No. 21-7000, 21-4080

United States Court of Appeals
for the Sixth Circuit

MCP No.165, OSHA Covid Rule

MOTION TO TRANSFER BY BST HOLDINGS, ET AL., BURNETT SPECIALISTS, CHOICE STAFFING, STAFF FORCE, AND LEADINGEDGE, PETITIONERS

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MOTION

Pursuant to 28 U.S.C. § 2112(a)(5), Petitioners, BST Holdings, LLC; RV Trosclair L.L.C.; Trosclair Airline LLC; Trosclair Almonaster LLC; Trosclair and Sons LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton LLC; Trosclair Claiborne LLC; Trosclair Donaldsonville, LLC; Trosclair Houma LLC; Trosclair Judge Perez LLC; Trosclair Lake Forest LLC; Trosclair Morrison LLC; Trosclair Paris LLC; Trosclair Terry LLC; Trosclair Williams LLC (the "Trosclair Companies"); Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; and Kip Stovall (the "CaptiveAire Employees") (collectively, "BST Holdings Petitioners"), Burnett Specialists, Choice Staffing, LLC, Staff Force, Inc., and LeadingEdge Personnel Services, Ltd., file this Motion requesting this Court transfer the consolidated Petitions for Review to the United States Court of Appeals for the Fifth Circuit.

Each of the petitions challenge the Emergency Temporary Standard (the "ETS") addressing occupational exposure to COVID-19 issued by the Occupational Safety and Health Administration, ("OSHA"),

published in the Federal Register on November 5, 2021 at Volume 86, pages 61,402 through 61,555.

INTRODUCTION

Congress established the multicircuit lottery system for review of agency orders to eliminate races to the courthouse, and so much the better. Compared with the battle of the time stamps, random selection is a reasonable alternative. But in amending 28 U.S.C § 2112(a), Congress expressly provided that the lottery is not the last word on the matter. Rather, § 2112(a)(5) preserves the discretion of this Court to manage its docket and to determine venue based on what makes the most practical sense for the parties and furthers the interests of justice.

This Court should grant Petitioners' Motion to Transfer the consolidated petitions for review to the Fifth Circuit because that choice of venue would best serve the convenience of the parties and is in the interests of justice. Whether measured by the number of petitions or number of petitioners, the plurality of parties in this consolidated case reside in the Fifth Circuit, as do many of their counsels of record. Their interests can be best represented in their chosen forum, which longstanding precedent holds is entitled to substantial weight. Moreover,

the Fifth Circuit has already invested substantial time, ordered and received briefing, and issued a detailed and substantive published decision on the important issue of this case. It therefore would serve judicial economy and the interests of justice for the Fifth Circuit to continue adjudicating these petitions.

Petitioners advised other challengers to the ETS of their intent to file this motion. The Petitioner States led by the Commonwealth of Kentucky in Case No. 21-4031 (6th Cir.), and the State of Texas, Case No. 21-60845 (5th Cir.) take no position on our motion. The Petitioner Trade Associations led by the Texas Trucking Association in Case No. 21-60845 (5th Cir.) do not oppose our motion. The Petitioners Tankcraft and Plasticraft in Case No. 21-3058 (7th Cir.); and the Petitioners Texas Governor Greg Abbott, Answers in Genesis, Word of God Fellowship, Inc. *d/b/a* Daystar Television Network, and American Family Association in Case No. 21-60845 (5th Cir.) consent to our motion.

Petitioners request that this motion be decided before any motion to dissolve Petitioners' stay or any motion for initial en banc review. *In re Apple Inc.*, 979 F.3d 1332, 1353 (Fed. Cir. 2020) (collecting cases and concluding "once a party files a transfer motion, disposing of that motion

should unquestionably take top priority."); *accord In re Horseshoe Entm't*, 337 F.3d 429, 433 (5th Cir. 2003); *In re Nintendo Co., Ltd.*, 544 F. App'x 934, 941 (Fed. Cir. 2013). The purposes of transfer in this case, particularly judicial economy, are not served if the Court decides other motions before this motion.

FACTUAL BACKGROUND

The ETS

On November 5, 2021, OSHA published the ETS in the Federal Register. 86 Fed. Reg. 61,402. The ETS requires all employers with 100 or more employees to develop, implement, and enforce a mandatory COVID-19 vaccination policy, ensuring their workforce is fully vaccinated or requiring any workers who remain unvaccinated to produce a negative test result on at least a weekly basis and wear a mask or face covering while at work. *Id.* at 61,402-04.

