

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

**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*

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**MOTION BY ALABAMA, ALASKA, ARIZONA, ARKANSAS,  
FLORIDA GEORGIA, IDAHO, INDIANA, IOWA, KANSAS,  
KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI,  
MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH  
DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH  
DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA  
AND WYOMING TO COMPEL PRODUCTION OF A  
COMPLETE ADMINISTRATIVE RECORD**

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## INTRODUCTION

To “permit meaningful judicial review, an agency must ‘disclose the basis’ of its action.” *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962)). The bases for agency actions ordinarily appear in an administrative record. For that reason, administrative agencies must produce an administrative record in any challenge to administrative actions. *Id.*

This case, which presents a challenge to OSHA’s “Vaccine Mandate,” *see COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021), is subject to the same rules. But OSHA has not yet provided the full administrative record. And it has suggested that it never will. OSHA seems to have taken the position that it will exclude from the administrative record all evidence regarding pretextual motives. Mot. to Dissolve Stay, Doc. 69 at 39; Certified List of Record, Doc. 146. That matters because the question of what motivated OSHA to issue the Vaccine Mandate is one of the central issues in this case. The petitioners contend, and the Fifth Circuit concluded, that OSHA’s “true purpose” in promulgating the Vaccine Mandate was “not to enhance workplace safety,” but instead to address President Biden’s desire to boost vaccination rates. *See BST Holdings, LLC v. OSHA*, —F.4th —, 2021 WL 5279381, at \*5, \*7 (5th Cir. Nov. 12, 2021).

Because that is not the basis on which OSHA claimed to be acting, and because pretextual agency actions are illegal, *Dep't of Commerce*, 139 S. Ct. at 2573, much turns on the question of what motivated OSHA to promulgate the Mandate.

Unless this Court acts, OSHA will produce an incomplete administrative record that prevents this Court from reviewing the issue of pretext. To prevent that, this Court should order OSHA to include certain specific materials in the administrative record. Specifically, OSHA should be directed to submit: (1) the internal OSHA memoranda or other documents that initiated the agency's emergency-temporary-standard rulemaking process; (2) any communications from the White House regarding the Vaccine Mandate; and (3) any *ex parte* communications with private parties about the Vaccine Mandate.

## BACKGROUND

For almost a year, President Biden and his Administration insisted (correctly) that the federal government had no authority to mandate COVID-19 vaccinations. Steven Nelson, *Joe Biden says he won't mandate getting COVID-19 vaccine, wearing masks*, N.Y. Post (Dec. 4, 2020), <https://perma.cc/AH5B-KFEW>; *Press Briefing by Press Secretary Jen Psaki*, The White House (July 23, 2021), <https://perma.cc/8W9B-F6K2>.

That changed, abruptly, on September 9. On that date, President Biden announced that his “patience” with unvaccinated Americans was “wearing thin.” Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), <https://perma.cc/YJW3-K3AX>. Notwithstanding the President’s previous and consistent disavowal of federal power to mandate vaccinations, the Biden Administration publicly announced that OSHA could enact a vaccine mandate as a workplace safety rule. And President Biden explained that OSHA would issue the rule because he “asked” it to. *Remarks by President Biden on the Importance of COVID-19 Vaccine Requirements* (Oct. 7, 2021), <https://perma.cc/QR4C-PJ98>.

Behind the scenes, however, the White House knew the OSHA rule was a stalking horse to accomplish a different, unstated goal: widespread public vaccination. White House Chief of Staff Ron Klain confirmed as much when he endorsed a commentator’s view that “OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.” Callie Patteson, *Biden chief apparently admits vaccine mandate ‘ultimate work-around’*, N.Y. Post (Sept. 10, 2021), <https://perma.cc/EDL7-DTZP>.

On November 5, 2021, OSHA promulgated the Vaccine Mandate without any recognition—much less reasonable discussion—of President Biden’s stated objective to get more Americans vaccinated, Chief of Staff Ron Klain’s “work-around”

endorsement, or any other material indicating the White House’s involvement in this unique rulemaking.

Multiple groups of petitioners filed petitions for review of the Vaccine Mandate. Many sought to stay the Vaccine Mandate under Federal Rule of Appellate Procedure 18. And those groups proffered the pretextual nature of the Vaccine Mandate as one basis for holding the Mandate illegal. *See, e.g.*, Mot. for Stay of Emergency Temporary Standard at 18–19, *BST Holdings v. OSHA*, No. 21-60845, Doc. 005160854105 (5th Cir. Nov. 7, 2021). The Fifth Circuit, in its decision staying the Vaccine Mandate’s enforcement, concluded that the Mandate likely *was* pretextual. OSHA’s “pretextual basis” for acting, it said, bore the “hallmarks of unlawful agency action[.]” *BST Holdings*, 2021 WL 5279381, at \*5. In part on that basis, the Fifth Circuit stayed the OSHA mandate. *Id.* at \*9.

