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# 2022 U.S. Supreme Court Docket



## 2<sup>nd</sup> Annual PA Farm Show Agricultural Law Symposium

Hour 1: **Agricultural Law: The Year in Review and the Year Ahead**

*Tuesday, January 11, 2022*





## **Writs of Certiorari Pending with U.S. Supreme Court for 2022 Term**

- 1. OSHA Emergency Temporary Standard – “Shot or Test” Rule**
- 2. Proposition 12 Commerce Clause Challenge**
- 3. Round-Up & Failure to Warn Products Liability Theory Preemption**
- 4. Sacketts Seek *Rapanos* Analysis Review**
- 5. EPA’s Year-round E15 Sales Authority**
- 6. Kansas “Ag-Gag” Statute**



## 1. OSHA Emergency Temporary Standard – “Shot or Test” Rule

- Oral argument apparently held on January 7, 2022 on emergency stay request. Awaiting decision.
- History goes back to January 29, 2021 Executive Order.

### COVID-19/Ag Labor: Executive Order Directs OSHA to Issue Guidance and Consider Emergency Temporary Standards

On January 29, 2021, the U.S. Department of Labor (DOL) Occupational Safety and Health Administration (OSHA) [announced](#) the issuance of new guidance titled “[Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#),” consistent with January 21, 2021’s [Executive Order 13999](#) directing DOL to, among many other things, issue revised COVID-19 workplace safety guidance within two weeks and consider the necessity of mandatory emergency temporary standards (ETS) on COVID-19 and, if necessary, issue them by March 15, 2021. EO 13999 also directs USDA, DOL and Health and Human Services (HHS) and the Department of Energy to “explore mechanisms to protect workers not protected under OSHA,” which may include an examination of the so-called “small farm exemption” to OSHA jurisdiction which prevents enforcement of OSHA standards on farming operations of less than 10 employees and no employer-supplied housing.

- ***Small Farm Exemption*** has never been mentioned and remains unaltered throughout ETS process. (no funds for enforcement if <10 employees and no employer-supplied housing)



## **OSHA Vaccination Mandate Issued and Immediately Stayed by Federal Court**

On **November 5**, 2021, the U.S. Department of Labor (DOL), Occupational Safety and Health Administration (OSHA) published in the Federal Register, “COVID-19 Vaccination and Testing; Emergency Temporary Standard (86 FR 61402), an interim final rule that consists of an emergency temporary standard (ETS) immediately effective requiring employers of 100 or more employees by December 5, 2021, to “develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.” That same day, multiple legal challenges, which included emergency motions requesting the ETS be stayed temporary and permanently, were filed by numerous parties in numerous federal courts across the country.

On **November 6**, 2021, the United States Court of Appeals for the Fifth Circuit, located in New Orleans, Louisiana, entered an order stating, “Because the petitions give cause to believe there are grave statutory and constitutional issues with the [ETS], the [ETS] is hereby STAYED pending further action by this court.” BST Holdings, et. al, v. OSHA, et. al, No. 21-60845.



## **Federal Courts Affirm Stay and Consolidate and Reassign Cases Challenging OSHA's Vaccination and Testing Emergency Temporary Standard**

On **November 12, 2021**, the U.S. Court of Appeals for the Fifth Circuit issued an opinion reaffirming the court's November 6, 2021 temporary stay of the U.S. Department of Labor (DOL) Occupational Safety and Health Administration's (OSHA) November 5, 2021 COVID-19 Vaccination and Testing Emergency Temporary Standard (86 FR 61402). *BST Holdings v. OSHA*, No. 21-60845. OSHA's "Emergency Temporary Standard" webpage now states that, although the agency "remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation." Those further developments will include disposition of a motion for a permanent injunction against the ETS.

On **November 16, 2021**, the United States Judicial Panel on Multidistrict Litigation ordered that all further legal proceedings in twelve separate legal challenges to the ETS filed in the twelve U.S. Circuit Courts of Appeals shall be decided in one consolidated case and decided by the Sixth Circuit Court of Appeals.