Identity of Petitioners

The Trosclair Companies have almost 500 employees, maintain their principal place of business in and are incorporated in Louisiana, and will be adversely affected by the ETS. Trosclair Decl. ¶5 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 159). They already face a shortage

of full-time employees, and the ETS will make it even harder to hire and to maintain employees because many of them do not want to be forced to receive the COVID-19 vaccine or be subjected to weekly testing. *Id*. ¶¶11-13.

The CaptiveAire Employees reside in Texas and work for a company that has approximately 1,500 employees. Dailey Decl. ¶¶2-3 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 164); Gamble Decl. ¶¶2-3 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 167); Jones Decl. ¶¶2-3 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 170); Loschen Decl. ¶¶2-3 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 173); Reyna Decl. ¶¶2-3 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 176); Stovall Decl. ¶¶2-3 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 179); Luddy Decl. ¶¶2-4 (5th Cir. No. 21-60845, ECF Doc. 00516083015, p. 182). They will be adversely affected by the ETS because they do not want to be forced to receive the COVID-19 vaccine or be subjected to weekly testing. Dailey Decl. ¶¶6-7; Gamble Decl. ¶¶6-7; Jones Decl. ¶¶6-7; Loschen Decl. ¶¶5-6; Reyna Decl. ¶¶6-7; Stovall Decl. ¶¶6-7. This adverse effect is particularly troubling as it applies to Petitioners Dailey, Gamble, Jones, and Reyna because they work mostly

alone on roofs and are highly unlikely to spread COVID-19 to colleagues. Dailey Decl. ¶4; Gamble Decl. ¶4; Jones Decl. ¶4; Loschen Decl. ¶4; Reyna Decl. ¶4.

LeadingEdge Personnel has about 200 employees serving in the San Antonio and Austin, Texas, metro areas. Decl. of Patty A. Yarbrough at ¶ 2 (5th Cir. No. 21-60845, ECF Doc. 00516085111). Burnett Specialists has over 1,600 employees and operates in the Houston, Austin, San Antonio, Dallas, and El Paso, Texas, metro areas. Decl. of Debbie D'Ambrosio at ¶ 2 (5th Cir. No. 21-60845, ECF Doc. 005160853855). Choice Staffing is a staffing agency with around 115 full-time employees operating in the San Antonio, Texas, metro area. Decl. of Chanel Cantu at ¶¶ 2, 4 (5th Cir. No. 21-60845, ECF Doc. 005160853856). Staff Force is the largest private staffing agency in Texas, with about 4,500 employees on assignment weekly and averaging about 25,000 total employees in a year. Decl. of Russell Potocki at ¶ 2 (5th Cir. No. 21-60845, ECF Doc. 005160853857). All of these companies will be adversely harmed by the ETS because it will require them to implement a costly and administratively burdensome testing system for the employees that choose to not get vaccinated. Burnett Specialists, Choice Staffing, and

Staff Force's Motion for Stay Pending Review at 18 (5th Cir. No. 21-60845, ECF Doc. 00516083854). They also risk losing employees who will simply choose to work for smaller firms. *Id.* at 19. This harm is particularly acute in the staffing industry, where temporary workers are particularly mobile. *Id.*

Most relevant here, all Petitioners above reside and do business primarily or entirely within the Fifth Circuit. In addition, undersigned counsel for Petitioners reside and work in the Fifth and Seventh Circuits—neither nonprofit organization maintains an office in the Sixth Circuit.

Proceedings Below

On November 5, 2021, Petitioners filed their Petition for Review, along with an Emergency Motion to Stay the ETS and an Opening Brief, in the Fifth Circuit. *See BST Holdings LLC v. OSHA*, No. 21-60845 (5th Cir. Nov. 5, 2021). They were soon joined by seven additional Fifth Circuit petitions,[1] along with some 26 petitions in other circuits around the country. On November 6, citing "cause to believe there are grave

[1] While other circuits docketed the petitions separately, all Fifth Circuit petitions were consolidated under the original *BST Holdings* docket number (21-60845).

statutory and constitutional issues with the Mandate," the Fifth Circuit issued an interim stay and set a briefing schedule. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33117, at *4 (5th Cir. Nov. 6, 2021). OSHA filed their Response on November 8, and Petitioners filed a Reply on November 9. On November 12, the Fifth Circuit ruled that Petitioners had met their burden and ordered the ETS stayed pending further review. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *27 (5th Cir. Nov. 12, 2021).[2]

On November 16, ten days after the ETS was issued, OSHA filed a Notice to The United States Judicial Panel On Multidistrict Litigation Of Multicircuit Petitions For Review, pursuant to 28 U.S.C § 2112(a). *See also* 28 U.S.C. § 1407. Also on November 16, via random selection, the Panel assigned the consolidated petitions to this Circuit for further proceedings. *See* 28 U.S.C § 2112(a)(3).

