

No. 21-4033

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE SOUTHERN BAPTIST THEOLOGICAL SEMINARY and ASBURY
THEOLOGICAL SEMINARY

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DOUGLAS L.
PARKER, in his official capacity as Assistant Secretary of Labor for
Occupational Safety and Health, U.S. DEPARTMENT OF LABOR, and
MARTIN J. WALSH, in his official capacity as Secretary of Labor,

Respondents.

On Petition for Review of an Emergency Temporary Standard from the
Occupational Safety and Health Administration.

PETITION FOR INITIAL HEARING *EN BANC*

David A. Cortman
John J. Bursch
Matthew S. Bowman
Frank H. Chang
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
dcortman@ADFlegal.org
jbursch@ADFlegal.org
mbowman@ADFlegal.org
fchang@ADFlegal.org

Ryan L. Bangert
Ryan J. Tucker
ALLIANCE DEFENDING FREEDOM
15100 N 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rbangert@ADFlegal.org
rtucker@ADFlegal.org

Counsel for Petitioners

RULE 35(b) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35, Petitioners The Southern Baptist Theological Seminary and Asbury Theological Seminary respectfully request that the full Court hear and consider this petition for review, the Seminaries' pending emergency motion for stay, and the cases that have been consolidated and are to be transferred to this Court by the Judicial Panel on Multidistrict Litigation ("JPML"). *See Consolidation Order, In re Occupational Safety and Health Administration*, MCP No. 165 (J.P.M.L. Nov. 16, 2021).

These cases present various questions "of exceptional importance" that warrant immediate *en banc* consideration. Fed. R. App. P. 35(a)(2); *see also Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 993 F.3d 489 (6th Cir. 2021) (granting initial hearing *en banc*). Namely, these cases raise the issue of whether the Occupational Safety and Health Administration ("OSHA")'s vaccine-or-test mandate—issued as an Emergency Temporary Standard ("ETS") that covers 80 million Americans—exceeds OSHA's constitutional and statutory authority. *See* Seminaries' Emergency Mot. for Stay 14-18 (ECF No. 10-1) ("Seminaries' Stay Mot."). In addition, these cases ask whether OSHA's mandate violates the First Amendment and the Religious Freedom Restoration Act ("RFRA"). *Id.* at 8-14, 19-21.

Even on a surface-level review, the Fifth Circuit found that OSHA's mandate raised "grave statutory and constitutional issues" that warranted an immediate stay. *BST Holdings, LLC v. OSHA*, No. 21-

60845, 2021 WL 5166656, at *1 (5th Cir. Nov. 6, 2021). And the Fifth Circuit soon thereafter found the mandate “staggeringly overbroad,” “liberty-restraining,” and in gross excess of OSHA’s authority. *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5279381, at *3, *6-*7 (5th Cir. Nov. 12, 2021). The Court also observed that it would be “dubious” to “assum[e] that the Mandate *does* pass constitutional muster.” *Id.* at *3; *see also id.* at *9 (Duncan, J., concurring) (raising concerns under the Commerce Clause and the non-delegation doctrine). The court also indicated that there are seriously negative implications for religious liberty. *See id.* at *8 n.21.

Aside from these exceptionally important legal questions, there are other aspects of these cases that warrant immediate *en banc* review. As courts have recognized, the use of an ETS is “extraordinary” and “should be delicately exercised, and only in those emergency situations which require it.” *Fla. Peach Growers Ass’n v. U.S. Dep’t of Labor*, 489 F.2d 120, 129-30 (5th Cir. 1974); *see also Pub. Citizen Health Rsch Grp. v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983) (describing an ETS “the most drastic measure in [OSHA’s] standard-setting arsenal”). “In fact, in its fifty-year history, OSHA has issued just ten ETSs. Six were challenged in court; only one survived.” *BST Holdings*, 2021 WL 5279381, at *1.

Now, OSHA invokes this rarely used power and seeks to impose a vaccine-or-test mandate on 80 million individuals by commandeering private and religious employers. It is no surprise that there have been

34 petitions for review that were filed in all 12 geographical courts of appeals. For these reasons, the Court should hear these cases *en banc*.

BACKGROUND

On November 4, 2021, OSHA announced its vaccine-or-test mandate, and this mandate became effective on November 5, 2021.¹ *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910 *et seq.*).

