Appendix A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0287p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402.

MASSACHUSETTS BUILDING TRADES COUNCIL, et al. (21-7000); BENTKEY SERVICES, LLC (21-4027); PHILLIPS MANUFACTURING & TOWER COMPANY, et al. (21-4028); COMMONWEALTH OF KENTUCKY, et al. (21-4031); ANSWERS IN GENESIS, INC. (21-4032); SOUTHERN BAPTIST THEOLOGICAL SEMINARY, et al. (21-4033); BST HOLDINGS, LLC, et al. (21-4080); REPUBLICAN NATIONAL COMMITTEE (21-4082); ASSOCIATED BUILDERS AND CONTRACTORS, INC., et al. (21-4083); MASSACHUSETTS BUILDING TRADES COUNCIL (21-4084); UNION OF AMERICAN PHYSICIANS AND DENTISTS (21-4085); ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (21-4086); NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO (21-4087); STATE OF MISSOURI, et al. (21-4088); UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (21-4089); STATE OF INDIANA (21-4090); TANKCRAFT CORPORATION, et al. (21-4091); NATIONAL ASSOCIATION OF HOME BUILDERS (21-4092); JOB CREATORS NETWORK, et al. (21-4093); UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL/CIO-CLC, et al. (21-4094); SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ (21-4095); MFA, INC., et al. (21-4096); STATE OF FLORIDA, et al. (21-4097); AFT PENNSYLVANIA (21-4099); DENVER NEWSPAPER GUILD, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 37074, AFL-CIO (21-4100); DTN STAFFING, INC., et al. (21-4101); FABARC STEEL SUPPLY, INC., et al. (21-4102); MEDIA GUILD OF THE WEST, THE NEWS GUILD-COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 39213 (21-4103); NATURAL PRODUCTS ASSOCIATION (21-4108); OBERG INDUSTRIES, LLC (21-4112); BETTEN CHEVROLET, INC. (21-4114); TORE SAYS LLC (21-4115); KENTUCKY PETROLEUM MARKETERS ASSOCIATION, et al. (21-4117); AARON ABADI (21-4133),

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, et al.,

Respondents.

Nos. 21-7000 /4027 /4028 /4031 /4032 /4033 /4080 /4082 /4083 /4084 /4085 /4086 /4087 /4089 /4088 /4090 /4091 /4093 /4092 /4095 /4094 /4096 /4097 /4099 /4100 /4101 /4102 /4103 /4108 /4112 /4114 /4115 /4117 /4133

On Emergency Motion to Dissolve Stay.

Multi-Circuit Petitions for Review from an Order of the U.S. Department of Labor, Occupational Safety and Health Administration, No. OSHA-2001-0007.

Decided and Filed: December 17, 2021

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

COUNSEL

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STRANCH, J., delivered the opinion of the court in which GIBBONS, J., joined. GIBBONS, J. (pg. 38), delivered a separate concurring opinion. LARSEN, J. (pp. 39–57), delivered a separate dissenting opinion.

OPINION

JANE B. STRANCH, Circuit Judge. The COVID-19 pandemic has wreaked havoc across America, leading to the loss of over 800,000 lives, shutting down workplaces and jobs across the country, and threatening our economy. Throughout, American employees have been trying to survive financially and hoping to find a way to return to their jobs. Despite access to vaccines and better testing, however, the virus rages on, mutating into different variants, and posing new risks. Recognizing that the "old normal" is not going to return, employers and employees have sought new models for a workplace that will protect the safety and health of employees who earn their living there. In need of guidance on how to protect their employees from COVID-19 transmission while reopening business, employers turned to the Occupational Safety and Health Administration (OSHA or the Agency), the federal agency tasked with assuring a safe and healthful workplace. On November 5, 2021, OSHA issued an Emergency

Temporary Standard (ETS or the standard) to protect the health of employees by mitigating spread of this historically unprecedented virus in the workplace. The ETS requires that employees be vaccinated or wear a protective face covering and take weekly tests but allows employers to choose the policy implementing those requirements that is best suited to their workplace. The next day, the U.S. Court of Appeals for the Fifth Circuit stayed the ETS pending judicial review, and it renewed that decision in an opinion issued on November 12. Under 28 U.S.C. § 2112(a)(3), petitions challenging the ETS—filed in Circuits across the nation—were consolidated into this court. Pursuant to our authority under 28 U.S.C. § 2112(a)(4), we **DISSOLVE** the stay issued by the Fifth Circuit for the following reasons.

I. BACKGROUND

A. OSHA's History and Authority

Congress passed the Occupational Safety and Health Act of 1970 (OSH Act or the Act) and established OSHA "to assure safe and healthful working conditions for the nation's work force and to preserve the nation's human resources." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 417 (5th Cir. 1984). It expressly found that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a). OSHA is charged with ensuring worker safety and health "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." *Id.* § 651(b)(5). To fulfill that charge, Congress authorized the Secretary of Labor (the Secretary) "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." *Id.* § 651(b)(3). And it vested the Secretary with "broad authority . . . to promulgate different kinds of standards" for health and safety in the workplace. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 611 (1980) (plurality opinion); *see, e.g.*, *N. Am.'s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271, 281 (D.C. Cir. 2017); *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1202, 1311 (D.C. Cir. 1980); 29 C.F.R. §§ 1910.141, 1926.51.

An occupational safety and health standard is one that "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Before going into effect, OSHA's standards must undergo a notice-and-comment period for 30 days, during which time anyone who objects to the standard may request a public hearing. *Id.* § 655(b)(2)–(3). Within 60 days from the end of the notice-and-comment period, the Secretary must either publish the standard or decline to issue the standard. *Id.* § 655(b)(4). The Secretary has set standards that affect workplaces across the country in a wide range of categories, including sanitation, air contaminants, hazardous materials, personal protective equipment, and fire protection. *See* National Consensus Standards and Established Federal Standards, 36 Fed. Reg. 10,466 (May 29, 1971).

In emergency circumstances, OSHA "shall" promulgate an "emergency temporary standard" that takes "immediate effect." 29 U.S.C. § 655(c)(1). Emergency temporary standards do not displace notice-and-comment requirements; rather, the ETS serves as the "proposed rule," and OSHA must proceed over the course of six months with the notice-and-comment procedures of a normal OSHA standard. *Id.* § 655(c)(2), (3). At the end of that period, the Secretary must promulgate either the same standard or a revised standard in light of the notice-and-comment process. *Id.* § 655(c)(2). Before issuing an ETS, OSHA must determine: (1) "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 (2) that an "emergency standard is necessary to protect employees from such danger." *Id.* § 655(c)(1).

With respect to any OSHA standard—emergency or otherwise—employers may seek a "variance" from the standard. *Id.* § 655(d). Under that provision, an employer must demonstrate "that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard." *Id.*

B. Factual Background

OSHA monitored the COVID-19 pandemic from the beginning. As early as April 2020, OSHA sought to protect workers through "widespread voluntary compliance" with "safety guidelines," specifying that workplaces should comply with personal protective equipment standards, *see* 29 C.F.R. § 1910, and by reinforcing employers' "general duty" to furnish each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm," *see* 29 U.S.C. § 654(a)(1). Given the pandemic's trajectory—and the emergence of rapidly-spreading variants causing "increases in infectiousness and transmission," 86 Fed. Reg. at 61,409—OSHA found that its "nonregulatory enforcement tools" were "inadequate" to ensure all working individuals "safe and healthful working conditions." 29 U.S.C. § 651(b); *see* 86 Fed. Reg. at 61,410–45.

Determining that the continued spread of COVID-19 met the two requirements of § 655(c)(1), on November 5, 2021, OSHA published an ETS to fulfill its statutory directive and address the "extraordinary and exigent circumstances" presented by this unprecedented pandemic. 86 Fed. Reg. at 61,434. OSHA published a 153-page preamble to the ETS to explain the bases for its decision to issue the ETS under 29 U.S.C. § 655(c). *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and 1928).

The ETS does not require anyone to be vaccinated. Rather, the ETS allows covered employers—employers with 100 or more employees—to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces. *Id.* at 61,438 (allowing employers to "opt out" of any vaccination policies). Employers have the option to require unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. *Id.* They can also require those workers to do their jobs exclusively from home, and workers who work exclusively outdoors are exempt. *Id.* at 61,419. The employer—not OSHA—can require that its workers get vaccinated, something that countless employers across the country have already done. *Id.* at 61,436 ("[T]his ETS offers employers a choice in how to comply . . . .").

Employers must also confirm their employees' vaccination status and keep records of that status. *Id.* at 61,552. Consistent with other OSHA standard penalties, employers who fail to follow the standard may be fined penalties up to $13,653 for each violation and up to $136,532 for each willful violation. 29 C.F.R. § 1903.15(d).

C. Procedural History

Shortly after OSHA issued the ETS, private employers, labor unions, state governments, and individual citizens across the country filed suit in virtually every circuit court, challenging OSHA's authority to issue such an ETS and OSHA's basis for the ETS. One day after the ETS went into effect, the Fifth Circuit issued a stay barring OSHA from enforcing the ETS until the completion of judicial review. *BST Holdings, LLC v. Occupational Safety & Health Admin.*, No. 21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021) (per curiam). Less than a week later, the Fifth Circuit issued a written opinion, reaffirming the initial stay after "having conducted . . . [an] expedited review." *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604 (5th Cir. 2021).

In reaching its decision to stay the ETS, the Fifth Circuit generally forecasted that the ETS faced fatal statutory and constitutional issues, then concluded that the Petitioners had demonstrated a strong likelihood of success on the merits. *Id.* at 611–18. On the other stay factors, the Fifth Circuit found that individuals, states, and employers would be "substantially burdened" due to the compliance costs, loss of constitutional freedom, and intrusion into States' "constitutionally reserved police power." *Id.* at 618. Without addressing any of OSHA's factual explanations or its supporting scientific evidence concerning harm, the Fifth Circuit summarily concluded that "a stay will do *OSHA* no harm whatsoever" and "a stay is firmly in the public interest." *Id.* at 618–19 (emphasis in original).

Under 28 U.S.C. § 2112(a)(3), the Government notified the judicial panel on multidistrict litigation of petitions across multiple circuits, invoking the lottery procedure to consolidate all petitions in a single circuit. On November 16, the panel designated the U.S. Court of Appeals for the Sixth Circuit to review the petitions. On November 23, the Government moved to

dissolve the stay issued by the Fifth Circuit pursuant to § 2112(a)(4), which provides that the court of appeals chosen through the multi-circuit lottery may modify, revoke, or extend a stay that a court of appeals issued before the lottery.

II. ANALYSIS

Relying primarily on the evidence and authority set out in its 153-page preamble, OSHA moved to dissolve the Fifth Circuit's stay. Under 28 U.S.C. § 2112(a)(4), we review de novo the challenged aspects of the ETS to determine whether the Fifth Circuit's stay should be modified, revoked, or extended.

A. Standard for Stay

"A stay is an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Va. Petroleum Jobbers Ass'n. v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Therefore, it "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Id.* (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "[T]he heavy burden for making out a case for such extraordinary relief" rests on "the moving parties." *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971); *see also Nken*, 556 U.S. at 433–34.

To determine whether a stay pending judicial review is merited, we consider four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

B. Likelihood of Success on the Merits

1. Scope of OSHA's Statutory Authority

Petitioners' arguments are primarily grounded in the Fifth Circuit's blanket conclusion that the ETS is beyond the scope of OSHA's statutory authority. The ETS was issued under

§ 655(c)(1) of the Act, which requires OSHA to issue an emergency standard if necessary to protect workers from a "grave danger" presented by "exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). In assessing that authority, the Fifth Circuit focused solely on the words in § 655(c)(1): "substances or agents," "toxic or physically harmful," and "grave danger," opining that those words are to be interpreted based on the words and phrases in the immediate vicinity of the statutory language at issue. *BST Holdings*, 17 F.4th at 612–13. But the Supreme Court has instructed that words and phrases must be viewed in the context of the entire statute. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (instructing that, when evaluating a statute, a court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law"). We therefore take a holistic view of the language that Congress chose to include in its statutory authorization to OSHA.

