Nos. 21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103
MCP No. 165

In the United States Court of Appeals
for the Sixth Circuit

IN RE: OSHA RULE ON
COVID-19 VACCINATION
AND TESTING, 86 FED. REG. 61402

Brief *Amicus Curiae* of the New Civil Liberties Alliance in Opposition to Respondents' Motion to Dissolve Stay

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1. *amicus curiae* New Civil Liberties Alliance states that it is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF INTEREST

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization founded by Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power and conditions imposed on spending as another means of legislating outside proper constitutional channels.[1] NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing *amicus curiae* briefs, and petitioning for a redress of grievances in other ways. Although Americans still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent. This unconstitutional state within the United States is the focus of NCLA's concern.

The "civil liberties" of the organization's name include rights at least as old as the United States Constitution itself, such as the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these selfsame rights are also very contemporary—and in

[1] No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief. Respondents consent to the filing of this *amicus* brief. It was impractical to seek consent from all Petitioners in this case due to their large number, the difficulty of ascertaining the identity of counsel for all Petitioners, and the limited time to file this brief.

dire need of renewed vindication—precisely because Congress, administrative agencies like OSHA, and even sometimes the courts have neglected them for so long.

In this case, NCLA takes issue with OSHA's sweeping attempt to impose an invasive vaccinate-or-test requirement on over half the nation's workforce as an unconstitutional exercise of legislative power vested solely in Congress. NCLA filed an *amicus* brief before the Fifth Circuit urging that court to stay enforcement of the ETS on nondelegation grounds. The Fifth Circuit issued a stay, which is the subject of Respondents' emergency motion. *See BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021). NCLA also represent clients before the United States District Courts for the Western District of Michigan and the Southern District of Texas challenging similar government-imposed vaccine mandates as a condition of employment. *See Norris*, *et al. v. Stanley, et al.*, No. 1:21-cv-00756, Dkt. 55 (11/05/21); *Rodden*, *et al. v. Fauci, et al.,* No. 3:21-cv-00317, Dkt. 3 (11/05/21).

SUMMARY OF THE ARGUMENT

The Emergency Temporary Standard ("ETS")[2] issued by the Occupational Safety and Health Administration ("OSHA") on November 5, 2021, is a damaging and unconstitutional usurpation of legislative power vested in Congress. While an agency may fill in details using intelligible and administrable principles supplied by legislation, only Congress may decide major questions of economic and political significance. The breadth and invasiveness of the ETS marks it as a regulation of vast economic and political significance. There is no need to determine whether Congress supplied an intelligible principle to guide OSHA's actions because Congress never explicitly and specifically delegated vaccine-mandate authority to OSHA in the first place.

STANDARD OF REVIEW

While 28 U.S.C. § 2112(a)(4) authorizes this Court to modify or revoke the Fifth Circuit's stay, the standard of review is not *de novo*, as the Government suggests. *See* Resp. Mot. at 9. Before the case was transferred to this Court, the Fifth Circuit stayed OSHA's enforcement of the ETS because it determined the Occupational Safety and Health Act (the "Act") "was not—and likely could not be, under … nondelegation doctrine—intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public

[2] Dep't of Labor, *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

health affecting every member of society in the profoundest of ways." *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 611 (5th Cir. 2021); *see also id.* at *9 (underscoring major questions doctrine as "one reason why these challenges to OSHA's unprecedented mandate are virtually certain to succeed.") (Duncan J,. concurring). Where, as here, a prior "appellate panel considering the preliminary injunction has issued a fully considered appellate ruling on an issue of law … then that opinion becomes the law of the case," which may not be revisited absent "extraordinary reasons." *Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021) (Cleaned up).

Although a "court has the power to revisit prior decisions of … a coordinate court in any circumstance, … as a rule courts should be loath[] to do so in the absence of extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (affirming appellate court's revisiting of a "clearly wrong" decision after case was transferred from a different appellate court). Thus, "issues, once decided, should be reopened only in limited circumstances, *e.g.*, where there is substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir.1994). The Fifth Circuit applies the same law-of-the-case standard to cases transferred there from this Circuit. *See, e.g.*, *McKay v. Novartis Pharms.*, 751 F.3d 694, 703 (5th Cir. 2014) (reviewing and

stating the law of the case standard in transfer of case from MDL in Sixth Circuit).[3] The law and facts are no different today than they were a month ago when the Fifth Circuit issued its stay. There are no exceptional circumstances to disturb that decision because, as explained below, OSHA's promulgation of the ETS remains an unconstitutional exercise of legislative power.

