

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

DAVE YOST  
Attorney General of Ohio

/s/Benjamin M. Flowers

BENJAMIN M. FLOWERS

Solicitor General

MAY DAVIS

Deputy Solicitor General  
30 E. Broad St., 17th Floor  
Columbus, OH 43215  
Phone: (614) 466-8980  
bflowers@OhioAGO.gov

*Counsel for the State of Ohio*

HERBERT H. SLATERY III  
Attorney General of Tennessee

/s/ Clark L. Hildabrand

CLARK L. HILDABRAND

BRANDON J. SMITH

Office of the Attorney General  
and Reporter

P.O. Box. 20207

Nashville, Tennessee 37202-0207

Phone: (615) 532-4081

clark.hildabrand@ag.tn.gov

*Counsel for the State of Tennessee*

Respectfully submitted,

DANIEL CAMERON  
Attorney General of Kentucky

VICTOR B. MADDOX

/s/ Christopher L. Thacker

CHRISTOPHER L. THACKER

ALEXANDER Y. MAGERA

JEREMY J. SYLVESTER

LINDSEY R. KEISER

Office of the Attorney General

700 Capital Avenue, Suite 118

Frankfort, Kentucky 40601

Phone: (502) 696-5300

Victor.Maddox@ky.gov

*Counsel for the Commonwealth of  
Kentucky*

PATRICK MORRISEY  
Attorney General of West Virginia

/s/ Lindsay S. See

LINDSAY S. SEE

Solicitor General

MICHAEL WILLIAMS (*admitted in Michi-  
gan; practicing under supervision of West  
Virginia attorneys*)

Office of the Attorney General

State Capitol Complex

Bldg. 1, Room E-26

Charleston, West Virginia 25305

Phone: (304) 558-2021

Lindsay.S.See@wvago.gov

*Counsel for the State of  
West Virginia*

STEVE MARSHALL  
Attorney General of Alabama

/s/ Edmund G. LaCour Jr.

EDMUND G. LACOUR JR.

Solicitor General

THOMAS A. WILSON

Deputy Solicitor General

State of Alabama

Office of the Attorney General

501 Washington Ave.

Montgomery, AL 36130

Phone: (334) 242-7300

Edmund.LaCour@AlabamaAG.gov

*Counsel for the State of Alabama*

LYNN FITCH  
Attorney General of Mississippi

WHITNEY H. LIPSCOMB

Deputy Attorney General

/s/ Scott G. Stewart

SCOTT G. STEWART

Solicitor General

JUSTIN L. MATHENY

Deputy Solicitor General

JOHN V. COGHLAN

Deputy Solicitor General

Mississippi Attorney General's Office

P.O. Box 220

Jackson, MS 39205

Phone: (601) 359-3680

scott.stewart@ago.ms.gov

*Counsel for the State of Mississippi*

TREG R. TAYLOR  
Attorney General of Alaska

/s/ Charles E. Brasington

CHARLES E. BRASINGTON

Assistant Attorney General

State of Alaska

1031 West Fourth Avenue, Suite 200

Anchorage, AK 99501

Phone: (907) 269-6612

charles.brasington@alaska.gov

*Counsel for the State of Alaska*

ERIC S. SCHMITT  
Attorney General of Missouri

/s/ D. John Sauer

D. JOHN SAUER

Solicitor General

Office of the Missouri

Attorney General

Supreme Court Building

P.O. Box 899

Jefferson City, MO 65102

Phone: (573) 751-3321

John.Sauer@ago.mo.gov

*Counsel for the State of Missouri*

MARK BRNOVICH  
Attorney General of Arizona

/s/ Drew Ensign

DREW ENSIGN  
Deputy Solicitor General  
Arizona Attorney General's Office  
2005 N. Central Ave.  
Phoenix, AZ 85004  
Phone: (602) 542-3333  
Drew.ensign@azag.gov

