

Nos. 21-7000

**IN THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

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

On Petitions for Review

**MOTION FOR LEAVE TO FILE RESPONSE OF AMICI CURIAE
IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISSOLVE STAY**

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TO THE HONORABLE COURT:

Pursuant to Federal Rule of Appellate Procedure 29(b) and this Court’s Order dated December 3, 2021, the Small Business Majority (“SBM”); the American Independent Business Alliance (“AMIBA”); and “Border Grill” (Border Grill Las Vegas, LLC; Ciudad LA, LLC; Border Grill Truck and Catering, LLC; Feedfolks LLC; BG SM20, LLC; and Mundo Management Group, LLC) (together *Amici*) file this motion for leave to file the *amicus curiae* brief that is submitted to this Court simultaneously with this motion. The brief is submitted in response to the Government’s Motion to Dissolve Stay.

Interest of *Amici Curiae*

1. The attached *amicus curiae* brief is submitted by associations representing small and independent business associations and alliances, along with several small restaurant businesses. The SBM and AMIBA are non-partisan, non-profit national small business organizations that provide resources and support to empower small businesses in the United States. *Amici* represent tens of thousands of small businesses and hundreds of thousands of American workers.

2. Founded in 2005, SBM engages a network of more than 85,000 small businesses and 1,500 business and other partner organizations to create a strong economy for all, through a combination of public policy advocacy and educational outreach. SBM advocates for the development of pro-entrepreneurial policy through

research, recruitment and training of spokespeople, and amplification of the voices of small businesses in the media. SBM also creates and distributes educational seminars for small businesses on topics such as access to capital, retirement security, and healthcare and other workforce benefits.

3. Founded in 2001, AMIBA is a network of independent business alliances, affiliates, and organizations supporting the “Buy Local” movement. AMIBA has more than 60 alliances spanning more than thirty states. Those alliances reach more than 50,000 locally owned businesses and organizations in the United States. AMIBA hosts networking events such as leadership roundtables and publishes resources such as guides on avoiding common business pitfalls, legal education materials, and guides on how to start one’s own independent business alliance.

4. Border Grill was founded in 1985 as a small, forty-seat “taco stand.” In the years since, founders Susan Feniger and Mary Sue Milliken have grown their business to several locations and food trucks. Border Grill also provides full-service events and a catering business. Border Grill blends a commitment to building community with sustainability and a passion for authentic Mexican cuisine. With their first-hand knowledge of how harmful COVID-19 has been for small, independent businesses, and the need for regulatory intervention to ensure that employers are taking the steps necessary to slow and eliminate that harm, Border

Grill is an example of the countless small businesses that would be both directly and indirectly affected by the ETS.

5. *Amici* have a substantial interest in protecting the health and safety of small business workers and operators while also reducing the probability of economic catastrophe for America’s small businesses. According to the Occupational Safety and Health Administration (“OSHA”), the pandemic has presented “special challenges for small businesses.” Whereas a quarter of larger businesses – defined as those with more than 100 employees – have seen revenue drop more than 30%, the same can be said for *two-thirds* of small businesses. Small businesses have also been struck especially hard by staff shortages.

6. Through their roles as experts in, resources to, and members of the small and independent business communities, *amici* have an interest in guiding how workplace-related safety policies will impact small businesses, which account for 99% of all employer firms and half the country’s jobs and economic production.

Desirability and Relevance of Amicus Brief

7. *Amici* believe that the Fifth Circuit’s decision to stay the Emergency Temporary Standard (“ETS”) will have deleterious effects on the health and economic well-being of America’s small and independent businesses, most of which support the ETS. The stay prevents a rule from going into effect that would set the

ground floor for workplace protections, a rule that is necessary to make sure the anticipated “winter surge” of COVID-19, along with the new Omicron variant, does not cripple the American economy and that states do not enact legislation barring businesses from imposing similar rules designed to protect workers.

8. *Amici* are concerned that the stay will endanger small and independent businesses in two ways. First, those businesses which have at least 100 employees lose the direct protection of the ETS. Second, businesses that are smaller than 100 employees lose the indirect protection of having larger businesses abide by the ETS.

Conclusion

The Small Business Majority, the American Independent Business Alliance, and Border Grill respectfully move the Court for leave to appear as *Amici Curiae* in support of the Government’s Motion to Dissolve Stay. The proposed *amicus* brief is attached hereto pursuant to F.R.A.P. 29(a)(3).

Dated: December 7, 2021

Respectfully submitted,

/s/ Emmy Levens

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CERTIFICATE OF COMPLIANCE WITH RULE 27(D)(2)(A)

I hereby certify that the foregoing motion complies with Fed. R. App. P. 27(d)(2)(a) because it contains 784 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced font in Microsoft Word 2010 using 14-point Times New Roman.

Dated: December 7, 2021

Respectfully submitted,

/s/ Emmy L. Levens
Emmy L. Levens

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 7, 2021

Respectfully submitted,

/s/ Emmy L. Levens

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