On November 16, all petitions challenging the Vaccine Mandate were consolidated in this Court. A week later, OSHA moved to dissolve the Fifth Circuit’s stay. OSHA recognized in that motion that one of the bases for the stay is the Fifth Circuit’s finding that the Vaccine Mandate’s rationale was pretextual. *See* Mot. to Dissolve at 7, 39. But OSHA contended that material showing pretext belongs “outside” the “administrative record” and that the Court’s review should not take that material into account. *See id.* at 39.

## ARGUMENT

The validity of the Vaccine Mandate must be determined based on the entire administrative record. 29 U.S.C. §655(f). An administrative record must include all material the agency considered either “directly or indirectly.” *In re United States Dep’t of Def. & United States Env’t Prot. Agency Final Rule: Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37,054 (June 29, 2015), No. 15-3751, 2016 WL 5845712, at \*1 (6th Cir. Oct. 4, 2016) (*per curiam*). And agencies cannot conceal adverse material from the record. “Private parties and reviewing courts alike have a strong interest in fully knowing the basis and circumstances of an agency’s decision. The process by which the decision has been reached is often mysterious enough without the agency’s maintaining unnecessary secrecy.” *Nat’l Courier Ass’n v. Bd. of Governors of Fed. Rsrv. Sys*, 516 F.2d 1229, 1241 (D.C. Cir. 1975).

This Court has “wide latitude in correcting omissions from the agency record under review.” *Consumers Union of U.S. v. Fed. Power Comm’n*, 510 F.2d 656, 661 (D.C. Cir. 1974). And the Court may preemptively “designate” specific material “to be included” in the record. 28 U.S.C. §2112(b)(3). The States set forth below three discrete categories of material that must be included in the administrative record but that OSHA has apparently decided to omit: (1) internal documentation memorializing initiation of the rulemaking; (2) communications with the White House about

the Vaccine Mandate, *see, e.g., Sierra Club v. Costle*, 657 F.2d 298, 387 (D.C. Cir. 1981) (referencing White House material included in administrative record); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1341 (D.C. Cir. 1985) (same); and (3) *ex parte* communications with private parties about the Vaccine Mandate. This Court should order OSHA to include those materials to ensure a complete record for judicial review.

To be clear, the States' present request concerns only material that belongs in a complete administrative record—material the agency considered either directly or indirectly. The States are not, at this time, seeking “supplementation” of the record. In other words, they are not asking for inclusion of “extra-record” material. *See, e.g., Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018). When evaluating motions to supplement, courts require movants to make a stronger showing before forcing the agency to add documents to the record (or to be subject to other discovery mechanisms, such as depositions). *Id.*; *see also Dep't of Commerce*, 139 S. Ct. at 2574.

**I. The Court should order OSHA to include all communications documenting the commencement of the Vaccine Mandate rulemaking**

A complete administrative record documents why the agency initiated the regulatory process under review in the first place. And that includes, where relevant, all communications pertaining to the initiation of the agency action in question. Consider, for example, *Department of Commerce*, which concerned a challenge to the

Secretary of Commerce’s decision to reinstate a question about citizenship on the census questionnaire. *See* 139 S. Ct. 2551. There, the government conceded that a full administrative record included material from one agency (DOJ) to another (Commerce) “requesting” the commencement of the specific regulatory action. *See id.* at 2564. It also agreed that the record should include material documenting when the Commerce Secretary “beg[a]n considering whether to add the citizenship question,” in addition to multiple internal “emails and other records” documenting how Commerce “explor[ed] the possibility of” taking this regulatory action. *Id.* That material ultimately proved decisive, and provided the grounds for the Supreme Court’s order concluding that Commerce’s decisionmaking process was invalid. *Id.* at 2576.

Here, a complete administrative record must include all communications within OSHA, *and* all communications between OSHA and others, regarding the decision to begin the process for announcing an emergency temporary standard. For one thing, as already discussed, publicly available evidence indicates pretextual motives—it suggests that OSHA promulgated the standard not because of a genuine concern about workplace safety, but rather because of a more general desire to get more Americans vaccinated. What is more, OSHA appears to have conspicuously structured the Vaccine Mandate rulemaking so as to avoid addressing the chronology



of events leading to its issuance. Specifically, OSHA issued the Vaccine Mandate as an “Emergency Temporary Standard” under 29 U.S.C. §655(c). OSHA emergency temporary standards typically include a section titled “Events Leading to the ETS” that describe how *very* recent events set the agency’s emergency action in motion.

For example:

- In May 1977 OSHA adopted an emergency temporary standard for benzene based on “data” it had obtained “in the last few weeks” about how benzene “conclusive[ly]” causes “leukemia.” *Emergency Temporary Standard for Occupational Exposure to Benzene*, 42 Fed. Reg. 22,516, 22,516 (May 3, 1977);
- In September 1977 OSHA adopted an emergency temporary standard for 1,2 Dibromo-3-chloropropane based on an August petition, backed by July findings, that the chemical was rendering workers “sterile.” *Emergency Temporary Standard for Occupational Exposure to 1,2 Dibromo-3-chloropropane*, 42 Fed. Reg. 45,536, 45,536 (Sept. 9, 1977); and
- In January 1978 OSHA adopted an emergency temporary standard for acrylonitrile based on a December 1977 report indicating that “the chemical must be viewed as a proven animal carcinogen and suspect human carcinogen.” *Emergency Temporary Standard for Occupational Exposure to Acrylonitrile*, 43 Fed. Reg. 2586, 2586–87 (Jan. 17, 1978).

