

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0287p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: MCP No. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY
TEMPORARY STANDARD 86 FED. REG. 61402.

MASSACHUSETTS BUILDING TRADES COUNCIL, et al. (21-7000); BENTKEY SERVICES, LLC (21-4027); PHILLIPS MANUFACTURING & TOWER COMPANY, et al. (21-4028); COMMONWEALTH OF KENTUCKY, et al. (21-4031); ANSWERS IN GENESIS, INC. (21-4032); SOUTHERN BAPTIST THEOLOGICAL SEMINARY, et al. (21-4033); BST HOLDINGS, LLC, et al. (21-4080); REPUBLICAN NATIONAL COMMITTEE (21-4082); ASSOCIATED BUILDERS AND CONTRACTORS, INC., et al. (21-4083); MASSACHUSETTS BUILDING TRADES COUNCIL (21-4084); UNION OF AMERICAN PHYSICIANS AND DENTISTS (21-4085); ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (21-4086); NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO (21-4087); STATE OF MISSOURI, et al. (21-4088); UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (21-4089); STATE OF INDIANA (21-4090); TANKCRAFT CORPORATION, et al. (21-4091); NATIONAL ASSOCIATION OF HOME BUILDERS (21-4092); JOB CREATORS NETWORK, et al. (21-4093); UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL/CIO-CLC, et al. (21-4094); SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ (21-4095); MFA, INC., et al. (21-4096); STATE OF FLORIDA, et al. (21-4097); AFT PENNSYLVANIA (21-4099); DENVER NEWSPAPER GUILD, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 37074, AFL-CIO (21-4100); DTN STAFFING, INC., et al. (21-4101); FABARC STEEL SUPPLY, INC., et al. (21-4102); MEDIA GUILD OF THE WEST, THE NEWS GUILD-COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 39213 (21-4103); NATURAL PRODUCTS ASSOCIATION (21-4108); OBERG INDUSTRIES, LLC (21-4112); BETTEN CHEVROLET, INC. (21-4114); TORE SAYS LLC (21-4115); KENTUCKY PETROLEUM MARKETERS ASSOCIATION, et al. (21-4117); AARON ABADI (21-4133),

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION, et al.,

Respondents.

Nos. 21-7000
/4027 /4028 /4031
/4032 /4033 /4080
/4082 /4083 /4084
/4085 /4086 /4087
/4089 /4088 /4090
/4091 /4093 /4092
/4095 /4094 /4096
/4097 /4099 /4100
/4101 /4102 /4103
/4108 /4112 /4114
/4115 /4117 /4133

On Emergency Motion to Dissolve Stay.

Multi-Circuit Petitions for Review from an Order of the U.S. Department of Labor,
Occupational Safety and Health Administration, No. OSHA-2001-0007.