## Sixth Circuit Dissolves the Stay

- On **December 17, 2021**, a divided three-judge panel of the U.S. Court of Appeals for the Sixth Circuit [granted](#) the administration's request Friday to dissolve the Fifth Circuit's Nov. 6 [stay](#) on the regulation. The harm caused by keeping the emergency temporary standard frozen outweighs any damage that would stem from letting it go into effect, the court said.
- “Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs,” the court said.
- The Sixth Circuit's ruling drew a **December 17, 2021** emergency application for [a stay](#) to the U.S. Supreme Court [filed](#) by numerous parties. Technically, a petition for cert. has not been filed.
- Last docket entry simply concerns the underlying pleadings on the stay application. No info on the oral argument held on 1/7/22.





Health effects may constitute a “grave danger” under the OSH Act if workers face “the danger of incurable, permanent, or fatal consequences . . . , as opposed to easily curable and fleeting effects on their health.” *Fla. Peach Growers Ass’n, Inc. v. U.S. Dep’t of Labor*, 489 F.2d 120, 132 (5th Cir. 1974). The “grave danger” required to warrant an ETS is a risk greater than the “significant risk” that OSHA must show to promulgate a permanent standard under § 655(b) of the Act. *See Indus. Union Dep’t*, 448 U.S. at 640 n.45. But the ultimate determination of what precise level of risk constitutes a “grave danger” is a “policy consideration that belongs, in the first instance, to the Agency.” *Asbestos Info. Ass’n*, 727 F.2d at 425 (accepting OSHA’s determination that 80 lives at risk over six months was a grave danger).





## 2. Proposition 12 Commerce Clause Challenge

- For background, see [Rapid Review: Window Closing on Legal Challenges to California's Proposition 12](#), August 3, 2021. One previous attempt to petition U.S. Supreme Court for cert re: Prop 12 failed, see [U.S. Supreme Court Denies Review of Refusal to Grant Injunction Against California's Proposition 12](#).

### Commerce Clause Challenge to Prop 12 Denied by Ninth Circuit

On **July 28, 2021**, the United States Circuit Court of Appeals for the Ninth Circuit issued a [decision](#) in *Nat'l Pork Producers Council, et al v. Karen Ross, et al*, [No. 20-55631](#), holding that [California's 2018 Proposition 12](#) swine confinement requirements for in-state production, and in-state sales restriction for pork products not produced in accordance with them, do not violate the United States Constitution's Commerce Clause. Proposition 12 prohibits the sale of pork in California from hogs: (a) born of a sow that cannot lie down, stand up, fully extend its limbs, or turn around without touching the side of its stall or another animal; or (b) raised in a pen no less than 24 square feet per pig.

- The so-called “cage-free” egg production portions of Prop 12 have not been similarly challenged.
- There has never been a stay granted and Prop 12's effective date is January 1, 2022.



## **Five U.S. Senators Introduce Federal Legislation to Stop Proposition 12**

On **August 5, 2021**, a group of five U.S. Senators introduced [S.2619](#), titled “[Exposing Agricultural Trade Suppression](#)” or “EATS Act,” seeking to erase the effect of the Ninth Circuit Court of Appeals’ July 28, 2021, ruling upholding California’s Proposition 12 and leaving in place its January 1, 2022 effective date. The bill proposes to prohibit states from imposing requirements on the “production of agricultural products sold or offered for sale in interstate commerce if the production . . . occurs in another state.”

The bill was referred to the Senate Committee on Agriculture, Nutrition, and Forestry and has since not moved.



