

No. 21-4028

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PHILLIPS MANUFACTURING & TOWER COMPANY

and

SIXARP, LLC,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION; MARTY WALSH, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF LABOR; DOUGLAS L. PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT
SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

Respondents

PETITION FOR INITIAL HEARING EN BANC

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

November 17, 2021

TABLE OF CONTENTS

Table of Authorities	ii
Rule 35(b) Statement.....	1
Introduction.....	1
Statement	2
Reasons for granting en banc review.....	6
I. The Vaccine Mandate is of Exceptional Importance.....	6
II. The Vaccine Mandate Conflicts with Supreme Court and Sixth Circuit Holdings.....	8
Conclusion.....	11
Certificate of Service.....	13

TABLE OF AUTHORITIES

Cases

<i>Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.</i> , 2021 WL 3783142 (U.S. Aug. 26, 2021).....	passim
<i>Asbestos Info. Ass’n/N. Am. v. Occupational Safety & Health Admin.</i> , 727 F.2d 415 (5th Cir. 1984).....	2
<i>Bond v. United States</i> , 572 U.S. 844 (2014).....	11
<i>BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.</i> , 2021 WL 5279381 (5th Cir. Nov. 12, 2021).....	1, 7
<i>Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers</i> , 531 U.S. 159 (2001).....	11
<i>Tiger Lily, LLC v. United States Dep’t of Hous. & Urb. Dev.</i> , 5 F.4th 666 (6th Cir. 2021).....	1, 9, 11
<i>United States v. Bass</i> , 404 U.S. 336 (1971).....	11
<i>Util. Air Regul. Grp. v. E.P.A.</i> , 573 U.S. 302 (2014).....	7
<i>Vistron v. OSHA</i> , No. 78-3026, 6 OSHC 1483 (6th Cir. Mar. 28, 1978).....	3

Rules

Fed. R. App. P. 35(b)(1).....	1, 7, 11
-------------------------------	----------

Regulations

29 U.S.C. §655(b).....	2
42 C.F.R. §70.2.....	10
42 U.S.C. §264(a).....	8, 10

Other Authorities

“COVID-19 Vaccination and Testing; Emergency Temporary Standard,” 86 Fed. Reg. 61402 (Nov. 5, 2021).....	1, 3, 4
--	---------

Cong. Research Serv., *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, R46288, at 27 (Sept. 13, 2021).....2

Gov’t Accountability Office, *WORKPLACE SAFETY AND HEALTH: Multiple Challenges Lengthen OSHA’s Standard Setting*, GAO-12-330 (Apr. 2012).....3

The White House, “Remarks by President Biden on Fighting the COVID-19 Pandemic” (Sept. 9, 2021), <https://bit.ly/3oI0pKr>3

The White House, *Path Out of the Pandemic: President Biden’s Covid-19 Action Plan*, <https://bit.ly/3adkMXx>.....3

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>.....3

RULE 35(B) STATEMENT

Petitioners move for initial en banc hearing in the consolidated challenges to the Occupational Safety and Health Administration’s “COVID-19 Vaccination and Testing; Emergency Temporary Standard,” 86 Fed. Reg. 61402 (Nov. 5, 2021) (“Vaccine Mandate”). Initial en banc review is necessary because the Vaccine Mandate presents issues of exceptional public importance and conflicts with holdings of the Supreme Court and this Court. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 2021 WL 3783142 (U.S. Aug. 26, 2021); *Tiger Lily, LLC v. United States Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 671 (6th Cir. 2021). The validity of the Vaccine Mandate under the Constitution and the OSH Act presents questions of exceptional importance. Moreover, another federal circuit court of appeals has determined that the Vaccine Mandate likely violates the Constitution and the OSH Act. *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.*, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021). Accordingly, initial en banc review is appropriate. Fed. R. App. P. 35(b)(1).

INTRODUCTION

Petitioners, Phillips Manufacturing & Tower Company and Sixarp, LLC, respectfully moved a panel of this Court for an emergency stay of the Vaccine Mandate on November 5, 2021. Since that motion, the Fifth Circuit has granted a stay of the Vaccine Mandate’s effective date. *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.*, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021). On

November 16, all petitions challenging the Vaccine Mandate were transferred to this Court pursuant to 28 U.S.C. §2112. For the reasons that follow, this Court should grant initial en banc review to the challenges to the Vaccine Mandate.