ARGUMENT

I. AN EXECUTIVE AGENCY MAY NOT WIELD LEGISLATIVE POWER VESTED IN CONGRESS

"Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 473 (2001) (cleaned up). In *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), the Supreme Court unanimously and emphatically rejected a statutory scheme that empowered the President to impose "codes of fair competition" whenever he made formal findings that the industry-proposed codes would not "promote monopolies" and that the organizations proposing such codes were "truly representative" of the affected trade or industry. *Id.* at 522–23; *see also id.* at 534 ("[T]he approval of a code by the President is conditioned on his finding that it 'will tend to effectuate the policy of this title.'"). The Court declared that Article I's Vesting Clause forbids Congress to "abdicate or to

[3] The Court should look with jaundiced eye on the Government's arguments given it moved to eliminate the stay days after the transfer of the cases to this Court, and in a voluminous over-size memorandum failed to even mention the law of the case doctrine. Few circumstances undermine the rule of law more thoroughly than the doctrine of "same facts, same law, new court, different outcome" that the Government seeks here.

transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. In the words of the Court: "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." *Id.* at 537-38.

The Supreme Court "has not overruled or even questioned its decision in the *Schechter Poultry* case" on the divestment of legislative power. Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1407 (2008). *Schechter*'s prohibition against divesting of legislative power is not only necessary to protect one branch of government from intrusion by another, but "[t]he structural principles secured by the separation of powers protect the individual as well." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 55 (2015) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). Bicameralism and presentment, for instance, ensure that the two chambers of Congress make laws that are subject to the presidential veto. Under that arrangement, lawmaking responsibilities reside in the two elected legislative bodies and in an elected president—all of whom are personally accountable to the people. "Of the three branches, Congress is the most responsive to the will of the people …. If legislators misuse this power, the people could respond, and respond swiftly." *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). "So, naturally, Congress has an incentive to insulate itself from the consequences of hard choices" by "transfer[ring] hard choices from Congress to the executive branch." *Id.*

But when Congress divests itself of its legislative power, "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say 'in the public interest'—can perhaps be excused for thinking that it is the

agency really doing the legislating." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). In effect, voters lose control over the laws that govern them, while elected officials no longer bear personal responsibility for laws. Instead, presidential appointees who are neither chosen by the public nor accountable to them become lawmakers. *See Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring) ("By shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have.").

II. THE COURT MUST BE ESPECIALLY VIGILANT IN PREVENTING OSHA FROM WIELDING LEGISLATIVE POWER AND THUS MAY NOT DEFER TO OSHA

Courts since *Schechter* have generally failed to diligently enforce the prohibition against vesting of legislative power in federal agencies, to the detriment of constitutional structure and democratic accountability. *See Ass'n of Am. Railroads*, 575 U.S. at 77 (Thomas, J., concurring) ("[I]t has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition."). One stark exception to this trend is OSHA's rulemaking authority, which courts have repeatedly interpreted to prevent that agency from exercising legislative power. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607, 646 (1980) (striking down OSHA's workplace health standard in part to avoid violation of nondelegation doctrine); *Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991) (remanding OSHA's safety standard to avoid "a serious nondelegation issue"). That is because the broad delegation of regulatory power in the Occupational

Safety and Health Act ("the Act") invites abuse of the nondelegation doctrine. In his article, *Is OSHA Unconstitutional?*, Professor Sunstein asked readers to:

> Imagine that Congress creates a federal agency to deal with a large problem, one that involves a significant part of the national economy. Suppose that Congress instructs the agency: Do what you believe is best. Act reasonably and appropriately. Adopt the legal standard that you prefer, all things considered. Suppose, finally, that these instructions lack clear contextual referents, such as previous enactments or judicial understandings, on which the agency might build.

94 Va. L. Rev. at 1407 (footnote omitted). "If the nondelegation doctrine exists, as the Supreme Court proclaims, then this hypothesized statute would seem to violate it." *Id.* (footnote omitted). Yet, "the core provision of one of the nation's most important regulatory statutes—the Occupational Safety and Health Act …—is not easy to distinguish from the hypothesized [unconstitutional] statute." *Id.*

In short, the Act on its face purports to vest OSHA with virtually standardless regulatory authority over not just a single industry but *every* industry. *See* 29 U.S.C. §§ 652(8), 655(b). It is thus unsurprising that, despite their insouciant approach toward the Vesting Clause, courts have stepped in repeatedly to prevent OSHA from exercising legislative power. In *American Petroleum*, the Supreme Court explicitly relied on *Schechter* to stop the Secretary of Labor from interpretating the Act to authorize any feasible workplace health standard that he deemed "reasonably necessary or appropriate to provide safe or healthful employment." 448 U.S. at 612, 646 (1980) (quoting 29 U.S.C. § 652(8)). Such unbounded power amounted to a "sweeping delegation of legislative power" that must be rejected. *Id.* at 646 (quoting *Schechter*, 295 U.S. at 539).