Decided and Filed: December 17, 2021

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

COUNSEL

ON EMERGENCY MOTION TO DISSOLVE STAY AND REPLY: Sarah E. Harrington, Michael S. Raab, Adam C. Jed, Brian J. Springer, Martin Totaro, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents. **IN RESPONSE:** R. Trent McCotter, BOYDEN GRAY & ASSOCIATES, Washington, D.C., for Job Creators Network Petitioners. Felicia K. Watson, NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, Washington, D.C., for Petitioner National Association of Home Builders of the United States. Christopher Wiest, CHRIS WIEST, ATTORNEY AT LAW, PLLC, Crestview Hills, Kentucky, for Petitioner Betten Chevrolet, Inc. Harold Craig Becker, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, Washington, D.C., Peter J. Ford, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, Washington, D.C., Randy Rabinowitz, OSH LAW PROJECT, LLC, Washington, D.C., Andrew D. Roth, BREDHOFF & KAISER, PLLC, Washington, D.C., Nicole Berner, SERVICE EMPLOYEES INTERNATIONAL UNION, Washington, D.C., Keith R. Bolek, O'DONOGHUE & O'DONOGHUE LLP, Washington, D.C., Victoria L. Bor, SHERMAN DUNN, P.C., Washington, D.C., for Petitioner Union of American Physicians and Dentists. Cathleen A. Martin, John A. Ruth, NEWMAN, COMLEY & RUTH, P.C., Jefferson City, Missouri, for MFA Incorporated Petitioners. Benjamin M. Flowers, May Davis, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, Christopher L. Thacker, Lindsey R. Keiser, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, Clark L. Hildabrand, Brandon J. Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, Brian Kane, Leslie M. Hayes, Megan A. Larrondo, OFFICE OF THE IDAHO ATTORNEY GENERAL, Boise, Idaho, Jeffrey A. Chanay, OFFICE OF THE KANSAS ATTORNEY GENERAL, Topeka, Kansas, Mithun Mansinghani, OFFICE OF THE OKLAHOMA ATTORNEY GENERAL, Oklahoma City, Oklahoma, Lindsay S. See, OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL, Charleston, West Virginia, Edmund G. LaCour Jr., OFFICE OF THE ALABAMA ATTORNEY GENERAL, Montgomery, Alabama, Charles E. Brasington, OFFICE OF THE ALASKA ATTORNEY GENERAL, Anchorage, Alaska, Drew C. Ensign, OFFICE OF THE ARIZONA ATTORNEY GENERAL, Phoenix, Arizona, D. John Sauer, OFFICE OF THE MISSOURI ATTORNEY GENERAL, Jefferson City, Missouri, David M. S. Dewhirst, Christian B. Corrigan, OFFICE OF THE MONTANA ATTORNEY GENERAL, Helena, Montana, Nicholas J. Bronni, Vincent M. Wagner, OFFICE OF THE ARKANSAS ATTORNEY GENERAL, Little

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STRANCH, J., delivered the opinion of the court in which GIBBONS, J., joined. GIBBONS, J. (pg. 38), delivered a separate concurring opinion. LARSEN, J. (pp. 39–57), delivered a separate dissenting opinion.

OPINION

JANE B. STRANCH, Circuit Judge. The COVID-19 pandemic has wreaked havoc across America, leading to the loss of over 800,000 lives, shutting down workplaces and jobs across the country, and threatening our economy. Throughout, American employees have been trying to survive financially and hoping to find a way to return to their jobs. Despite access to vaccines and better testing, however, the virus rages on, mutating into different variants, and posing new risks. Recognizing that the “old normal” is not going to return, employers and employees have sought new models for a workplace that will protect the safety and health of employees who earn their living there. In need of guidance on how to protect their employees from COVID-19 transmission while reopening business, employers turned to the Occupational Safety and Health Administration (OSHA or the Agency), the federal agency tasked with assuring a safe and healthful workplace. On November 5, 2021, OSHA issued an Emergency

Temporary Standard (ETS or the standard) to protect the health of employees by mitigating spread of this historically unprecedented virus in the workplace. The ETS requires that employees be vaccinated or wear a protective face covering and take weekly tests but allows employers to choose the policy implementing those requirements that is best suited to their workplace. The next day, the U.S. Court of Appeals for the Fifth Circuit stayed the ETS pending judicial review, and it renewed that decision in an opinion issued on November 12. Under 28 U.S.C. § 2112(a)(3), petitions challenging the ETS—filed in Circuits across the nation—were consolidated into this court. Pursuant to our authority under 28 U.S.C. § 2112(a)(4), we **DISSOLVE** the stay issued by the Fifth Circuit for the following reasons.

I. BACKGROUND

A. OSHA’s History and Authority

Congress passed the Occupational Safety and Health Act of 1970 (OSH Act or the Act) and established OSHA “to assure safe and healthful working conditions for the nation’s work force and to preserve the nation’s human resources.” *Asbestos Info. Ass’n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 417 (5th Cir. 1984). It expressly found that “personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.” 29 U.S.C. § 651(a). OSHA is charged with ensuring worker safety and health “by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems.” *Id.* § 651(b)(5). To fulfill that charge, Congress authorized the Secretary of Labor (the Secretary) “to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.” *Id.* § 651(b)(3). And it vested the Secretary with “broad authority . . . to promulgate different kinds of standards” for health and safety in the workplace. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 611 (1980) (plurality opinion); *see, e.g., N. Am.’s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271, 281 (D.C. Cir. 2017); *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1202, 1311 (D.C. Cir. 1980); 29 C.F.R. §§ 1910.141, 1926.51.

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