Nos. 21-7000 (lead), 21-4027/4028/4031/4032/4033, 21-4080, 21-4091/4090, 21-4093/4088/4101/4096, 21-4097/4102/4083

MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61402

REPLY IN SUPPORT OF MOTION TO COMPEL A COMPLETE ADMINISTRATIVE RECORD FILED 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

REPLY

OSHA's Vaccine Mandate is unprecedented. Never before has the United States government claimed that a federal agency has jurisdiction to dictate the private healthcare-treatment decisions of every working American. In assessing the legality of that unprecedented assertion of executive power, this Court, the parties, and indeed the country are entitled to know the real reason for OSHA's decision to issue the Mandate. "The reasoned explanation requirement of administrative law … is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019). The States moved this Court to order a complete record that would allow the Court and parties to scrutinize this most-important agency decision. OSHA, in resisting that motion, seeks to undermine the enterprise. It should not be allowed to do so.

I. The presumption of regularity has been rebutted.

OSHA insists, correctly, that an "agency's designation of the Administrative Record is entitled to a presumption of administrative regularity." Opposition to Motions to Compel ("Opp.") at 9, Doc.372 (quoting *Transp. Div. of Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Fed. R.R. Admin.*, 10 F.4th 869, 878 (D.C. Cir.

2021)). "But a defendant agency cannot have sole, unreviewable authority to decide which documents properly comprise the administrative record and which do not." *New York v. ICE*, 438 F. Supp. 3d 216, 217 (S.D.N.Y. 2020). OSHA faults the States for allegedly failing "to support their claim" that a "hypothetical set" of internal agency documents exist or belong "in the administrative record." Opp.9–10. Combining this with the presumption of regularity, OSHA argues that the States are not entitled to relief.

The Court should reject this argument. Parties challenging administrative actions may, with "clear evidence" of incompleteness, rebut the presumption of regularity that applies to an agency's preparation of the administrative record. *Blanca Tel. Co. v. FCC*, 991 F.3d 1097, 1120 (10th Cir. 2021). The States meet that standard.

OSHA's brief conspicuously includes no concrete denial of the sought-after records' existence. If there were no such records, OSHA would have every incentive to say so. So why does the brief make no such claim? Because the records exist.

Allowing OSHA to defeat the States' request without even denying the existence of the records in question would transform "judicial review" of agency actions into "an empty ritual." *Dep't of Com.*, 139 S. Ct. at 2576. Rarely can any party prove the existence of documents an agency is unlawfully withholding. That is why, in Freedom of Information Act responses, agencies generally "must acknowledge the

existence of information responsive to a FOIA request" if it exists. *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). If agencies can be expected to affirmatively deny the existence of allegedly withheld evidence in mundane public-records disputes, they can be expected to acknowledge or deny the existence of important documents bearing on an unprecedented exertion of federal authority. OSHA's silence, by itself, constitutes evidence of irregularity.

Even putting this aside, the totality of the circumstances make "clear" the incompleteness of the proposed administrative record. *Blanca*, 991 F.3d at 1120.

First, the record consists primarily of documents the Emergency Temporary Standard cites—materials already available through the public domain. As best the States can tell, just four documents plausibly provide any connection between facts in the world and OSHA's decision, and those documents primarily analyze the effect of the rule rather than explaining OSHA's reasons for acting. *See* Cert. List of Record, Doc.146 at 486, 487, 488, 491.

This is unusual. Rulemakings, especially those issued without notice and public comment, regularly contain non-public documents that the agency considered. *See, e.g.*, Index for Certified Administrative Record (Doc.117-2), *Texas v. United States*, No. 6:21-cv-16 (S.D. Tex. Nov. 4, 2021); Documents Produced in Response to Court's Order (Doc.105), *National Urban League v. Ross*, No. 5:20-cv-5799 (N.D.

Cal. Sept. 13, 2020); Exhibit Administrative Record for Sudan (Doc.111), *Ramos v. Nielsen*, No. 3:18-cv-1554 (N.D. Cal. Sept. 5, 2018). Rightly so, for a complete administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers, including evidence contrary to the agency's position." *Saget v. Trump*, 375 F. Supp. 3d 280, 340–41 (E.D.N.Y. 2019) (quoting *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). Indeed, "an agency may not 'exclude information on the grounds that it did not 'rely' on the excluded information in its final decision.'" *Center for Biol. Diversity v. Wolf*, 447 F. Supp. 3d 965, 973 (D. Ariz. 2020) (quoting *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006)). It is simply not believable that "everything that was before the agency pertaining to the merits of its decision" consists almost exclusively of studies and sources available online. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

Second, while it is undisputed that President Biden ordered OSHA to initiate the Vaccine Mandate rulemaking, the administrative record contains *nothing* regarding the initiation process. In that regard, at least, the record is incomplete—a complete administrative record would include *all* information the agency relied upon in deciding whether to initiate the rulemaking. *Dep't of Com.*, 139 S. Ct. at 2564. The

States pointed this out in their motion, *see* States Mot. to Compel at 7–9, Doc.225, and OSHA does not deny it.