OSHA ran into another "serious nondelegation issue" in *International Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991), where it attempted to wield authority to promulgate any workplace safety standard it deemed "reasonably necessary or appropriate." Especially concerning was the breadth of OSHA's regulatory power: "As was true of the standard upset in *Schechter*, the scope of regulatory program is immense, encompassing all American enterprise." *Id.* "Cases upholding delegations governing a single industry are thus inapposite" and did not cure the nondelegation problem. *Id.* (collecting cases).

To be sure, the statutory provision authoring the ETS at issue is different from provisions authorizing the non-emergency health and safety standards in *American Petroleum* and *International Union*. In particular, 29 U.S.C. § 655(c)(1) authorizes the Secretary of Labor to promulgate an emergency temporary standard "if he determines (A) that employees are exposed to grave danger … and (B) that such emergency standard is necessary to protect employees from such danger." But this provision presents the same breadth and vagueness nondelegation risks. As in *International Union*, the breadth of the ETS "encompass[es] all American enterprise," and therefore "[c]ases upholding delegations governing a single industry are inapposite." 938 F.2d at 1317. Moreover, there are no discernible bounds on the Secretary's authority regarding what is a "grave danger" in the workplace and what protective measures are "necessary."

The Government says otherwise, asserting that "Section 655(c)(1) provides clear guidelines" by "[p]ermitting only emergency standards necessary to protect employees from grave danger of new hazards or toxic or physically harmful substances or agents." Resp. Mot. at 21. But in the same breadth, it claims "deference [is] owed to the agency's

evidence-based determination" as to what constitutes a "grave danger" and what measures are "necessary" to prevent it. *Id.* at 22; *see also id.* at 17 (claiming that "a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority") (quoting *Arlington*, 569 U.S. at 296-297).

Section 655(c)(1) cannot "provide[] clear guidelines" if OSHA has discretion to define "grave danger," "necessary" protective measures, and other statutory terms to suit whatever policy whim it fancies at a given moment. In June 2020, for instance, OSHA determined a COVID-19 emergency standard was not necessary to protect employees from a grave danger, which was apparently "entitled to considerable deference." *In re AFL-CIO*, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020). When OSHA changed its mind to promulgate an emergency standard for healthcare workers in June 2021, it determined vaccination was *insufficient* to address the grave danger. *See* Dep't of Labor, *Occupational Exposure to COVID-19; Emergency Temporary Standard*; 86 Fed. Reg. 32,376, 32,379 (June 21, 2021) ("OSHA has determined that a grave danger to healthcare and healthcare support workers remains, despite the fully-vaccinated status of some workers, and that an ETS is necessary to address this danger."). OSHA has changed its mind again and now seeks deference to its newest determination that a vaccine-mandate ETS is necessary to protect all workers (except those employed by small employers apparently) from grave danger. In short, OSHA claims "near-dictatorial power for the duration of the pandemic"—from doing nothing at all to mandating vaccination by sanction of loss of employment for over 80 million Americans. *Tiger Lily*, 5 F.4th at 672. "Such unfettered power would likely require

greater [statutory] guidance than" letting OSHA define "grave danger" and "necessary" protective measures under a deferential standard because the "degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.* (quoting *Am. Trucking*, 531 U.S. at 475).

Without searching analysis by courts, the vaguely worded authority to issue emergency standards will become the type of "sweeping delegation of legislative power" found unconstitutional in *American Petroleum*, 448 U.S. at 646. This Court must not simply defer to OSHA's factual and legal conclusions and instead should interpret 29 U.S.C. § 655(c)(1) to prevent OSHA from wielding legislative power in violation of the Vesting Clause.

III. AN AGENCY EXERCISES UNCONSTITUTIONAL LEGISLATIVE POWER WHEN IT RESOLVES 'MAJOR QUESTIONS' INSTEAD OF CONGRESS

Courts have traditionally enforced the Vesting Clause through the intelligible-principle test, which states that where Congress delegates regulatory power to an agency, it must supply "an intelligible principle to guide the [agency]'s use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). The Supreme Court is split regarding the precise parameters of that test. *Compare id.* at 2139. (Gorsuch, J., dissenting) ("'intelligible principle' was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details") *with id.* at 2131 (Alito, J., concurring) (recognizing the Court has in the past favored more "capacious standards" while expressing willingness "to reconsider the approach … taken for the past 84 years").

