

Lead Case No. 21-7000
(Member Case Nos. 21-4027, 21-4032, 21-4033, 21-4080, 21-4088, 21-4097)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: MCP No. 165; OSHA RULE
ON COVID-19 VACCINATION AND TESTING

On Petitions for Review of an Emergency Temporary Standard from the
Occupational Safety and Health Administration.

**OPPOSED MOTION TO HOLD IN ABEYANCE THE
GOVERNMENT'S EMERGENCY MOTION TO DISSOLVE STAY**

Petitioners Bentkey Services, LLC d/b/a The Daily Wire, The Southern Baptist Theological Seminary, Asbury Theological Seminary, Sioux Falls Catholic Schools d/b/a Bishop O’Gorman Catholic Schools, The King’s Academy, Cambridge Christian School, Home School Legal Defense Association, Inc., Christian Employers Alliance, Burnett Specialists, Choice Staffing, LLC, Staff Force, Inc., Answers in Genesis, Inc., American Family Association, Inc, and Word of God Fellowship, Inc. d/b/a Daystar Television Network, Inc. respectfully request that the Court hold in abeyance the government’s emergency motion to dissolve stay, ECF No. 69 (Nov. 23, 2021), until after the Court issues an order on the pending petitions for initial hearing *en banc* and a comprehensive case management order.

Just two days before Thanksgiving, the government seeks to unleash procedural chaos on the Court, the petitioners, and over 80 million individuals before the Court has even ruled on the *en banc*

petitions or issued a comprehensive case management order. And the government has done so by filing what is effectively a *merits* brief, with nearly 13,000 words, masquerading as an emergency motion.

Indeed, the government's request is nothing short of extraordinary. It asks this Court, in an emergency posture, to summarily dispense with a sister circuit's cogent and carefully calibrated stay orders, the second of which addressed in detail the same arguments now raised in the government's motion. *See BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021) (finding "grave statutory and constitutional issues" with the mandate), *aff'd* —F.4th—, 2021 WL 5279381 (5th Cir. Nov. 12, 2021) (staying the mandate and enjoining OSHA from implementing the mandate). And the government asks this Court to disregard the Fifth Circuit's order, after it had the full and fair opportunity to submit not one, but two responses to the court on November 8, 2021 and on November 10, 2021. *See* Fifth Cir. No. 21-60845. This move vitiates "the interest of inter-circuit comity and the concomitant husbanding of scarce judicial resources." *L.A. Cnty. v. Marshall*, 631 F.2d 767, 768 (D.C. Cir. 1980).

But this Court has already shown the appropriate respect and solicitude for its sister circuit by canceling briefing for the outstanding emergency motions for stay in the original Sixth Circuit cases. *See, e.g.,* Ruling Letter, *The S. Baptist Theological Seminary v. OSHA*, No. 21-4033 (6th Cir. Nov. 19, 2021) (ECF No. 24) (canceling outstanding deadlines "in light of the stay issued by the U.S. Fifth Circuit Court of

Appeals relevant to this case”); Ruling Letter, *Phillips Mfg. & Tower Co. v. OSHA*, No. 21-4028 (6th Cir. Nov. 19, 2021) (ECF No. 25) (same); *Kentucky v. OSHA*, No. 21-4031 (6th Cir. Nov. 19, 2021) (ECF No. 34) (same). Needlessly rushing the Court to a decision in a compressed timeline is not the proper way to revisit a decision of a sister circuit, which has been entrusted to this Court’s care under 28 U.S.C. § 2112.

The government’s request is also extraordinary because it seeks to create procedural chaos. This case is already procedurally and substantively complex and raises matters of significant national importance. This Court has “inherent” authority to “control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). It can most efficiently decide this case by holding the government’s emergency motion to dissolve stay in abeyance until after the Court issues a ruling on the *en banc* petitions and a comprehensive case management order.

As an initial matter, the government asks the Court to issue a sweeping ruling when the Court has not decided the threshold question of whether the full Court should take this case *en banc*. There are presently five pending petitions for initial hearing *en banc*, and consistent with the Court’s order, various petitioners are filing notices or additional *en banc* petitions. The government’s opposition is due on November 30, 2021. This is a *key* procedural decision that is still

outstanding and that should be decided before the government's merits "motion."¹

Moreover, the parties still need to work out the procedural and case management roadmaps before delving into deciding motions that bear on the ultimate issues in the case. This litigation began in multiple circuits by varying coalitions of petitioners, including: States, businesses and associations, religious organizations, and unions, *etc.* The parties need instructions from this Court on key matters, including but not limited to: deadlines for filing case-initiating documents; deadlines for procedural and substantive motions; merits briefing schedule; instructions on whether and how petitioners can join together in filing and responding to motions and briefs; and division of time and responsibility at oral argument.

