

Nos. 21A243, 21A244, 21A245, 21A246,
21A247, 21A248, 21A249, 21A250

In The
Supreme Court of the United States

JOB CREATORS NETWORK ET AL.,
Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,
Respondents.

[additional captions on inside cover]

On Emergency Applications For Stay of Agency Standard
Pending The Disposition By the United States Court of Appeals
for the Sixth Circuit of a Petition For Review and any Further
Proceedings in This Court or, Alternatively, Petition For A Writ
Of Certiorari Before Judgment And Stay Pending Resolution

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND
BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS
CURIAE* SUPPORTING APPLICANTS, A STAY OF AGENCY
STANDARD, AND CERTIORARI BEFORE JUDGMENT**

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

DECEMBER 2021

NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL.,
Applicants,

v.

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,

Respondents.

PHILLIPS MANUFACTURING & TOWER COMPANY ET AL.,
Applicants,

v.

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,

Respondents.

THE SOUTHERN BAPTIST THEOLOGICAL SEMINARY ET AL.,
Applicants,

v.

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,

Respondents.

STATE OF OHIO ET AL.,

Applicants,

v.

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,

Respondents.

BST HOLDINGS, LLC ET AL.,

Applicants,

v.

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,

Respondents.

HERITAGE FOUNDATION,

Applicant,

v.

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,

Respondents.

WORD OF GOD FELLOWSHIP, INC. D/B/A
DAYSTAR TELEVISION NETWORK ET AL.

Applicants,

v.

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Washington Legal Foundation moves for leave to file the attached brief as *amicus curiae* supporting the applications to reinstate the stay of the Occupational Safety and Health Administration's illegal emergency temporary standard without ten days' notice to the parties of its intent to file as normally required by this Court's Rule 37.2(a). Given the anticipated expedited briefing schedule, it was not feasible to give the parties ten days' notice of the filing of this brief.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing the accumulation of power in any one governmental branch, which violates the Constitution's careful separation of powers. *See, e.g., Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

The attached *amicus* brief includes arguments and citations to authorities that are not included in the pending applications for stay. It focuses on why OSHA's ETS will harm our economy by causing more supply-chain disruptions. It also explains why OSHA's failure to act for over twenty-one months shows that the emergency temporary standard process was not the proper way to enact this policy proposal. Finally, the brief explains why certiorari before judgment is appropriate here.

National Federation of Independent Business et al., State of Ohio et al., The Southern Baptist Theological Seminary et al., Phillips Manufacturing & Tower Company et al., and BST Holdings, LLC et al. consent to granting the motion. Respondents and the other Applicants did not respond to an email seeking their position on the motion before it was printed.

WLF thus moves for leave to file the attached *amicus* brief.

Respectfully submitted,

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

DECEMBER 2021

QUESTIONS PRESENTED

1. Whether the Court should stay the emergency temporary standard that the Occupational Safety and Health Administration issued, which exceeded its statutory authority and violates the United States Constitution.

2. Whether the Court should grant certiorari before judgment so that it can review the ETS before the cases become moot.

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE <i>AMICUS CURIAE</i> BRIEF	i
QUESTIONS PRESENTED	iii
TABLE OF AUTHORITIES	v
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION & SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE COURT SHOULD STAY THE ETS PENDING FINAL DISPOSITION OF APPLICANTS' CHALLENGES	3
A. The ETS Will Hurt The Economy	4
B. OSHA's Delay In Issuing The ETS Shows The Mandate Should Have Undergone Notice-And-Comment Rulemaking	8
II. THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT	12
CONCLUSION	14