An "agent" is "a chemically, physically, or biologically active principle." *Agent*, Merriam-Webster Collegiate Dictionary, https://unabridged.merriam-webster.com/collegiate/agent. And a virus is defined, in part, as "any large group of submicroscopic infectious agents." *Virus*, Merriam-Webster Collegiate Dictionary, https://unabridged.merriam-webster.com/collegiate/virus. The statute requires OSHA to determine whether an agent is "toxic *or* physically harmful *or* from new hazards," 29 U.S.C. § 655(c)(1) (emphasis added), speaking in the disjunctive, which specifies that words so connected "are to be given separate meanings," *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (quoting *United States v. Woods*, 571 U.S. 31, 45–46 (2013)). To conflate two descriptors into one meaning would improperly render one disjunctive phrase superfluous. *See Bailey v. United States*, 516 U.S. 137, 146 (1995); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338–39 (1979). Under the statutory definition, any agent, including a virus, that is *either* "toxic" (i.e., poisonous, toxicity) *or* "physically harmful" (i.e., causing bodily harm) falls within OSHA's purview. An agent that causes bodily harm—a virus—falls squarely within the scope of that definition.

Other provisions of the Act reinforce OSHA's authority to regulate infectious diseases and viruses. As explained above, Congress enacted the OSH Act under the Commerce Clause

because Congress found that "*illnesses arising out of work situations* impose a substantial burden upon . . . interstate commerce." 29 U.S.C § 651(a) (emphasis added). Congress created the safety and *health* administration to protect workers from those illnesses by reducing "health hazards at their places of employment." *Id.* § 651(b)(1). The Act's objectives include exploring "ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems . . . ." *Id.* § 651(b)(6). And finally, the Act sought to "provid[e] medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience." *Id.* § 651(b)(7).

Section 20 of the OSH Act provides for OSHA to work with and through other agencies by expressly directing the Secretary of Health and Human Services to conduct research in consultation with the Secretary of Labor to develop "information regarding potentially toxic substances or harmful physical agents," including through medical examination and tests. *Id.* § 669(a)(5). That provision also contains the religious exemption for the entire OSH Act: "[n]othing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment, for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." *Id.* The provision's reference to immunization and its creation of a limited exception to the Act's authorization of standards involving immunization would be rendered meaningless if the statute did not contemplate both that "harmful agents" include infectious, disease-causing agents, such as viruses, and that OSHA would employ the use of immunizations to combat those agents.

Congress confirmed OSHA's infectious disease authority in other statutes. In 1989, OSHA proposed a standard governing bloodborne pathogens to curb transmission rates of HIV, hepatitis B (HBV), and hepatitis C. *See* Occupational Exposure to Bloodborne Pathogens, 54 Fed. Reg. 23,042 (proposed May 30, 1989). When the standard had not been finalized by 1991, Congress ordered OSHA to finalize its rulemaking by a date certain, "warning that if [OSHA] did not meet its deadline, the proposed standard would become effective in the interim." Dale and Tracy, Occupational Safety and Health Law 64 (2018). In 1992, Congress passed the

Workers Family Protection Act, codified in 29 U.S.C. § 671a, the same U.S. Code chapter as the OSH Act. The statute resulted from findings that "hazardous chemicals and substances" were being transported home on workers and their clothing posing a "threat to the health and welfare of workers and their families." 29 U.S.C. § 671a(b)(1)(A)–(B). Section 671a requires the National Institute for Occupational Safety and Health to work with OSHA to study "issues related to the contamination of workers' homes with hazardous chemicals and substances, *including infectious agents*, transported from the workplaces of such workers." *Id.* § 671a(c)(1)(A) (emphasis added). OSHA is then specifically required to consider the need for additional standards on the studied issues and to promulgate such standards "pursuant to . . . the Occupational Safety and Health Act of 1970." *Id.* § 671a(d)(2).

In 2000, Congress passed the Needlestick Safety and Prevention Act, directing OSHA to strengthen its bloodborne pathogens standard and provide language for the regulatory text. Pub. L. No. 106-430, 114 Stat. 1901 (2000). Although legal challenges were brought against the standard, no party challenged OSHA's authority to regulate bloodborne pathogens. *See Am. Dental Ass'n v. Martin*, 984 F.2d 823, 826 (7th Cir. 1993). Removing any basis for doubt that OSHA is authorized to regulate infectious diseases, Congress expressly included funding for OSHA in the American Rescue Plan that is to be used "to carry out COVID-19 related worker protection activities." Pub. L. No. 117-2, § 2101, 135 Stat. 4, 30 (2021).

Based on the OSH Act's language, structure, and Congressional approval, OSHA has long asserted its authority to protect workers against infectious diseases. In 1991, it promulgated a standard regarding exposure to bloodborne pathogens. Occupational Exposure to Bloodborne Pathogens; Final Rule; 56 Fed. Reg. 64,004 (1991) (codified at 29 C.F.R. § 1910.1030). That standard required employers to make the hepatitis B vaccine available to employees at risk of exposure to HBV. 29 C.F.R. § 1910.1030(f). OSHA has also promulgated standards requiring employers engaged in hazardous waste cleanup to protect against any "biological agent and other disease-causing agent" that "upon exposure, ingestion, inhalation or assimilation into any person,. . . will or may reasonably be anticipated to cause death [or] disease," *id.* § 1910.120(a)(3); requiring use of respirators to prevent occupational diseases caused by

"harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors," *id.* § 1910.134(a)(1); and requiring employers to provide adequate toilet and handwashing facilities to protect workers from pesticides and prevent the spread of harmful bacteria and disease, *id.* § 1910.141; *see also* Field Sanitation, 52 Fed. Reg. 16,050, 16,087, 16,090–91 (May 1, 1987) (codified at 29 C.F.R. § 1928.110) (requiring construction employers to ban the use of common drinking cups to avoid the risk of contracting diseases); 29 C.F.R. § 192.51(a)(4).

Given OSHA's clear and exercised authority to regulate viruses, OSHA necessarily has the authority to regulate infectious diseases that are not unique to the workplace. Indeed, no virus—HIV, HBV, COVID-19—is unique to the workplace and affects only workers. And courts have upheld OSHA's authority to regulate hazards that co-exist in the workplace and in society but are at heightened risk in the workplace. *See, e.g.*, *Forging Indus. Ass'n v. Sec'y of Labor*, 773 F.2d 1436, 1442–43 (4th Cir. 1985) (*en banc*) (rejecting the argument that "because hearing loss may be sustained as a result of activities which take place outside the workplace . . . OSHA acted beyond its statutory authority by regulating non-occupational conditions or causes"); *Am. Dental Ass'n*, 984 F.2d at 826 (recognizing that the "infectious character of HIV and HBV warrant[s] even on narrowly economic grounds more regulation than would be necessary in the case of a noncommunicable disease"); *see also* 29 C.F.R. § 1910.1025 (OSHA regulates workplace exposure to lead).

Longstanding precedent addressing the plain language of the Act, OSHA's interpretations of the statute, and examples of direct Congressional authorization following the enactment of the OSH Act all show that OSHA's authority includes protection against infectious diseases that present a significant risk in the workplace, without regard to exposure to that same hazard in some form outside the workplace.

The responsibility the Act imposes on OSHA to protect the safety and health of employees, moreover, is hardly limited to "hard hats and safety goggles." OSHA has wide discretion to form and implement the best possible solution to ensure the health and safety of all workers, and has historically exercised that discretion. *See United Steelworkers of Am.*, 647 F.2d at 1260. Having been charged by the Act with creating such health-based standards, it makes

sense that OSHA's authority contemplates the use of medical exams and vaccinations as tools in its arsenal. *See id.* at 1228–40 (concluding that OSHA has the authority to require medical surveillance of lead levels). "To suggest otherwise would mean that Congress had to have anticipated both the unprecedented COVID-19 pandemic and the unprecedented politicization of the disease to regulate vaccination against it." *Florida v. Dep't of Health & Hum. Servs.*, No. 21-14098-JJ, 2021 WL 5768796, at *12 (11th Cir. Dec. 6, 2021). No such prescience is required to address the health and safety concerns of American workers as they seek to return to their workplaces. The language of the OSH Act plainly authorizes OSHA to act on its charge "to assure safe and healthful working conditions for the nation's work force and to preserve the nation's human resources." *Asbestos Info. Ass'n*, 727 F.2d at 417.

2. Major Questions Doctrine

Having established OSHA's statutory authority, we pause to address Petitioners' and the Fifth Circuit's arguments pertaining to the major questions doctrine. The Fifth Circuit's complete discussion of the point is contained in a single paragraph:

> [T]he major questions doctrine confirms that the Mandate exceeds the bounds of OSHA's statutory authority. Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." The Mandate derives its authority from an old statute employed in a novel manner, imposes nearly $3 billion in compliance costs, involves broad medical considerations that lie outside of OSHA's core competencies, and purports to definitively resolve one of today's most hotly debated political issues. There is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one. Nor can the Article II executive breathe new power into OSHA's authority—no matter how thin patience wears.

BST Holdings, 17 F.4th at 617–18 (citations and footnote omitted) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The seldom-used major questions doctrine is a canon of statutory interpretation that has been described as an exception to *Chevron* deference. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 485–86 (2015). If any agency's regulatory action "bring[s] about an enormous and transformative expansion in [the agency's] regulatory authority," then there must be "clear

congressional authorization." *Util. Air Regul. Grp.*, 573 U.S. at 324. "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The doctrine itself is hardly a model of clarity, and its precise contours—specifically, what constitutes a question concerning deep economic and political significance—remain undefined.

The major questions doctrine is inapplicable here, however, because OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority. OSHA has regulated workplace health and safety on a national scale since 1970, including controlling the spread of disease. *See Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 520 (1981). As cataloged at length above, vaccination and medical examinations are both tools that OSHA historically employed to contain illness in the workplace. The ETS is not a novel expansion of OSHA's power; it is an existing application of authority to a novel and dangerous worldwide pandemic.

The dissent assumes our conclusion rests on the length of time (since 1970) OSHA has regulated workplaces and that we miss the point that the major questions doctrine is also about the "*scope* or *degree*" of the power an agency wields. (Dissent Op. at 53) Our conclusion rests on much more, including: An extensive catalog of OSHA's regulatory authority, citing the text of the Act and precedent, both replete with references that contemplate the authority OSHA uses here; the actual components of OSHA's work—such as its many years of regulating illness in the workplace; and other statutes acknowledging OSHA's authority, including one that expressly allocates funding to OSHA for its intervention in the COVID-19 crisis. This listing shows that OSHA was granted the authority that it exercised. The case cited by the dissent, *FDA v. Brown & Williamson Tobacco Corporation*, is inapposite because there the FDA made the claim that its authority to regulate "drugs" extended to cigarettes, but Congress had *repeatedly* declined to grant the FDA that authority. *See* 529 U.S. at 125, 137–39.

Any doubt as to OSHA's authority is assuaged by the language of the OSH Act. In arguing that OSHA does not have this authority, Petitioners and the Fifth Circuit rely on the Supreme Court's and the Sixth Circuit's recent cases invoking the major questions doctrine

regarding a nationwide moratorium on evictions in counties experiencing high levels of COVID-19 transmission. *See Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021); *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666 (6th Cir. 2021). The Centers for Disease Control and Prevention (CDC) promulgated the moratorium under § 361(a) of the Public Health Service Act (PHSA), referencing its "broad authority to take whatever measures it deems necessary to control the spread of COVID-19." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488. The Supreme Court determined that clear language in the PHSA expressly limited the scope of the CDC's authority to specific measures, which scope did not include moratoria. *Id.* The Court noted that "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's agency interpretation." *Id.* at 2489. Because 80 percent of the United States population fell within the moratorium, which would cost nearly $50 billion, and the moratorium intruded into an area traditionally left to the States, landlord-tenant law, the Court noted that if Congress wished the CDC to have such authority, it needed to "enact exceedingly clear language" to that effect. *Id.* (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1850 (2020)).

As an initial point, *Alabama Association of Realtors* and *Tiger Lily* do not control this case. Those cases concerned a different agency, the CDC, and a different regulation, the suspension of evictions. Any authority to issue such regulation came from a different statute: the PHSA. The decisions primarily focused on interpreting the language of that underlying statute. *Ala Ass'n of Realtors*, 141 S. Ct. at 2488; *Tiger Lily*, 5 F.4th at 669–71.

Those cases are inapposite because here the statutory language unambiguously grants OSHA authority for the ETS. As discussed at length, the OSH Act confers authority on OSHA to impose standards and regulations on employers to protect workplace health and safety, including the transmission of viruses in the workplace. *See* 29 U.S.C. §§ 651(b), 655(c). OSHA's ETS authority is circumscribed not only by the requirements of grave danger and necessity, but also by the required relationship to the workplace. *Id.; see United Steelworkers of Am.*, 647 F.2d at 1230. And OSHA honored those parameters, issuing emergency standards only eleven times, including the currently challenged ETS. *See* SCOTT D. SZYMENDRA, CONG. RSCH.