*Counsel for the State of Arizona*

AUSTIN KNUDSEN  
Attorney General of Montana

KRISTIN HANSEN

Lieutenant General

/s/ David M.S. Dewhirst

DAVID M.S. DEWHIRST  
Solicitor General  
CHRISTIAN B. CORRIGAN  
Assistant Solicitor General  
Office of the Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Phone: (406) 444-2026  
David.Dewhirst@mt.gov

*Counsel for the State of Montana*

LESLIE RUTLEDGE  
Attorney General of Arkansas

/s/ Nicholas J. Bronni

NICHOLAS J. BRONNI  
Solicitor General  
VINCENT M. WAGNER  
Deputy Solicitor General  
Office of the Arkansas  
Attorney General  
323 Center Street, Suite 200  
Little Rock, Arkansas 72201  
Phone: (501) 682-8090  
Nicholas.bronni@arkansasag.gov

*Counsel for the State of Arkansas*

DOUGLAS J. PETERSON  
Attorney General of Nebraska

/s/ James A. Campbell

JAMES A. CAMPBELL  
Solicitor General  
Office of the Nebraska  
Attorney General  
2115 State Capitol  
Lincoln, Nebraska 68509  
Phone: (402) 471-2682  
jim.campbell@nebraska.gov

*Counsel for the State of Nebraska*



ASHLEY MOODY  
Attorney General of Florida  
*/s/ Henry C. Whitaker*  
HENRY C. WHITAKER  
Solicitor General  
DANIEL W. BELL  
Chief Deputy Solicitor General  
EVAN EZRAY  
JASON H. HILBORN  
Deputy Solicitors General  
JAMES H. PERCIVAL  
Deputy Attorney General of  
Legal Policy  
NATALIE P. CHRISTMAS  
Assistant Attorney General of  
Legal Policy  
State of Florida  
Office of the Attorney General  
The Capitol, Pl-01  
Tallahassee, Florida 32399-1050  
Phone: (850) 414-3300  
Henry.Whitaker@myfloridalegal.com  
*Counsel for the State of Florida*

JOHN M. FORMELLA  
Attorney General of New Hampshire  
*/s/ Anthony J. Galdieri\**  
ANTHONY J. GALDIERI  
Solicitor General  
*\* Admission application forthcoming*  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301  
Phone: (603) 271-3658  
Anthony.J.Galdieri@doj.nh.gov  
*Counsel for the State of New Hampshire*

WAYNE STENEHJEM  
Attorney General of North Dakota  
*/s/ Matthew A. Sagsveen*  
MATTHEW A. SAGSVEEN  
Solicitor General  
Office of Attorney General  
500 North 9th Street  
Bismarck, ND 58501-4509  
Phone: (701) 328-3640  
masagsve@nd.gov  
*Counsel for the State of North Dakota*

JOHN M. O'CONNOR  
Attorney General of Oklahoma  
*/s/ Mithun Mansinghani*  
MITHUN MANSINGHANI  
Solicitor General  
313 N.E. 21st St.  
Oklahoma City, OK  
Phone: (405) 521-3921  
Mithun.Mansinghani@oag.ok.gov  
*Counsel for the State of Oklahoma*

CHRISTOPHER M. CARR  
Attorney General of Georgia

STEPHEN J. PETRANY  
Solicitor General

/s/ Ross W. Bergethon

ROSS W. BERGETHON

DREW F. WALDBESER

Deputy Solicitors General  
State of Georgia  
Office of the Attorney General  
40 Capitol Square, S.W.  
Atlanta, Georgia, 30334  
Phone: (404) 458-3378

*Counsel for the State of Georgia*

ALAN WILSON  
Attorney General of South Carolina

/s/ Thomas T. Hydrick

THOMAS T. HYDRICK

Assistant Deputy Solicitor General  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Phone: (803) 734-3680  
thomashydrick@scag.gov

*Counsel for the State of South Carolina*

LAWRENCE G. WASDEN  
Attorney General of Idaho

/s/ Brian Kane

BRIAN KANE

Chief Deputy Attorney General  
LESLIE M. HAYES  
MEGAN A. LARRONDO  
Deputy Attorneys General  
700 W. Jefferson Street, Ste. 210  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Phone: (208) 334-2400  
brian.kane@ag.idaho.gov

