

Nos. 21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103, -4108, -4112, -4114, -4115, -4117
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

On Petitions for Review

RESPONDENTS' MOTION TO AMEND SCHEDULE FOR STAY
BRIEFING AND TO SET SCHEDULE FOR MERITS BRIEFING

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In light of the exigent circumstances, and for the convenience of the Court, the government respectfully requests that the Court clarify and shorten the schedule for stay briefing and set an expedited schedule for merits briefing. As the Court is aware, and as the government detailed in its November 23 filing, there is significant and ongoing transmission of COVID-19 in workplaces throughout the Nation. Employees are being hospitalized with COVID-19 every day, and many are dying. Case numbers and deaths have also recently been increasing.¹

1. These consolidated cases involve challenges to an emergency temporary standard issued by the Occupational Safety and Health Administration to protect employees from the acute danger of COVID-19 in the workplace. Before the various petitions for review were assigned to this Court, the Fifth Circuit granted a stay and enjoined the implementation and enforcement of the Standard. On November 23, the government moved to dissolve or, in the alternative, to narrow that stay. One group of petitioners has filed a response, and several groups have filed a motion asking this

¹ The “7-day moving average of daily new cases (88,482) increased 16.1%” in the United States as of November 17 “compared with the previous 7-day moving average (76,223).” CDC, *COVID Data Tracker Weekly Review*, <https://go.usa.gov/xeQHc>. And the “7-day moving average of new deaths” during that period exceeded 1,000, with hospitalizations exceeding 5,000. *Id.* Workplace outbreaks of COVID-19 continue to occur; for example, Colorado recently reported 724 active outbreaks in a variety of occupational settings, resulting in 6,190 COVID-19 staff cases and 6 staff deaths. Colorado Department of Public Health & Environment, *COVID-19 Outbreak Data*, <https://go.usa.gov/xeQH4>. That is a significant increase compared to what Colorado reported in early September. *See* Pmbl.-61413.

Court to hold the matter in abeyance. The Court subsequently set a schedule for the parties to address the Fifth Circuit's stay. The schedule provides that any parties wishing to join the government's motion or to file their own motion do so by November 30; that any responses should be filed by December 7; and that any replies should be filed by December 10.²

2. For the convenience of the Court, and to facilitate a more expedited schedule, the government respectfully requests that the Court clarify that any party is limited to one principal filing. In particular, as reflected in the proposed schedule below, parties seeking to dissolve or narrow the stay should either join in the government's motion or file their own motion by a fixed date. Parties seeking to defend or extend the stay should file responses to those motions by a fixed date rather than file motions of their own on the date set for parties to join the government's motion. This clarification would avoid duplicative filings by the many parties to this case.

3. In light of the great exigency, the government further requests that the Court make a modest but important modification to the schedule as follows:

- Any party wishing to join in the government's pending motion to dissolve or narrow the stay or any party wishing to file their own motion to dissolve or narrow the stay must do so by November 29.
- Any responses seeking to defend or extend the stay must be filed by December 2.

² The government understands the Court's scheduling order to render the abeyance motion moot.

- Any replies must be filed by December 6.

4. The government also requests that the Court set an expedited briefing schedule on the merits now, before resolving any pleadings related to the stay or any petitions for initial hearing en banc. Given the exigent circumstances that led to OSHA's promulgation of the emergency temporary standard—and that persist and are now worsening—swift resolution of the petitioners' challenges to the Standard is warranted. The lives and health of thousands of American workers are at stake.

The government is prepared to file the certified index of record immediately.

The government proposes the following schedule:

- Petitioners file opening briefs by December 8.
- The government files one responsive brief, limited to no more than half the total number of words collectively used by petitioners, by December 22.
- Petitioners file reply briefs by December 29.
- Oral argument held as soon as practicable after the close of briefing.

5. In addition, given the large number of petitioners, the government also respectfully suggests that the Court issue a further order to prevent dozens of separate and duplicative 13,000 word briefs. As often occurs in cases with large numbers of parties, the Court may wish to direct the petitioners to organize themselves into groups that each file a single brief or may wish to set a total word limit and allow petitioners to divide that total briefing among themselves. *See, e.g.,* Order, *Wisconsin v. EPA*, Nos. 16-1406, 16-1410, 16-1428, 16-1429, 16-1432, 16-1435, 16-1436, 16-1437, 16-1438, 16-

1439, 16-1440, 16-1441, 16-1442, 16-1443, 16-1444, 16-1445, 16-1448, 17-1066 (D.C. Cir. May. 15, 2017). This would conserve judicial resources and facilitate expedited briefing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 823 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer

Brian J. Springer