2.0*wage Sun). According to Phillips, the lost employee overtime hours are worked at the lower Mon-Sat rate.

The number of additional overtime hours available per remaining employee is 2 hours/day Mon-Sat and 12 hours on Sunday. Each of the remaining 84 employees can make up 12 hours/week on Mon-Sat and an additional 12 hours on Sunday. Therefore, overtime hours available for remaining employees to replace lost hours is 12 hours/week Mon-Sat multiplied by the remaining 84 employees, which yields 1,008 hours available Mon-Sat. The overtime hours available on Sunday is 12 hours/week per remaining employee, which yields an additional 1,008 hours.

Because the pay rate is lower Mon-Sat, the analysis assumes that of the 1,380 lost hours/week, 1,008 hours are made up Mon-Sat before allocating the remaining 372 overtime hours on Sunday. (See Table 1.)

Table 1 – Substitution of Additional Overtime for Lost Hours

Lost Hours Description	Lost Hours by Type	Replacement Hours Description	Replacement Hours by Type	Pay Rate Difference
Lost Base Pay Hours	23 employees * 40 base hr/week = 920 hrs	Overtime hrs Mon-Sat (max 1,008 from above)	920 hrs Mon-Sat	1.5 * $33.10 - $33.10 = $16.50
Lost Overtime Mon-Sat Hours	1,380 total loss – 920 base loss = 460 OT hrs lost	Remaining Mon-Sat OT hrs	1,008 – 920 (from above row) = 88 hrs	$0.00, both are paid 1.5 OT rate
Remaining Lost OT Mon-Sat Hours	460 – 88 (accounted for in above row) = 372	OT Sunday hrs	372	2.0 * $33.10 – 1.5 * $33.10 = $16.50

Proper accounting of replacement hours implies that the total lost hours (1,380) is the same as the replacement hours (920+88+372) put into appropriate context by using the least cost pay rate difference available.

Multiplying the appropriate replacement hours (Table 1, column 4) by the pay rate difference (Table 1, column 5) by the assumed number of weeks (4) provides the total cost of replacing lost employee productivity with remaining employee overtime during Time Period 1: **$85,530.40**.

During Time Period 2, the method of calculating overtime replacement cost is the same because although replacement workers have been hired, they do not produce any company revenue.

Because Time Period 2 is also 4 weeks, its additional overtime cost is the same as Time Period 1: **$85,530.40**. Replacement employees earn $33.10/hour and work 40 hours/week. These wages present Phillips with a direct cost, which is found by multiplying the number of replacement employees (23) by 40 hours/week by the average wage ($33.10/hour) by the number of weeks (4), yielding a total cost of **$121,808**.

During Time Period 3, our analysis assumes that replacement employees work 60 hours/week and earn the same total as the lost employees, but the productivity of the replacement workers during this 22-week period is lower than the lost employees' productivity. The productivity difference is replaced by assigning overtime to experienced employees in order to maintain pre-mandate company revenue.

The annual productivity of an experienced employee is $404,000/year and the annual productivity of a trainee is $300,000/year. The hourly productivity of each is found by dividing the annual productivity by the expected number of hours worked per year. This calculation yields a productivity value of $129.49/hour for experienced employees and $96.15/hour for trainees. The amount of lost productivity in a week is found by taking the difference of the productivity rates ($129.49/hour - $96.15/hour = $33.34/hour) and multiplying it by the number of hours worked in a week by replacements (1,380) which yields a total lost productivity of $46,009.20 per week. To make up for this lost productivity, the value of lost productivity per week is divided by the productivity rate of an experienced employee yielding 355 hours of needed experienced productivity per week. This extra overtime is charged at the full rate (1.5 * $33.10/hour) because these hours are in addition to the pre-mandate hours and the replacement employees are earning the wages of the lost employees. The total cost of this overtime equals the wage per hour (1.5 * $33.10/hour) times the number of makeup hours per week (355) time the number of weeks in Time Period 3 (22), which yields a total cost of **$387,766.50**.

