

**Nos. 21-7000 (lead), 21-4092  
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***

---

**MOTION TO EXTEND THE STAY AND  
OPPOSITION TO RESPONDENT’S EMERGENCY MOTION TO  
DISSOLVE STAY**

Pursuant to 28 U.S.C. § 2112(a)(4), Petitioner National Association of Home Builders of the United States (“Petitioner” or “NAHB”) respectfully request that the Court extend the stay granted by the Fifth Circuit Court of Appeals during the pendency of this litigation (ECF 104). *See BST Holdings, LLC v. Occupational Safety and Health Admin.*, No. 21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021) (finding “grave statutory and constitutional issues” with the mandate<sup>1</sup>), *aff’d* \_\_\_ F.4<sup>th</sup> \_\_\_, 2021 WL 5279381 (5th Cir. Nov. 12, 2021) (staying the mandate and enjoining OSHA from implementing or enforcing the mandate). In addition, NAHB

---

<sup>1</sup> Referring to the Occupational Safety and Health Administration’s November 5, 2021 Emergency Temporary Standard – COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1918, 1926, and 1928).

respectfully requests the court deny the government's emergency motion to dissolve the stay filed on November 23, 2021 (ECF No. 69).

There are numerous pending motions before this court, including several petitions for full *en banc* review. Dissolving the stay at this time needlessly complicates the procedural posture of this case, particularly in light of the sheer number of petitions, motions, and oppositions that have already been filed to date. Further, the Fifth Circuit carefully considered the motion to stay in that circuit, and the issues were fully briefed by the government. Nothing has changed now that the cases have been consolidated in this Circuit.

Dissolving the stay will have immediate practical impacts on the residential construction industry. It will force businesses to determine their compliance obligations even as they continue to operate their businesses and wrap up operating obligations to close out the year. Among these obligations are developing a mandatory vaccination policy or testing and face covering policy, determining the vaccination status of their employees, and informing employees about the ETS,<sup>2</sup> vaccine efficacy and the criminal penalties associated with providing false information and documentation. 86 Fed. Reg. at 61552, 61554. While the Fifth Circuit has issued a stay, effectively pushing out the compliance dates, these

---

<sup>2</sup> Emergency Temporary Standard – COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1918, 1926, and 1928) (hereafter “ETS”).

compliance dates remain on the minds of employers affected by this ETS. Deadlines include comments to the rulemaking Docket No. OSHA–2021–0007 (still due December 6, 2021), and reporting and recordkeeping obligations that will become due almost immediately (by December 6<sup>th</sup>) if this court dissolves the Fifth Circuit stay.

Businesses are concerned because they are trying to track these proceedings and determine the best path forward in the event this court dissolves the stay. Although OSHA stated it is confident that employers with more than 100 employees “will have sufficient administrative systems in place to comply quickly with the ETS[,]” 86 Fed. Reg. at 61403, the agency’s confidence misses the mark. This ETS is broadly applicable to a host of different industries, is 154 pages in triple-column format, and if the Fifth Circuit stay is dissolved, will have immediate compliance deadlines beginning next Monday, December 6, 2021. NAHB itself is a not-for-profit trade association with greater than 100 employees. As such, it will be required to rework its policies and recordkeeping requirements to meet the fast-approaching compliance obligations set out in this ETS. Moreover, of particular concern for NAHB and its members is the impact dissolving the stay will have on small businesses.

OSHA recognizes that “[t]he requirements of the ETS could have a differential impact on small businesses compared with larger firms. Many small

businesses lack separate human resources departments and struggle to carry out HR functions.” 86 Fed. Reg at 61511. OSHA has arbitrarily chosen to apply the ETS to businesses with 100 or more employees believing this will minimize impacts to small businesses. This approach is mistaken.