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Air Transp. Ass’n of Am. v. DOT</i> , 900 F.2d 369 (D.C. Cir. 1990).....	10
<i>Browning-Ferris Indus. of Cal., Inc. v. NLRB</i> , 911 F.3d 1195 (D.C. Cir. 2018)	1
<i>BST Holdings, L.L.C. v. OSHA</i> , 17 F.4th 604 (5th Cir. 2021).....	10
<i>Dry Color Mfrs. Ass’n, Inc. v. DOL</i> , 486 F.2d 98 (3d Cir. 1973).....	10
<i>Env’tl Def. Fund v. EPA</i> , 716 F.2d 915 (D.C. Cir. 1983).....	10
<i>Fla. Peach Growers Ass’n, Inc.</i> <i>v. U.S. Dep’t of Lab.</i> , 489 F.2d 120 (5th Cir. 1974).....	10
<i>In re AFL-CIO</i> , 2020 WL 3125324 (D.C. Cir. June 11, 2020)	9
<i>In re Velox Express, Inc.</i> , 2019 WL 7584332 (N.L.R.B. Sept. 30, 2019)	1
<i>Nat’l Ass’n of Farmworkers Orgs. v. Marshall</i> , 628 F.2d 604 (D.C. Cir. 1980).....	10, 11
<i>Parker Drilling Mgmt. Servs., Ltd. v. Newton</i> , 139 S. Ct. 1881 (2019).....	1
<i>United States v. Texas</i> , 142 S. Ct. 14 (2021)	12
<i>United States v. Texas</i> , 2021 WL 5855550 (U.S. Dec. 10, 2021).....	12

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Whole Woman’s Health v. Jackson</i> , 2021 WL 4928617 (U.S. Oct. 22, 2021).....	12
<i>Whole Woman’s Health v. Jackson</i> , 2021 WL 5855551 (U.S. Dec. 10, 2021).....	12
<i>Wisconsin Cent. Ltd. v. United States</i> , 138 S. Ct. 2067 (2018).....	10
Statutes	
5 U.S.C. § 533(b)(B).....	10
29 U.S.C. § 652(8).....	9
29 U.S.C § 655(c)(1).....	8, 9, 10
29 U.S.C. § 655(c)(3).....	12
Regulation	
Exec. Order No. 14,017, 86 Fed. Reg. 11,849 (Mar. 1, 2021)	4
Other Authorities	
Ashley Bowerman, <i>Labor shortages, supply chain issues affecting retailers</i> , WSFA-12 News (Dec. 13, 2021)	6
Chaim Gartenberg, <i>Heated seats for 2022 Chevy trucks are the latest victim of the chip shortage</i> , The Verge (Nov. 17, 2021).....	1, 5
Cong. Research Serv., <i>Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19</i> , R46288 (Sept. 13, 2021).....	11

TABLE OF AUTHORITIES
(continued)

	Page(s)
Elizabeth Chuck, <i>Growing number of companies suspend vaccine mandates, including hospitals and Amtrak</i> , NBC News (Dec. 16, 2021)	6
Forum News Service, <i>Sticker shock: Supply-chain issues holding up Minnesota DVS tab renewals</i> (Dec. 17, 2021)	4, 5
Katelyn Carralle, <i>Biden will invest \$30 million in the trucking industry to hire more drivers after the crippling supply chain crisis and backlash over the vaccine mandates</i> , Daily Mail (Dec. 16, 2021)	7
Martin Farrer, <i>Global supply chain crisis could last another two years, warn experts</i> , The Guardian (Dec. 18, 2021)	4, 5
Megan Leonhardt, <i>55% of people blame the government for the supply chain crunch. But what's actually behind the slowdown?</i> , Fortune (Dec. 16, 2021).....	6
Michael Willems, <i>Covid silver lining: 'Extremely mild' Omicron variant is rapidly killing off much more deadly Delta coronavirus mutation</i> , City A.M. (Dec. 6, 2021)	9
Molly Osberg, <i>Black Friday's Supply Chain Problems Are Really Labor Problems</i> , The New Republic (Nov. 25, 2021)	5

TABLE OF AUTHORITIES
(continued)

	Page(s)
Robbie Whelan & Melanie Evans, <i>Some Hospitals Drop Covid-19 Vaccine Mandates to Ease Labor Shortages</i> , Wall Street Journal (Dec. 13, 2021)	6
S. Rep. No. 91-1282 (1970)	10
Sergei Klebnikov, <i>Rivian Shares Fall To Record Low As Company Warns Of Supply Chain Issues</i> , Forbes (Dec. 17, 2021)	5
Steve Scherer & David Shepardson, <i>Canadian, U.S. truckers warn vaccine mandates will disrupt supply chains</i> , Reuters (Dec. 3, 2021)	7
Thomas Black, <i>Supply-chain hell ignites economic boom along U.S.-Mexico border</i> , Pittsburgh Post-Gazette (Dec. 18, 2021)	4
Tonya Garcia, <i>Is Fido finicky? Pet food gets hit by supply-chain disruptions</i> , MarketWatch (Dec. 18, 2021)	4
U.S. Bureau of Labor, <i>Consumer Price Index</i> (Dec. 10, 2021)	2