Our analysis of the continuous economic impact incurred due to the new OSHA regulation focuses on costs associated with Phillips testing its employees weekly. Based upon survey responses from employees, Phillips estimates that 35 percent of its existing 107 employees will choose to remain and participate in weekly testing. According to Phillips, each test will cost it $50 to purchase and process. Multiplying the expected 37 employees choosing testing by 52 weeks by $50/test yields a continuous **annual cost of $96,200**.

The estimated immediate and continuous economic impact of the new OSHA regulation that will require Phillips to replace lost employees and conduct on-going weekly employee testing is summarized in Table 2.

Table 2 – Summary of Economic Impacts

Description	Economic Impact
Search and Training	$138,000.00
Time Period 1 Additional Overtime	$85,530.40
Time Period 2 Additional Overtime	$85,530.40
Time Period 2 Replacement Employee Wages	$121,808.00
Time Period 3 Additional Overtime	$387,766.50

Total One-Time cost to Replace Lost Employees (sum of above)	$818,635.30
Annual Cost for Employee Testing	$96,200/year
First Year Total Cost	**$914,835.30**

Appendix B

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

DECLARATION OF RICK KING

I, Rick King, hereby declare as follows:

1. I am the President of Sixarp, L.L.C. Sixarp is a full service contract packaging company specializing in Secondary Packaging operations for the consumer product, cosmetics, food & beverage, over the counter (OTC) and prescription (Rx) pharmaceuticals, and promotional products industry as well as primary filling and packaging of oral solid dosage tablets.

2. As President of Sixarp, I have personal knowledge of out facilities' operations and experience to understand the effects of the OSHA "COVID-19 Vaccination and Testing; Emergency Temporary Standard" ("Vaccine Mandate") on Sixarp.
3. Sixarp has focused on the potential challenge posed by the emergency temporary standard Vaccine Mandate process since President Biden's September 2021 announcement.
4. Sixarp owns and operates multiple packaging facilities. Its primary facility in Grand Rapids, Mich., employs more than 600 people and is thus subject to the Vaccine Mandate, which I understand applies to businesses with 100 or more employees. We also employ dozens of people at other facilities, including one in the Columbus, Ohio, area, that I also understand is subject to the Vaccine Mandate because of the overall size of Sixarp.
5. Sixarp would not impose a vaccine mandate or testing requirement but for the Vaccine Mandate.
6. Many of the employees at Sixarp's facilities can work in a socially distanced manner, particularly those who work in our warehouse and quality control divisions. We have encouraged the use of face masks and social distancing (where practicable) in our facilities. We also have imposed staggered lunches.

7. Based on information made available to us from voluntary company reporting, at least 60 employees at our Michigan facility have had COVID and thus possess natural immunity. Only about one-third of the workforce has indicated it is actually vaccinated. Many of our employees have indicated they will quit before taking the vaccination.
8. We currently face difficulty in filling our positions; there are more than 20 open positions in Grand Rapids and another dozen-plus at our other facilities.
9. We have had to turn to temporary employment agencies to fill our positions, and even then still have jobs left unfilled.
10. The Vaccine Mandate will exacerbate this labor shortage. Based on my experience, requiring vaccination or onerous testing will make it even more difficult for Sixarp to fill its currently open positions, let alone new vacancies created by the Vaccine Mandate.
11. We have been advised that imposing weekly testing for COVID-19 could cost $27,600 weekly for the primary Grand Rapids facility alone, and more than $44,000 weekly across the company. The Vaccine Mandate thus imposes millions of dollars of potential annual additional costs to Sixarp.
12. Preparing to impose the Vaccine Mandate, including the alternative testing protocols, will require us to devote time and substantial costs immediately, as that ramp-up will take place in the coming weeks and over the Holidays.

