UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MCP No. 165., Occupational Safety and Health Administration Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402	No. 21-7000
United Food and Commercial Workers International Union, AFL/CIO-CLC; American Federation of Labor-Congress of Industrial Organizations, Petitioners, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4094

MOTION TO TRANSFER CONSOLIDATED CASES TO D.C. CIRCUIT AND OPPOSITION TO MOTION TO TRANSFER CASES TO FIFTH CIRCUIT

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the United Food and Commercial Workers International Union (UFCW) respectfully request that this Court transfer the pending litigation over the Occupational Safety & Health Administration's (OSHA) emergency temporary standard (ETS) concerning the grave danger posed by COVID-19 to the U.S. Court of Appeals for the D.C. Circuit and deny the pending motion to transfer this litigation to the U.S. Court of Appeals for the Fifth Circuit. The grounds for this motion and opposition are described more fully below.

FACTS AND PROCEDURAL POSTURE

This litigation involves challenges by multiple parties to OSHA's COVID-19 Vaccination and Testing: Emergency Temporary Standard (ETS), 86 Fed. Reg. 61402 (Nov. 5, 2021). Since March 2020, when the pandemic first began, the AFL-CIO has been urging OSHA to issue an ETS under section 6(c)(1) of the Occupational Safety & Health Act of 1970 (OSH Act) to protect workers from the grave danger posed by COVID-19. The AFL-CIO petitioned OSHA to issue a COVID-specific ETS in March 2020 and, when OSHA did not act on its petition, filed suit in the D.C. Circuit to compel OSHA to promulgate an ETS. In response, OSHA implicitly conceded that COVID-19 posed a grave danger, but argued that an ETS was not then "necessary" within the meaning of the statute because the agency's existing general standards, non-mandatory COVID-19 guidance, and the

OSH Act's general duty clause, 29 U.S.C. § 654(a)(1), were adequate to protect workers. The D.C. Circuit, after full briefing on the merits, concluded "OSHA reasonably determined that an ETS is not necessary *at this time*." Order Den. Pet. at 1, *In re: AFL-CIO*, Case No. 20-1158 (D.C. Cir. 2020) (emphasis added).

The United Mine Workers of America also filed an emergency petition for a writ of mandamus in the D.C. Circuit seeking to compel the Mine Safety & Health Administration to issue an emergency temporary standard for infectious diseases. *In re: United Mine Workers*, Case No. 20-1215 (D.C. Cir. 2020) . The standard setting provisions of the OSH Act and the Mine Safety & Health Act are similar. *Compare* 30 US.C. § 811(b) *with* 29 U.S.C. § 655(c)(1). After full briefing, the Court denied relief. Order Den. Pet at 1, *In re: United Mine Workers*, Case No. 20-1215 (D.C. Cir. 2020).

On June 21, 2021, OSHA finally published an ETS addressing the grave danger posed by COVID-19 but limited the scope of that ETS to health care workers. 86 Fed. Reg. (June 21, 2021). Because the health care ETS did nothing to protect workers facing a grave danger in dozens of other industries, the AFL-CIO and the UFCW filed a petition for review in the D.C. Circuit challenging the scope of the health care ETS as too narrow. *UFCW v. OSHA,* Case No. 21-1143 (D.C. Cir. Jun 24, 2021). The D.C. Circuit petition is pending. The Union Petitioners had hoped that the COVID-19: Vaccination and Testing ETS currently

before the Court would address their concerns about the health care ETS by extending the full range of layered workplace safety protections set forth in the health care ETS to the nation's workforce as a whole. Unfortunately, the new ETS does not do so.

On November 8, 2021, the AFL-CIO and the UFCW jointly filed a petition for review of the subject ETS, again in the D.C. Circuit. *UFCW v. OSHA,* Case No. 21-1219 (D.C. Cir. Nov. 8, 2021). That petition was transferred to this Court and has been docketed as Case No. 21-4094.

ARGUMENT

Transfer to the D.C. Circuit would be "convenien[t for] the parties" and further the "interest of justice," the relevant legal criteria under 28 U.S.C. § 2112(a)(5).