INTEREST OF *AMICUS CURIAE**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal tribunals supporting economy-boosting employment rules and opposing economy-destroying rules. *See, e.g., Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019); *In re Velox Express, Inc.*, 2019 WL 7584332 (N.L.R.B. Sept. 30, 2019); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

INTRODUCTION & SUMMARY OF ARGUMENT

Anyone who has tried to buy a car recently knows how difficult it is to find both new and used cars in stock. The dealerships lucky enough to have inventory to sell are asking over \$10,000 above the manufacturer's suggested retail price. And unlike normal times, the dealerships are not negotiating with consumers. Even one who pays this markup and grabs a coveted new car will not receive the same features that have become standard on most vehicles. For example, General Motors has stopped offering heated seats and steering wheels on its new trucks and sport utility vehicles. *See* Chaim Gartenberg, *Heated seats for 2022 Chevy trucks are the latest victim of the chip shortage*, *The Verge* (Nov. 17, 2021), <https://bit.ly/3yFU2uk>.

Similar shortages are evident at the grocery store. Many shelves normally full of goods are now barren or have scarce goods. The food and other items on the shelf

* No party's counsel authored any part of this brief. No person or entity, other than *amicus* and its counsel, paid for the brief's preparation or submission.

cost far more than they did just a few months ago. Last month, the Consumer Price Index rose by an annual rate of 9.6%. See U.S. Bureau of Labor, *Consumer Price Index* (Dec. 10, 2021), <https://www.bls.gov/cpi/>. These increased prices are hurting consumers during a time—the Christmas season—when they can least afford it.

What is causing these supply-chain issues and raising prices? Vaccine mandates. When governments or companies require employees to get vaccinated, many employees quit or are fired. Those positions often remain unfilled because many job seekers either refuse to join companies that require vaccines or move to jurisdictions without vaccine mandates.

It makes no sense for the federal government to exacerbate this problem by instituting a nationwide vaccine mandate for most businesses critical to our national economy. Rather than help alleviate the supply-chain issues, it will only cause further problems. If the Sixth Circuit's mistaken decision is left to stand, the result will be greater supply-chain shortages. This will have a devastating effect on our economy, right when it is starting to recover from the corrosive restrictions that many governments imposed at the start of the COVID-19 pandemic.

What is even more troubling is that all of this is being done by the Occupational Safety and Health Administration using an emergency temporary standard. The Occupational Safety and Health Act does not give OSHA the power to regulate non-workplace safety issues like employees' personal or religious decisions to forgo receiving a vaccine. Even if the OSH Act permitted the agency to issue such an order, it must be done through normal notice-and-comment rulemaking—not an emergency temporary standard. That process is reserved for new issues that require immediate action, not something that arose over twenty-one months ago.

Allowing OSHA to exceed its legislative grant of authority gives the Executive Branch far too much power and violates core separation-of-powers principles.

Half of the Sixth Circuit's active judges believe that the ETS should be stayed. So too for a majority of the Fifth Circuit panel that originally considered whether to stay the ETS. Yet because of the vagaries of the Sixth Circuit's panel assignment, two judges decided to ignore the reasoned legal judgment of most of the circuit judges who have considered the issue and lifted the Fifth Circuit's stay of the ETS. The Court's urgent intervention is necessary to reinstate the stay and keep our country's economy from spiraling into a recession while protecting the conscience rights of millions of American citizens.

Earlier this year, the Court granted certiorari before judgment in two cases based only on public pressure. There, the Court ended up keeping in place most of the Fifth Circuit's decision. Here, the Court's quick disposition of the issue is even more justified. Left to stand, the Sixth Circuit's decision would seriously undermine our tripartite form of government while wrecking the economy. If the case proceeds normally, the ETS will expire before the Court has a chance to weigh in on this critical issue. Thus, the Court should also grant certiorari before judgment.

