UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BENTKEY SERVICES, LLC D/B/A THE DAILY WIRE, Petitioner, v. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; U.S. DEPARTMENT OF LABOR, Respondents.	:	CASE NO.: 21-4027

PETITION FOR INITIAL HEARING *EN BANC*

RULE 35(b) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35, Petitioner Bentkey Services, LLC, doing business as The Daily Wire, respectfully requests that the full Court hear and consider Petitioner's petition for review of agency action, Petitioner's pending emergency motion for stay, and the petitions that have been consolidated and are to be transferred to this Court pursuant to a Consolidation Order entered by the Judicial Panel on Multidistrict Litigation ("JPML"), *In re Occupational Safety and Health Administration*, MCP No. 165 (J.P.M.L. Nov. 16, 2021).

There is little question that these cases present various questions "of exceptional importance" that qualify for immediate *en banc* consideration, namely whether the Occupational Safety and Health Administration ("OSHA")'s Emergency Temporary Standard ("ETS") requiring 80 million Americans in private employment to be vaccinated or tested for COVID-19 exceeds OSHA's constitutional and statutory authority. *See* Daily Wire Emergency Mot. for Stay 14-18 (ECF No. 14) ("Daily Wire Stay Mot."). Prior to consolidation, the Fifth Circuit found that this mandate exceeded OSHA's statutory authority in a manner that was "staggeringly overbroad" and "liberty-restraining," and that the mandate was almost certain not to pass constitutional muster. *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5279381, at *3, *6-*7 (5th Cir. Nov. 12, 2021). Furthermore, 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. Circuit courts of appeal are also authorized to institute select cases *en banc* when judicial efficiency and effectiveness would be enhanced by doing so. *Textile Mills Sec. Corp. v. Comm'r of Internal Revenue,* 314 U.S. 326, 335 (1941); see, *In re El Toro Materials Co., Inc.*, 504 F.3d 978, 982 n.7 (9th Cir. 2007).

As the Supreme Court explained in *Textile Mills Sec. Corp*., where appropriate and immediate, *en banc* review "makes for more effective judicial administration . . . in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases." *Id*. at 334–35. Such consideration is appropriate here.

BACKGROUND

The federal government has issued an unprecedented mandate of COVID vaccines based on a rarely used law of questionable applicability. OSHA's Emergency Temporary Standard, which the agency made effective immediately without public comment, essentially classifies millions of American workers *as* "hazards" who must be purified from the workplace. But OSHA's mandate is protecting employees *from* hazards under the Occupational Safety & Health Act (OSH Act or Act), 29 U.S.C.

§ 655(c), not *deeming them* hazards to themselves based on their medical decisions outside the workplace.

The timing of the ETS raises serious questions about whether its purpose is political rather than scientific. More than 81% of American adults have received at least one vaccine dose, and more have developed natural immunity following COVID infection. Meanwhile, overall hospitalization rates and deaths have dropped substantially from pandemic highs without this mandate, despite regional fluctuations. Indeed, in June, OSHA itself, acting without apparent political interference, declined to impose a COVID-19 vaccine mandate "in non-healthcare settings" because of the much lower magnitude of risk. 86 Fed. Reg. 32,376, 32,385 (June 21, 2021).

The Supreme Court has repeatedly reminded government officials that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn. v. Cuomo*, 2020 WL 6948354 (U.S. Nov. 25, 2020). The ETS, however, is only the latest unlawful assertion of expansive federal power by this administration. In August the Supreme Court firmly rejected the similarly odd and unilateral assertion by the Centers for Disease Control and Prevention

("CDC") to issue a nationwide moratorium on residential evictions—even *after* the Court forewarned the CDC that such an assertion of power would be unconstitutional. *Alabama Association of Realtors v. Department of Health & Human Services*, No. 21A23, 2021 WL 3783142 at *3 (U.S. Aug. 26, 2021).

This ETS, too, exceeds the federal government's statutory authority. The OSH Act only allows an ETS where "necessary" to protect employees from "grave danger" from exposure to *workplace* substances, agents, or hazards. 29 U.S.C. § 655(c). It does not treat employees themselves as "hazards" to be fumigated because of a general condition unrelated to workplace hazards. Interpreting the Act as the ETS does would give OSHA unprecedented fiat power to impose medical procedures on any American who has a job, or bar classes of people from gainful employment if they do not bow to the Executive Branch's health choice preferences. "[T]he sheer scope of [OSHA's] claimed authority . . . would counsel against the Government's interpretation." *See Ala. Ass'n of Realtors*, 2021 WL 3783142 at *3.

