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

RESPONSE IN OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY[1]

This Court should reject Respondents' Motion to dissolve the stay issued by the Fifth Circuit in a published opinion, which held that OSHA's Occupational Safety and Health Administration's "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61402 (Nov. 5, 2021) ("Vaccine Mandate"). *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021). The Vaccine Mandate fundamentally alters the relationships between the federal government and the States and between

[1] Pursuant to the Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Petitioners Phillips Tower and Manufacturing Company and Sixarp LLC state that they do not have a parent corporation, and no publicly held corporation owns 10 percent or more of their stock.

government and citizen. It imposes billions in costs on the economy. And it purports to resolve one of the most significant political, social, and economic issues of our time—all without any hint of congressional authorization. The Fifth Circuit was right to stay the Mandate to prevent irreparable harms until it receives full judicial review on the merits.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits.

A. The 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. Respondents' only argument (at 20-21) regarding the major question doctrine's clear statement rules is to assert—in a couple of conclusory sentences—that the Mandate is simply a run of the mine "workplace-safety regulation[]." That 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." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021). The Fifth Circuit rejected precisely the same argument Respondents invoke here to downplay the Mandate as an

average workplace safety standard: "Here, it is simply unlikely that Congress assigned authority over such a monumental policy decision to OSHA—hard hats and safety goggles, this is not." *Id.* at 617 n.20. Indeed, OSHA itself recognized the importance of the Mandate by labelling it a "major rule." *See* 86 Fed. Reg. at 61504; *cf. State v. Becerra*, 2021 WL 2514138, at *21 (M.D. Fla. June 18, 2021).

Tellingly, Respondents completely omit discussion of this Court's holding in *Tiger Lily LLC v. United States*, 5 F.4th 666 (6th Cir. 2021), and the Supreme Court's holding in *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), in their major questions argument. As Petitioners explained at length in their Emergency Motion for Stay, ECF 168 at 20-22, this Court's holding in *Tiger Lily* and the Supreme Court's holding in *Alabama Association of Realtors* that the Eviction Moratorium required clear statutory authorization applies with greater force to the Vaccine Mandate, which is even more far-reaching. Respondents ignore these cases because they have no answer for them.

Applying the major questions doctrine yields no clear statutory authorization for the Vaccine Mandate. *BST Holdings*, 17 F.4th at 618 ("There is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority"); *see also id.* at 619 (Duncan, J., concurring) ("OSHA invokes no statute expressly authorizing the rule."). Respondents' attempts to rehash their arguments in favor of unprecedented federal actions to address COVID-19 are not more compelling than those the Fifth Circuit rejected in *BST Holdings* or this Court rejected in *Tiger Lily*, 5 F.4th at 671 ("This

approach also accords with the expectation that Congress would 'speak clearly if it wish[ed] to assign to an agency decisions of vast economic and political significance,' like the decision to shut down evictions across the entire country.").

Read in the context of §655, the terms "substances," "agents," and "hazards" clearly refer to only those that occur or arise uniquely in the "employment" context or at particular "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."). Under §655(b), standards can be promulgated only for substances encountered specifically in the workplace. *BST Holdings*, 17 F.4th at 613 ("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."). Moreover, the plain meaning of the terms "toxic materials" and "harmful physical agents" do not include viruses. See, e.g., Paul J. Larkin & Doug Badger, *The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for COVID-19 Vaccinations*, at 9-11 & n. 50-58, https://bit.ly/3Dok06C (collecting definitions to conclude that "a 'virus' is a communicable pathogen with a protein coat encapsulating an RNA or DNA genetic

material that replicates within a host or dies. A 'toxin' is different" and "[t]he natural reading of the term 'physical agent' does not include viruses").

OSHA's attempt (at 13-14) to distinguish between a "recognized" and "new" hazard is too absurd to merit discussion. A hazard that has been present for nearly two years and that has been expressly "recognized" by OSHA since at least May of 2020 is not "new" under any definition of that term. *BST Holdings*, 17 F.4th at 613 ("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)).[2]

Finally, and equally fatally, Respondents have still not identified any limiting principle whatsoever for its powers under §655(c). *See Ala. Ass'n of Realtors*, 141 S. Ct.

[2] Respondents grossly mischaracterize (at 16) 29 U.S.C. §669(a)(5) as authorizing "OSHA [to] require 'immunization,' including to 'protect[] the health or safety of others." Far from being an affirmative grant of power, this clause is a rule of construction *prohibiting* forced immunization:

> Nothing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others.