ARGUMENT

I. THE COURT SHOULD STAY THE ETS PENDING FINAL DISPOSITION OF APPLICANTS' CHALLENGES.

The Court should immediately stay the ETS pending final disposition of the case in the Sixth Circuit and this Court. Any other action would lead to economic devastation, the loss of freedom of conscience in the United States, and a rebuke of the Constitution's core separation-of-powers principles.

A. The ETS Will Hurt The Economy.

The Court should immediately stay the ETS pending final disposition of the case in the Sixth Circuit and this Court. Otherwise, our already fragile economy will suffer more. Even the administration admits that supply-chain problems are real. *See, e.g.*, Exec. Order No. 14,017, 86 Fed. Reg. 11,849 (Mar. 1, 2021). But contrary to what the government says, the gravity of those supply-chain problems has not diminished over the past several months. Rather, the supply-chain problems are as serious today as they were in March. Just Saturday, “Maersk, one of the big three shipping companies, said the worst delays were still on the US west coast where ships were waiting four weeks to unload.” Martin Farrer, *Global supply chain crisis could last another two years, warn experts*, The Guardian (Dec. 18, 2021), <https://bit.ly/3p4hi1M>.

It is hard to overstate the extent of the problem caused by the supply-chain issues on the West Coast. MGA Entertainment, for example, “has 750 containers of toys stuck in supply-chain hell at ports around Los Angeles. Produced in China, those items were supposed to be on U.S. store shelves this holiday season. That won’t happen.” Thomas Black, *Supply-chain hell ignites economic boom along U.S.-Mexico border*, Pittsburgh Post-Gazette (Dec. 18, 2021), <https://bit.ly/326uo50>.

Although many problems are due to backups on the West Coast, the effect is not limited to that geographic region. For example, “Shortages of wet dog food persisted, while out-of-stock levels in areas like third-party and proprietary branded hardgoods [have] increased” across the country. Tonya Garcia, *Is Fido finicky? Pet food gets hit by supply-chain disruptions*, MarketWatch (Dec. 18, 2021), <https://on.mktw.net/33vPvii>. In Minnesota, drivers who renew their vehicle registration online won’t be receiving the required stickers on time because of the supply-chain issues. *See* Forum News Service, *Sticker shock: Supply-*

chain issues holding up Minnesota DVS tab renewals (Dec. 17, 2021), <https://bit.ly/3e6CFZT>.

And it's not just foreign products affected by the supply-chain problems. American-made products face similar setbacks. As mentioned above, General Motors is no longer offering heated seats and steering wheels due to the supply-chain shortage. Gartenberg, *supra*. General Motors is not the only carmaker that cannot meet consumer demand given the supply-chain problems. For example, Rivian has said that it cannot fulfill next year's production targets because of ongoing supply-chain issues. See Sergei Klebnikov, *Rivian Shares Fall To Record Low As Company Warns Of Supply Chain Issues*, Forbes (Dec. 17, 2021), <https://bit.ly/3sigOH9>.

So what is at the root of many of the supply-chain issues? The answer is simple: A lack of workers. For example, Maersk says that the four-week backup on the West Coast is mainly "due to the lack of workers on land." Farrer, *supra*. In other words, there are not enough workers who can operate the large cranes needed to unload the container boxes that weigh tons. Nor are there enough workers to use forklifts and other equipment needed to move the goods from the shipping containers to trains and trucks that can transport them across our nation.

But even then, there is a problem. Although there are plenty of licensed commercial drivers who could get the goods from ports to stores, they simply are not taking the jobs. See Molly Osberg, *Black Friday's Supply Chain Problems Are Really Labor Problems*, The New Republic (Nov. 25, 2021), <https://bit.ly/3mgpmLc>. So once the goods are unloaded there are not enough truckers to transport them the last miles needed to reach consumers.