By contrast, the Vaccine Mandate is not pinned to a recent event at all (it omits President Biden’s September 9 instruction). Instead, the agency’s bottom-line explanation is that vaccines had come to market: “In short, at the present time, workers are becoming sick and dying unnecessarily as a result of occupational exposures, when there is a simple and effective measure, vaccination, that can largely prevent those deaths and illnesses.” 86 Fed. Reg. at 61,432. That, of course, is not a rational

explanation at all: the Vaccine Mandate was promulgated on November 5, 2021, but vaccines had been available to the public for nearly a *year* at that point. More fundamentally, this explanation omits any discussion of factors (like the President’s impatience or his instruction) that clearly played at least some role in the initiation of rule-making.

The Vaccine Mandate’s impoverished discussion of the initiation process stands in stark contrast to the discussion appearing in the only other emergency standard that OSHA has issued in the last 38 years. In June 2021, OSHA promulgated a COVID-19 emergency temporary standard specific to healthcare workers (with no vaccine mandate). *See Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 Fed. Reg. 32,376 (June 21, 2021). The agency candidly admitted there that President Biden “directed OSHA” to consider whether that emergency temporary standard should issue. *Id.* at 32,413. The Vaccine Mandate’s failure to acknowledge President Biden’s instruction, or any other event that could have plausibly triggered—after so long a delay—the rulemaking at issue here, strongly suggests that OSHA intends to conceal this material from the administrative record.

## **II. The Court should order OSHA to include all communications between the agency and the White House concerning the Vaccine Mandate**

The Court should order OSHA to include in the administrative record all communications with the White House concerning the Vaccine Mandate.

Again, administrative agencies must disclose the bases for their actions. *Dep't of Commerce*, 139 S. Ct. at 2573. And a pretextual basis for a rule is fatal: “explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process” renders agency action invalid. *Id.* at 2575. Here, OSHA’s stated rationale for the Vaccine Mandate is to improve workplace safety. 86 Fed. Reg. at 61,429, 61,507. But in light of President Biden’s public statements and Chief of Staff Ron Klain’s endorsement of the notion that the Vaccine Mandate was a “work-around,” OSHA’s stated basis for its action is, at the very least, dubious.

OSHA claims in its motion to dissolve, *see* Motion to Dissolve at 39, that OSHA’s stated bases are not pretextual and that the President and Chief of Staff’s statements are irrelevant. That argument is irreconcilable with *Department of Commerce*, 139 S. Ct. at 2573–76. For the States to fairly challenge OSHA’s claims and for the Court to fairly evaluate the government’s defense, the Court should have before it all communications between OSHA and the White House regarding the Vaccine Mandate. Those communications might reveal that what OSHA is saying about pretext is true. Or they might contain a smoking gun, such as admissions by OSHA to the White House that it was moving forward with the Vaccine Mandate only because President Biden expressly instructed it to, and not, for example, because the

agency thought the Mandate necessary to protect workplace safety. Those communications might also explain how the agency developed its pretextual “workplace safety” rationale notwithstanding that President Biden’s public statements indicate he was interested in mass public vaccination irrespective of whether it bore any relation to workplace safety. Unless these communications are included in the record, their importance cannot be assessed.

### **III. The Court should order OSHA to include *ex parte* communications with private parties regarding the Vaccine Mandate**

In addition, this Court should compel OSHA to include in the administrative record any *ex parte* communications with private parties regarding the Vaccine Mandate.

OSHA’s promulgation of an emergency temporary standard occurs under an unusual form of administrative rulemaking: the agency is statutorily exempt from notice and comment. *See* 29 U.S.C. §655(c). That means that interested parties had no formal mechanism to express their views to OSHA. But that does not mean OSHA had no communications with private parties. Sometimes agencies speak with private parties about their actions off the record, and when that happens courts can require them to include material from the discussions in the administrative record. *See United States Line v. Fed. Mar. Comm’n*, 584 F.2d 519, 541 (D.C. Cir. 1978) (undisclosed “[e]x parte contacts ... foreclose effective judicial review”).

Here, it would appear that OSHA or its proxies engaged in at least some *ex parte* communications with private parties. For example, public reports reveal that the White House arranged for meetings with “pro-business” and “worker advocacy” groups to discuss the Mandate. Andrew Harris, *White House Sets Vaccine Meetings with Business Groups*, Bloomberg Law (Oct. 14, 2021), <https://perma.cc/W4B3-3747>. Because such communications would directly or indirectly bear on the agency’s decisionmaking process—there would be no reason to arrange or allow for meetings otherwise—the Court should order that any such communications be included in the administrative record.

### CONCLUSION

The Court should order OSHA to include in the administrative record the categories of material set forth above.

November 30, 2021

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## CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume requirements and contains 2,588 words. *See* Fed. R. App. P. 27(d)(2)(A).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2021, the foregoing motion was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers

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