This mandate “covers all employers with a total of 100 or more employees”—private businesses *and* religious non-profit organizations. 29. C.F.R. § 1910.501(b)(1). These employers are required to develop, implement, and enforce either a written mandatory vaccination policy or an alternative testing and masking policy. *Id.* § 1910.501(d)(1). OSHA coerces private businesses and religious organizations to enforce this mandate on their own employees with the threat of heavy penalties. OSHA’s latest penalty guidelines impose up to \$13,653 per violation or \$136,532 per willful violation.² Compliance deadlines are fast approaching. Employers have until December 6, 2021 to implement vaccination or testing policies and to determine the employees’

¹ A detailed explanation of how the OSHA mandate commandeers private and religious employers to enforce the vaccine-or-test mandate can be found in the Seminaries’ emergency motion for stay. *See Seminaries’ Stay Mot.* 4-6.

² See U.S. Dep’t of Labor, OSHA Penalties, <https://www.osha.gov/penalties> (last visited Nov. 17, 2021).

vaccination status. *Id.* § 1910.501(m)(2). And employees have until January 4, 2022 to get vaccinated, and employers must begin testing unvaccinated employees from then on. *Id.*

The Seminaries filed a petition for review in this Court on November 5, 2021. On the same day, the Seminaries moved for an emergency motion for a stay, arguing that the mandate exceeds OSHA's authority and violates the First Amendment and RFRA. *See* Seminaries' Stay Mot. 8-21. The Court ordered the government to respond by November 15, 2021, and on November 16, 2021, the government filed an untimely consolidated response.

Between November 4, 2021 and November 16, 2021, there were 34 petitions for review filed in 12 courts of appeals. On November 16, 2021, the Department of Justice asked JPML to consolidate the pending OSHA cases and randomly designate one court of appeals to handle the consolidated cases. On the same day, JPML designated this Court to be the court of appeals to decide the pending challenges against the OSHA mandate. It is expected that the sister circuits will begin transferring their OSHA mandate cases to this Court shortly.

REASONS FOR GRANTING *EN BANC* REVIEW

The Court should grant initial hearing *en banc*. Under Rule 35(a), the Court has the discretion to hear a case *en banc* if “the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a)(2); *cf.* 6th Cir. I.O.P. 35(a). Various courts of appeals, including this one, have exercised this discretion to immediately and promptly decide cases

of “exceptional importance” by sitting *en banc*. See, e.g., *Bristol Reg’l Women’s Ctr.*, 993 F.3d at 489 (granting Tennessee’s request for initial *en banc* hearing to resolve a conflict with Supreme Court precedents on abortion); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020) (hearing an election law appeal on initial hearing *en banc*); *Mayor of Balt. v. Azar*, 973 F.3d 258, 266 (4th Cir. 2020) (initially reviewing a final agency action *en banc*); *Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’y of Veterans Affs.*, 957 F.3d 1382, 1383 (Fed. Cir. 2020) (granting initial *en banc* hearing to resolve jurisdictional questions).

An initial hearing *en banc*, in appropriate cases, can serve “as an efficient means” of deciding a case “without requiring the matter to percolate uselessly through a panel.” *Williams v. Catoe*, 946 F.3d 278, 279 (5th Cir. 2020). Indeed, an initial *en banc* review could decisively resolve the matter at the circuit level or facilitate a prompt Supreme Court review. See, e.g., Order, *Int’l Refugee Assistance Proj. v. Trump*, No. 17-1351 (4th Cir. Apr. 10, 2017) (*sua sponte* ordering initial *en banc* hearing to decide the travel restrictions case), *injunction vacated sub nom. Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017).

There are several reasons why the Court should immediately hear the consolidated OSHA mandate cases *en banc*. **First**, these cases raise many “question[s] of exceptional importance.” Fed. R. App. P. 35(a)(2). As the Fifth Circuit observed, the OSHA mandate raises “grave statutory and constitutional issues.” *BST Holdings*, 2021 WL 5166656, at *1. Whether OSHA has exceeded its authority has been briefed by the

Seminaries in this case and also by nearly every petitioner that has sought an emergency stay, to the Seminaries' knowledge.