Third, the government met with numerous stakeholders, including private parties, while drafting the Vaccine Mandate. *See, e.g.*, Bruce Rolfsen & Ben Penn, *White House Sets Vaccine Meetings with Business Groups*, Bloomberg Law (Oct. 14, 2021), https://perma.cc/W4B3-3747. Indeed, there were at least 140 such meetings. *See* OIRA, *EO 12866 Meetings Search Results* (searched Dec. 15, 2021). The government had good reason to hold these meetings—they enabled it to learn how the Vaccine Mandate might affect businesses around the country, and to decide whether to accommodate any concerns. While there was nothing improper about hosting meetings, the agency had to include in the administrative record *all* of the information on which it relied in crafting the Vaccine Mandate, including *ex parte* communications. *See Portland Audubon Soc.*, 984 F.2d at 1548. The government has previously included such communications in administrative records without being told to do so. *See, e.g.*, *Maine Care Servs., Inc. v. Dep't of Agric.*, 2001 WL 261558, at *1 (D. Me. Mar. 15, 2001). But in this case, OSHA failed to include this information in the record.

Finally, the Court has before it evidence of pretext. For example, President Biden announced that he was directing OSHA to issue a vaccine mandate because

his "patience" with unvaccinated Americans was "wearing thin." *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), https://perma.cc/E8FH-XWC3. Further, one of the highest-ranking officials at the White House—White House Chief of Staff Ron Klain—publicly endorsed the view that the Vaccine Mandate was "the ultimate work-around for the Federal govt to require vaccinations." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 n.13 (5th Cir. 2021). In other words, he admitted a pretextual motive.

OSHA denies the significance of Klain's actions, noting that the quoted statement comes from a tweet that Klain retweeted. OSHA says Klain was merely "shar[ing] the tweet with others," and points to a supposedly "common understanding that a 'retweet' is not the same as an endorsement." Opp.13. OSHA's argument asks the Court "to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.*, 139 S. Ct. at 2575 (quotation omitted). High-ranking administration officials do not promote characterizations of administration actions with which they disagree. And this particular characterization is especially informative, because it comports with other statements from the Biden Administration suggesting that the workplace-related justifications for the Vaccine Mandate are a pretext for what is, in truth, a desire to boost vaccination rates society-wide. *See, e.g.*, States Mot.2–3, 9–11; Phillips Manufacturing and Tower Company's Motion to Compel at 2–4, Doc.247.

The inference of pretext is bolstered by other administrative actions. The Biden Administration has imposed other vaccination mandates in recent months. One, which purports to rest on the President's power to promote economy and efficiency in federal procurement contracts, requires that all federal contractors impose vaccine mandates on their employees. *See Safe Federal Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Nov. 10, 2021), https://perma.cc/PKL6-LALA. Another requires entities participating in Medicare and Medicaid to impose vaccination requirements on their staffs. *See Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61555-01 (Nov. 5, 2021). (There are others, too.) That the Administration is invoking so many different rationales for policies so similar to the Vaccine Mandate shows that the Mandate, just like these other policies, is simply one part of President Biden's self-described "science-based plan … to get more people vaccinated." *Guidance for Federal Contractors and Subcontractors* at 1. In other words, the Mandate, just as Klain indicated, is a strained "work-around for the Federal govt to require vaccination." *BST*, 17 F.4th at 612 n.13.

*

OSHA has not denied that it relied on information other than what it included in the administrative record; the certified administrative record implausibly consists

almost exclusively of online documents; the administrative record fails to include any of the *ex parte* communications that occurred according to uncontradicted public reports; the White House Chief of Staff publicly endorsed the view that the Vaccine Mandate is pretextual; and other administrative actions are consistent with an inference of pretext. All told, this constitutes "clear evidence" that the record is incomplete. *Blanca*, 991 F.3d at 1120. The States (and Phillips Manufacturing) have rebutted the presumption of regularity.

II. OSHA's other reasons for denying the States' motion all fail.

With the presumption of regularity rebutted, OSHA has little to say in defense of its position.