"When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines." *Id.* at 2139. (Gorsuch, J., dissenting). In particular, the Supreme Court has endorsed applying "the major question doctrine in service of the constitutional rule that Congress may not divest itself of legislative powers by transferring that power to an executive agency." *Id.* Under that doctrine, an agency lacks authority to resolve questions of deep "economic and political significance" where Congress has not provided a clear statement delegating that authority. *See FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000). While sometimes framed as a question of Congressional intent, the crux is really divesting: a clear statement is needed to authorize agency regulation of "major questions" not simply to evince intent but also because such a statement would contain administrable (and thus judicially enforceable) guidelines to prevent any delegation from crossing into unconstitutional divesting of legislative power.

Justice Kavanaugh's statement respecting the denial of certiorari in *Paul v. United States*, 140 S. Ct. 342 (2019) further approved of using the "major questions" doctrine to enforce the Vesting Clause. Under that approach, "major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch." *Id.* (citing *Am. Petroleum*, 448 U.S. at 685-86 (Rehnquist, J., concurring in judgment)). The intelligible-principle inquiry is

unnecessary where, as here, there is no explicit delegation of authority to decide major questions in the first place.

The "major questions" doctrine is particularly useful in resolving delegation questions raised by an agency's sudden "discovery" of new regulatory authority when authorizing statutory text has remained unchanged for decades. The Supreme Court applied this doctrine in *Utility Air Regulatory Group v. EPA* to reject the agency's greenhouse gas emissions standard as "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 573 U.S. 302, 324 (2014). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.*

IV. OSHA LACKS AUTHORITY TO ISSUE THE ETS UNDER THE 'MAJOR QUESTIONS' DOCTRINE

"Given [its] economic and political significance," Congress could not have delegated to OSHA unbounded powers to impose a vaccine mandate without a clear statement providing discernible guidelines about how to exercise that power. *Brown & Williamson*, 529 U.S. at 147. Because no such clear statement from Congress exists, the

ETS falls outside OSHA's regulatory authority. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curium).

The ETS is unprecedently broad and invasive. It is expected to force 84 million employees nationwide[4]—over half the U.S. workforce[5]—to make a "choice between their job(s) and their jab(s)." *BST Holdings*, 17 F.4th at 618. For OSHA to exercise regulatory authority over such a major policy question of great economic and political importance, Congress must have explicitly and specifically authorized it to do so. Nothing in the Act, however, suggests that OSHA has authority to issue the ETS, which stands completely outside of OSHA's expertise in work-related health and safety. In the half-century since Congress passed the Act, OSHA has never claimed authority to promulgate any type of vaccine mandate, let alone a nationwide mandate that has no specific connection to workplace risks. Even federal agencies specifically tasked with combating infectious diseases have never made such an attempt. The only vaccination-related rule OSHA has ever promulgated, the Bloodborne Pathogens standard, required employers to merely *offer* Hepatitis B vaccination to workers who faced *workplace* exposure to bloodborne diseases. *See* Dep't of Labor, *Occupational Exposure to Bloodbourne Pathogens*, 54 Fed. Reg. 23,042 (May 30, 1989). In explaining why Hepatitis B vaccination

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[4] Dep't of Labor Issues Emergency Temporary Standard to Protect Workers from Coronavirus, Nov. 4, 2021, available at https://www.dol.gov/newsroom/releases/osha/osha20211104 (last visited Dec. 7, 2021).

[5] Bureau of Labor Statistics, Employment status of civilian population by sex and age, https://www.bls.gov/news.release/empsit.t01.htm (last modified Dec. 6, 2021) (estimating total U.S. labor force at 162 million).

would not be mandatory, OSHA said: "Health in general is an intensely personal matter .... OSHA prefers to encourage rather than try to force by governmental coercion, employee cooperation in [a] vaccination program." *Id.* at 23,045.

Whereas OSHA's prior standards have concerned risks at workplaces because of work, the ETS attempts to regulate a risk that has no special connection with work.[6] This is not, for instance, a requirement that employers install certain ventilation in the workplace. The ETS does not address certain types of workplaces and ameliorate their dangers. Instead, it favors certain kinds of workers—vaccinated ones. OSHA is tasked with regulating the workplace, not discriminating between categories of workers. The President has openly admitted that the ETS has nothing to do with workplace risks. Rather, it was promulgated "to reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements—these requirements will become dominant in the workplace."[7]

Against this backdrop, the Court must look askance at OSHA's claim to having discovered within a "long-extant statute an unheralded power to regulate a significant portion of the American economy." *Utility Air Regulatory Group*, 573 U.S. at 324. The Supreme Court recently invoked the "major questions" doctrine in the context of COVID-19 policies to lift a stay on a lower court order that had set aside the nationwide

[6] The preamble to the ETS conceded that "COVID-19 is not a uniquely work-related hazard." 86 Fed. Reg. 61,407.