## U.S. Supreme Court Petitioned to Accept Appeal Challenging Constitutionality of California's Proposition 12

On **September 27, 2021**, the National Pork Producers Council (NPPC) and American Farm Bureau Federation (AFBF) filed a [petition for writ of certiorari](#) in the U.S. Supreme Court seeking to have California's Proposition 12 declared unconstitutional as a violation of the U.S. Constitution's Commerce Clause. *National Pork Producers Council, et al. v. Karen Ross*, No. [21-468](#). The law was upheld as constitutional by the U.S. Court of Appeals for the Ninth Circuit in July 2021. [NPPC](#) and [AFBF](#)'s announcement states that the Court is being asked to determine whether a state law that "requires pervasive changes to an integrated nationwide industry" and thus imposes "dramatic economic effects largely outside of the state" is a dormant Commerce Clause violation, i.e. it unreasonably burdens interstate commerce. If the U.S. Supreme Court agrees to hear the appeal, its decision on the constitutionality of the law will likely be rendered in mid-2022, six months or more after Proposition 12's effective date of January 1, 2022.

- Last docket entry: "[Distributed for Conference of 1/14/22.](#)" Previously distributed for conference of 1/7/22.



## **California Department of Food and Agriculture Adapts to “No Supply” Problem**

According to [December 2021 guidance](#) issued from the California Department of Food and Agriculture (CDFA),

- *Will inventory of shell eggs, liquid eggs and pork meat already in stock prior to January 1, 2022 need to be discarded if this covered product originated from animals not raised according the confinement standards of cage-free for hens and twenty-four square feet per breeding pig?*

No. The definition of “confined in a cruel manner” changes at the end of the day on December 31, 2021 for egg-laying hens and breeding pigs. Therefore, the shell eggs, liquid eggs and **pork meat already in inventory or commerce on December 31, 2021 will still be legal to sell in California.**

- *For covered pork product to be compliant after Jan 1, 2022, does the farm of origin have to house breeding pigs with a minimum of twenty-four square feet per pig at the time of breeding (February 2021)?*

Per the Proposition 12 statutes, the definition of “confined in a cruel manner” changes at the end of the day on December 31, 2021 for breeding pigs. Therefore, **covered product and animals in inventory would be considered compliant if born before this effective date.**



### 3. Round-Up & Failure to Warn Products Liability Theory

- *In March 2019, the Hardeman jury verdict was returned against Bayer in the amount of \$5.2 million and \$20 million (reduced from \$75m) in punitive damages. (The appeal also alleges expert testimony errors not addressed here.)*

#### **Bayer Announces Intent to Seek U.S. Supreme Court Appeal of Hardeman Verdict and To Remove Glyphosate from Consumer Products**

On **July 29, 2021**, Bayer [announced](#) that it will file a petition for writ of certiorari with the U.S. Supreme Court seeking to appeal the Ninth Circuit's May 14, 2021, decision that FIFRA does not preempt a failure to warn and duty to disclose a state court product liability claim in *Hardeman v. Monsanto Company et al.*, [No. 19-16636](#).

The same day, during an [investor relations conference call](#) on Bayer's [five-point plan](#) to address its glyphosate personal injury liabilities. Bayer stated that if the Supreme Court declines to hear the case or rules against the company, it will begin its claims administration program to comprehensively [address glyphosate liabilities](#), including adding \$4.5 billion to an already-pledged \$11.6 billion settlement fund.

Additionally, Bayer announced that it plans to replace glyphosate with “alternative active ingredients” in its Roundup consumer products beginning in 2023, subject to EPA and state approval, “exclusively to manage litigation risk and not because of any safety concerns.”



## **Bayer Files for U.S. Supreme Court Review of *Hardeman* Round-Up Verdict**

On **August 16th, 2021**, Bayer filed a [Petition for a Writ of Certiorari](#) with the U.S. Supreme Court, requesting review of the U.S. Court of Appeal for the Ninth Circuit's decision affirming the jury verdict in *Hardeman v. Monsanto*, Nos. [19-16636](#) & [19-16708](#). *Monsanto Company v. Edwin Hardeman*, No. [21-241](#). In its [announcement](#) of the filing, Bayer argues that the California state law-based failure-to-warn product liability claims upon which the verdict was based, are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and that the Ninth Circuit improperly admitted expert testimony.