At one point, it accuses the States of failing to "explain how their speculation about motive could have any bearing on judicial review of the" Vaccine Mandate. Opp.16. In fact, the States explained that, when an agency's explanation for its actions "is incongruent with what the record reveals about the agency's priorities and decisionmaking process," its action is pretextual and therefore invalid. *Dep't of Com.*, 139 S. Ct. at 2575; *see also* States Mot.1–2, 9–11. The foregoing establishes that OSHA's justification for the Vaccine Mandate—a newly discovered grave workplace risk—is incongruent with what a complete record would reveal about its motives.

This case thus presents a question about the pretextual nature of OSHA's rationale. *See BST*, 17 F.4th at 614.

OSHA also spends much of its response arguing that the material the States seek includes "predecisional and deliberative documents [that] are not part of the administrative record." Opp.8 (quoting *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019)). But that argument does not get OSHA very far. First, even if predecisional and deliberative documents had to be categorically excluded from the administrative record, the Court could order the agency to provide all requested documents, and portions of documents, that are *not* deliberative or predecisional in nature. *See In re: DOD & EPA Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, 2016 WL 5845712, at *2 (6th Cir. Oct. 4, 2016). "Memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government." *EPA v. Mink,* 410 U.S. 73, 87–88 (1973). Certain of the requested materials—for example, portions of documents recording *ex parte* communications with third parties—are not even arguably predecisional or deliberative. Others—for example, any "documents and materials from the White House" that OSHA "directly or indirectly considered," *Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 5370101,

at *5 (W.D. La. Nov. 17, 2021)—are also part of the administrative record even though some documents, or some portions of documents, may ultimately be excluded as predecisional, deliberative, or otherwise privileged.

To the extent that OSHA believes that portions of the administrative record are deliberative or otherwise privileged, it must at the very least identify the documents and the basis for asserting privilege. For "while deliberative materials may not be part of the administrative record, 'it does not follow from this premise that courts should not have a role in reviewing whether this privilege was properly invoked and applied to particular documents so withheld.'" *New York v. Wolf*, 2020 WL 2049187, at *2 (S.D.N.Y. Apr. 29, 2020) (quoting *New York*, 438 F. Supp. 3d at 218) (alterations accepted). "'Courts routinely make determinations of privilege in other contexts, and they are expert at doing so.'" *Id.* (quoting *New York*, 438 F. Supp. 3d at 218). In *Wolf*, once the court ordered production of the complete administrative record, the government conceded that the record defeated its arguments. That case thus provided a "vivid reminder of the 'important' role that courts play 'in ensuring that agencies have engaged in reasoned decisionmaking.'" *New York v. Wolf*, 2020 WL 6047817, at *6 (S.D.N.Y. Oct. 13, 2020) (quoting *Judulang v. Holder*, 565 U.S. 42, 53 (2011)).

In any event, OSHA overstates the rule regarding predecisional or deliberative documents. It is true that, in general, the "subjective motivation of agency decisionmakers is immaterial as a matter of law." *In re: Subpoena Duces Tecum Served on the Off. of the Comptroller of the Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). And so, in general, documents (like deliberative materials) relating to subjective motivations need not be included in the record. But that logic makes little sense in "circumstances in which the cause of action is directed at the agency's subjective motivation." *Id.* at 1280. Perhaps not surprisingly, OSHA identifies no case applying its rule to those circumstances. Indeed, the primary decision on which it relies says that predecisional and deliberative documents *are* properly considered part of the administrative record in cases involving "bad faith or improper behavior" by the agency. *Oceana*, 920 F.3d at 865. Pretextual agency actions are "improper" action actions, and so deliberative documents must be included in the record when there is reason to think the agency's action is pretextual. Presumably that is why, in one major case involving allegations of pretext, the government included "more than 12,000 pages of internal deliberative materials as part of the administrative record." *Dep't of Com.*, 139 S. Ct. at 2564.

This case, like *Department of Commerce*, involves strong evidence of pretext for the reasons addressed already. OSHA tries to limit *Department of Commerce* to its

facts, suggesting that agency actions may be supported by pretextual reasons if the pretextual reasons provide plausible bases for the actions in question. Opp.19. But that is not what the Supreme Court held. The case stands for the proposition that a court may find improper pretext whenever "the evidence tells a story that does not match the explanation the [agency] gave for [its] decision," even if that explanation is reasonable in a vacuum. *Dep't of Com.*, 139 S. Ct. at 2575. Such is the case here.

December 17, 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 reply complies with the type-volume requirements and contains 2,536 words. *See* Fed. R. App. P. 27(d)(2)(C).

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 December 17, 2021, the foregoing 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.

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