SERV., R46288, OCCUPATION SAFETY AND HEALTH ADMIN. (OSHA): COVID-19 EMERGENCY TEMPORARY STANDARDS (ETS) ON HEALTH CARE EMP. AND VACCINATIONS AND TESTING FOR LARGE EMPS. at 35–36 tbl. A-1 (2021), https://crsreports.congress.gov/product/pdf/R/R46288. This is, therefore, different from the CDC's authority under the PHSA, which provided a limited scope of tools to effectuate the Act's purposes, which scope did not include moratoria, and which regulated an area not traditionally in the CDC's wheelhouse.[1] Finally, the same federalism concerns are not at issue here: "[a]lthough . . . 'public health issues' . . . have 'traditionally been a primary concern of state and local officials,' Congress, in adopting the OSH Act, decided that the federal government would take the lead in regulating the field of occupational health." *Farmworker Just. Fund v. Brock*, 811 F.2d 613, 625 (D.C. Cir. 1987) (quoting *Am. Textile Mfrs. Inst.*, 452 U.S. at 509).

In sum, the major questions doctrine is inapplicable here. OSHA's issuance of the ETS is not a transformative expansion of its regulatory power as OSHA has regulated workplace health and safety, including diseases, for decades.

3. OSHA's Basis for the Emergency Temporary Standard

Having found no threshold issue that OSHA exceeded its authority under the statute, we turn to the challenges to the ETS itself.

As noted, OSHA is permitted to issue an emergency temporary standard, which takes "immediate effect" and serves as a "proposed rule" for a notice-and-comment rulemaking if it determines: (1) "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 (2) that a standard "is necessary to protect employees from such danger." 29 U.S.C. § 655(c). Those determinations are "conclusive if supported by substantial evidence in the record as a whole."

[1]In comparing this case with *Alabama Association*, the Fifth Circuit wrote, "But health agencies do not make housing policy, and occupational safety administrators do not make health policy." *BST Holdings*, 17 F.4th at 619. The Fifth Circuit fails to acknowledge that OSHA stands for the Occupational Safety and *Health* Administration. *See* 29 U.S.C. § 651(b) ("The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and *healthful* working conditions . . . ." (emphasis added)).

Id. § 655(f). On judicial review, we determine "whether the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Asbestos Info. Ass'n*, 727 F.2d at 421 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

While the ultimate question hinges on whether the record contains substantial evidence, "the nature of the evidence in this case requires that we inquire into whether OSHA 'carried out [its] essentially legislative task in a manner reasonable under the state of the record before [it].'" *Id.* at 421 (quoting *Aqua Slide 'n' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831, 838 (5th Cir. 1978)). To this end, deference is given to OSHA's fact-finding expertise. *Id.* (citing *Aqua Slide 'n' Dive Corp.*, 569 F.2d at 838). While "we must take a 'harder look' at OSHA's action than we would if we were reviewing the action under the more deferential arbitrary and capricious standard," *id.* at 421, by the very nature of the administrative proceeding, some flexibility is to be exercised in judicial review, *id.* at 422.

The court "can review [the] data in the record and determine whether it reflects substantial support for the Secretary's findings." *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974) (recognizing that substantial evidence standard of review in a legislative-type proceeding is only applicable to some dimensions of the agency's decision). But some "determinations involve policy choices or factual determinations so much 'on the frontiers of scientific knowledge' that they resemble policy determinations more than factual ones." *Asbestos Info. Ass'n*, 727 F.2d at 422 (quoting *Hodgson*, 499 F.2d at 474). For these determinations we respect "'the boundaries between the legislative and the judicial function,' [and] we 'approach our reviewing task with a flexibility informed and shaped by sensitivity to the diverse origins of the determinations that enter into a legislative judgment' made by an agency." *Id.* (quoting *Hodgson*, 499 F.2d at 475). So too here.

In assessing the likelihood of success of the ETS challenges, we rely on the extensive preamble to the ETS and the record before the courts.

i. Emergency

We begin with the contention endorsed by the Fifth Circuit that the standard automatically fails because OSHA did not issue the ETS at the outset of the pandemic. The claim that COVID-19 does not present "a true emergency" in the workplace has no foundation in the record and law and ignores OSHA's explanations. OSHA addressed COVID-19 in progressive steps tailored to the stage of the pandemic, including consideration of the growing and changing virus, the nature of the industries and workplaces involved, and the availability of effective tools to address the virus. This reasoned policy determination does not undermine the state of emergency that this unprecedented pandemic currently presents.

Even if we assume that OSHA should have issued an ETS earlier, moreover, "to hold that because OSHA did not act previously it cannot do so now only compounds the consequences of the Agency's failure to act." *Id.* at 423. In *Asbestos Information Association*, the petitioners challenged the Agency's motives in promulgating an ETS "when the Agency has known for years that asbestos constitutes a serious health risk, and, in fact, has had all the data it uses to support its . . . action at hand, but nevertheless failed to act on it." *Id.* The Fifth Circuit concluded that the statutory language itself precludes a requirement that OSHA may only act on "new information" because the Act permits regulation of harmful agents *or* "new hazards," proving that not all regulated dangers must be new. *Id.* "OSHA should, of course, offer some explanation for its timing in promulgating an ETS," *id.*, and OSHA has done so here.

The record establishes that COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs. To protect workers, OSHA can and must be able to respond to dangers as they evolve. As OSHA concluded: with more employees returning to the workplace, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission" and "potentially more severe health effects." 86 Fed. Reg. at 61,409–12. OSHA also explained that its traditional nonregulatory options had been proven "inadequate." *Id.* at 61,444. OSHA acted within its discretion in making the practical decision to wait for Federal Drug Administration (FDA) approval of the vaccines before issuing the ETS; "this fact demonstrates appropriate caution and thought on the part of the Secretary."

Florida, 2021 WL 5768796, at *14 n.2. These findings, therefore, coupled with FDA-approved vaccines, more widespread testing capabilities, the recognized Delta variant and the possibility of new variants[2] support OSHA's conclusion that the current situation is an emergency, and one that can be ameliorated by agency action.

ii. Grave Danger

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).

The Fifth Circuit's conclusion, unadorned by precedent, that OSHA is "required to make findings of exposure—or at least the presence of COVID-19—in *all* covered workplaces" is simply wrong. *BST Holdings*, 17 F.4th at 613 (emphasis in original). If that were true, no hazard could ever rise to the level of "grave danger" because a risk cannot exist equally in every workplace and so the entire provision would be meaningless. Almost fifty years ago, the Third Circuit quickly dismantled this argument:

> Industry petitioners argue that there must also be substantial evidence to support OSHA's determination that employees are *in fact* being exposed to those harmful substances. Although subsection 6(c)(1) readily lends itself to such a reading, that interpretation would render ineffective the provision for emergency temporary standards. The purpose of subsection 6(c)(1) is to provide immediate protection in cases where there is a grave danger of harm to employees. This necessarily requires rather sweeping regulation. OSHA cannot be expected to conduct on-the-spot investigations of every user to determine if exposure is occurring.

[2]This possibility has borne out with the Omicron variant.

> In cases where OSHA determines that a substance is sufficiently harmful that a grave danger *would* be created by exposure, OSHA must be allowed to issue necessary regulations. In other words exposure can be assumed to be occurring at any place where there is a substance that has been determined to be sufficiently harmful to pose a grave danger and where the regulations that have been determined to be necessary to meet that danger are not in effect. This interpretation of subsection 6(c)(1) is supported by the existence of subsection 6(d), which provides that any affected employer may obtain a variance from any standard if he can show that "the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard."

Dry Color Mfrs. Ass'n v. Dep't of Labor, 486 F.2d 98, 102 n.3 (3d Cir. 1973) (emphasis added). Thus, OSHA is not required to investigate every business to show that COVID-19 is present in each workplace nor is it required to prove that every worker will experience the same risk of harm.[3]

On this point, OSHA has demonstrated the pervasive danger that COVID-19 poses to workers—unvaccinated workers in particular—in their workplaces. First, OSHA explains why the mechanics of COVID-19 transmission make our traditional workplaces ripe for the spread of the disease, putting workers at heightened risk of contracting it. Transmission can occur "when people are in close contact with one another in indoor spaces (within approximately six feet for at least fifteen minutes)" or "in indoor spaces without adequate ventilation where small respiratory particles are able to remain suspended in the air and accumulate." 86 Fed. Reg. at 61,409. Transmissibility is possible from those who are symptomatic, asymptomatic, or pre-symptomatic, and variants are likely to be more transmissible. *Id.* American workplaces often require employees to work in close proximity—whether in office cubicles or shoulder-to-shoulder in a meatpacking plant—and employees generally "share common areas like hallways, restrooms, lunchrooms[,] and meeting rooms." *Id.* at 61,411. Evidence cited by OSHA

[3]Our dissenting colleague argues that OSHA fails to satisfy the "grave danger" in the workplace limitation on its authority because it does not establish that "all covered employees have a high risk both of contracting COVID-19 and suffering severe consequences." (Dissent Op. at 49) But this section on "*Grave Danger*" explains that OSHA is not required to show the presence of COVID-19 in *every* workplace industry by industry nor that *every* employee will be harmed in the same serious way by it. *Am. Dental Ass'n*, 984 F.2d at 827 (holding that OSHA is not required to proceed "workplace by workplace").

corroborates its conclusion: scientific studies and findings prescribed by the CDC show that the nature of the disease itself provides significant cause for concern in the workplace. *Id.* (citing studies).

OSHA relied on public health data to support its observations that workplaces have a heightened risk of exposure to the dangers of COVID-19 transmission. Many empirical, peer-reviewed studies cited by OSHA have found that because of the characteristics of our workplace, "most employees who work in the presence of other people (e.g., coworkers, customers, visitors) need to be protected." 86 Fed. Reg. at 61,412. Reports produced by state public health organizations corroborate that finding. *See, e.g.*, *id.* at 61,413 (North Carolina Department of Health and Human Services reporting that "number of cases associated with workplace clusters began increasing in several different types of work settings, including meat processing, manufacturing, retail, restaurants, childcare, schools, and higher education."); *id.* (Colorado Department of Public Health & Environment reporting similar outbreaks across many types of industries.); *id.* (Louisiana Department of Health, reporting that "[m]ore than three quarters of outbreaks through [August 24, 2021] were associated with workplaces.").[4]

Having established the risk to covered employees in the workplace, OSHA also set out evidence of the severity of the harm from COVID-19. Apart from death, COVID-19 can lead to "serious illness, including long-lasting effects on health," (now named "long COVID"). *Id.* at 61,410. It has also "killed over 725,000 people in the United States in less than two years." *Id.* at 61,402. The number of deaths in America has now topped 800,000 and healthcare systems across the nation have reached the breaking point. COVID-19 affects individuals of all age groups; but on the whole "working age Americans (18-64 years old) now have a 1 in 14 chance of hospitalization when infected with COVID-19." *Id.* at 61,410. The "severity is also likely exacerbated by long-standing healthcare inequities experienced by members of many racial and

[4]Our dissenting colleague argues that OSHA fails to satisfy the grave danger "in the workplace" limitation on its authority because the Secretary did not specify how many employees would contract the virus at work and instead "calculated the number of people *who happen to work* who would, in any event, contract COVID-19." (Dissent Op. at 51) As shown in this section, however, OSHA presented substantial evidence both that the workplaces of virtually every industry across America present a heightened risk of COVID-19 exposure to employees and that a clear predominance of COVID-19 outbreaks come from workplaces.

economic demographics." *Id.* Compounding matters, mutations of the virus become increasingly likely with every transmission, contributing to uncertainty and greater potential for serious health effects. *Id.* at 61,409. Based on this record, the symptoms of exposure are therefore neither "easily curable and fleeting" nor is the risk of developing serious disease speculative. *See Fla. Peach Growers*, 489 F.2d at 132; *Dry Color Mfrs. Ass'n*, 489 F.2d at 106.

OSHA further estimated that the standard would "save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." *Id.* at 61,408. This well exceeds what the Fifth Circuit previously found to present a grave danger. *See Asbestos Info. Ass'n*, 727 F.2d at 424 (assuming that 80 deaths over six months would constitute a grave danger). As the death rate in America has continued to climb throughout 2021, those estimates may prove to be understated. Bill Chappell, *800,000 Americans Have Died of COVID. Now the U.S. Braces for an Omicron-Fueled Spike*, NPR (Dec. 14, 2021), https://www.npr.org/sections/coronavirus-live-updates/2021/12/14/1063802370/america-us-covid-death-toll. And where grave danger exists in a workplace, of course OSHA may consider the statistical proof on lives saved and hospitalizations prevented when issuing an ETS, even if the risk to individual workers varies within workplaces.