OSHA itself recognizes, without clearly stating, that many small businesses have more than 100 employees. 86 Fed. Reg at 61511. Additionally, the Small Business Administration (“SBA”) has established size standards that “define whether a business entity is small. . . .” 13 C.F.R. § 121.101(a). The industry specific size standards are expressed by either the “number of employees or by annual receipts in millions of dollars.” 13 C.F.R. § 121.201. For example, the SBA recognizes Wood Window and Door Manufacturing businesses that have up to 1,000 employees and Manufactured Home Manufacturing businesses that have up to 1,250 employees as small businesses. *Id.*

Additionally, SBA classifies most small businesses by the business’s average annual receipts, regardless of the number of employees. *See* U.S. Congressional Research Service, *Small Business Size Standards: A Historical Analysis of Contemporary Issues* 2 (R40860, Updated May 28, 2021) (<https://crsreports.congress.gov/product/pdf/R/R40860>) (last visited Nov. 29, 2021). Thus, for example, the SBA considers a Single-Family Home Construction business

that has more than 100 employees as a small business if its average annual receipts are less than \$39.5 million. 13 C.F.R. § 121.201.

OSHA has established the 100-employee threshold to minimize impacts on small businesses. Yet, the SBA, the agency with particular expertise in working with small businesses, classifies many businesses with more than 100 employees as small businesses. It is imperative that the Fifth Circuit's stay remain place so that these small businesses are not forced "to establish new systems to track vaccination status among workers, to keep related records, and for firms that allow the testing option, to keep records of each test," only to later find out that OSHA had no authority to promulgate the ETS. 86 Fed. Reg at 61511.

OSHA's effort to now dissolve the stay is creating confusion for small businesses in light of its' public statement that it would "take no steps to implement or enforce" the ETS "until further court order[ ]" and the statement on its website a statement that it "has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation." *See* <https://www.osha.gov/coronavirus/ets2> (last visited Nov. 29, 2021). According to OSHA's website, dissolving the stay would allow the Agency to take steps to implement and enforce the ETS even when there are so many open questions to be decided by this court.

For the foregoing reasons, NAHB respectfully requests the court extend the existing stay issued by the Fifth Circuit and deny the government's motion to dissolve the stay as altering the existing stay this early in the litigation will create undue hardships on employers and businesses.

Dated: November 30, 2021.

Respectfully submitted,

/s/ Felicia K. Watson  
NATIONAL ASSOCIATION OF HOME  
BUILDERS OF THE UNITED STATES  
1201 15<sup>th</sup> Street N.W.  
Washington, D.C. 20005  
Telephone: (202) 266-8229  
fwatson@nahb.org

/s/ Thomas Jon Ward  
NATIONAL ASSOCIATION OF HOME  
BUILDERS OF THE UNITED STATES  
1201 15<sup>th</sup> Street N.W.  
Washington, D.C. 20005  
Telephone: (202) 266-8230  
tward@nahb.org

*Attorneys for Petitioner*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner National Association of Home Builders of the United States (“NAHB”) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

**CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)**

This Opposition complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure Rule 27(d)(2)(A) because it contains 1,102 words excluding the parts of the response exempted by Rule 27(a)(2)(B); and (2) the typeface requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 365 (the same program used to calculate the word count).

/s/ Felicia K. Watson

Felicia K. Watson

NATIONAL ASSOCIATION OF HOME  
BUILDERS OF THE UNITED STATES

1201 15<sup>th</sup> Street N.W.

Washington, D.C. 20005

Telephone: (202) 266-8229

fwatson@nahb.org

Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30<sup>th</sup> day of November 2021, this Opposition was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any privacy redactions have been made in compliance with Federal Rule of Appellate Procedure 25(a)(5); and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed, per this Court's Rule 25(a)(3).

/s/ Felicia K. Watson  
Felicia K. Watson  
NATIONAL ASSOCIATION OF HOME  
BUILDERS OF THE UNITED STATES  
1201 15<sup>th</sup> Street N.W.  
Washington, D.C. 20005  
Telephone: (202) 266-8229  
fwatson@nahb.org  
Attorney for Petitioner