

**No. 21-7000 (lead), 21-4149
MCP No. 165**

**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 Petition for Review

**PETITIONER THE HERITAGE FOUNDATION'S
RESPONSE TO RESPONDENTS' MOTION TO DISMISS**

Jay Alan Sekulow
Jordan A. Sekulow
Abigail A. Southerland
Miles Terry
Harry Hutchison
Christy Stierhoff
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
Tel. (202) 546-8890
asoutherland@aclj.org

Counsel for Petitioners

On November 5, 2021, the Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), issued the Vaccination and Testing emergency temporary standard (“ETS Mandate”)– a sweeping public health mandate requiring covered employers to “develop, implement, and enforce a mandatory COVID-19 vaccination policy” and requiring any workers who remain unvaccinated to “undergo [weekly] COVID-19 testing and wear a face covering at work.” 86 Fed. Reg. 61,402 (Nov. 5, 2021). OSHA’s overreach of authority was immediately challenged by The Heritage Foundation and a host of other states, businesses, and nonprofit organizations in Courts of Appeal across the country. Following this Court’s decision to dissolve the stay initially entered by the Fifth Circuit, *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021), The Heritage Foundation and numerous other petitioners filed applications in the U.S. Supreme Court seeking to enjoin OSHA from enforcing the Mandate.

On January 13, 2022, the U.S. Supreme Court granted petitioners/applicants the relief requested and stayed the ETS Mandate finding that “applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate.” *National*

Fed'n of Indep. Bus. v. Department of Labor, 211 L. Ed. 2d 448, 453 (2022). The Supreme Court agreed with petitioners that the Mandate is “a significant encroachment into the lives – and health – of a vast number of employees” and extends “beyond the agency’s legitimate reach.” *Id.* “Imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not ‘part of what the agency was built for.’” *Id.* at 454 (citation omitted).

In light of the Supreme Court’s ruling, OSHA has no choice but to withdraw the ETS Mandate. The Supreme Court’s decision forecloses any possibility of OSHA moving forward with the ETS or a permanent rule just like it. There remains no doubt regarding the limits of OSHA’s authority “to set *workplace* safety standards, not broad public health measures” such as the Mandate attempted by OSHA here. *Id.* at 453 (citing 29 U.S.C. § 655(b)). Accordingly, The Heritage Foundation has obtained the relief it requested and has no opposition to the governments motion to dismiss.

February 4, 2022

Respectfully Submitted,

Jay Alan Sekulow
Jordan A. Sekulow
/s/ Abigail Southerland
Abigail Southerland
Miles Terry
Harry Hutchison
Christy Stierhoff
**AMERICAN CENTER FOR LAW
& JUSTICE**
201 Maryland Avenue, NE
Washington, DC 20002
Tel. (202) 546-8890
asoutherland@aclj.org

Edward L. White III
**AMERICAN CENTER FOR LAW
& JUSTICE**
3001 Plymouth Road, Suite 203
Ann Arbor, MI 48105

*Counsel for Petitioner
The Heritage Foundation*

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with Fed. R. App. P. 27(d)(2) and Fed. R. App. P. 32(a)(5)-(6) because it contains 506 words and has been prepared in a proportionally spaced typeface using Microsoft Word for Windows XP in Century School Book 14 point font.

/s/Abigail A. Southerland
Abigail A. Southerland

CERTIFICATE OF SERVICE

I certify that on February 4, 2022, I caused the foregoing to be served through CM/ECF upon the following:

Martin J. Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Douglas Parker
Assistant Secretary, Occupational Safety & Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Edmund C. Baird
Associate Solicitor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210
zzSOL-Covid-19-ETS@dol.gov

Seema Nanda
Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

/s/ Abigail A. Southerland
Abigail A. Southerland