Lead Case No. 21-7000
(Member Case No. 21-4027/4028/4031/4032/4033/4080/4082/4083/4084/4085/4086/4087/4088/4080/4090/4091/4092/4093/4094/4095/4096/4097/4099/4100/4101/4102/4103/4108/4112/4114/4115/4117)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SITH CIRCUIT

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

On Petitions for Review

PETITIONER BENTKEY SERVICES, LLC D/B/A THE DAILY WIRE'S MOTION FOR LEAVE TO FILE REPLY TO OSHA'S OPPOSITION TO PETITIONS FOR INITIAL HEARING EN BANC

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 27(a)(1), Petitioner Bentkey Services, LLC, doing business as The Daily Wire, hereby moves for leave to file a Reply to the Occupational Health and Safety Administration ("OSHA")'s Opposition to Petitions for Initial Hearing En Banc ("Opposition").

On November 21, 2021, the Court directed Respondents to file a consolidated response to the various parties' petitions for initial *en banc* hearing. Initial Case Mgmt. Order (ECF No. 8) at 2. The court's order

was silent as to whether the various petitioners could file a reply to OSHA's Opposition. OSHA filed its Opposition on November 29, 2021. (ECF No. 220.)

Under FRAP 27(a)(4), "[a]ny reply to a response must be filed within 7 days after service of the response." But because Petitioner filed its request for initial *en banc* review under FRAP 35, Petitioner is requesting leave of court to file its reply. The FRAP contemplates that whenever a party moves for relief, that party shall have the right to file a reply to any response filed in opposition. *See* FRAP 27(a)(4). Petitioner therefore respectfully requests that the Court provide Petitioner with that same opportunity here.

Petitioner therefore respectfully requests that the Court grant Petitioner leave to file its proposed Reply, a copy of which is filed herewith. *See* Decl. of Michael A. Columbo, Exhibit 1.

Dated: December 4, 2021

Respectfully submitted,

/s/ *Harmeet K. Dhillon*

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 27(d)(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 222 words according to the word count function of Microsoft Word 365.

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/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

Dated: December 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2021, a true and accurate copy of the foregoing 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
Harmeet K. Dhillon

Dated: December 4, 2021

Declaration of Michael A. Columbo

I, Michael A. Columbo, declare:

1. I am an attorney at the law firm Dhillon Law Group Inc., counsel for Petitioner Bentkey Services, LLC, doing business as The Daily Wire. I am admitted to practice before the United States Court of Appeals for the Sixth Circuit.

2. Attached hereto as Exhibit 1 is a true and correct copy of Petitioner's proposed Reply to the Occupational Health and Safety Administration's Opposition to Petitions for Initial Hearing En Banc, which Petitioner has sought leave to file.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 3rd day of December 2021, at San Rafael, California.

/s/Michael A. Columbo
Michael A. Columbo

EXHIBIT "1"

Lead Case No. 21-7000
(Member Case No. 21-4027/4028/4031/4032/4033/4080/4082/4083/4084/4085/4086/4087/4088/4080/4090/4091/4092/4093/4094/4095/4096/4097/4099/4100/4101/4102/4103/4108/4112/4114/4115/4117)

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IN RE: OSHA RULE ON
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On Petitions for Review

PETITIONER BENTKEY SERVICES, LLC D/B/A THE DAILY WIRE'S REPLY TO OSHA'S OPPOSITION TO PETITIONS FOR INITIAL HEARING EN BANC

INTRODUCTION

Before misapplying the standard for initial review by the Court sitting *en banc*—the only issue to be resolved by The Daily Wire's Petition— OSHA regurgitates the same breathless claims it published as justifications for the ETS. It has included these assertions in nearly every document it has filed in every court considering the issues now consolidated in the Sixth Circuit. OSHA's transparent attempt to use COVID-19 to browbeat the judicial branch or distract it from pivotal legal questions is no more subtle than the imperious statement made by the President, when announcing the ETS, that he had lost "patience" with unvaccinated Americans, or his Chief of Staff's public endorsement of the ETS as a means to circumvent the Constitution. These "pound the table" tactics did not work before the Fifth Circuit, and should not work here.