These instructions are critical in managing a procedurally complex and substantively high-stakes case like this one. *See, e.g., In re EPA*, No. 15-3799 (ECF Nos. 108, 113, 116, 133, 138) (issuing five case management orders in an EPA rule case that was consolidated and transferred to this Court after a multi-circuit lottery). For example, this Court's Initial Case Management Order provided a crystal-clear instruction on how petitioners may join in the pending petitions for *en banc*. *See* ECF No. 8 (Nov. 21, 2021). All parties need to work out these procedural steps with each other and receive similar case management

¹ There is also a pending motion to transfer by some of the petitioners that should be decided before the government's motion.

instruction from this Court before they can respond to a merits filing—whether disguised as an emergency motion or not.

Finally, what the government is asking to do is extraordinary because it seeks to disturb the *status quo* for 80 million individuals and countless employers. OSHA spent nearly two months crafting the mandate after President Biden directed that it be issued. Very shortly after it was issued, the OSHA mandate was “stayed pending adequate judicial review,” and OSHA was directed to “take no steps to implement or enforce the [m]andate until further court order.” *BST Holdings*, 2021 WL 5279381, at *9.

This *status quo* protects 80 million individuals and “all covered employers in America” from the “immediate and irreversible imprint” that OSHA’s mandate would leave. *Id.* at *8. There is no pressing reason to upend life for vast numbers of Americans over a holiday weekend when the government will now need to carry the heavy burden to show that it is entitled to lift the stay, alter this *status quo*, and force Americans to choose “between their job(s) and their jab(s),” *id.* at *8, just before the holidays and the New Year.

Given the magnitude of the government’s request in altering the *status quo*, the Court should not permit the government to wreak procedural havoc before the Court can properly adjudicate the arguments. Until the Court issues critical procedural case management instructions, the Fifth Circuit’s stay will “allow[] for a more deliberate determination whether [the] exercise of Executive power [by OSHA] . . .

is proper under the dictates of federal law.” *See In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated on other grounds In re U.S. Dep’t of Def.*, 713 F. App’x 489, 490 (6th Cir. 2018).

CONCLUSION

The Court should hold in abeyance the government’s emergency motion to dissolve stay until after the Court issues a ruling on the pending *en banc* petitions and a comprehensive case management order.

* * *

At the time of filing, the following petitioners have indicated their consent to this motion: State of Florida, Governor Greg Abbott, the Republican National Committee, FabArc Steel Supply, Inc., Tony Pugh, Tankcraft Corp., Plasticraft Corp., Scotch Plywood Co., DTN Staffing, Inc., Jamie Fleck, Sadie Haws, Sheriff Sharma, Wendi Johnston, Miller Insulation Co, Inc., Brad Miller, Corey Hager, Julio Hernandez Ortiz, Aaron Janz, MFA Inc., MFA Enterprises, Inc., MFA Oil Co., Missouri Farm Bureau Services, Inc., Missouri Farm Bureau Insurance Brokerage, Inc., Doyle Equipment Manufacturing Co., and Riverview Manufacturing, Inc.

Federal respondents oppose this motion. The following petitioners have indicated their opposition: American Federation of Labor—Congress of Industrial Organizations, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (AFL-CIO), AFT Pennsylvania, National Association of Broadcast Employees & Technicians, Local 51

(AFL-CIO), Media Guild of the West the News Guild-Communications Workers of America (AFL-CIO, Local 39213), Union of American Physicians and Dentists, Service Employees International Union Local 32BJ, the United Food and Commercial Workers International Union (AFL/CIO-CLC), and the Massachusetts Trades Council.

State of Ohio takes no position on this motion. The undersigned counsel received no response from the remaining petitioners.

Dated: November 23, 2021

Respectfully submitted,

/s/ Ryan L. Bangert

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**Application for 6th Cir.
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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 6th Cir. R. 32(b), this document contains 1,438 words according to the word count function of Microsoft Word 365.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Ryan L. Bangert

Date: November 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Ryan L. Bangert

Date: November 23, 2021