STATEMENT

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

OSHA has sparingly used its extraordinary power to promulgate emergency temporary standards. Indeed, between the OSH Act’s enactment in 1971 and 1983, OSHA issued only nine ETS Rules. And of those nine, six were challenged. And of those six, only one survived judicial review. *See* Cong. Research Serv., *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*,

R46288, at 27 (Sept. 13, 2021). And even the one ETS to survive judicial review was immediately stayed to allow for full stay motion briefing. *See Vistrion v. OSHA*, No. 78-3026, 6 OSHC 1483 (6th Cir. Mar. 28, 1978). Anticipating heightened judicial scrutiny,¹ OSHA did not issue another ETS until July 2021, when it sought to impose various COVID-related requirements on the healthcare industry. 86 Fed. Reg. 32376 (June 21, 2021). Notably, this ETS did not require vaccination and instead addressed working-condition requirements such as personal protective equipment.

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

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

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

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

Phillips Manufacturing & Tower Company manufactures welded steel tube and has 104 employees. *See* Affidavit of Angela R. Phillips, Ex. A ¶4. Phillips is thus directly regulated by the ETS. Moreover, Phillips has invested in antibody testing for its workforce to determine whether they have natural immunity. *Id.* ¶6. Those results

indicated that 44 employees tested positive for COVID-19 antibodies. *Id.* ¶6. And most of the company's workers are necessarily separated in the manufacturing process. Management has further encouraged 6-foot social distancing since the COVID-19 pandemic began. *Id.* ¶7.

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

Petitioner Sixarp is a full-service contract packaging company specializing in secondary packaging operations for a number of industries. Declaration of Rick King, Ex. B ¶1. Like Phillips, Sixarp has been following the promulgation of the Vaccine

Mandate and has studied the Mandate's effects on its business. *Id.* ¶3. Sixarp employs more than 600 people and would not otherwise impose a vaccine mandate or testing requirement but for the Vaccine Mandate. *Id.* ¶¶4, 5. At least 60 Sixarp employees have had COVID-19 and thus have natural immunity. *Id.* ¶7. Additionally, like Phillips, Sixarp has over 30 open positions that it is struggling to fill. *Id.* ¶8.

REASONS FOR GRANTING EN BANC REVIEW

The Court should grant initial en banc review for two reasons. Fed. R. App. P. 35.

I. The Vaccine Mandate is of Exceptional Importance.

OSHA has issued one of the most significant rules in American history without authorization from Congress and in contravention of the Constitution. The Vaccine Mandate is one of the most far-reaching and invasive rules ever promulgated by the Federal Government. It fundamentally alters federal-state relations and pushes Congress's authority beyond its outer limits. Yet OSHA can cite to no clear statutory authorization for the Mandate. The only statute OSHA does cite for authority, §655(c)—a workplace safety provision—contains no explicit authority to mandate vaccination for an extensive portion of the American people. Indeed, the Supreme Court and this Circuit have just recently rejected a substantively indistinguishable attempt to rely on ambiguous-at-best statutory authority to impose a nationwide eviction moratorium to stop the spread of COVID-19.

The validity of the Vaccine Mandate is of enormous constitutional and public

importance. As the Fifth Circuit recognized, if OSHA’s interpretation of the OSH Act is upheld, there is no limit to the federal government’s authority in pandemics. *See BST Holdings*, 2021 WL 5279381, at *8 (“[C]oncerns over separation of powers principles cast doubt over the Mandate’s assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation.”). This case raises fundamental questions about the relationship between citizen and the government, between the branches of the federal government, and between the federal government and the States. Additionally, the Mandate reaches *all* private business in *all* sectors of the economy with 100 or more employees. Moreover, because the Mandate is effective immediately, it threatens to impose substantial damage across the entire American economy. The Vaccine Mandate is thus a decision of “vast ‘economic and political significance,’” *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014), that warrants immediate en banc review, *cf. BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.*, No. 21-60845, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021) (“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.”).

Because the Vaccine Mandate raises questions of exceptional importance, initial en banc review is warranted. *See Fed. R. App. P. 35(b)(1)(A)*.