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[2] In addition to Transfer Movants' Motion to Stay, there was also a stay motion included in the stay order by the separately represented petitioners in *State of Texas et al. v. Department of Labor*.

LEGAL STANDARD

28 U.S.C § 2112(a)(5) provides that the circuit randomly selected by the process prescribed in § 2112(a)(3) "may thereafter transfer all the proceedings with respect to that order to any other court of appeals" "[f]or the convenience of the parties in the interest of justice."

ARGUMENT

Congress created the procedure in § 2112(a)(3) to avoid sprints to the courthouse. *See Sacramento Mun. Util. Dist. v. FERC*, 683 F.3d 769, 770 (7th Cir. 2012). In creating the procedure, however, it still preserved the traditional standard for determining the correct venue: convenience and justice. "Considerations of convenience center around the physical location of the parties." *ITT World Commc'ns, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980). It is likewise a "well recognized principle that the interests of justice favor placing the adjudication in the forum chosen by the party that is significantly aggrieved by the agency decision." *Id.* Also relevant is a court's "previous consideration of virtually the identical issue. . .[since] there is a significant interest in transferring a case to a court that has already ruled on an identical or related case." *Id.* Transfer is not only authorized by statute, but part of the inherent power of this

Court. *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708 (6th Cir. 1975).

I. Transferring the consolidated petitions to the Fifth Circuit will best serve the convenience of the parties.

While the lottery procedure is unusual, the standard in § 2112(a)(5) is not. It is substantively the same standard district and appellate courts apply every day. *See* 28 U.S.C. § 1404 ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); *see also Indus. Union Dep't v. Bingham*, 570 F.2d 965, 971-72 (D.C. Cir. 1977) ("Supportive of this construction of § 2112(a) is the generally accepted construction of virtually identical language of 28 U.S.C. § 1404(a)."). District courts interpreting § 1404 hold that as "a general rule, a plaintiff's 'choice of venue is entitled to substantial weight in determining whether transfer is appropriate.'" *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs.*, 791 F.3d 436, 444 (4th Cir. 2015) (citing *Bd. of Trs. v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 477 (E.D. Va. 2007)). Indeed, "unless the balance is strongly in

favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Collins v. Straight, Inc.*, 748 F.2d 916, 921 (4th Cir. 1984) (quoting *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1946)).

"Considerations of convenience center around the physical location of the parties." *ITT World,* 621 F.2d 1208. In assessing convenience, courts commonly look to where most of the parties live and work. *See Newsweek, Inc. v. United States Postal Serv.*, 652 F.2d 239, 243-44 (2d Cir. 1981) (stating venue was appropriate in the Second Circuit where "of the twenty-two parties directly involved in the various appeals from the Governors' decision, twelve have their principal office within this Circuit, four in the District of Columbia, and six elsewhere"). Courts also consider the location of the parties' chosen counsel. *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 683 n.1 (8th Cir. 2003) (transferring to the D.C. Circuit Court in part because "most of the parties have D.C. counsel of record").

As in cases like *Newsweek*, there is a clear basis here for finding the Fifth Circuit is the appropriate forum. Of the 34 petitions consolidated by the Judicial Panel on Multidistrict Litigation, eight were filed in the Fifth Circuit. *See* MCP No. 165, Docket 1. No other circuit had more than five, and nine circuits had three or fewer. *See id.* While

the total number of parties on each petition is not dispositive, the Fifth Circuit petitions likewise represent more total parties than any other circuit. *Id.* The location of the parties' counsel likewise supports transfer to the Fifth Circuit: of the counsel of record on the government's own service list, a full 13 are listed with Fifth Circuit addresses. *Id.* Only four of the served counsel list addresses in the Sixth Circuit. *Id.*

Petitioners concede that there are some parties for whom the Fifth Circuit may be more convenient than others. But this is true any time the lottery process is invoked—inherently, there will be multiple petitions in multiple circuits around the country. Congress still included convenience as a metric that this Court must apply, and in this context the most sensible standard is where the plurality of parties and their counsel reside.

II. Transferring the consolidated petitions to the Fifth Circuit will best serve the interests of justice.

This Court should also transfer the petitions because the interests of justice favor a continuation of the established Fifth Circuit litigation, which has already generated a published opinion. *See BST Holdings.* 2021 U.S. App. LEXIS 33698 at *5 (identified as ____ F.4th ____). When

another circuit has actively considered the same question presented here, it serves the principles of both consistency and economy to transfer to that court which has already traveled well down the road towards answering these important questions. *See Cleveland Elec. Illuminating Co. v. ICC*, 905 F.2d 1537 (6th Cir. 1990) (transferring from this Circuit to the D.C. Circuit in the interests of justice because there were related proceedings there).