As an initial matter, the ETS exceeds OSHA's authority because OSHA lacks jurisdiction over religious non-profit organizations. *See, e.g.*, Seminaries' Stay Mot. 8-14, 19; Emergency Mot. for Stay 12-13, *Missouri v. Biden*, No. 21-3494 (8th Cir. Nov. 5, 2021) ("Mo. Stay Mot."); Emergency Mot. for Stay at 18-19, *Florida v. OSHA*, No. 21-13866 (11th Cir. Nov. 8, 2021) ("Fla. Stay Mot."). In addition, many petitioners have argued that the OSH Act does not authorize OSHA to promulgate sweeping public health measures to combat a situation outside the workplace. Seminaries' Stay Mot. 17; *see also BST Holdings*, 2021 WL 5279381, at *3-*5; Emergency Mot. for Stay at 17-22, No. 21-4027 (6th Cir. Nov. 9, 2021) ("Daily Wire Stay Mot."); Mo. Stay Mot. 13-17; Fla. Stay Mot. 4-7. There is also a question of whether the mandate (and/or the OSH Act itself) is unconstitutional by violating the Commerce Clause and the non-delegation doctrine. Seminaries' Stay Mot. 14-17; *see also BST Holdings*, 2021 WL 5279381, at *3; Daily Wire Stay Mot. 17-22; Mo. Stay Mot. 17-21.

These cases also ask whether OSHA violated the requirements of the OSH Act by issuing an ETS without proving necessity and gravity. Seminaries' Stay Mot. 17-18; *see also BST Holdings*, 2021 WL 5279381, at *5-*6; Daily Wire Stay Mot. 22-27; Mo. Stay Mot. 7-12; Fla. Stay Mot. 8-18. And to the Seminaries' knowledge, challengers in the Fifth, Sixth, Eighth, and Eleventh Circuits have argued that the OSHA mandate

violates the First Amendment and RFRA. *See, e.g.*, Seminaries' Stay Mot. 19-21; Mo. Stay Mot. 12-13; Fla. Stay Mot. 18-19; Am. Family Ass'n's Joinder Mot. 4-12, *BST Holdings LLC v. OSHA*, 21-60845 (5th Cir. Nov. 9, 2021). This is a multitude of exceptionally important legal questions that the full Court should resolve.

Second, OSHA's invocation of the emergency powers invites the full Court's careful scrutiny. Although the Court may not need to grant initial *en banc* hearing every time OSHA issues an ETS, this specific vaccine-or-test mandate places 80 million individuals to "a choice between their job(s) and their jab(s)," imposes nearly \$3 billion in compliance cost, "involves broad medical considerations that lie outside OSHA's core competencies," and "purports to definitively resolve one of today's most hotly debated political issues." *BST Holdings*, 2021 WL 5279381, at *8. This is without question a set of cases that implicate a "vast economic and political significance" that the full Court should review. *Id.* (*quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Finally, the consideration of various parties' interests and judicial economy counsels heavily in favor of an initial *en banc* hearing. While it is true that the Fifth Circuit has stayed the OSHA mandate, it also remains true that there is lingering "uncertainty about the requirements of the [mandate] and whether they will survive legal testing." *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated on other grounds In re U.S. Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018). Despite the stay, the

OSHA mandate’s fast-approaching compliance deadlines have caused confusion among regulated individuals, and the White House has told businesses to proceed with the mandate. *See* Spencer Kimball, *White House tells businesses to proceed with vaccine mandate despite court-ordered pause*, CNBC (Nov. 8, 2021), <https://www.cnbc.com/2021/11/08/biden-vaccine-mandate-white-house-tells-business-to-go-ahead-despite-court-pause.html>. A final ruling from this Court—and possibly a Supreme Court review—is necessary to definitively safeguard the rights of the parties involved. Initial *en banc* hearing is an “efficient means” of accomplishing that goal. *Catoe*, 946 F.3d at 279.

CONCLUSION

The Court should grant initial *en banc* hearing.

Respectfully submitted,

/s/ Ryan L. Bangert

David A. Cortman
John J. Bursch
Matthew S. Bowman
Frank H. Chang
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
dcortman@ADFlegal.org
jbursch@ADFlegal.org
mbowman@ADFlegal.org
fchang@ADFlegal.org

Ryan L. Bangert
Ryan J. Tucker
ALLIANCE DEFENDING FREEDOM
15100 N 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rbangert@ADFlegal.org
rtucker@ADFlegal.org

Counsel for Petitioners

Dated: November 17, 2021

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 6th Cir. R. 32(b), this document contains 1,823 words according to the word count function of Microsoft Word 365.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Ryan L. Bangert

Date: November 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2021, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Ryan L. Bangert

Date: November 17, 2021