[7] The White House, *Path out of the Pandemic*, https://www.whitehouse.gov/covidplan/ (last visited Dec. 7, 2021).

eviction moratorium imposed by the Centers for Disease Control and Prevention ("CDC"). *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. The CDC claimed to have discovered never-before-exercised authority to impose a nationwide eviction moratorium within a decades-old public health statute that delegated power to implement measures like fumigation and pest extermination. *Id.* A majority of Justices initially "agreed … that the CDC's moratorium exceeded its statutory authority," but did not issue a stay "because the CDC planned to end the moratorium in only a few weeks." *Id.* at 2488. "The moratorium expired on July 31, 2021. Three days later, the CDC reimposed it." *id.*

According to the President, he extended an eviction moratorium that he knew was "not likely to pass constitutional muster" because "at a minimum, by the time it gets litigated, it will probably give some additional time … to people who are, in fact, behind in the rent."[8] In other words, the Government attempted to use litigation to extend the duration of what it knew to be an unconstitutional regulation. The Supreme Court reviewed the moratorium a second time and struck it down, explaining that it

[8] The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, Aug. 3, 2021, available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/ (last visited Dec. 7, 2021).

"expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

The same logic obtains here. The President and his advisors have repeatedly acknowledged they lack authority to impose a nationwide vaccine mandate.[9] It was only when the President found his "patience is wearing thin" with the pace at which Americans were vaccinating[10] that the White House discovered OSHA's regulatory authority as the "ultimate work-around for the Federal [government] to require vaccinations."[11] But "Congress ... does not ... hide elephants in mouseholes." *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1349 (2021) (quoting *Am.*

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[9] *See, e.g.,* Julia Manchester, *Biden: Coronavirus vaccine should not be mandatory*, The Hill, Dec. 4, 2020 (quoting Joe Biden saying "I don't think [the vaccine] should be mandatory. I wouldn't demand it to be mandatory."), https://thehill.com/homenews/campaign/528834-biden-coronavirus-vaccine-should-not-be-mandatory (last visited Dec. 7, 2021); The White House, Press Briefing by Press Secretary Jen Psaki, July 23, 2021 (declaring, in response to a question regarding a vaccine mandate, "that's not the role of the federal government"), https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/ (last visited Dec. 7, 2021); *U.S. CDC Chief Says there will be no federal mandate on COVID-19 vaccine*, Reuters, Jul. 31, 2021, https://www.reuters.com/world/us/biden-administration-weighing-federal-mandate-covid-19-vaccine-cdc-director-2021-07-30/ (last visited Dec. 7, 2021).

[10] The White House, Remarks by President Biden on Fighting the COVID-19 Pandemic, Sep. 9, 2021, available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/ (last visited Dec. 7, 2021).

[11] Callie Patteson, Biden Chief Apparently Admits Vaccine Mandate 'Ultimate Work-Around,' The New York Post (Sept. 10, 2021), https://nypost.com/2021/09/10/ronald-klain-retweets-vaccine-mandate-ultimate-work-around/ (last visited Dec. 7, 2021).

Trucking, 531 U.S. at 468). Nor does it secrete within a decades-old statute concerning workplace hazards the never-before-exercised "work-around" to force employees nationwide to vaccinate against an infectious disease that is not primarily transmitted in the workplace. Because Congress never explicitly and specifically delegated such authority, the ETS is an unconstitutional exercise of legislative power. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

The Government attempts here to repeat the tactic it employed in the eviction moratorium context, *i.e.*, use litigation to extend the duration of what it knows to be an unconstitutional regulation. This Court should follow the old adage "fool me once, shame on you, fool me twice shame on me" and maintain the stay so as to forestall this anti-constitutional tactic now and in the future. Even if the Government believed such unlawful tactics were justified in pursuit of what it deems a noble purpose, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585-586 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization)). As such, the Fifth Circuit's stay should stand.

CONCLUSION

For the foregoing reasons, the Court should maintain the Fifth Circuit's stay against enforcement of the ETS.

Dated: December 7, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this Brief contains 4,944 words, excluding the parts of the brief exempted by Rule 32(f), and within the word limit of 6,500 under Rule 29(a)(5). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

/s/ Sheng Li

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished via email using the appellate CM/ECF system.

/s/ Sheng Li