The Daily Wire filed a petition for review in this Court on November 4, 2021, and filed an emergency motion for a stay on November 9, arguing

that the mandate exceeds OSHA's authority and violates the First Amendment and RFRA. *See* Daily Wire Stay Mot. The government filed a consolidated response on November 15, 2021.

Meanwhile, however, no fewer than 34 petitions for review of the OSHA ETS were filed between November 5, 2021, and November 16, 2021, in 12 circuits. 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

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). Such resolution of a case makes for "more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be

promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases." *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. at 334–35 (footnote omitted). And this is no ordinary case. 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).

Rule 35(a) thus grants the Court discretion to hear a case *en banc* where, as here, "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2); *cf.* 6th Cir. I.O.P. 35(a). *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 (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).

There can be no question but that consideration of the parties' interests and judicial economy counsel heavily in favor of an initial *en banc* hearing, given that any panel decision is certain to be the subject of a petition for reconsideration *en banc*. The Fifth Circuit's stay of the OSHA mandate may not adequately resolve the judicial "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). The government has certainly not conceded that the Fifth Circuit's ruling is dispositive, and it has reserved the right to ask this Court to vacate the stay imposed by that court. Because a final ruling from this Court with respect to the various consolidated petitions will inevitably be sought, and applications for Supreme Court review also nearly certain to be filed, initial *en banc* hearing is an "efficient means" of accomplishing that goal. *Catoe*, 946 F.3d at 279.

There can be no question but that these cases raise many "question[s] of exceptional importance" as required by Fed. R. App. P.

35(a)(2). The Fifth Circuit's ruling that the OSHA mandate raises "grave statutory and constitutional issues" forecloses any serious debate on that question. *See BST Holdings*, 2021 WL 5166656, at *1. The ETS exceeds OSHA's authority because, in part, the OSH Act does not authorize OSHA to promulgate sweeping public health measures to combat a situation outside the workplace. *See 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. The mandate may also be an unconstitutional violation of the Commerce Clause and the non-delegation doctrine. *See BST Holdings*, 2021 WL 5279381, at *3; Daily Wire Stay Mot. 17-22; Mo. Stay Mot. 17-21. These proceedings also ask whether OSHA violated the requirements of the OSH Act by issuing an ETS without proving necessity and gravity. *See BST Holdings*, 2021 WL 5279381, at *5-*6; Daily Wire Stay Mot. 22-27; Mo. Stay Mot.7-12; Fla. Stay Mot. 8-18.

OSHA's invocation of emergency powers here also invites the full Court's careful scrutiny because of its reliance on the procedural device of an ETS, which—for no rational reason—bypasses normal OSHA rulemaking procedures. The ETS is also arbitrary and capricious under

the Administrative Procedure Act because OSHA arbitrarily chose the size of employers who must comply (the round number of 100 employees) and failed to tailor the ETS to actual workplace needs and alleged dangers with appropriate consideration for different employees and different workplaces, including employees who have natural immunity, or those with minimal contact with others. Such shortcuts, juxtaposed against the scope and invasiveness of the OSHA ETS, are an unjustifiable assertion of state power that raises the most profound constitutional and governance issues.

CONCLUSION

The Court should grant initial *en banc* hearing.

Date: November 17, 2021

/s/Harmeet K. Dhillon

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

*Federal practice only

Harmeet K. Dhillon
Ronald D. Coleman
Mark P. Meuser
Michael A. Columbo
Stuart S. McCommas
DHILLON LAW GROUP INC.
177 POST STREET, SUITE 700
SAN FRANCISCO, CALIFORNIA 94108
TELEPHONE: (415) 433-1700
FACSIMILE: (415) 520-6593
harmeet@dhillonlaw.com
rcoleman@dhillonlaw.com
mmeuser@dhillonlaw.com
mcolumbo@dhillonlaw.com
smcommas@dhillonlaw.com

Counsel for Bentkey Services LLC d/b/a The Daily Wire

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 1,811 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/ Harmeet K. Dhillon

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/ Harmeet K. Dhillon

Date: November 17, 2021