A lack of workers is currently most acute for the shipping industry—a key cog in the supply chain. But the

problem is not limited to truckers and crane operators. “[I]ndustries along the supply chain” are all affected by the worker shortages. See Megan Leonhardt, *55% of people blame the government for the supply chain crunch. But what’s actually behind the slowdown?*, Fortune (Dec. 16, 2021), <https://bit.ly/3E2EYb6>. Even when goods get to stores, those stores are having trouble keeping the doors open because of the labor shortage. See Ashley Bowerman, *Labor shortages, supply chain issues affecting retailers*, WSFA-12 News (Dec. 13, 2021), <https://bit.ly/32bGIS6>. In sum, labor shortages are causing the supply-chain issues plaguing our nation’s economy.

The next logical question to ask is: why is there a labor shortage? One reason that the government refuses to acknowledge is vaccine mandates. Even in the healthcare industry, where vaccination rates are much higher than in the general population, companies dropped their vaccine mandates after a lower federal court held that Centers for Medicare & Medicaid Services could not enforce its vaccine mandate. Robbie Whelan & Melanie Evans, *Some Hospitals Drop Covid-19 Vaccine Mandates to Ease Labor Shortages*, Wall Street Journal (Dec. 13, 2021), <https://on.wsj.com/3GU9JAW>. For example, the Cleveland Clinic would have lost fifteen percent of its workforce had it enforced a vaccine mandate. Elizabeth Chuck, *Growing number of companies suspend vaccine mandates, including hospitals and Amtrak*, NBC News (Dec. 16, 2021), <https://nbcnews.to/3mCgMGP>. That would be devastating to a hospital’s workforce.

OSHA has jurisdiction over many of these same health systems that have suspended their vaccine mandates to address the labor shortage. So this is yet another way that our economy will be harmed if the Court does not step in and stay the ETS. Imagine what will happen if more people cannot receive the necessary care because a medical provider is short staffed after the ETS takes effect. Not only

would the medical industry be negatively affected, all industries that rely on workers could face hurdles to economic recovery.

But it may be the supply chain that sees the biggest shock if the Court does not intervene. The ETS “will further disrupt supply chains because there is already a dire shortage of drivers.” Steve Scherer & David Shepardson, *Canadian, U.S. truckers warn vaccine mandates will disrupt supply chains*, Reuters (Dec. 3, 2021), <https://reut.rs/3J1DWQ7>. About 16,000 American truck drivers are unvaccinated and would be affected by the ETS. *See id.* That is why the ETS “could have devastating impacts on the supply chain and the economy.” *Id.* (quotation omitted).

Many “truckers would rather quit, retire or change jobs than get the vaccine through the [ETS].” Katelyn Carralle, *Biden will invest \$30 million in the trucking industry to hire more drivers after the crippling supply chain crisis and backlash over the vaccine mandates*, Daily Mail (Dec. 16, 2021), <https://bit.ly/33LaE8B>. Trucking company executives have repeatedly told OSHA and others about these concerns. *See id.* But instead of acknowledging that the ETS needs to go, the response has been to throw money at the problem; money that will not fix the root cause of the trucker shortage. *See id.*

The ETS will thus have a crippling effect on our nation’s economy. Most companies key to the supply chain have more than 100 employees. So under the ETS, employees must show proof of vaccination to their employer or risk being fired. If the company decides to allow workers to test weekly to keep their jobs, they can pass on the cost of those tests to the employees. Failure to test or be vaccinated means a worker *must* be removed from the workforce.

There are thus several barriers to hiring and retaining workers for companies. Many workers or job applicants do

not want to tell their bosses their vaccine status. They are not required to disclosure whether they received the HPV or the Shingles vaccine. So in their view, they should also not have to disclose if they have been vaccinated against COVID-19. Then there is the problem of getting the vaccine. Many are hesitant because of religious concerns, medical concerns, or other feelings about the vaccine. For companies willing to allow testing, these employees might have to foot the bill. Most supply-chain workers are not rich and paying for these tests would be a financial burden. So they are likely to seek employment elsewhere or just collect unemployment checks, which may be larger than their net paychecks considering the COVID-19 testing costs their employers may pass on.

There is no way to view this as helping with the supply-chain problem. Experience proves this. Some companies with vaccine mandates have lifted them. If they attracted and retained more workers because of the mandates, or had more of their staff show up to work with the mandates, they would not have lifted the mandates. These companies understand that they lose far more workers when they impose a vaccine mandate than when they leave it up to individuals to decide. Thus, the ETS will continue to hurt the economy if the Court does not stay it now.