A few Petitioners attack the veracity of some of the studies on which OSHA relies in its ETS or point to other studies that they claim contradict the studies on which OSHA relied. But the court's "expertise does not lie in technical matters." *Pub. Citizen Health Rsch. Grp. v. Tyson*, 796 F.2d 1479, 1495 (D.C. Cir. 1986). "[I]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from facts and probabilities on the record to a policy conclusion." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). OSHA pointed to extensive scientific evidence, including studies conducted by the CDC, of the dangers posed by COVID-19. We therefore cannot say that OSHA acted improperly in light of its clear reliance on "a body of reputable scientific thought." *Indus. Union Dep't.*, 448 U.S. at 656.

The claim that COVID-19 exists outside the workplace and thus is not a grave danger in the workplace is equally unavailing. As discussed above, OSHA routinely regulates hazards that

exist both inside and outside the workplace. More to the point, OSHA here demonstrated with substantial evidence that the nature of the workplace—commonplace across the country and in virtually every industry—presents a heightened risk of exposure. Union Petitioners illustrate this point as well. Within one week in mid-November, Michigan had reported 162 COVID-19 outbreaks, 157 of which were in workplaces;[5] Tennessee reported 280 COVID-19 outbreaks, 161 of which were in workplaces;[6] Washington state reported 65 outbreaks, of which 58 were in workplaces.[7] And other states similarly experienced outbreaks predominantly in the workplace.[8] COVID-19 is clearly a danger that exists in the workplace.

Some Petitioners contend that COVID-19 is no longer a grave danger and claim that OSHA's delay in promulgating the ETS is evidence that no grave danger exists. As explained, however, OSHA provided its reasoning for the delay. When the pandemic began, "scientific evidence about the disease" and "ways to mitigate it were undeveloped." 86 Fed. Reg. at 61,429. At that point, OSHA chose to focus on nonregulatory options, and crafted workplace guidance "based on the conditions and information available to the agency at that time," including that "vaccines were not yet available." *Id.* at 61,429–30. The voluntary guidance, however, proved inadequate, and as employees returned to workplaces the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission" and "potentially more severe health effects." *Id.* at 61,409–12.

At the same time, the options available to combat COVID-19 changed significantly: the FDA granted approval to one vaccine on August 23, 2021, and testing became more readily available. *Id.* at 61,431, 61,452. These changes, coupled with the ongoing risk workers face of

[5]Mich. Dep't of Health & Human Servs., https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173_ 102057---,00.html.

[6]TN Dep't of Health, https://www.tn.gov/content/dam/tn/health/documents/cedep/novel-coronavirus/Critical IndicatorReport.pdf

[7]Wash. Dep't of Health, https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/data-tables/Statewide COVID-19 OutbreakReport.pdf.

[8]Union Petitioners point to California, New Mexico, and Oregon as other states that illustrate significant outbreaks in a variety of workplaces.

contracting COVID-19, support OSHA's conclusion that the time was ripe for OSHA to address the ongoing danger in the workplace through an ETS. More importantly, we are not to second guess what the Agency considers a "risk worthy of Agency action" because that "is a policy consideration that belongs, in the first instance to the Agency." *Asbestos Info. Ass'n*, 727 F.2d at 425. Relying on the history of the pandemic, OSHA explained that "the agency cannot assume based on past experience that nationwide case levels will not increase again." 96 Fed. Reg. at 61,431. That conclusion has proven correct, as we now see the rise of new and more transmissible variants and the resulting increases in COVID-19 cases. *See* Centers for Disease Control and Prevention (CDC), *Omicron Variant: What You Need to Know* (Dec. 13, 2021), https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html. And we know that in our nation, over 800,000 people have died in less than two years and the numbers continue to climb, with more of those deaths having occurred in 2021 than in 2020. *See* Bill Chappell, *supra*.

Based on the wealth of information in the 153-page preamble, it is difficult to imagine what more OSHA could do or rely on to justify its finding that workers face a grave danger in the workplace. It is not appropriate to second-guess that agency determination considering the substantial evidence, including many peer-reviewed scientific studies, on which it relied. Indeed, OSHA need not demonstrate scientific certainty. As long as it supports it conclusion with "a body of reputable scientific thought," OSHA may "use conservative assumptions in interpreting the data . . . , risking error on the side of overprotection rather than underprotection." *Indus. Union Dep't*, 448 U.S. at 656.

iii. Necessity

To issue an ETS, OSHA is also required to show that the ETS is "necessary to protect employees from" the grave danger. 29 U.S.C. § 655(c)(1). This standard is more demanding than the "reasonably necessary or appropriate" standard applicable to permanent standards. *See id.* § 652(8); *see also Indus. Union Dep't*, 448 U.S. at 615. To pass muster, OSHA must demonstrate, by substantial evidence, that the regulation is essential to reducing the grave danger asserted. *See Dry Color*, 486 F.2d at 105. In addition, OSHA must address economic feasibility

because the ETS's "protection afforded to workers should outweigh the economic consequences to the regulated industry." *Asbestos Info. Ass'n*, 727 F.2d at 423.

Some Petitioners argue the word "necessity" mandates that OSHA's standard may use only the means that are absolutely required to quell the grave danger. Taken seriously, such a cramped reading of the statute would require OSHA to prognosticate an emergency and devise the most narrowly tailored ETS to entirely remove the grave danger from the workplace. But in virtually every emergency situation that would require an ETS, no precaution proposed by OSHA could ever be 100 percent effective at quelling the emergency. Courts have acknowledged this practical reality, explaining that ETS standards "may necessarily be somewhat general . . . . It cannot be expected that every procedure or practice will be strictly necessary as to every substance, type of use, or plant operation." *Dry Color Mfrs. Ass'n, Inc.*, 486 F.2d at 105. OSHA need only demonstrate that the solution it proposes "is necessary to *alleviate* a grave risk of worker deaths during [the ETS's] six month term." *Asbestos Info. Ass'n*, 727 F.2d at 427 (emphasis added).

The dissent disagrees, contending that the Secretary must rule out alternatives to show why his proposed means are "indispensable," pointing us to *Asbestos Information Association*. (Dissent Op. at 44) But in that case, the Fifth Circuit found that OSHA's determination of necessity for the proposed ETS was undercut by its existing regulation through which "much of the claimed benefit could be obtained." 727 F.2d at 427. The Fifth Circuit did not require that OSHA rule out every plausible alternative in devising its ETS because the critical question was whether OSHA's current regulations were sufficient to address the problem. *See id.* To answer that question, the Secretary here cataloged OSHA's actions involving COVID-19, starting with advisory guidance then moving to attempts to enforce its General Duty clause. 86 Fed. Reg. at 61,444. These actions were to no avail as COVID-19 transmission rates in the workplace continued to climb and COVID-19-related complaints continued to pour in, suggesting "a lack of widespread compliance." *Id.* at 61,445. With nothing left at his disposal to curb the transmission in the workplace, the Secretary issued the ETS. We find that this explanation satisfies the Secretary's obligation.

Turning to assess the remaining evidence supporting OSHA's necessity finding, OSHA explained that the pandemic in the United States has significantly changed course since the emergence of COVID-19 in early 2020, necessitating an ETS at this point in time. In particular, the emergence of the Delta variant significantly increased transmission when reported cases had been dwindling for months. The realities of the Delta variant significantly changed public health policy and underscored a need for issuing an ETS—not only to control the variant itself, but to control the spread of the disease to slow further mutations. 86 Fed. Reg. at 61,431–32. Recognizing this new reality, the Agency crafted an ETS with options for employers, noting that "employers in their unique workplace settings may be best situated to understand their workforce and strategies that will maximize worker protection while minimizing workplace disruptions." *Id.* at 61,436.

Regarding the vaccine component of the ETS, OSHA explained the importance of vaccination to combat the transmission of COVID-19 and relied upon studies demonstrating the "power of vaccines to safely protect individuals," including from the Delta variant. *Id.* at 61,432, 61,450. Extensive evidence cited by OSHA shows that vaccination "reduce[s] the presence and severity of COVID-19 cases in the workplace," and effectively "ensur[es]" that workers are protected from being infected and infecting others. *Id.* at 61,434, 61,520, 61,528–29 (citing studies). Likewise, the face-covering-and-test facet of the ETS is similarly designed based on the scientific evidence to reduce the risk of transmission and infection of COVID-19. Regular testing "is essential because SARS-CoV-2 infection is often attributable to asymptomatic or pre-symptomatic transmission." *Id.* at 61,438 (citing studies). And wearing a face covering provides an additional layer of protection, designed to reduce "exposure to the respiratory droplets of co-workers and others[, and] . . . to significantly reduce the wearer's ability to spread the virus." *Id.* at 61,439.

Vaccinated employees are significantly less likely to bring (or if infected, spread) the virus into the workplace. *Id.* 61,418–19. And testing in conjunction with wearing a face covering "will further mitigate the potential for unvaccinated workers to spread the virus at the workplace." *Id.* at 61,439. Based on the evidence relied on by OSHA, these measures will

"protect workers" from the grave dangers presented by COVID-19 in the workplace. *See* 29 U.S.C. § 655(c)(1). And OSHA is required to minimize a grave danger, even if it cannot eliminate it altogether. *Nat'l Grain & Feed Ass'n v. Occupational Safety & Health Admin.*, 866 F.2d 717, 737 (5th Cir. 1988).

OSHA limited the ETS to coverage of 100 or more employees, based on four reasons. First, as a practical matter, those employers have the administrative and managerial capacity to be able to promptly implement and meet the standard. *Id.* at 61,511. Second, the coverage threshold is sufficiently expansive to ensure protection to meaningfully curb transmission rates to offset the impact of the virus. *Id.* Third, the ETS "will reach the largest facilities, where the most deadly outbreaks of COVID-19 can occur." *Id.* And finally, the standard is consistent with size thresholds established in analogous congressional and agency decisions, including standards promulgated by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, requirements under the Affordable Care Act (in allowing greater flexibility with its requirements for employers with 100 or fewer employees), and requirements under the Family Medical Leave Act (exempting compliance for employers with fewer than 50 employees given decreased administrative capacity and inability to easily accommodate such employee absences). *Id.* at 61,513.

Petitioners contend, relying on the Fifth Circuit's decision, that the necessity of the ETS is undermined by the fact that it is both "overinclusive" and "underinclusive." Neither observation warrants a stay. OSHA may lean "on the side of overprotection rather than underprotection" when promulgating an ETS. *Indus. Union Dep't*, 448 U.S. at 656.[9] And OSHA is not required to proceed "workplace by workplace," *Am. Dental Ass'n*, 984 F.2d at 827, in its ETS nor would it "be expected to conduct on-the-spot investigations," *Dry Color Mfrs. Ass'n Inc.*, 486 F.2d at 102 n.3. To expect otherwise of OSHA would belie the whole point of an

[9]The dissent contends that our citation is inapposite because it "did not review an emergency standard" and refers to the Secretary's interpretation of data underlying a risk assessment. (Dissent Op. at 47) The language cited, however, addresses whether OSHA's evidence supporting its estimation of a risk, which was the basis for the standard, was supported by substantial evidence. *Indus. Union Dep't*, 448 U.S. at 656. Critically, the substantial evidence standard at issue there governs *both* emergency temporary standards and run-of-the-mill OSHA standards and is applicable here. *See* 29 U.S.C. § 655(f).

emergency temporary standard, which demands that OSHA act quickly "to provide immediate protection" to workers facing a grave danger. *Id.* at 105. OSHA explored the dangers in varied workplaces and industries and concluded that "employees can be exposed to the virus in almost any work setting" and that employees routinely "share common areas like hallways, restrooms, lunchrooms[,] and meeting rooms" and are at risk of infection from "contact with coworkers, clients, or members of the public." 86 Fed. Reg. at 61,411–12. OSHA supported those conclusions by relying on peer-reviewed studies and data collected by government health departments. But in any case, OSHA tailored the ETS by excluding workplaces where the risk is significantly lower, including those where employees are working exclusively outdoors, remotely from home, or where the employee does not work near any other individuals. *Id.* at 61,516.