29 U.S.C. §669(a)(5). And §669(a) applies only to "research, demonstrations, and experiments"—not mandatory vaccination of workers under an emergency standard. 29 U.S.C. §669(a)(2).

at 2489.[3] OSHA's purported limitation to "acute workplace hazard[s]" is no limit at all. OSHA could cite the "hazard" of unhealthy employee lunch habits to mandate 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. 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*, 5 F.4th at 672.

B. OSHA Failed to Demonstrate Grave Danger.

OSHA's finding that COVID-19 poses grave danger for purposes of the OSH Act is arbitrary and unsupported by the record. Because 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."). As discussed above, OSHA cannot meet this fundamental standard to invoke its OSH Act authority.

[3] Respondents' reference (at 16-17) to bloodborne pathogens proves Petitioners' point—Congress must specifically authorize OSHA to address pathogens. *See* Needlestick Safety and Prevention Act, Pub. L. 106-430, 114 Stat. 1901 (2000). But even there Congress did not authorize a vaccination requirement. *Id.* Respondents' example proves that Congress knows how to specifically empower an agency to address the spread of communicable diseases like COVID-19 but it has failed to grant any such authority to OSHA. *Cf. W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991).

Respondents (at 28-30) also unconvincingly attempt to undermine the Fifth Circuit's reasoning 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. *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 ignore that a majority of the workforce is vaccinated and thus not at grave risk of complications from COVID-19 infection. *See BST Holdings*, 17 F.4th at 614 ("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.").

The Fifth Circuit actually applied the deference[4] that Respondents (at 17-18) insist upon. *Id.* ("To be sure, 'OSHA's assessment of ... scientifically complex [facts] and its balancing of the competing policies that underlie the decision whether to issue an ETS ... are entitled to great deference.'"). But it correctly found that the OSHA did

[4] In any event, the deference insisted upon by Respondents is inappropriate here because ETSs do not go through notice-and-comment. Accordingly, courts "take a 'harder look' at OSHA's action." *Asbestos Info. Ass'n/N.Am. v. OSHA*, 727 F.2d 415, 421 (5th Cir. 1984).

not establish a grave danger in light of Respondents' unexplained change in positions, weak factual record, and the serious reliance interests at stake. *Id.* Respondents present no reason to doubt the Fifth Circuit's holding.

C. OSHA Failed to Demonstrate Necessity.[5]

Respondents' (at 32-39) discussion of the OSH Act's necessity requirement fails to undermine the Fifth Circuit's careful analysis.

First, Respondents (at 33) attack the Fifth Circuit's conclusion that OSHA failed to account for natural immunity in its necessity analysis. But 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; *see also Fla. Peach Growers Ass'n, Inc.*, 489 F.2d at 130. 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. Indeed, OSHA itself has recognized in the past that vaccination is unnecessary when "antibody testing has revealed that the employee is immune." 29

[5] Respondents erroneously assert (at 37, 39) 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 to aid us in our understanding of this technologically complex case.").

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 Petitioner Phillips demonstrates the feasibility and effectiveness of antibody testing and other mitigation measures short of vaccination. *See* No. 21-4028 ECF 4-2 ¶4. Phillips has invested in antibody testing for its workforce to determine whether they have natural immunity. *Id.* ¶6. Those results indicated that 44 employees tested positive for COVID-19 antibodies. *Id.* ¶6. And most of the company's workers are necessarily separated in the manufacturing process. Management has further encouraged 6-foot social distancing since the COVID-19 pandemic began. *Id.* ¶7.

Second, Respondents fail (at 34-35) to remedy the basic flaw that 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. *Fla. Peach Growers Ass'n, Inc.*, 489 F.2d at 130.

Third, Respondents (at 35-37) mistake OSHA's perfunctory discussion of industries on its way to implementing a one-size-fits-all-industries mandate for 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:

> "Based on substantial evidence, OSHA determined that an ETS is not necessary both because there are existing OSHA and non-OSHA standards that address COVID-19 and because an ETS would actually be counterproductive.... To address all employers and to do so with the requisite dispatch, an ETS would at best be an enshrinement of these general and universally known measures that are already enforceable through existing OSHA tools that require employers to assess and address extant hazards. **OSHA's time and resources are better spent issuing industry-specific guidance that adds real substance and permits flexibility as we learn more about this virus.** Given that we learn more about COVID-19 every day, 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)); *see also id.* ("[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) (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"). Accordingly, 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, Respondents cannot rebut the Fifth Circuit's holding that

> [T]he Mandate's strained prescriptions combine to make it the rare government pronouncement that is both overinclusive (applying to employers and employees 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) and underinclusive (purporting to save 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).