*Counsel for the State of Idaho*

JASON R. RAVNSBORG  
South Dakota Attorney General

/s/ David McVey

DAVID M. MCVEY

Assistant Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501-8501  
Phone: (605) 773-3215  
david.mcvey@state.sd.us

*Counsel for the State of South Dakota*

THEODORE E. ROKITA  
Attorney General of Indiana

/s/ Thomas M. Fisher

THOMAS M. FISHER  
Solicitor General

KIAN HUDSON  
Deputy Solicitor General

JULIA C. PAYNE

MELINDA R. HOLMES

Deputy Attorneys General  
Office of the Indiana Attorney General

IGC South, Fifth Floor  
302 W. Washington Street  
Indianapolis, IN 46204

Phone: (317) 232-6255

Tom.Fisher@atg.in.gov

*Counsel for the State of Indiana*

KEN PAXTON  
Attorney General of Texas

BRENT WEBSTER

First Assistant Attorney General

AARON F. REITZ

Deputy Attorney General for  
Legal Strategy

/s/ Judd E. Stone II

JUDD E. STONE II

Solicitor General

LANORA C. PETTIT

Principal Deputy Solicitor General

WILLIAM F. COLE

RYAN S. BAASCH

Assistant Solicitors General

LEIF A. OLSON

Special Counsel

Office of the Attorney General

P.O. Box 12548 (MC 059)

Austin, Texas 78711-2548

Phone: (512) 936-1700

William.Cole@oag.texas.gov

*Counsel for the State of Texas*

JEFFREY S. THOMPSON  
Solicitor General of Iowa

/s/ Samuel P. Langholz

SAMUEL P. LANGHOLZ

Assistant Solicitor General

Office of the Iowa Attorney General

1305 E. Walnut Street  
Des Moines, Iowa 50319

Phone: (515) 281-5164

jeffrey.thompson@ag.iowa.gov

*Counsel for the State of Iowa*

SEAN REYES  
Attorney General

/s/ Melissa A. Holyoak

MELISSA A. HOLYOAK

Solicitor General

Office of the Attorney General

350 N. State Street, Suite 230

P.O. Box 142320

Salt Lake City, UT 84114-2320

Phone: (385) 271-2484

melissaholyoak@agutah.gov

*Counsel for the State of Utah*

DEREK SCHMIDT  
Attorney General of Kansas

/s/ Jeffrey A. Chanay

JEFFREY A. CHANAY

Chief Deputy Attorney General  
120 SW 10th Avenue, 2nd Floor  
Topeka, Kansas 66612  
Phone: (785) 296-2215  
jeff.chanay@ag.ks.gov

*Counsel for the State of Kansas*

BRIDGET HILL  
Attorney General of Wyoming

/s/ Ryan Schelhaas\*

RYAN SCHELHAAS

Chief Deputy Attorney General  
*\* Admission application filed*  
Wyoming Attorney General's Office  
109 State Capitol  
Cheyenne, WY 82002  
Telephone: (307) 777-5786  
ryan.schelhaas@wyo.gov

*Counsel for the State of Wyoming*

JEFF LANDRY  
Attorney General of Louisiana

/s/ Elizabeth B. Murrill

ELIZABETH B. MURRILL

Solicitor General

JOSEPH S. ST. JOHN

Deputy Solicitor General

JOSIAH KOLLMEYER

Assistant Solicitor General

MORGAN BRUNGARD

Assistant Solicitor General

Louisiana Department of Justice

1885 N. Third Street

Baton Rouge, LA 70804

Phone: (225) 326-6766

emurrill@ag.louisiana.gov

*Counsel for the State of Louisiana*

## 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.

/s/ Benjamin M. Flowers  
Benjamin M. Flowers

## 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.

/s/ Benjamin M. Flowers

Benjamin M. Flowers