13. A number of Sixarp's employees have expressed interest in a religious exemption. Some of our employees are foreign immigrants who distrust western medicine, others have religious objections based upon the teachings of the Amish, Christian Scientist, Scientologist religions.

I declare under penalty of perjury that the foreguiding is correct. Executed on this 4th day of November 2021, at Grand Rapids, Mich.

Rick King

Appendix C

OBERG INDUSTRIES, LLC, Petitioner, 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.	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

DECLARATION OF RICH BARTEK

I, Rich Bartek, hereby declare as follows:

1. I am CEO of Oberg Industries. Oberg Industries is a metals contract manufacturer that was founded in 1948. Oberg manufactures products for a variety of markets, including medical, food & beverage, commercial and residential building construction, consumer products, defense, energy and automotive sectors.

2. Oberg currently employees 697 full-time employees, the vast majority of

whom are highly skilled machinists and operators. Oberg operates manufacturing facilities in four locations: Freeport, Pennsylvania; Sarver, Pennsylvania; Chicago, Illinois; and Wallingford, Connecticut. All but our Connecticut facility have more than 100 employees on site.

3. As CEO of Oberg, I have personal knowledge of our facilities, employees, operations and experience. Moreover, because Oberg is self-insured, I have knowledge as to many of our employees' experiences with COVID-19 and the available vaccines to date. I am thus able to describe the effects of the OSHA "COVID-19 Vaccination and Testing; Emergency Temporary Standard" ("Vaccine Mandate") on Oberg.

4. As mentioned above, we employ hundreds of employees at four different manufacturing facilities. I understand that all of these facilities would be subject to the Mandate given the overall size of Oberg.

5. Oberg Industries has worked hard to address the risks associated with the pandemic while maintaining safe operations for our employees. Since the spring of 2020, we have hired agencies for deep cleaning services to disinfect work areas; deployed hand sanitizers, face coverings, and wipes; practiced social distancing where possible; used temperature checks on employees to screen for infections; emphasized personal hygiene; implemented flexible work hours, working from home, and staggered work schedules and lunches; improved HVAC ventilation; formed a COVID committee to ensure we continue to follow proper procedures; and regularly communicated our policies and efforts to limit spread.

6. These efforts have cost the company more than $84,000 per year.

7. Since January of 2020, more than 180 employees have tested positive for COVID-19 and thus possess some form of natural immunity.

8. We know that 43% of Oberg's full time employees have received the vaccine (although this may not account for some employees whose vaccines were administered or covered outside the company's health insurance plan).

9. Due to the state of the economy and Oberg's need for skilled labor, Oberg has had difficulty filling its open positions. As of November 2021 there were more than 21 open positions across the company.

10. Based on communications with employees and the number who have not yet been vaccinated, we estimate that a vaccination requirement could lead to the loss of more than 200 employees—nearly 30% of our existing workforce. Even if we lost only half of those employees, it would equate to a $22 million loss per year in revenue to the company, based on current efficiencies.

11. Moreover, we estimate a loss of seven additional employees in the event we mandated only testing.

12. Given the difficulty of filling existing openings, the anticipated losses associated with these Vaccine Mandate would be economically crippling to Oberg, endangering its ability to fulfill existing orders.

13. Apart from the employment effects, the Vaccine Mandate will impose substantial economic hardship on Oberg. We have investigated the feasibility of setting

up weekly testing at our sites. Due to the limited number of suppliers of the PCR testing kits (which, per our health insurance contractor, currently costs more than $100 per kit), we anticipate that testing our 286 unvaccinated employees could cost more than $32,000 per week, or up to $1.7 million annually. And this does not account for the lost employee time necessary to accomplish the testing.

14. These costs are economically unsustainable for Oberg, and would force us to curtail operations and ultimately eliminate jobs.

I declare under penalty of perjury that the foreguiding is correct. Executed on this 6 day of December, at Pennsylvania.

Rich Bartek, CEO, Oberg Industries