The argument that the ETS is overinclusive because it imposes requirements on some workers that are at lesser risk of death than others overlooks OSHA's reasoning. OSHA promulgated the ETS to prevent employees from transmitting the virus to other employees—that risk is not age-dependent. *See, e.g.*, *id.* at 61,403; 61,418–19; 61,435; 61,438. OSHA found that unvaccinated workers in workplaces where they encountered other workers or customers faced a grave danger and that vaccination or testing and masking were necessary to protect those workers from COVID-19. Those workers are in "a wide variety of work settings across all industries" thus counseling for the broad standard. *Id.* at 61,411–12.

That the ETS is underinclusive, as some Petitioners argue, suggests that OSHA has not done enough to eliminate the grave danger facing workers, and more workplace safeguards—not fewer—are needed to protect the workplace. And OSHA explained that it chose a tailored threshold because those employers would be best positioned to actually effectuate the standard and their employees are more at risk. *Id.* at 61,513 ("OSHA has set the threshold for coverage based primarily on administrative capacity for purposes of protecting workers as quickly as possible."); *id.* at 61,512 (suggesting that "larger employers are more likely to have many employees gathered in the same location" and have "larger" and "longer" outbreaks).

OSHA also demonstrates that selecting larger employers means that the ETS reaches enough workers to make a meaningful difference in mitigating the risk. *Id.* at 61,513.

It has long been the case that an agency "is not required to identify the optimal threshold with pinpoint precision. It is only required to identify the standard and explain its relationship to the underlying regulatory concerns." *Nat'l Shooting Sports Found. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (quoting *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461–62 (D.C. Cir. 2001)); *see also Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1191 (9th Cir. 2010); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (noting that the government "need not address all aspects of a problem in one fell swoop"). Courts are "generally unwilling to review line-drawing performed by the [agency] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." *Cassel v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (alteration in original) (quoting *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)). OSHA's ETS readily shows a relationship to the underlying regulatory problem—larger employers are better able to implement the policies, are at heightened risk, and regulating them will be a significant step in protecting the entire workforce from COVID-19 transmission. And of course, agencies can later revise, refine, and broaden (or narrow) their regulations, but exigent circumstances allow there to be some reasonable discretion at the initial steps of promulgating a regulation. *See Forging Indus. Ass'n*, 773 F.2d at 1454; *United Steelworkers of Am.*, 647 F.2d at 1309–10 (D.C. Cir. 1980).

Turning to the cost analysis, OSHA is not required to conduct a "formal cost-benefit analysis" before issuing an ETS. *Asbestos Info. Ass'n*, 727 F.2d at 423 n.18 (reasoning that it is "unlikely" that "the agency would have time to conduct such an analysis" in the context of an emergency). Congress recognized that OSHA standards would impose costs, but placed "the benefit of worker health above all other considerations save those making attainment of this benefit unachievable." *Am. Textile Mfrs. Inst.*, 452 U.S. at 509. The question is whether the standard is economically feasible. *United Steelworkers of Am.*, 647 F.2d at 1264. An OSHA "standard is economically feasible if the costs it imposes do not 'threaten massive dislocation to, or imperil the existence of, the industry.'" *Am. Iron & Steel Inst. v. Occupational Safety*

& Health Admin., 939 F.2d 975, 980 (D.C. Cir. 1991) (quoting *United Steelworkers of Am.*, 647 F.2d at 1265). OSHA must consider the costs in relation to the financial health of the affected industries or their impact on consumer prices. *United Steelworkers of Am.*, 647 F.2d at 1265.

Here, OSHA conducted a detailed economic analysis, concluding that the costs amounted to approximately 0.02 percent of the revenue of the average covered employer, or about $11,298 per affected entity. 86 Fed. Reg. at 61,493–94. "To put this into perspective, if the average firm decided to raise prices to cover the costs of the ETS, the price of a $100 product or service, for example, would have to be increased by 2 cents (during the six-month period)." *Id.* at 61,499. These costs are modest in comparison to other standards OSHA has implemented. *See, e.g.*, *United Steelworkers of Am.*, 647 F.2d at 1281 (estimating capital costs for primary lead smelters to comply with OSHA's lead exposure standard to be between $32 million and $47 million). OSHA's analysis, moreover, does not consider the economic harm a business will undergo if it is closed by a COVID-19 outbreak in its workplace—taking this into account would further show that the benefits will outweigh the costs of the ETS. If the costs of implementation become too high for a single business, an employer can raise infeasibility or impossibility as a defense to any citation that OSHA may issue for violating the ETS. 29 C.F.R. § 2200.34(b)(3).

Based on the substantial evidence referenced and relied upon by OSHA, there is little likelihood of success for the challenges against OSHA's bases for issuing the ETS.

4. Constitutional Challenges

We turn to the likelihood of success on the remaining constitutional arguments raised by the Petitioners and were presumed persuasive by the Fifth Circuit.[10]

[10]Some Petitioners raise challenges regarding religious liberty. The ETS states, "if the vaccination, and/or testing for COVID-19, and/or wearing a face covering conflicts with a sincerely held religious belief, practice or observance, a worker may be entitled to a reasonable accommodation." 86 Fed. Reg. at 61,522. Therefore, Petitioners are unlikely to succeed on their argument that the ETS infringes on religious liberty. Regardless, their circumstance-specific arguments are premature and do not provide a basis to stay the entire ETS.

i. Commerce Clause

First, Petitioners raise challenges to the ETS under the Commerce Clause, directing us to the Fifth Circuit's conclusion that the ETS "likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power." *BST Holdings*, 17 F.4th at 617. Relying on *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 522 (2012), the Fifth Circuit reasoned that "[a] person's choice to remain unvaccinated and forego regular testing is noneconomic activity," and falls within the States' police power. *Id.* On that basis, the stay opinion summarily concluded that because the ETS "commandeers" employers to compel activity that falls within the States' police power, it "far exceed[s] current constitutional authority." *Id.*

Petitioners and the Fifth Circuit miss the mark. The ETS regulates employers with more than 100 employees, not individuals. It is indisputable that those employers are engaged in commercial activity that Congress has the power to regulate when hiring employees, producing, selling and buying goods, etc. *See NFIB*, 567 U.S. at 550 ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated."). The ETS regulates economic activity by regulating employers.

It has long been understood that regulating employers is within Congress's reach under the Commerce Clause. To hold otherwise would upend nearly a century of precedent upholding laws that regulate employers to effectuate a myriad of employee workplace policies. *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 109, 114 (1941) (finding the Fair Labor Standards Act imposed a permissible use of government power when it set a minimum wage standard to prevent the production of goods "for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being"); *United Steelworkers of Am., AFL-CIO v. Weber*, 443 U.S. 193, 206 n.6 (1979) (finding proper use of the commerce power to bar employers from discriminating against employees on a protected ground under Title VII); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (finding proper use of commerce power to safeguard "the right of employees to self-organization

and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer"). These cases recognize, for example, that, a person's choice to discriminate against another based on race is "noneconomic activity," but the effect of that choice on the workplace and the flow of commerce in and from that workplace is economic—hence, it is subject to regulation under the Commerce Clause. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964) (finding "discrimination by hotels and motels impedes interstate travel").

That principle was at the heart of the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel*, 201 U.S. 1 (1927). There, the Court emphasized that to determine the Commerce Clause's applicability, we focus on the "effect upon commerce, not the source of the injury," 301 U.S. at 32, and that Congress may legislate under the Commerce Clause to ensure the safety of commerce, *id.* at 37. When industries occupy a "national scale," moreover, Congress may protect interstate commerce from "paraly[sis]." *Id.* at 41. COVID-19's paralyzing effect on commerce has been repeatedly demonstrated throughout the pandemic. *See, e.g.*, U.S. Bureau of Labor Statistics, TED: The Economics Daily (July 8, 2021), https://www.bls.gov/opub/ted/2021/6-2-million-unable-to-work-because-employer-closed-or-lost-business-due-to-the-pandemic-june-20 21.htm.

This also demonstrates why *NFIB v. Sebelius* is inapposite. In *NFIB*, the Supreme Court considered challenges to the Affordable Care Act's individual mandate. 567 U.S. at 539. Critically, and fatal to the Fifth Circuit's point, the Affordable Care Act contains two separate types of mandates: the individual mandate to direct individuals to purchase health insurance—at issue in *NFIB*—and the employer mandate—not at issue in *NFIB*. *See* 26 U.S.C. § 4980H. A plurality of five Justices questioned whether the Commerce Clause gave Congress the power to mandate that people engage in economic activity to sustain the *individual* mandate. *See NFIB*, 567 U.S. at 547–58. But no Justice doubted that Congress could, under the Commerce Clause, require *employers* to provide health insurance to their employees. So too here.

Citing *Zucht v. King*, 260 U.S. 174 (1922), and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), Petitioners and the Fifth Circuit contend that the ETS "falls squarely within the States'

police powers." *BST Holdings*, 17 F.4th at 617. But those cases concerned challenges to state vaccine requirements under the Fourteenth Amendment, not federalism questions over whether states or the federal government can impose such a requirement. If the suggestion here is that the federal and state regulatory powers over economic activity are mutually exclusive, the Supreme Court rejected that argument in *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 251–52 (1829) (holding an act empowering the State's construction of a dam that obstructed an interstate walkway is not "repugnant to the power to regulate commerce in its dormant state"). To be sure, there are numerous areas—for example, education—in which States and the federal government have overlapping authority. But that states may regulate COVID-19 safety measures does not operate to preclude the federal government from doing so.

Finally, Congress already addressed the issue when it passed the OSH Act, expressing its intention to preempt state and local standards that conflict with OSHA standards. *See Gade*, 505 U.S. at 98–99 (holding that "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted" by OSHA's standard). Hazards are often regulated by both OSHA and state agencies, such as exposure to lead. But overlap does not limit the authority Congress granted to OSHA to regulate the same risk of exposure.

For the foregoing reasons, the Commerce Clause challenges do not have a meaningful likelihood of success.

ii. Non-Delegation Doctrine

Relying on the Fifth Circuit's decision, Petitioners cast constitutional doubt on the ETS by questioning Congress's delegation of authority to OSHA when it passed the OSH Act. The Fifth Circuit cursorily concluded that Congress cannot "authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncement on matters of public health affecting every member of society in the profoundest of ways." *BST Holdings*, 17 F.4th at 611. That contention never specifies which provision of the OSH Act is an

improper delegation. We therefore construe its analysis in line with the Petitioners' arguments that 29 U.S.C. § 655(c)(1) constitutes an improper delegation.

The Supreme Court has only twice invoked the non-delegation doctrine to strike down a statute. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935). In *Gundy v. United States*, the Supreme Court stated that, "[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." 139 S.Ct. 2116, 2121 (2019) (plurality opinion). "But the Constitution 'does not deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].'" *Id.* at 2123 (alterations in original) (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)) (alterations in original). To the contrary, Congress "may confer substantial discretion on executive agencies to implement and enforce the laws." *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). A statutory delegation is therefore constitutional as long as "Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* (quoting *Mistretta*, 488 U.S. at 372) (alterations in original). The starting and often ending point for the analysis is "statutory interpretation": We must "construe the challenged statute to figure out what task it delegates and what instructions it provides" and then "decide whether the law sufficiently guides executive discretion to accord with Article I." *Id.* at 2124.

The Supreme Court has long recognized the power of Congress to delegate broad swaths of authority to executive agencies under this standard and has ultimately concluded that extremely broad standards will pass review. *See id.* at 2129. How broad? Delegations to regulate in the "public interest," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943), to set "fair and equitable prices," *Yakus*, 321 U.S. at 427, and to issue air quality standards "requisite to protect the public health," *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001). *See Gundy*, 139 S. Ct. at 2129 (collecting sources).

Our extensive discussion of the statutory framework of the OSH Act above starts and ends the inquiry. OSHA's statutory authority to issue standards is found in 29 U.S.C. § 655.

Specific authorization is in § 655(c)(1) and requires the Secretary to promulgate "emergency temporary standards," when he determines that employees are in "grave danger" from exposure to a workplace hazard and that the standard is "necessary to protect the employees from such danger." As shown above, it is well-established that the scope of the OSH Act and OSHA's authority include infectious diseases in the workplace, even when those diseases also exist outside the workplace. Therefore, Congress applied an "intelligible principle" when it directly authorized OSHA to exercise this delegated authority in particular circumstances. The Supreme Court long ago recognized this authority: "The [Occupational Safety and Health] Act delegates broad authority to the Secretary to promulgate different kinds of standards." *Indus. Union Dep't*, 448 U.S. at 611.

There is little possibility of success under the non-delegation doctrine.