The Daily Wire does not dispute the seriousness of COVID-19, *see* Daily Wire Emergency Mot. For Stay 14-18 (ECF No. 14) ("Daily Wire Stay Mot."), Decl. of Jeremy Boreing, ¶ 25. And we note for context that, beyond certain civil rights, no authority prevents states and local municipalities, or any employer, from imposing a vaccination

requirement, and vaccines are freely available to any American who wants them. Indeed, at this time, 82.8% of Americans over 18 have received at least one vaccination shot. *Covid Data Tracker*, Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-onedose-pop-5yr (accessed Dec 2, 2021), which is a 2.8% increase over the rate at the time the ETS was published just one month ago. Daily Wire Stay Mot. at 7. This is one reason why, with still another month to go before the ETS would have gone into effect under OSHA's original plan, and allowing for a certain amount of medical and religious exceptions and others expressly excluded from the reach of this ETS, the asserted urgency of OSHA's crusade against the unvaccinated is seriously questionable. Despite its appetite for coercion, OSHA may just face the prospect of having relatively few people left to coerce—further undermining the government's supposed justifications for avoiding public comment through a slow-rolling "emergency" standard in the first place.

This case is arguably limited to just two, narrow questions on the merits: Of all government authorities, does *OSHA* have the power to make vaccination or perpetual masking and testing a condition of

employment as a workplace safety requirement; and, if so, may it do so through the published ETS to avoid the routine statutory requirement for notice and comment for federal rulemaking? Before the Court considers these merits questions, however, the instant Petition for Initial Hearing En Banc consists of just one, narrow procedural request: that for the sake of speed and efficiency, these questions be decided by the full Sixth Circuit sitting *en banc*. For the reasons stated in its Petition, and argued further below, the Court should grant Daily Wire's Petition.

GOVERNING LEGAL STANDARD

Under Federal Rule of Appellate Procedure 35(a)(1), the Court "may order that an appeal or other proceeding be heard or reheard . . . en banc" if "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; **or** (2) *the proceeding involves a question of exceptional importance*." Fed. R. App. P. 35(a) (formatting omitted) (emphases added); *see also Mayor and City Council of Baltimore v. Azar*, 799 Fed. App'x 193, 194 (4th Cir. 2020) (Thacker, J., concurring) (explaining that "the Federal Rules and statutory law clearly provide for" initial hearing *en banc* (citing Fed. R. App. P. 35(a))). Indeed, Judge Thapar recently explained that a party could seek *en banc* review of even

a stay order because "the United States Code provides that a majority of active circuit judges may hear any 'case or controversy' en banc." *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 344 fn. 1 (6th Cir.) (Thapar, J., dissenting) (citing 28 U.S.C. § 46(c)), *vacated*, 994 F.3d 774 (6th Cir. 2021).

THIS PROCEEDING IS OF EXCEPTIONAL IMPORTANCE

Perhaps recognizing that no one could deny the "exceptional importance" of this case and its consequent eligibility for immediate *en banc* consideration, OSHA argues that "Petitioners' extensive discussion of the merits . . . improperly 'reduces the exceptional importance test to a self-serving and result-oriented criterion.'" OSHA's Opp. to Pets. For Initial Hearing En Banc (ECF No. 220) at 11-12 ("OSHA Opp.") (citing *Neuman v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring)). OSHA's reliance on *Neuman*, where the court denied rehearing *en banc* of a decision that "merely follow[ed] well-established Supreme Court precedent," despite the dissenters' view that it was a "sweeping and revolutionary decision," *Neuman*, 824 F.2d at 1242-43, is inapposite. Unlike in *Neuman*, there is no judicial precedent upholding a federal vaccination mandate. Further, no court would categorize this

case as "routine or run-of-the-mill" considering the legal and constitutional issues at stake and the effect the ultimate decision will have on tens of millions of Americans—and perhaps the entire American workforce, if OSHA expands the rule beyond large employers, as it has indicated it may. *See id.* at 1242; *COVID–19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402, 61403 (November 5, 2021).

OSHA suggests that the Court should not consider arguments regarding the importance of the case. But the drafters of the Federal Rules made clear that a case's "exceptional importance" is in fact the *crucial* inquiry the court must conduct. *See* Fed. R. App. P. 35's Advisory Committee's note (1998 amendments) (explaining that intercircuit conflict is just "one reason" that a proceeding may be of "exceptional importance"). The Court's decision will determine whether the federal government can use an OSHA ETS as an "*ultimate work-around for the Federal govt* [sic] *to require vaccinations*," a view apparently endorsed by White House Chief of Staff Ron Klain. *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, --- F.4th ---, 2021 WL 5279381, at *4-5 n.13, 18 (5th Cir. Nov. 12, 2021).