B. OSHA's Delay In Issuing The ETS Shows The Mandate Should Have Undergone Notice-And-Comment Rulemaking.

OSHA may issue an emergency temporary standard only if it “determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.” 29 U.S.C § 655(c)(1). OSHA cannot satisfy either requirement.

Start with whether employees face “grave danger.” At the start of the pandemic, many of the first people infected with COVID-19 became very ill. Some even died. But since then, we have seen a string of variants that have become dominant. The scientific consensus is that the omicron variant is the one that will dominate moving forward. This is because it is much easier to transmit than the current dominant variant, delta. *See* Michael Willems, *Covid silver lining: ‘Extremely mild’ Omicron variant is rapidly killing off much more deadly Delta coronavirus mutation*, City A.M. (Dec. 6, 2021), <https://bit.ly/3GWnMWs>. But experts are “ecstatic because” omicron is “much milder and less deadly” than previous variants. *See id.*

So if the ETS had been issued at the start of the pandemic, OSHA may have been able to satisfy the first requirement for issuing an emergency temporary standard. Last year, however, OSHA argued vociferously in the District of Columbia Circuit that it need not issue an ETS. *See In re AFL-CIO*, 2020 WL 3125324 (D.C. Cir. June 11, 2020) (*per curiam*). And the D.C. Circuit agreed with OSHA. *See id.* It makes no sense to say that grave danger was lacking when a much deadlier virus was spreading only to turn around and argue that there is now a grave danger despite the less deadly variant becoming the dominant strain.

But even if COVID-19 currently poses a grave danger to employees, OSHA still lacked the statutory authority to issue the ETS. It may issue an emergency temporary standard only if it is “necessary.” 29 U.S.C. § 655(c)(1). It was unnecessary to issue the ETS. OSHA had over twenty-one months after the pandemic began in the United States to undertake notice-and-comment rulemaking. It failed to do so.

OSHA regulations that satisfy notice-and-comment rulemaking need only be “reasonably necessary or appropriate.” 29 U.S.C. § 652(8). As the Court has

explained, when Congress uses narrower language in one part of a statute, it is assumed to have a different meaning than broader language passed by the same Congress. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2072 (2018). Congress used the narrower “necessary” when defining when OSHA may regulate grave dangers under Section 655(c)(1). In other words, “Congress intended a carefully restricted use of the emergency temporary standard.” *Fla. Peach Growers Ass’n, Inc. v. U.S. Dep’t of Lab.*, 489 F.2d 120, 130 n.16 (5th Cir. 1974).

OSHA “cannot use its ETS powers as a stop-gap measure.” *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 616 (5th Cir. 2021) (cleaned up). Rather, the emergency temporary standard process can be used only as “an unusual response to exceptional circumstances.” *Dry Color Mfrs. Ass’n, Inc. v. DOL*, 486 F.2d 98, 104 n.9a (3d Cir. 1973); *see also* S. Rep. No. 91-1282, at 7 (1970).

Section 655(c) resembles 5 U.S.C. § 533(b)(B), which permits other federal agencies to bypass notice-and-comment rulemaking if they can prove “good cause.” Because many agencies try to use this good-cause exception to eliminate notice-and-comment rulemaking, there is a good body of case law explaining what qualifies as good cause. These decisions show that delay in deciding to issue a regulation cannot form the good cause needed to bypass notice-and-comment rulemaking.

In one case, the District of Columbia Circuit explained that “the FAA [wa]s foreclosed from relying on the good cause exception” because it “waited almost nine months before taking action.” *Air Transp. Ass’n of Am. v. DOT*, 900 F.2d 369, 379 (D.C. Cir. 1990), *vacated on other grounds*, 498 U.S. 1077 (1991). The D.C. Circuit similarly has found that eight-month and seven-month delays foreclosed the possibility of agencies invoking the good-cause exception. *See Env’tl Def. Fund v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (*per curiam*); *Nat’l Ass’n of Farmworkers Orgs. v.*

Marshall, 628 F.2d 604, 622 (D.C. Cir. 1980). Proper notice-and-comment rulemaking can be done in seven months or less. Yet in each case the agency tried to bypass that step by using the good-cause exception. Each time, the D.C. Circuit properly held that the agency could not do so.