C. Irreparable Harm

The foregoing analysis shows that Petitioners cannot establish a likelihood of success on the merits, and this reason alone is sufficient to dissolve the stay. *Nken*, 556 U.S. at 433–34. We also conclude, however, that Petitioners have not shown that any injury from lifting the stay outweighs the injuries to the Government and the public interest.

To merit a stay, Petitioners bear the burden to demonstrate an irreparable injury; "simply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Nken*, 556 U.S. at 434–35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). Moreover, because this case involves the Government as an opposing party, the third and fourth factors "merge." *Id.* at 435. The Fifth Circuit failed to analyze any harm to OSHA, instead baldly concluding that a stay will "do OSHA no harm whatsoever." *BST Holdings*, 17 F.4th at 618. We engage in our own balancing of the parties' harm.

The injuries Petitioners assert are entirely speculative. First, some Petitioners assert that compliance costs will be too high. As detailed in the preceding section, these assertions ignore the economic analysis OSHA conducted that demonstrates the feasibility of implementing the ETS. To the extent that a business with over 100 employees impacted at this stage of the ETS

faces true impossibility of implementation, it can assert that as an affirmative defense in response to a citation. 29 C.F.R. § 2200.34(b)(3). Relying on employee declarations, other Petitioners claim that they will need to fire employees, suspend employees, or face employees who quit over the standard. These concerns fail to address the accommodations, variances, or the option to mask-and-test that the ETS offers. For example, employers that are confident that they can keep their employees safe using alternative measures can seek a variance from the standard pursuant to 29 U.S.C. § 655(d). Or employers may choose to comply with the standard by enforcing the mask-and-test component, which are entirely temporary in nature and do not create irreparable injuries. These provisions of the ETS undercut any claim of irreparable injury.

By contrast, the costs of delaying implementation of the ETS are comparatively high. 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. In a conservative estimate, OSHA finds that the ETS will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" in just six months. 86 Fed. Reg. 61,402, 61,408. A stay would risk compromising these numbers, indisputably a significant injury to the public. The harm to the Government and the public interest outweighs any irreparable injury to the individual Petitioners who may be subject to a vaccination policy, particularly here where Petitioners have not shown a likelihood of success on the merits. *See Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1307–08 (1976).

In light of the foregoing, we find that the factors regarding irreparable injury weigh in favor of the Government and the public interest.

III. CONCLUSION

For the foregoing reasons, we **GRANT** the Government's motion and **DISSOLVE** the stay issued by the Fifth Circuit.

CONCURRENCE

GIBBONS, Circuit Judge, concurring. I agree that the government's motion to dissolve the stay should be granted and concur fully in Judge Stranch's opinion. I write separately to note the limited role of the judiciary in this dispute about pandemic policy. Petitioners and various opinions discuss at length how OSHA could have handled the pandemic's impact on places of employment differently. Some of the writings include sweeping pronouncements about constitutional law and the scope of OSHA's statutory authority. Much of this writing is untethered from the specific facts and issues presented here and overlooks the limited nature of our role.

Reasonable minds may disagree on OSHA's approach to the pandemic, but we do not substitute our judgment for that of OSHA, which has been tasked by Congress with policy-making responsibilities. *See Charles D. Bonnano Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 418 (1982). This limitation is constitutionally mandated, separating our branch from our political co-branches. "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984). Beyond constitutional limitations, the work of an agency, often scientific and technical in nature, is outside our expertise. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019).

Our only responsibility is to determine whether OSHA has likely acted within the bounds of its statutory authority and the Constitution. As it likely has done so, I concur.

DISSENT

LARSEN, Circuit Judge, dissenting. As the Supreme Court has very recently reminded us, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021). The majority's theme is that questions of health science and policy lie beyond the judicial ken. I agree. But this case asks a legal question: whether Congress authorized the action the agency took. That question is the bread and butter of federal courts. And this case can be resolved using ordinary tools of statutory interpretation and bedrock principles of administrative law. These tell us that petitioners are likely to succeed on the merits, so I would stay OSHA's emergency rule pending final review.

I.

The majority opinion describes the emergency rule at issue here as permitting employers "to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces." Maj. Op. at 7. With respect, that was the state of federal law *before* the rule, not after.

Here is what the emergency rule does. It binds nearly all employers with 100 or more employees,[1] and requires them to "establish, implement, and enforce a written mandatory vaccination policy." 29 C.F.R. § 1910.501(b)(1), (d)(1). It covers all employees, part-time, full-time, and seasonal, except for those who work exclusively from home, outdoors, or alone. *Id.*

[1]The rule exempts employers covered by two different federal rules: the federal contractors and subcontractors already subject to a vaccine mandate and healthcare workers subject to OSHA's June 2021 emergency standard. 29 C.F.R. § 1910.501(b)(2). The latter rule required healthcare employers to adopt a COVID-19 protection plan and encouraged vaccination but did not impose a vaccinate-or-test mandate. *Id.* § 1910.502. In addition, neither "the United States . . . [n]or any State or political subdivision of a State" is a covered "employer." 29 U.S.C. § 652(5). Several states say that they nonetheless will be forced to comply with the standard because they have adopted their own OSHA plans pursuant to 29 U.S.C. § 667. Such plans must be "at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655." *Id.* § 667(c)(2).

§ 1910.501(b)(3). Employees must "be fully vaccinated," unless they qualify for medical or religious exemptions or reasonable accommodations. *Id.* § 1910.501(c). While vaccines are free to the public, employers must provide employees with paid time off both to secure the vaccine and to recover from any side effects. *Id.* § 1910.501(f).

An employer may instead permit unvaccinated employees to undergo weekly COVID-19 testing and wear a mask in the workplace. *Id.* § 1910.501(d)(2), (g)(1), (i)(1). But OSHA consciously designed this exception to be less palatable to employers and employees. The agency expects that employers who adopt a mandatory-vaccination policy will "enjoy advantages," including fewer "administrative burden[s]," than employers who permit the mask-and-test exception. 86 Fed. Reg. at 61,437. And even if an employer elects to take on these additional burdens, it need not absorb the cost of masks and tests, nor provide time off (paid or otherwise) to secure them. *Id.* § 1910.501(d)(2), (g)(1) n.1. This, despite the fact that OSHA's ordinary regulations require employers to pay for agency-mandated equipment, tests, and exams. *See Employer Payment for Personal Protective Equipment*, 72 Fed. Reg. 64,341, 64,342 (Nov. 15, 2007); 86 Fed. Reg. at 61,532 (noting OSHA "has commonly required" employers to pay for protective equipment); 29 C.F.R. § 1910.1030(d)(3)(i), (f)(1)(ii) (Hepatitis B equipment and testing "at no cost"); *id.* § 1910.1018(j)(1), (n)(1)(ii) (same for arsenic); *id.* § 1910.1001(h)(1), (l)(1)(ii)(A) (same for asbestos); *Sec'y of Lab. v. Beverly Healthcare-Hillview*, 541 F.3d 193, 200–01 (3d Cir. 2008) (OSHA's interpretation of "at no cost" includes compensation for testing time and travel expenses). Indeed, OSHA required employers to provide COVID-19 tests "at no cost" to employees under its earlier healthcare ETS. *See* 29 C.F.R. § 1910.502(l)(1)(ii). OSHA was candid about why it deviated from its normal rule: Putting the onus on employees "will provide a financial incentive . . . to be fully vaccinated." 86 Fed. Reg. at 61,437. The rule, in sum, is a mandate to vaccinate or test.

One more background point: The purpose of the mandate is to protect unvaccinated people. *Id.* at 61,419. The rule's premise is that vaccines work. *Id.* And so, OSHA has explained that the rule is not about protecting the vaccinated; they do not face "grave danger" from working with those who are not vaccinated. *Id.* at 61,434.

The various monitoring and reporting duties required by the mandate were to go into effect on December 6, 2021. 29 C.F.R. § 1910.501(m)(2)(i). And employees were required to be fully vaccinated or comply with mask-and-test requirements (if available) by January 4, 2022. *Id.* § 1910.501(m)(2)(ii). The United States Court of Appeals for the Fifth Circuit stayed the enforcement of the vaccinate-or-test mandate. *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604 (5th Cir. 2021). After a multi-circuit lottery held pursuant to 28 U.S.C. § 2112(a)(3), this court obtained jurisdiction over all petitions challenging the mandate filed throughout the country. OSHA has now moved to dissolve the stay entered by the Fifth Circuit.[2]

II.

A. Likelihood of Success on the Merits

In this case, a multitude of petitioners—individuals, businesses, labor unions, and state governments—have levied serious, and varied, charges against the mandate's legality. They say, for example, that the mandate violates the nondelegation doctrine, the Commerce Clause, and substantive due process; some say that it violates their constitutionally protected religious liberties and the Religious Freedom Restoration Act of 1993. To lift the stay entirely, we would have to conclude that not one of these challenges is likely to succeed. A tall task. To keep the stay, however, there is no need to resolve each of these questions; the stay should remain if we conclude that petitioners are likely to succeed on just one ground. In my view, the petitioners have cleared this much lower bar on even the narrowest ground presented here: The Secretary of Labor lacks statutory authority to issue the mandate. So the most important factor supporting the stay is satisfied. *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 524 (6th Cir. 2021).

[2]Petitioners moved for initial en banc hearing, which this court denied. *In re MCP No. 165*, No. 21-7000, 2021 WL 5914024, at *1 (6th Cir. Dec. 15, 2021). I would have granted the petitions regardless of the merits of the case. Given the unique nature of these consolidated proceedings, I thought it preferable to enlist the talents of all sixteen active judges. This panel agreed that the work of the en banc court was separate from the work of this panel and that the orders and opinions from each should issue as soon as they were ready.

1. Statutory Authority

OSHA cannot act without a source of authority. The ordinary way to bring about a rule affecting the people's health and safety is for a state legislature, or sometimes Congress, to pass one into law. Because the legislature "wields the formidable power of 'prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated,'" it is, by design, the branch of government "most responsive to the will of the people." *Tiger Lily, LLC v. U.S. Dep't of Housing & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (quoting The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

But there is a workaround. "In the modern administrative state, many 'laws' emanate not from Congress but from administrative agencies, inasmuch as Congress has seen fit to vest broad rulemaking power in the executive branch." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part). To preserve at least a modicum of democratic protections, Congress created the notice-and-comment requirements of the Administrative Procedure Act (APA), which provide public notice of a proposed rule and an opportunity for the public to express its concerns. *Id.* Whether successful or not, the aim is to ensure "that agency 'rules' are also carefully crafted (with democratic values served by public participation) and developed only after assessment of relevant considerations." *Id.*

Consistent with this scheme, Congress delegated to OSHA the authority to promulgate "occupational safety or health standard[s]" that are "reasonably necessary or appropriate" to address a "significant risk" of harm in the workplace. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642–43 (1980); 29 U.S.C. §§ 652(8), 655(b). Those standards must go through a notice-and-comment procedure. 29 U.S.C. § 655(b) (prescribing procedures similar to those of the APA).

This case, though, involves yet a more truncated process. Congress understood that emergencies might arise, and so it provided the Secretary with authority to bypass the public and the deliberative process, and to issue emergency temporary standards that "take immediate effect upon publication" and remain effective for six months. *Id.* § 655(c)(1), (c)(3). Because this is

such a departure from the ordinary processes, federal courts have recognized this authority as the "most dramatic weapon in [OSHA's] enforcement arsenal." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984). It is an "[e]xtraordinary power" that "should be delicately exercised, and only in those emergency situations which require it." *Fla. Peach Growers Ass'n, Inc. v. Dep't of Lab.*, 489 F.2d 120, 129–30 (5th Cir. 1974); *see also Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983) ("[E]mergency standards are to be used only in limited situations" and "only as an unusual response to exceptional circumstances." (quotation marks omitted)).

Perhaps wary of misusing such immense authority, OSHA has rarely invoked it. The agency has issued only ten previous emergency standards in the half-century that it has held that power. Six of those were challenged in court; five were struck down. *BST Holdings*, 17 F.4th at 609.

Congress too was wary of conferring this authority, "repeatedly express[ing] its concern about allowing the Secretary to have too much power" in this area. *Indus. Union*, 448 U.S. at 651. Accordingly, Congress "narrowly circumscribed" the Secretary's ability to use this considerable tool. *Id.* Before the Secretary may issue an emergency standard, he must "determine[] (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."[3] 29 U.S.C § 655(c)(1) (emphases added).