Transfer of a case is appropriate "where the same or interrelated proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary 'to maintain continuity in the total proceeding.'" *Eschelon Telecom*, 345 F.3d at 682 (quoting *Public Serv. Comm'n for New York v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972)); *see also Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83, 131 (2d Cir. 2007) (Ninth Circuit transferred to Second Circuit where Second had adjudicated a prior version of the rule); *Arkansas Midland R.R. v. Surface Transp. Bd.*, 2000 U.S. App. LEXIS 18003, No. 00-1206, 2000 WL 1093266, at * 1 (D.C. Cir. 2000) (D.C. Circuit transferring a case because "petitioner is now seeking review of

an order entered, in part, on remand from the Eighth Circuit"). By contrast, it is *not* a basis for transfer that one court "has regularly considered cases involving the same industry, or the same type of legal questions," because each geographic circuit court is understood to be a court of general jurisdiction. *ITT World*, 621 F.2d at 1208; *accord United Church of Christ Office of Communs., Inc. v. FCC*, No. 08-3245/3369/3370/3450/3452, 2008 U.S. App. LEXIS 28519, at *6 (6th Cir. May 22, 2008).

The Fifth Circuit has already considered and ruled on the core objections to the ETS. *BST Holdings*. 2021 U.S. App. LEXIS 33698. While this Court no doubt has the ability to consider the issues at stake in just as great detail, it should not waste the resources. Judicial economy favors a transfer, so the court that has already considered briefing and ruled on the ETS may adjudicate follow-up proceedings. Such a transfer is both authorized by § 2112(a) and also within this Court's inherent power of sound judicial administration. *Am. Tel. & Tel. Co. v. Fed. Commc'ns Com.*, 519 F.2d 322, 325 (2d Cir. 1975). This panel should grant "considerable weight in the guidance of judicial discretion [to] the desirability of transfer to a circuit whose judges are familiar with the

background of the controversy through review of the same or related proceedings." *N.Y. & Atl. Ry. Co. v. Surface Transp. Bd.*, Nos. 08-1335, 09-1267, 2010 U.S. App. LEXIS 6645, at *2 (D.C. Cir. Mar. 29, 2010) (quoting *Eastern Air Lines, Inc. v. Civil Aeronautics Bd.*, 354 F.2d 507, 510 (D.C. Cir. 1965)); *accord Mun. Distribs. Grp. v. Fed. Power Com.*, 459 F.2d 1367, 1368 (D.C. Cir. 1972) (quoting *Southern Louisiana Area Rate Cases v. FPC*, 428 F.2d 407 (5th Cir. 1970)); *Pac. Gas & Elec. Co. v. Fed. Power Com.*, 272 F.2d 510, 511 (D.C. Cir. 1958) (accepting transfer back to D.C. Circuit to "save judicial time, to maintain continuity in the total proceeding, and because our prior order is involved"). Indeed, the situation is analogous to the frequent practice of circuit courts to permit a motions panel to retain or decide a case on the merits to conserve judicial resources. *See, e.g., Ligon v. City of N.Y. (In re Reassignment of Cases)*, 736 F.3d 118, 166 (2d Cir. 2013); *United States v. Mason*, 343 F.3d 893, 895 (7th Cir. 2003); *Coal. for Econ. Equity v. Wilson,* 122 F.3d 692, 711 n.5 (9th Cir. 1997); *Gregorio T. by & Through Jose T. v. Wilson*, 54 F.3d 599, 600 (9th Cir. 1995). *See also Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 951 (7th Cir. 2006).

These considerations of judicial economy are especially important in this case, when everything is running on a clock. The ETS, by law, may only last six months. 29 U.S.C. § 655(c). And the ETS sets compliance deadlines for employers like Petitioners of December 6, 2021, and January 4. 86 Fed. Reg. 61,554, 2022; 29 C.F.R. § 1910.501(m). Thus, the Fifth Circuit's prior investment of time in learning this case and issuing a comprehensive ruling is especially valuable because of the limited time available for consideration and implementation of this ETS.

Precedent on the priority of judicial economy therefore supports this Court granting the Motion to Transfer.

CONCLUSION

For the forgoing reasons, this court should transfer the petitions for review to the United States Court of Appeals for the Fifth Circuit.

Dated: November 23, 2021

Respectfully submitted,

On behalf of the BST Holdings Petitioners

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CERTIFICATE OF SERVICE

I certify that on November 23, 2021, I caused a copy of this Motion to Transfer to be served on all parties by the Courts CM/ECF system.

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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, according to the Word Count function, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3,121 words.

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