The COVID-19 pandemic hit the United States in March 2020—twenty-one months before OSHA issued the ETS. Vaccines became available in December 2020, eleven months before the ETS. And President Biden took office in January 2021, ten months before OSHA issued the ETS. As the cases above show, such extensive delay in issuing an emergency temporary standard is fatal. OSHA had to go through the notice-and-comment rulemaking process if it wanted a vaccine mandate.

OSHA knows how stringent the requirements are for using its emergency temporary standard authority. Before this year, it issued only nine since it was first given that power over fifty years ago. Of those, only one survived judicial challenge. *See* Cong. Research Serv., *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, R46288, 35-36 (Sept. 13, 2021). But rather than stick to its statutory authority and issue emergency temporary standards only when necessary to address a grave danger, OSHA caved to President Biden’s pressure and issued the illegal ETS.

The Sixth Circuit then twisted itself into a pretzel to find that OSHA had the statutory authority to issue the ETS. Rather than give the word “necessary” its common meaning, the majority held that an emergency temporary standard need not be indispensable to be necessary. *See* Phillips App. 25-26. But if the ETS is not indispensable, it cannot be necessary to combat a grave danger.

The ETS therefore was unnecessary. OSHA has a better chance of defending a vaccine mandate issued through notice-and-comment rulemaking than it does through the

emergency temporary standard process. Yet the Sixth Circuit turned a blind eye toward the different standards that apply in the two contexts. OSHA's lack of statutory authority to issue the ETS means that Applicants are likely to succeed on their challenges. Thus, the Court should stay the ETS pending final disposition of the parties' challenges.

II. THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT.

Just two months ago, the Court granted certiorari before judgment in two cases. *See Whole Woman's Health v. Jackson*, 2021 WL 4928617 (U.S. Oct. 22, 2021) (*per curiam*); *United States v. Texas*, 142 S. Ct. 14, 14 (2021) (*per curiam*). The Court then set an expedited briefing schedule unseen in over twenty years. Only seven weeks after granting certiorari before judgment, the Court largely affirmed the Fifth Circuit in one case and dismissed as improvidently granted the other. *See Whole Woman's Health v. Jackson*, 2021 WL 5855551 (U.S. Dec. 10, 2021); *United States v. Texas*, 2021 WL 5855550 (U.S. Dec. 10, 2021) (*per curiam*).

The Court granted certiorari before judgment despite no real deadline to act and knowing that the Fifth Circuit got it mostly right. The Texas law at issue in the two cases was in effect when certiorari was granted and remains in effect today. There was no sunset provision that ensured the case would go away at the end of the year requiring the Court's immediate attention.

But here the situation is much more dire. The ETS can last only six months. *See* 29 U.S.C. § 655(c)(3). That means if the Court lets the case run its normal course, by the time this Court could rule on a certiorari petition the case would become moot. In other words, there is a ticking clock in this case. If the Court does not act now and grant certiorari before judgment, it will lose the chance to decide

important questions about our government's structure and OSHA's authority over the economy.

That's not all. The Sixth Circuit's decision is grievously wrong. As explained in all eight applications, the dissents from denial of initial hearing *en banc*, the panel dissent, and the Fifth Circuit panel's majority opinion, there are both statutory and constitutional problems with the ETS. So unlike the two cases the Court agreed to hear in October, there is little chance that the Court would leave the Sixth Circuit's decision in place if it considered the merits of the challenges to the ETS. Rather, it is far more likely that the Court would reverse and find that the ETS does not comply with the U.S. Code or Constitution.

* * *

The ticking clock is one reason that the Court has the certiorari before judgment process. In some rare cases, two circuit judges, who disagree with most circuit judges to consider the question, can act as a court of last resort. The Founding Fathers set up the Judiciary to have *one* Supreme Court—this Court. The only way the Court can fulfill this duty is to grant certiorari before judgment and decide the important issues presented.

CONCLUSION

The Court should stay the ETS and grant certiorari before judgment.

Respectfully submitted,

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

DECEMBER 2021