In an appellate challenge to an OSHA standard, "[n]either the location of the plants nor the location of the workers bears . . . on the issue of relative convenience for the review of an OSHA standard adopted pursuant to § 6 of the Act. Review is confined to the agency record. Thus neither the officials of the employers nor the affected employees will appear in court. The only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions." *United*

Steelworkers v. Marshall, 592 F.2d 693, 697 (3d Cir. 1979) (footnote omitted). Here, lead counsel for the unions are all based in the District of Columbia, as are all the lawyers representing the government. Many lawyers representing private parties challenging OSHA's standard are also based in D.C., with other lawyers spread across the country.[1]

In addition, the D.C. Circuit is the only court where both parties seeking greater workplace protections from COVID-19 – the AFL-CIO and the UFCW – and those challenging OSHA's authority to adopt any protections – the Republican National Committee and the National Association of Home Builders – filed petitions for review within the 10-day window that governs the venue lottery established by 28 U.S.C. § 2112. The D.C. Circuit is clearly the court that would be most convenient for the appellate lawyers participating in this case.

Transfer to the D.C. Circuit would also serve the interests of justice. The D.C. Circuit has already decided one fully-briefed case addressing OSHA's obligations to protect workers from COVID-19. Indeed, the very first sentence of the Fifth Circuit's stay decision relies on, in fact, quotes the D.C. Circuit's decision. *BST Holdings v. OSHA,* Case No. 21-60845, slip op. at 2 (5th Cir. 2021). The Fifth Circuit also relied extensively on agency filings in the D.C. Circuit case.

[1] Indeed, the lawyers who filed the motion to transfer to the Fifth Circuit are based in Chicago, IL, not New Orleans, LA.

See, e.g., *id. at* 8 n.14, 9 n.15, 10, 13-14. The D.C. Circuit is best positioned to construe its own decision as well as to place in proper context statements made in the course of litigation before it. In addition, a petition claiming that OSHA has a statutory duty to expand its health care COVID ETS to workers in other industries who face a grave danger is already pending in the D.C. Circuit.

The D.C. Circuit has a large body of precedent addressing OSHA's standard setting authority – more than any other circuit.[2] This Court has considered the validity of an OSHA standard only once and not since the 1970s.[3] And, the D.C. Circuit is widely regarded as expert in complex administrative law cases, which make up a disproportionate share of that Court's docket. *See* Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence, & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 146 (2013) ("[T[he [D.C.] Circuit has a particular expertise in administrative law simply

[2] *See, e.g.*, *AFL-CIO v. Marshall*, 617 F.2d 636 (D.C. Cir. 1979) *aff'd*, *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (cotton dust); *Indus. Union Dep't v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) (asbestos); *Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980) (lead); *Bldg. & Constr. Trades Dep't v. Brock*, 838 F.2d 1258 (D.C. Cir. 1988) (asbestos); *UAW v. Pendergrass,* 878 F.2d 389 (D.C. Cir. 1989) (formaldehyde); *UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) (lockout); *NABTU v. OSHA*, 878 F.3d 271 (D.C. Cir. 2017) (silica); *In re: Int'l Chem. Workers Union*, 958 F.2d 1133 (D.C. Cir. 1992) (cadmium); *Pub. Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986) (ethylene oxide).

[3] *Visitron Corp. v. OSHA*, 6 OSHC 1483 (6th Cir. 1978).

because of the nature of its docket over the last few decades. In addition, a large percentage of the members of the court have experience in either the executive or the legislative branches, a perspective that undoubtedly helps inform their decisions addressing the government and its agencies.")

Transfer to the D.C. Circuit would also foster judicial economy in two ways. First, the questions raised in this Court – whether OSHA has authority to issue a COVID-19 ETS at all and, if so, what its scope should be – overlap with the questions likely to be raised in the pending D.C. Circuit case challenging OSHA's healthcare ETS. Second, D.C. Circuit actively manages complex multi-party litigation of agency actions and encourages joint briefing by parties resulting in more focused and less redundant briefing. D.C. Circuit Handbook of Practice and Internal Procedures at 24.