II. The Vaccine Mandate Conflicts with Supreme Court and Sixth Circuit Holdings.

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

The Vaccine Mandate is directly at odds with that holding. The Vaccine Mandate is an even broader measure than the Eviction Moratorium, because it potentially reaches every working-age American who is currently or could at some point work for a company with 100 employees, while the Moratorium affected only landlords and tenants in existing landlord-tenant relationships. And the OSH Act provides a far thinner reed for the Vaccine Mandate than the PHSA did for the Moratorium. The OSH Act speaks of toxic agents and potentially harmful substances, things that are tied to workplace safety. But the PHSA specifically authorized CDC to address "the

introduction, transmission, or spread of communicable diseases,” which unmistakably includes COVID-19. Even more so than CDC’s interpretation of the PHSA, OSHA’s “read[ing] of §[655(c)] would give [OSHA] a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside [OSHA’s] reach.” 2021 WL 3783142, at *3. As in *Alabama Association of Realtors*, the government has “identified no limit in §[655(c)] beyond the requirement that [OSHA] deem a measure ‘necessary.’” *Id.* And like CDC’s Eviction Moratorium, OSHA’s “claim of expansive authority under §[655(c)] is unprecedented.” *Id.* at *4. It takes more than the “wafer-thin reed” of the term “necessary” to authorize one of the most significant governmental actions in American history. *Id.*

The Vaccine Mandate also conflicts with this Court’s holding in *Tiger Lily*. There, the court also relied on the major questions doctrine to determine that the Eviction Moratorium was unlawful. In focusing on the statutory terms “necessary” and “other measures,” this Court concluded that this “broadly worded statute” did not “supersede state landlord-tenant law” because, broad as these phrases are, “Congress must ‘enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power.’” *Tiger Lily, LLC*, 5 F.4th at 671. Moreover, like the Supreme Court, this Court noted that CDC’s interpretation would authorize “the CDC [to] do anything it can conceive of to prevent the spread of disease.” *Id.* at 672. So too here. And as with the Eviction Moratorium, “[s]uch unfettered power would likely require greater guidance than” the analogous necessity standard of §655(c). *Id.*

Alabama Association of Realtors and *Tiger Lily* are indistinguishable from this case. A few simple points illustrate how those decisions foreclose OSHA's interpretation of the OSH Act to authorize the Vaccine Mandate. First, the Vaccine Mandate—a positive injunction—impacts more individuals and businesses and is more intrusive on State power and individual liberty than the Eviction Moratorium—a negative prohibition affecting a subset of the population in landlord-tenant relationships. Second, the Eviction Moratorium was focused on one industry, while the Vaccine Mandate impacts *all American industries*. Third, both cases are fundamentally about the term “necessary” and §655(c) of the OSH Act provides far less clear authority to OSHA to address COVID-19 than §361(a), which specifically addresses communicable diseases, provided to CDC. Fourth, OSHA, like CDC, identifies no limiting principle whatsoever. *See Ala. Ass'n of Realtors*, 2021 WL 3783142, at *3 (“It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in §361(a) beyond the requirement that the CDC deem a measure ‘necessary.’ 42 U.S.C. §264(a); 42 C.F.R. §70.2. Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?”).

If Congress wishes to authorize the President to implement a Vaccine Mandate—and test the limits of the Executive's power under the nondelegation doctrine and the Federal Government's power under the Commerce Clause and Tenth

Amendment—it must do so clearly. *See Ala. Ass’n of Realtors*, 2021 WL 3783142, at *3; *Tiger Lily, LLC*, 5 F.4th at 671; *see also Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172-73 (“Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”); *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”). Just as the statutes at issue in *Alabama Association of Realtors* and *Tiger Lily*, Section 655(c)’s ambiguous-at-best authority does not come close to providing the absolutely clear authorization needed to displace “the background assumption that Congress normally preserves ‘the constitutional balance between the National Government and the States.’” *Bond v. United States*, 572 U.S. 844, 862 (2014).

Because the Vaccine Mandate directly contravenes the holdings of the Supreme Court and Sixth Circuit, initial en banc review is warranted. Fed. R. App. P. 35(b)(1)(B).

CONCLUSION

The Court should grant the petition for initial hearing en banc.

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 SERVICE

I hereby certify that on November 17, 2021, I caused the foregoing Motion For Initial En Ban Hearing 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