So the Secretary's emergency authority extends no further than to issue temporary standards that are (1) necessary to protect employees from (2) grave danger. And because the Secretary's authority is to set "occupational safety and health standards," governing "employment and places of employment," the danger to be regulated must come from

[3]I assume here that the virus that causes COVID-19 constitutes a "substance[] or agent[] determined to be toxic or physically harmful" or a "new hazard," within the meaning of § 655(c)(1). Even if so, OSHA lacked authority to issue the rule.

(3) "exposure" in the workplace. 29 U.S.C. §§ 652(8), 655(c)(1); *Indus. Union*, 448 U.S. at 612. I doubt the Secretary has met this test.

a. Necessary

The Secretary has not made the appropriate finding of necessity. An emergency standard must be "necessary to protect employees from [grave] danger." 29 U.S.C. § 655(c)(1). "Necessary," in the legal vernacular, is a tailoring word. It asks how closely, or how loosely, a regulatory solution must fit a particular problem. Sometimes "necessary" means simply "useful." *Necessary*, Black's Law Dictionary (5th ed. 1979). In those instances, the government may impose solutions that it thinks might help the problem, even if it ends up regulating a good deal more than it really needs to. At other times, though, "necessary" means "indispensable." *American Heritage Dictionary of the English Language* 877 (1976). Then, the government must stitch together its solution with more precision, regulating only as much as is critical to its mission. Every American law student will be familiar with these dueling meanings of "necessary," prominently displayed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). There, as here, the choice between meanings is revealed by context.

Consider first the textual differences between a permanent OSHA standard and an emergency one. A permanent standard, issued after public notice and comment, need be only "reasonably necessary or appropriate" to address the problem at hand. 29 U.S.C. § 652(8); *see Indus. Union*, 448 U.S. at 642–43. But when conferring emergency authority on the Secretary, Congress shaved that down to "necessary." An emergency measure must, therefore, be more than "reasonably" needful; it must be closer to "indispensable." *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 413–15. And then consider context. The Supreme Court has already said that Congress "narrowly circumscribed" the Secretary's authority to issue emergency standards. *Indus. Union*, 448 U.S. at 651 & n.59. It follows that, in this context especially, "necessary" must be read as a word of limitation, not enlargement. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 420.

The majority opinion initially agrees with this statutory construction point. It notes that an emergency standard must be more than "reasonably necessary"; it must be "essential." Maj. Op. at 25. But then that word, and the concept, disappear from the analysis. What starts as a demand for an "essential" solution, quickly turns into acceptance of any "effective" or "meaningful[]" remedy, *id.* at 26–30; and later, acquiescence to a solution with a mere "reasonable" "relationship" to the problem, *id.* at 30. The majority opinion never explains why "necessary" undergoes such a metamorphosis.

While the majority opinion starts with the right read on the statute, the Secretary seems to have missed this point altogether. He made no finding that the emergency rule is "necessary" in any sense even approaching "indispensable." We cannot uphold a rule based on a finding the agency never made. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

What the Secretary did say is that the agency's existing regulatory tools and "non-mandatory guidance" were insufficient. 86 Fed. Reg. at 61,440, 61,444. In other words, OSHA believed there was a problem to be solved. But the statute requires OSHA to find that the solution it actually picked—the nationwide vaccinate-or-test mandate—was "necessary" to solve the problem.[4] *See* 29 U.S.C § 655(c)(1); *see also Asbestos Info.*, 727 F.2d at 426–27 (OSHA failed to show that an emergency standard was "necessary" when other means were available "to achieve the projected benefits."). OSHA never makes that case. Like the majority opinion, the Secretary focused on explaining why his solution will be effective. 86 Fed. Reg. at 61,434–39. But that is not enough. Many over-broad solutions might work; but they would not be a "necessary," or "indispensable," means of curing the ill.

[4]The statute requires the Secretary to find that "such" emergency standard is necessary. 29 U.S.C. § 655(c)(1). In other words, he must find that *this* solution—the vaccinate-or-test mandate—is indispensable. The majority opinion suggests that the Secretary's duty would be fulfilled if he found simply that "an" emergency standard (whatever its content) is necessary. Maj. Op. at 6; *id.* at 26 (citing *Asbestos Info.*, 727 F.2d at 427). That reading is inconsistent with the statutory text.

To the extent that the majority reads my opinion to say that an emergency standard must remove the grave danger from the workplace *entirely*, that is a misread. I do not read "necessary" to require total elimination of the harm.

To illustrate (without intending to trivialize) OSHA's task, consider the danger from fire in a workplace: a pizzeria. One way to protect the workers would be to require all employees to wear oven mitts all the time—when taking phone orders, making deliveries, or pulling a pizza from the flames. That would be effective—no one would be burned—but no one could think such an approach necessary. What OSHA's rule says is that vaccines or tests for nearly the whole American workforce will solve the problem; it does not explain why that solution is necessary.

Bedrock principles of administrative law also support this point. It is a "quintessential aspect[] of reasoned decisionmaking" that an agency explore "common and known or otherwise reasonable options" and "explain any decision to reject" them. *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 818 (D.C. Cir. 1983); *see also Dist. Hosp. Partners, LP v. Burwell*, 786 F.3d 46, 58–59 (D.C. Cir. 2015) (holding an agency action arbitrary and capricious for failing to explain inconsistencies in the agency's own data when the data revealed a "significant and viable and obvious" alternative that the agency failed to consider (quoting *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215, 405 (D.C. Cir. 2013)). Emergency decisionmaking may lessen, but does not relieve, the agency of this basic responsibility. While a temporary measure may require "further refinement in the subsequent permanent standard," the agency should "not overlook those obvious distinctions . . . that make certain regulations that are appropriate in one category of cases entirely unnecessary in another." *Dry Color Mfrs.' Ass'n v. Dep't of Lab.*, 486 F.2d 98, 105 (3d Cir. 1973); *see also id.* at 107 (Emergency standard must explain "the alternative kinds of regulations considered by OSHA.").

OSHA's mandate applies, in undifferentiated fashion, to a vast swath of Americans: 84 million workers, 26 million unvaccinated, with varying levels of exposure and risk. 86 Fed. Reg. at 61,424. The burden is on "the agency to articulate rationally why the rule should apply to a large and diverse class." *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). The agency does not do so.

And it is easy to envision more tailored solutions OSHA could have explored. It might, for example, have considered a standard aimed at the most vulnerable workers; or an exemption

for the least. The government's own data show that unvaccinated workers between the ages of 18 and 29 bear a risk roughly equivalent to vaccinated persons between 50 and 64. *See* Ctr. for Disease Control, *Rates of COVID-19 Cases and Deaths by Vaccination Status* (last visited Dec. 16, 2021), https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status; https://perma.cc/8SU2-SVLZ. Or it might have considered a standard aimed at specific industries or types of workplaces with the greatest risk of COVID-19 exposure. Congress told the Secretary to "give due regard" to the need for standards "for particular industries" and types of "workplaces or work environments." 29 U.S.C. § 655(g). And OSHA acknowledges that death rates are higher in "[c]ertain occupational sectors," 86 Fed. Reg. at 61,415; yet its rule never considers what results would obtain from targeting those sectors alone. Would these, or other alternatives, have achieved similar results? We do not know because OSHA did not ask.

OSHA counters that given the COVID-19 emergency, rough-cut mandates are the best it can do. I see two problems with OSHA's assertion. First, even an emergency standard must consider "obvious distinctions" among those it regulates. *Dry Color*, 486 F.2d at 105. Here, there are many, none reflected in the emergency rule. Second, the agency's claim of emergency rings hollow. It waited nearly two years since the beginning of the pandemic and nearly one year since vaccines became available to the public to issue its vaccinate-or-test mandate. The agency does not explain why, in that time, it could not have explored more finely tuned approaches.

The majority opinion contends that to require more of OSHA would contradict the point of an emergency standard. But it offers no support for this proposition. It cannot be found in the text of § 655 itself. Indeed, as discussed, the only distinction apparent from the statutory text is that emergency standards should be *more* tailored to the problem, not less. The majority cites *Industrial Union* for the proposition that "OSHA may lean 'on the side of overprotection rather than underprotection' when promulgating an ETS." Maj. Op. at 28 (quoting *Indus. Union*, 448 U.S. at 656). But that case did not review an emergency standard, and in any event, the quoted language refers to "us[ing] conservative assumptions in interpreting the data" underlying a risk assessment. *Indus. Union*, 448 U.S. at 656. It says nothing about excusing OSHA from considering alternative means. Perhaps, instead, the majority relies on a bit of intuition;

circumstances demanding swift action often produce a less measured response. That may be true, but only so far as it goes. Surely, when an agency fails to *treat* a situation as an emergency, we should refuse to afford it any extra bit of deference, regardless of what label it attaches. *See Fla. Peach Growers*, 489 F.2d at 130–31 (addressing exposure to pesticides that had been used for years was not an emergency). Here, OSHA waited well over a year to respond to, in the agency's words, "the biggest threat to employees in OSHA's more than 50-year history." 86 Fed. Reg. at 61,424. To be sure, the agency may have had reasons for its wait-and-see approach—hoping individuals would vaccinate voluntarily, for example. *Id.* at 61,431–32. But that is beside the point. What matters is that the agency had plenty of time to consider and develop more tailored responses, belying any notion that its blunt approach is merely the expected product of an unexpected emergency.

Having failed to explore whether other feasible alternatives would have allowed him to tackle the problem, the Secretary cannot show that his solution is "necessary"; nor is he able to survive the requirements of "hard look" review. *See Asbestos Info.*, 727 F.2d at 421 (When reviewing an emergency standard, we must "take a 'harder look' . . . than we would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the [APA].").

b. Grave Danger in the Workplace

This case can be resolved on the ground that the Secretary is unlikely to be able to show that the mandate was necessary. But there are also significant concerns with OSHA's determination that all unvaccinated employees face grave danger from exposure to the virus in the workplace. 29 U.S.C. § 655(c)(1).

Grave danger. "Grave danger" comprises two meanings. First, severity: A "grave danger" is a risk of "incurable, permanent, or fatal consequences to workers." *Fla. Peach Growers*, 489 F.2d at 132. The agency determined that symptomatic cases of COVID-19 can cause such consequences, 86 Fed. Reg. at 61,408, and no one seriously questions that finding. But the statutory concept of "danger," or risk, also carries a second connotation—the likelihood

of its occurrence. *See Asbestos Info.*, 727 F.2d at 424 (noting "gravity" includes "the number of workers likely to suffer [severe] consequences"); *Fla. Peach Growers*, 489 F.2d at 132 (measuring danger "relative to the mass of agricultural workers in contact with treated foliage"). I question whether the Secretary has made this second showing—that all covered employees have a high risk both of contracting COVID-19 and suffering severe consequences from it.

The agency must provide substantial evidence supporting the risk it has identified and give reasons for the conclusions it has drawn. *Asbestos Info.*, 727 F.2d at 421; *see also Dry Color*, 486 F.2d at 105–06. Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Asbestos Info.*, 727 F.2d at 421 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Here, a quick look at the evidence raises an eyebrow. OSHA has determined that *no* vaccinated worker is in "grave danger," whereas *all* unvaccinated workers are. 86 Fed. Reg. at 61,434, 61,419. But the government's own data reveal that the death rate for *unvaccinated* people between the ages of 18 and 29 is roughly equivalent to that of *vaccinated* persons between 50 and 64. *See Rates of COVID-19 Cases and Deaths by Vaccination Status*, *supra*, at 10.[5] So an unvaccinated 18-year-old bears the same risk as a vaccinated 50-year-old. And yet, the 18-year-old is in grave danger, while the 50-year-old is not. One of these conclusions must be wrong; either way is a problem for OSHA's rule.

In the Workplace. OSHA's authority extends only so far as Congress provides. And Congress has clearly marked the perimeter of OSHA's authority: the workplace walls. *See* 29 U.S.C. § 651(a) ("work situations"); *id.* § 651(b) ("occupational safety and health standards") ("working conditions"); *see also Steel Joint Inst. v. Occupational Safety & Health Admin.*, 287 F.3d 1165, 1167 (D.C. Cir. 2002) ("[T]he Act authorizes OSHA to regulate only the employer's conduct at the worksite.").

The virus that causes COVID-19 is not, of course, uniquely a workplace condition. Its potency lies in the fact that it exists everywhere an infected person may be—home, school, or grocery store, to name a few. So how can OSHA regulate an employee's exposure to it?

[5]Hospitalization rates corresponding to these age groups is not readily available from the CDC.

