

Supreme Court to Consider Arguments on Pulling Plug on OSHA COVID-19 ETS

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The U.S. Supreme Court has scheduled expedited arguments on the [U.S. Court of Appeals for the Sixth Circuit's decision](#) to lift the [Fifth Circuit's stay](#) of the Occupational Safety and Health Administration's (OSHA) [Emergency Temporary Standard \(ETS\)](#).

The ETS mandated COVID-19 vaccination or voluntary vaccinations with testing and masking for unvaccinated employees for employers with at least 100 employees. The Court will hear oral arguments from petitioners and OSHA on January 7, 2022, three days before OSHA will begin enforcement efforts.

Judge Jane B. Stanch authored the Sixth Circuit decision to lift the stay. She asserted that OSHA “must be able to respond to dangers as they evolve” such as a spreading virus with emerging variants. OSHA followed the Sixth Circuit decision with an announcement that it will not issue citations for noncompliance with the ETS before January 10, 2022. The agency also stated it will exercise its discretion and not issue citations for noncompliance with testing requirements under the ETS before February 9, 2022, provided an employer is exercising reasonable, good faith efforts to come into compliance with the standard. The agency has also given OSHA State Plans until January 7, 2022, to announce their intentions on adoption of the ETS and move forward with adoption by January 24, 2022.

Multiple parties, including 27 states, filed emergency motions with the Supreme Court to block enforcement efforts following the Sixth Circuit decision. They emphasized the irreparable harm they will suffer in having to implement the ETS, citing labor shortages, the unavailability of tests, and the

unintended consequence of having to lay off vaccinated workers to absorb the costs of compliance. In addition to the challengers' concerns about economic viability of their businesses, they argued their likelihood of success in enjoining the standard on the merits and balance of equities weigh in favor of a stay. These petitioners also have asked the Supreme Court for a rare grant of their requested alternative relief: granting review before judgment by the lower court and deciding the legality of the OSHA ETS on the merits. They claim this is appropriate and necessary, given the importance of the issues, for the high court to weigh in on questions about the structure of government and OSHA's authority over the economy. They argue that the Supreme Court must act now because, given the six-month life of an ETS, the case could become moot by the time the Court has the opportunity to review the issues if the case progresses normally.

Friend-of-the-court briefs have been filed by the Washington Legal Foundation and three former OSHA assistant secretaries of labor on both sides of the issue. The Washington Legal Foundation, a non-profit public interest law firm and policy center, argues the ETS will have dire effects on the economy, which already is suffering from supply chain issues and labor shortages, as well as OSHA's failure to follow proper notice and comment rulemaking for 21 months. The former OSHA officials weighing in are Gerard Scannell (under George W. Bush), Charles Feddres (under Bill Clinton), and Dr. David Michaels (under Barack Obama). They argue the Court should deny the stay of the OSHA ETS and that OSHA is well within its authority to issue the ETS.

The emergency appeals were assigned initially to Justice Brett Kavanaugh, who directed OSHA to provide briefs in support of its argument by December 30, 2021. Justice Kavanaugh then referred the matter to the full Court for review. In addition, the Court will hear oral arguments on [a stay](#) of the Centers for Medicare and Medicaid Services (CMS) Vaccine Mandate for covered providers who participate in the Medicare and Medicaid government programs and others covered by the CMS Vaccine Mandate.

The Sixth Circuit has yet to hear, let alone to decide, the case on the merits, and has not considered the arguments of the petitioners, including arguments over whether the ETS overrides state or local laws due to federal preemption. Meanwhile, Alabama, Arkansas, [Florida](#), Iowa, Kansas, Montana, North Dakota, Tennessee, Texas, Utah, and West Virginia have enacted measures that would restrict or impact vaccination requirements.

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