No different result is required either by the number of parties who filed in the Fifth Circuit or the fact that it issued a stay of the ETS before the petitions were consolidated in this Court. This is a case of national importance. It affects businesses and workers throughout the country. It does not affect businesses in the Fifth Circuit any more than it affects businesses in other parts of the country. The fact that individual businesses filed in the Fifth Circuit, whereas trade associations made up of businesses filed in other circuits, should not weigh in favor of transfer to the Fifth Circuit. That type of gamesmanship in pleading should not be

rewarded. Indeed, the AFL-CIO could have filed in the name of its 56 independent affiliates and, if it had, more petitions would have been pending in D.C. than in the Fifth Circuit. Basing the venue decision on that type of nose counting would not further the interests of justice.

Nor should the fact that the Fifth Circuit precipitously issued a stay of the ETS tip the venue scales in its favor. OSHA issued the COVID-19 ETS on Friday, November 5, 2021. BST Holdings filed a motion seeking an emergency stay of the ETS in the Fifth Circuit that same day. The Fifth Circuit issued its initial stay of the ETS the next day, before the government had even responded to the motion and despite the fact that the ETS imposed no compliance obligations for another 30 days. The Fifth Circuit gave the government only two days to respond to the motion for stay. The Fifth Circuit has hardly engaged in deliberative consideration of the various legal arguments about the validity of the stay. Moreover, the Fifth Circuit was not aware of, much less did it consider, the Union Petitioners' claims that OSHA has failed to adequately protect all workers who face a grave danger from COVID-19, and that keeping the standard in effect was a critical first step. What is more, the Fifth Circuit's rushed opinion relied heavily on the pleadings filed by the government over a year ago, in the earlier D.C. Circuit mandamus case, without considering the government's detailed explanation, in the preamble to the ETS, of the circumstances that have led it to change course. Industry

petitioners feigned "emergency," a transparent effort to forum shop, should not tip the balance in deciding the proper venue for this case.

Relying on the Fifth Circuit's hasty stay decision to determine the proper venue would completely undermine the procedure "Congress created . . . in § 2112(a)(3) to avoid sprints to the courthouse." Pet'rs' Mot. to Transfer at 9, Dkt. 95, citing *Sacramento Mun. Util. Dist. v. FERC*, 683 F.3d 769, 770 (7th Cir. 2012). In providing for random selection among the circuits in which petitions are filed, Congress acknowledged that one of the circuits might stay the challenged regulation before the end of the 10-day period. 28 U.S.C. § 2112(a)(4) ("Any court of appeals in which proceedings . . . have been instituted may, . . . stay the effective date of the order"). Rather than treat such action by one of the circuits as determinative of venue, however, the statute provides that the circuit in which the petitions are ultimately consolidated may "modif[y], extend[] or revoke[]" the stay. Permitting one set of petitioners that secured a quick stay to parlay that stay into a transfer to the circuit that issued it– particularly in a case like this one involving petitions filed in every circuit –would thus be contrary to congressional intent and unduly favor one set of petitioners over all others.

WHEREFORE, petitioners AFL-CIO and UFCW respectfully request that this Court transfer the pending litigation over the OSHA ETS to the U.S. Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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Dated: November 29, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion to Transfer Consolidated Cases to D.C. Circuit and Opposition to Motion to Transfer Cases to Fifth Circuit complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a). The brief was prepared in 14-point Times New Roman font, and with the exception of the portions excluded by F.R.A.P. 32(f) it contains 2,019 words.

/s/ Randy Rabinowitz
Randy Rabinowitz

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2021, a true and correct copy of the foregoing Motion to Transfer Consolidated Cases to D.C. Circuit and Opposition to Motion to Transfer Cases to Fifth Circuit was electronically filed with the Clerk and served electronically upon all counsel of record registered with the Court's CM/ECF system.

/s/ Randy Rabinowitz
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