BST Holdings, 17 F.4th at 611.

D. OSHA's Rationale is Pretextual.

Respondents (at 39) blithely brush aside Petitioners' extensive evidence of pretext only by pointing to the supposedly robust administrative record. But that's precisely the point—nowhere in this record are the reasons the President expressly

dictated in his multiple press conferences and public statements. The length of the record buttresses the pretextual nature of the ETS. As the Fifth Circuit noted, all along, the Vaccine Mandate has been about increasing "the country's vaccination rate." *BST Holdings*, 17 F.4th at 612. Lacking the authority to do so "the Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." *Id.* "The vehicle it landed on was an OSHA ETS," which had to be made to seem like its aim was increasing workplace safety rather than increasing vaccination rates. *Id.* This "pretextual basis" is one of the "hallmarks of unlawful agency action[.]" *Id.* at 614.

E. The Mandate Violates the Commerce Clause & Encroaches Upon State Sovereignty.

Respondents' only way around Petitioners' Commerce Clause arguments is to assert (at 18-20) that the decision to forgo vaccination is 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." *BST Holdings*, 17 F.4th at 617. Accordingly, the 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.").

F. The Mandate Violates the Nondelegation Doctrine.

Respondents' assertion (at 21-22) that OSHA's extraordinary emergency temporary standard power fits into the mine run of delegations ignores the unfettered power that OSHA claims to wield. By asserting that §655(c) is not limited to workplace-specific dangers, Respondents push away 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." *BST Holdings*, 17 F.4th at 611. Just as in *Tiger Lily*, 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.").

G. The Mandate Violates the Congressional Review Act.

The Congressional Review Act provides an independent reason for maintaining the stay. As Petitioners explained in their stay motion, ECF 168 at 32-33, the Vaccine Mandate violates the CRA because it was not submitted to Congress for review prior to its effective date. In their response to Petitioners' stay motion, No. 21-4028, ECF 16 at 35-36, Respondents assert that courts may not review an OSHA's failure to comply with the Congressional Review Act. However, several "Circuit and District Courts have found that § 805 does not preclude judicial review of agency action." *Tugaw Ranches, LLC v. United States Dep't of the Interior*, 362 F. Supp. 3d 879, 885 (D. Idaho 2019) (collecting case). To be sure, the reviewability of agency omissions under the CRA is a question of first impression in this Circuit. This Court should adopt the position of courts that hold that "Congress only intended to preclude judicial review of Congress's own determinations, findings, actions, or omissions made under the CRA after a rule has been submitted to it for review," because "to read [the CRA] to preclude a court

from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual." *Id.*

Respondents' attempt (No. 21-4028 ECF 16 at 36) to revive OSHA's failure to comply with the CRA under the good cause exception gets them nowhere. "[I]t is well established that the 'good cause' exception to notice-and-comment should be read narrowly in order to avoid providing agencies with an 'escape clause' from the requirements Congress pre-scribed." *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011). OSHA's conclusory good cause finding, which is entitled to no deference, *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014), falls far short of meeting the exacting standard of an "emergency" sufficient to justify CMS's dispensing with the CRA. *BST Holdings*, 17 F.4th at 611 ("The Mandate's stated impetus—a purported 'emergency' that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to—is unavailing as well."); *Florida v. Becerra*, 2021 WL 2514138, at *45 (concluding that the COVID-19 pandemic was insufficient for "good cause"); *Regeneron Pharms. v. HHS*, 510 F. Supp. 3d 29, 48 (S.D.N.Y. 2020) (similar).

II. Petitioners Will Be Irreparably Harmed Absent Continuation of the Stay.

Respondents strain mightily and unconvincingly to undermine the Fifth Circuit's finding of irreparable harm. First (at 42-44), they downplay the impact of the Vaccine Mandate as "ordinary compliance costs." But "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance

costs," *BST Holdings*, 17 F.4th at 618, particularly in light of the federal government's sovereign immunity, *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 599-600 (6th Cir. 2014). Moreover, the compliance costs here are far from ordinary. Petitioners Phillips and Sixarp have extensively documented the substantial costs that they will incur in implementing the Mandate. *See* No. 21-4028 ECF 4-2, 4-3. Such unrecoverable costs are quintessential irreparable harms. *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."); *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").