- Last docket entry: [“U.S. Solicitor General is invited to file a brief in this case expressing the views of the United States.”](#) (Dec. 13, 2021). Was previously distributed for conference of 12/10/21.



## 4. Sacketts Seek Rapanos Analysis Review

### Sacketts Seek U.S. Supreme Court Review of Rapanos WOTUS analysis

On **September 24, 2021**, Priest Lake, Idaho landowners Michael and Chantell Sackett filed a [petition for writ of certiorari](#) in the U.S. Supreme Court seeking to revisit the court's 2006 *Rapanos* decision attempting to define jurisdictional "waters of the United States" under the Clean Water Act (CWA). *Michael Sackett, et ux. v. EPA*, No. [21-454](#). In [Rapanos v. United States](#), the plurality opinion, in which four justices joined, determined that the CWA regulates surface waters only when they have a "continuous surface water connection" to a regulated body of water. The concurring opinion, in which three dissenting justices joined, claimed that surface waters with a "significant nexus" to regulated waters are subject to the CWA. The Sacketts petition for writ of certiorari appeals an August 2021 [decision](#) of the U.S. Court of Appeals for the Ninth Circuit, which used the "significant nexus" test to determine that surface waters on the Sacketts' property is subject to CWA regulation.

- Last docket entry: "[Distributed for Conference of 1/14/22.](#)" Was previously distributed for conference of 1/7/22.





## 5. EPA's Year-round E15 Sales Authority

### Biofuel Advocacy Group Files Supreme Court Petition for Review of E15 Vacatur

On **October 4, 2021**, biofuel advocacy group Growth Energy filed a [petition for writ of certiorari](#) in the U.S. Supreme Court, asking the court to review the U.S. Court of Appeals for the District of Columbia Circuit's July 2021 vacatur of the U.S. Environmental Protection Agency's (EPA) rule allowing year-round sales of fifteen percent ethanol fuel blend (E15). *Growth Energy v. American Fuel & Petrochemical Manufacturers, et al.*, No. [21-519](#).

The group argues that the appellate court erred in finding that Congress intended its statutory high-volatility fuel waiver to only apply to 10% ethanol fuel blends—not E15—because it incorrectly interpreted the phrase “containing . . . 10 percent . . . ethanol” to mean “containing *exactly* 10% ethanol.” The group contends that interpretation negates Congress's legislative intent to promote increased ethanol use.

- [Petition for Cert denied](#) on January 10, 2022. As a result, only E10 may be sold year-round, and EPA has no ability to allow E15 to be sold between May 1 and September 15.



## 6. Kansas “Ag-Gag” Statute

### Kansas Files for Supreme Court Review of its ‘Ag-Gag’ Law

On November 17, 2021, Kansas Governor Laura Kelly and Kansas Attorney General Derek Schmidt filed a [petition for writ of certiorari](#) in the U.S. Supreme Court seeking review of the U.S. Court of Appeals for the Tenth Circuit’s August 2021 [decision](#) that portions of the “Kansas Farm Animal and Field Crop and Research Facilities Protection Act (Act)” violate First Amendment free speech protections. Kansas is prohibited from enforcing [§ 47-187](#) (b), (c), and (d) of the Act. *Laura Kelly, Governor of Kansas, et al., v. Animal Legal Defense Fund, et al.*, No. [21-760](#).

Kansas argues that the dissenting opinion correctly found that the statute does not criminalize constitutionally protected speech and that false statements made to successfully gain access to a property and commit trespassing create a legally cognizable harm and are unprotected speech. Kansas additionally argues that the statute is viewpoint neutral, because the “Act applies regardless of whether the deceptive speech is critical or laudatory of the animal facility.”

- Last docket entry: “[Distributed for conference of 1/21/22.](#)”

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# Thank you!

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