Specifically, the Court will determine whether OSHA has the authority to move beyond regulating workplaces, as the OSH Act contemplates, into regulating workers' private, extramural conduct by labeling them—the workers *themselves*—as workplace hazards. If the ETS is upheld, 80 million Americans in private employment will be required by federal law to be vaccinated or regularly tested for Covid-19, *see* Daily Wire Stay Mot., and no limiting principle would prevent OSHA from regulating every American worker's decisions. Indeed, if a person's mere *presence* in the workplace regardless of their occupation or the nature of the workplace is sufficient to trigger federal regulation by OSHA of their personal medical decisions, why couldn't OSHA regulate the choices of supposedly hazardous customers, vendors or others who enter the workplace, too, in order to protect workers?

Beyond the profound effect this case will have on Americans and their employers, important matters of constitutional and administrative law are also at stake. The transformation of OSHA from an agency that regulates occupation-specific workplaces to one that regulates the medical decisions of all workers requires the Court to evaluate whether OSHA can promulgate sweeping public health measures to combat a

situation outside the workplace. Daily Wire Stay Mot. at 17-22. OSHA's decision to circumvent the notice and comment process by issuing an ETS — after months of inaction and without proving necessity and gravity — raises the issue of whether OSHA violated the requirements of the OSH Act. *See, e.g.*, *BST Holdings*, 2021 WL 5279381, at *5-*6; Daily Wire Stay Mot. 22-27. And the federal government's use of OSHA to force Americans to obtain vaccinations regardless of personal circumstance (both medical and occupational) raises grave constitutional concerns regarding the Commerce Clause and the Nondelegation Doctrine. *See BST Holdings*, 2021 WL 5279381, at *3.

The case could resolve in one of two ways. The Court could (and should) agree with the Fifth Circuit's assessment of the merits and enjoin OSHA from conditioning employment for 80 million Americans based on whether their medical decisions conform to the Executive Branch's preferences. Or the Court could allow the federal government, for the first time in American history, to compel mandating a medical treatment as a condition of employment through a federal "workplace safety" rule—without notice-and-comment, without regard to the characteristics of one's workplace or occupation, and without regard to the principles of

federalism embodied in the Constitution. Either outcome would be of "exceptional importance."

THE EFFICIENCY OF INITIAL EN BANC REVIEW

Ignoring the actual legal standard, OSHA instead argues that the importance of this case weighs against *en banc* review because it would somehow be more efficient for a three-judge panel to hear this case before the court hears it *en banc* (a strong possibility given how important this case is). OSHA Opp. at 12. Even if the court were to look past the legal standard and consider efficiency rather than importance, *en banc* review would nonetheless be proper.

OSHA's discussion of cases that describe the inefficiency and time-consuming nature of *en banc* review is misleading. Each of the cases OSHA cites relates to *rehearing*—not initial—*en banc* consideration. *See Mitts v. Bagley*, 626 F.3d 366, 369–70 (6th Cir. 2010) (Sutton, J., concurring) (explaining that "[e]n banc rehearing . . . may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort"); *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001) (describing the process of overruling "binding circuit authority" by rehearing *en banc* as "'unwieldy'" and

"time-consuming" (quoting Richard A. Posner, *The Federal Courts: Crisis and Reform* 101 (1985)); *Neuman*, 824 F.2d at 1244 (explaining that the rehearing process "substantially delays the case being reheard"). Indeed, if the court were to deny the Petition, the case would be heard by a three-judge panel, and then possibly heard again by the court *en banc*. Thus, *granting* the petition would prevent the case from following the time-consuming and inefficient process of rehearing *en banc*.

Finally, OSHA's efforts to delay *en banc* review makes no sense in light of its rhetoric concerning the necessity of the ETS and bypassing the rulemaking process established by Congress. If resolving the matter expeditiously is as important as OSHA claims, OSHA's insistence that a three-judge panel hear the case is nonsensical given the high likelihood of rehearing *en banc*.

CONCLUSION

There is no question that the Court has the power to consider a petition for sitting *en banc* for the initial review. There is also no question that the standard for determining the appropriateness of initial *en banc* review is satisfied if a case is of "exceptional importance." And given the tremendous impact this case will have on the American people and this

country's body of constitutional and administrative law, there is no question that this case is of "exceptional importance." The Court should therefore grant the Petition and hear the case *en banc*.

Dated: December 3, 2021

Respectfully submitted,

/s/ *Harmeet K. Dhillon*

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/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

Dated: December ___, 2021

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/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

Dated: December __, 2021