Respondents' conclusory assertions (at 2, 43) that the harm to Petitioners is "speculative" are directly contradicted by the record. Far from being speculative, Petitioner Phillips submitted a declaration and economic impact analysis demonstrating the immediate and devastating effects of the Mandate. 21-4028 ECF 4-2. The Mandate would cost more than $900,000 in the first year alone and imperil its ability to fulfill contracts. 21-4028 ECF 4-2. Similarly, Petitioner Sixarp submitted a declaration specifically demonstrating the damages Sixarp will incur due to the Mandate including the immediate expenditure of time and resources to begin the multi-step process of complying with the Mandate. 21-4028 ECF 4-3. These harms are immediate and

irreparable.

III. The Equities Favor a Stay.

Respondents' discussion (at 40-42) of the equities does not undermine the overwhelming conclusion of courts, that the public interest and balance of equites require that unlawful federal COVID-19 measures be stayed or enjoined. *See, e.g.*, *Alabama Ass'n of Realtors*, 141 S. Ct. at 2490. Although "the public has a strong interest in combating the spread of the COVID–19 Delta variant ... our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* As with the Eviction Moratorium, "[i]t is up to Congress, not [OSHA], to decide whether the public interest merits further action here." *Id.* In sum, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *see also Marysville Baptist Church v. Beshear*, 957 F.3d 610, 614-15 (6th Cir. 2020) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one.").

IV. The Court Should Not Narrow the Stay.

Respondents (at 46-48) ask this Court to narrow the Fifth Circuit's stay based on a phantasmic distinction between the Mandate's vaccination requirement and the Mandate's masking and testing requirements. No such distinction is apparent in the Fifth Circuit's opinion, which declares all aspects of the Mandate—vaccination, testing, and masking—to be beyond the Executive's authority. *See BST Holdings*, 17 F.4th at 609 ("This case concerns OSHA's most recent ETS ... requiring employees of covered

employers to undergo COVID-19 vaccination or take weekly COVID-19 tests and wear a mask."); *see also id.* at 619 (Duncan, J., concurring) ("It compels covered employers to (1) make employees get vaccinated or get weekly tests at their expense and wear masks; (2) "remove" non-complying employees; (3) pay per-violation fines; and (4) keep records of employee vaccination or testing status. [] OSHA invokes no statute expressly authorizing the rule."). The same legal reasoning that compelled staying the vaccine requirement also compelled staying the other requirements. And Respondents' purported distinction between an unlawful vaccine mandate and lawful masking and testing requirement is not apparent from the Mandate itself, which treats masking and testing as inseparably wrapped up in the vaccination requirement.[6] *See, e.g.*, 86 Fed. Reg. at 61433, 61434, 61435, 61436, 61437, 61439, 61525, 61532.

What Respondents' attempt (at 48-50) to preserve the preemptive effect of the Mandate even if the remainder is unlawful lacks in sound legal basis, it makes up for in boldness. Respondents are asking the Court to allow a rule that is unlawful in part because of its interference with an area of traditional State police power to continue to have preemptive effect over exercises of precisely this same State police power to forbid vaccination mandates. The Court should not allow a rule that unlawfully usurps State

[6] The Mandate's severability clause is irrelevant because the entire ETS is unlawful. In any event, because the vaccination, masking, and testing requirements are bound up together and treated as inseparable by the ETS, severance is not appropriate. *See Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020) ("Despite the severability clause, the [Rule] is not severable because it is clear [the SEC and Nasdaq] intended the [Rule] to stand or fall as a whole, and the agency desired a single, coherent policy.").

police power over public health continue to preempt State police power over public health.

The scope of the Fifth Circuit's stay could not be more clear or appropriate: "Enforcement of the Occupational Safety and Health Administration's 'COVID-19 Vaccination and Testing; Emergency Temporary Standard' remains STAYED pending adequate judicial review of the petitioners' underlying motions for a permanent injunction. In addition, IT IS FURTHER ORDERED that OSHA take no steps to implement or enforce the Mandate until further court order." *BST Holdings*, 17 F.4th at 619. This Court should reject Respondents' rhetorical gymnastics designed to undermine this clear command.

CONCLUSION

For the foregoing reasons, this Court should deny Respondents' motion to dissolve or narrow the Fifth Circuit's stay.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, I caused the foregoing brief to be served via the Court's CM/ECF system on all registered counsel.

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