

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*

**OPPOSITION OF 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 RESPONDENTS' MOTION
TO AMEND SCHEDULE FOR STAY BRIEFING AND THE
SET SCHEDULE**

At 4:05 PM on the day before Thanksgiving, and without any consultation with the petitioners, OSHA filed its “Motion to Amend Schedule for Stay Briefing and to Set Schedule for Merits Briefing.” That motion proposes a schedule that would require the parties to fully brief, by December 6, OSHA’s request to dissolve the Fifth Circuit’s stay. Further, the schedule would require the parties to fully brief the case *on the merits* by December 29.

The Court should reject OSHA’s motion in full, for at least five reasons.

First, this lightning-speed approach to these issues is unnecessary. The current schedule allows this Court to either vacate the stay, or not, by mid-December. That will leave the parties with ample time to ask the Supreme Court to either reinstate or vacate the stay before January 4, which is the date on which the “Vaccine Mandate” would go into full effect absent a stay. *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402, 61551 (Nov. 5, 2021). If OSHA is not content to wait a few weeks for a ruling on its motion to dissolve the stay, it can go to the Supreme Court now.

Second, the proposed schedule for briefing stay-related issues is inequitable. The burdens of OSHA’s suggested stay-stage briefing schedule would fall exclusively on the petitioners. The proposed schedule shortens the petitioners’ response period by five days, while expanding OSHA’s reply period from three days to four.

Compare Mt. to Amend Briefing Schedule, Doc. 131 at 2–3 with Scheduling Order, Doc. 141. If OSHA is going to demand that everyone else move faster, it should at least be willing to do the same.

Third, the merits-briefing schedule that OSHA proposes will not allow for full development of the issues before this Court. In this challenge to OSHA’s administrative action, the petitioners are entitled to a complete administrative record. OSHA has neither provided the record nor committed to providing it by any date. Depending on what the administrative record says, the petitioners may need to pursue discovery. Here, public statements from federal officials suggest that OSHA’s stated reasons for promulgating the Vaccine Mandate are pretextual. *BST Holdings, L.L.C. v. OSHA*, —F.4th—, 2021 WL 5279381, at *5 (5th Cir. Nov. 12, 2021). If the administrative record does not adequately account for the petitioners’ concerns regarding pretext, the petitioners will pursue, and will likely be entitled to, discovery. *See, e.g., Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019).

Fourth, the proposed schedule is impractical for another reason: it gives the petitioners almost no time to coordinate their filings with this Court. OSHA asks this Court “to direct the petitioners to organize themselves into groups” and to require each group “to file a single brief.” *See* Motion to Amend Schedule at 3. Alternatively, it says, the Court could “set a total word limit and allow petitioners to divide

that total briefing among themselves.” *Id.* It is not feasible for the many petitioners in this case to confer and come to an agreement in time to file opening merits briefs by the December 8 due date that OSHA has proposed.

Fifth, and perhaps most importantly, OSHA should not be able to demand expedition in order to resolve an emergency of its own making. OSHA waited almost a year after vaccines became available to the public before issuing the Vaccine Mandate. *See* 86 Fed. Reg. 61402. After the Fifth Circuit stayed enforcement of the Vaccine Mandate, *see BST*, 2021 WL 5279381 at *1, OSHA waited eleven days before seeking relief from that stay—though it could have asked this Court to vacate the stay earlier, it could have sought an expedited schedule before this Court at the same time, and it could have gone to the Supreme Court immediately. OSHA’s eventual motion to dissolve the Fifth Circuit’s stay did not even suggest any briefing schedule. Then, after moving to dissolve the stay, OSHA waited until 4:05 PM on the Wednesday before Thanksgiving to move to expedite the resolution of its motion to dissolve the stay and to propose a schedule under which merits briefing must be completed in a matter of weeks.

OSHA’s delay suggests that the agency does not really think a speedy resolution is needed to protect employees’ lives; if it really believed that, it would have issued the Vaccine Mandate months ago and filed for relief in the Supreme Court

within hours of the Fifth Circuit's decision. If time is now short before the arbitrary deadline of January 4, it is only because of OSHA's sloth. No one stopped OSHA from issuing the Vaccine Mandate sooner, allowing more time for judicial review. No one stopped the agency from more quickly filing a motion to dissolve the stay, either. And no one stopped the Solicitor General from seeking immediate relief at the Supreme Court on OSHA's behalf. If matters are now progressing more slowly than OSHA would like, it has only itself to blame.

November 26, 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 829 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 26, 2021, the foregoing petition 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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