OSHA answers that it has authority to protect employees from general types of hazards that may occur both inside and outside of the workplace. It may, for example, protect employees from the danger of workplace fire, even though every person in America has some risk of injury by fire outside the workplace. *See, e.g.*, 29 C.F.R. § 1910.157 (requiring fire extinguishers in the workplace). Sure. But one's exposure to fire may be easily differentiated by location, and OSHA has heretofore respected that its regulatory authority extends no further than the workplace walls. In *Industrial Union*, for example, the Court noted that although "[t]he entire population of the United States is exposed to small quantities of benzene" in the air, OSHA sought to regulate the increased risk of exposure to benzene only in the workplace. 448 U.S. at 615, 622–23. And the Fourth Circuit upheld OSHA's Occupational Noise Exposure standard because workers faced "sustained noise of great intensity" at work, which did not exist at those levels outside the workplace. *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1442–44 (4th Cir. 1985) (en banc) ("The hazard is identified as sustained noise of great intensity-85 db and above. Non-occupational noise of that intensity sustained over a period of eight hours each day is hard to imagine.").

Yet OSHA admits that it "cannot state with precision the total number of workers in our nation who have contracted COVID-19 at work." 86 Fed. Reg. at 61,424. And it has not identified any particular rate or risk of workplace exposure to COVID-19. So instead OSHA determined that each of the 26 million unvaccinated workers are "in grave danger" based on "current mortality data show[ing] that unvaccinated people of working age have a 1 in 202 chance of dying when they contract COVID-19." *Id.* I can find no example of a court accepting generalized statistics like these, totally untied to the workplace. *Cf. Asbestos Info.*, 727 F.2d at 425–26. "The 'grave danger' and 'necessity' findings must be based on evidence of *actual*, prevailing [workplace] conditions, *i.e.*, current levels of employee exposure." *UAW v. Donovan*, 590 F. Supp. 747, 751 (D.D.C. 1984).

The risk the Secretary calculated to support his "grave danger" finding was in no way tied to any workplace. Instead, he calculated the risk of being a person "of working age" in America. 86 Fed. Reg. at 61,424. Indeed, in OSHA's eyes, the risk to an employee who starts a

job today is no more "grave" than it was yesterday, before she entered the workforce; and, should she quit tomorrow, it will remain the same. In other words, the Secretary did not calculate the number of people who will contract COVID-19 *at work*; he calculated the number of people *who happen to work* who would, in any event, contract COVID-19. That kind of risk assessment is hard to justify as an "occupational safety and health standard[]." 29 U.S.C. § 651(b)(3). And it is hard to square with Congress's codified mission statement for the Agency: to prevent "personal injuries and illnesses arising out of work situations." *Id.* § 651(a).

And what of the solution? Here, OSHA has ventured into entirely new territory. An authority to protect "employees" from a "grave danger" encountered in the workplace, *id.* at § 655(c)(1), is most naturally read to place a workplace boundary on the solution. Flame-retardant clothing may be mandated at work, but not also at home. And that is true even if taking such precautions at home would save many "employee" lives.

OSHA has never before acted otherwise. It has consistently regulated workplace hazards with workplace solutions. *See, e.g.*, 29 C.F.R § 1926.96 (steel-toe boots); *id.* § 1926.97 (electrical protective equipment); *id.* § 1926.100 (hard hats); *id.* § 1926.101 (ear protective devices); *id.* § 1926.102 (eye and face protection); *id.* § 1926.103 (respirators). Even its one foray into vaccines was offered to, but not required of, employees who had been exposed to Hepatitis B in the workplace. *See, e.g.*, *id.* § 1910.1030(f)(2)(i). Here, employers, not employees, control any non-vaccine option in the first instance; and OSHA has been candid that it has stacked the deck in favor of vaccination. 86 Fed. Reg. at 61,437. OSHA has alerted us to no prior attempt on its part to mandate a solution that extends beyond the workplace walls—much less a permanent and physically intrusive one, promulgated on an emergency basis, without any chance for public participation. But that it is what OSHA has done here. A vaccine may not be taken off when the workday ends; and its effects, unlike this rule, will not expire in six months.

Accordingly, I question whether the Secretary can show that OSHA's risk assessment and solution are tied to its authority—to protect employees against grave danger in the workplace.

2. Major Questions Doctrine

If there were doubt, the major questions doctrine tells us how to respond. Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). And we should be skeptical when an agency suddenly discovers "in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Id.* (quotation marks omitted).

OSHA has never issued an emergency standard of this scope. Each of this rule's few predecessors addressed discrete problems in particular industries. *See* 48 Fed. Reg. 51,086, 51,087–93 (Nov. 4, 1983) (targeting workplaces where "asbestos is handled," specifically 375,000 employees in manufacturing, construction, fabrication, brake repair, and shipbuilding); 43 Fed. Reg. 2,586, 2,593 (Jan. 17, 1978) (targeting acrylonitrile manufacturing, acrylic fiber production, and similar activities with the "highest exposure" to acrylonitrile); 42 Fed. Reg. 45,536, 45,536 (Sept. 9, 1977) (targeting DBCP manufacturers, specifically 2,000 to 3,000 employees in a handful of companies); 42 Fed. Reg. 22,516, 22,517–22 (May 3, 1977) (targeting 150,000 employees in the chemical, printing, lithograph, rubber, paint, varnish, stain remover, adhesive, and petroleum industries with high exposure to Benzene, but exempting retail gas stations); 41 Fed. Reg. 24,272, 24,275 (June 15, 1976) (targeting 2,305 commercial divers); 39 Fed. Reg. 12,342, 12,343 (Apr. 5, 1974) (targeting vinyl chloride manufacturers, processers, and storers); 38 Fed. Reg. 10,929, 10,929 (May 3, 1973) (targeting 14 carcinogens when manufactured, processed, used, repackaged, released, or otherwise handled, as requested by oil, chemical, and atomic workers); 38 Fed. Reg. 17,214, 17,216 (June 29, 1973) (targeting field workers exposed to 12 pesticides, but limited to crops of apples, citrus, grapes, peaches, and tobacco); 36 Fed. Reg. 23,207, 23,207 (Dec. 7, 1971) (targeting workplaces with extremely high levels of asbestos). Most of those were challenged in court and only one of those survived. Now the Secretary claims authority to impose a vaccinate-or-test mandate across "all industries" on 84 million Americans (26 million unvaccinated) in response to a global pandemic that has been raging for nearly two years. 86 Fed. Reg. at 61,424. But no congressional grant of authority

does what the Supreme Court requires in such circumstances: speak with "exceedingly clear language." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

The majority deems the major questions doctrine inapplicable, first because, in its eyes, OSHA's authority to undertake a nationwide vaccine-or-test mandate is "unambiguous." Maj. Op. at 16. It rests that conclusion primarily on the fact that OSHA has been regulating workplace health and safety since 1970. But the major questions doctrine is not about the age of the agency; and it is not only about the *kind* of power but also the *scope* or *degree*. Claiming that it made no such error, the majority doubles down with examples of OSHA exercising power similar in kind and calls that "scope." But no matter how many times OSHA has regulated discrete illnesses in particular workspaces, this emergency rule remains a massive expansion of the scope of its authority. In *Brown & Williamson*, the FDA had been regulating "drugs" and "devices" for 58 years. 529 U.S. at 125. And regulating nicotine seemed to fit in the FDA's wheelhouse. *See id.* at 127. Nonetheless, the Court denied the FDA's authority to make "a policy decision of such economic and political magnitude"—even one in the agency's ken, and even though tobacco was "perhaps the single most significant threat to public health in the United States" at the time.[6] *Id.* at 133, 161.

Just months ago, the Supreme Court rejected a similar attempt by a different agency to take the pandemic into its own hands. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2486. The CDC had imposed an eviction moratorium for any counties with high levels of COVID-19 transmission, citing its authority in the Public Health Act to make "such regulations as . . . are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries." *Id.* at 2487. Deciding that a challenge to the moratorium was "virtually certain to succeed on the merits," the Court found that even if the provision could be read that

[6]The majority thinks *Brown & Williamson* is distinguishable because there Congress had directly spoken on the issue of tobacco, which was further evidence that the FDA had no such authority. *See* 529 U.S. at 137–39. However, in *Utility Air Regulatory Group*, the Supreme Court reaffirmed the language in *Brown & Williamson* and applied it even where Congress had been silent. *See* 573 U.S. at 307, 324 (finding that an EPA determination "that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements" was an "enormous and transformative expansion" in authority that triggered *Brown & Williamson*). *Utility Air Regulatory Group* is yet another example of the Supreme Court applying the major questions doctrine to a regulation similar in kind but with an increased scope.

way, "the sheer scope of the CDC's claimed authority" belied the government's interpretation. *Id.* at 2489.

The majority gives short shrift to this very recent precedent, calling the major questions doctrine a "seldom-used . . . exception to *Chevron* deference." Maj. Op. at 14. It is hard to see how that can be right when *Alabama Association of Realtors* just applied the doctrine and *Chevron* made no appearance in the case. The majority protests that the doctrine is "hardly a model of clarity" and that "economic and political significance" is undefined. *Id.* Maybe so. Yet it is hard to think of a more apt comparison than the one the Supreme Court just gave us to follow. Finding it to be a power of "vast economic and political significance," the Court emphasized that the CDC's moratorium covered "80% of the country, including between 6 and 17 million tenants," all to "combat[] the spread of COVID-19." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489–90. OSHA's rule covers two-thirds of the private sector, including 84 million workers (26 million unvaccinated), also to combat COVID-19. 86 Fed. Reg. at 61,424–41. If it is not clear on its face that OSHA's vaccinate-or-test mandate covering most of the country is significant, then *Alabama Association of Realtors* tells us it is.

Finally, the majority tries to escape the doctrine by claiming that the Secretary's authority is carefully circumscribed by the requirements in § 655 that the rule be "necessary" to combat a "grave danger," and that OSHA has "honored those parameters" by using its power infrequently. Maj. Op. at 16. Two short responses are in order. One, the provision in *Alabama Association of Realtors* was similarly circumscribed; the CDC could act only when it was "necessary" to prevent the "spread of communicable disease," and it had "rarely . . . invoked" its power. 141 S. Ct. at 2487. Two, the fact that § 655 "narrowly circumscribe[s]" OSHA's authority, *Indus. Union*, 448 U.S. at 651, and that its assertions of power in the past have been limited, supports a restrictive reading, not an expansive one.

A last point bears mention. Congress may enlist the help of administrative agencies to implement and enforce the laws, as it has done here. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). But there are limits to how much Congress may delegate. *See id.* And the greater the putative delegation of power, the less discretion an agency has when exercising it.

See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

Here, the Secretary asks for maximum authority *and* maximum discretion; he wants to issue a rule of national import, covering two-thirds of American workers, and he wants to do it without clear congressional authorization, without even public notice and comment, and with a capacious understanding of necessity. Such a combination of authority and discretion is unprecedented, and the Secretary is unlikely to show that he has been granted it.

B. Other Stay Factors

Petitioners have shown a likelihood of success on the merits of their challenge to the emergency rule. That factor is the most important; but the other factors favor the stay as well.

Will petitioners be irreparably harmed absent a stay? Yes. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Consider just two classes of petitioners. First, individuals. Without a stay, they will be forced to decide whether to get vaccinated. In some cases, employers may permit employees to undergo weekly testing and wear a mask. But some will fire those who are not vaccinated, rather than deal with the recordkeeping hassles of the testing requirement. In those instances, the individuals will be irreparably harmed, either by loss of livelihood or an unwelcome vaccination. And even if given the choice by her employer, an individual petitioner might reluctantly submit to vaccination, rather than incur a weekly hit to her finances and to her time. And if it turns out she did so due to an invalid regulation, she will have been irreparably harmed.

Second, businesses. The business petitioners say they will be harmed in various ways, including unrecoverable compliance costs and loss of employees amidst a labor shortage. For example, one petitioner, Oberg Industries, says that it will incur more than "$22 million in lost revenue per year," and that the vaccinate-or-test mandate "will imperil Petitioner's business going forward given significant labor market shortages." Docket Nos. 21-7000, 21-4112, Motion for Emergency Stay at 2. Currently, the company has 21 open positions and, according

to Oberg, "studies show that at least seven million affected workers report that they definitely will not get the vaccine." *Id.* The vaccinate-or-test mandate will exacerbate these shortages, with Oberg estimating that it will lose "200 employees—approximately 30% of its existing workforce." *Id.* at 2–3. The papers before this court are filled with similar stories. There is no question that if these harms occur, they will be irreparable.

OSHA responds that the administrative record it compiled does not support the alleged severity of petitioners' harms. Of course the record is silent as to petitioners' concerns, given that the emergency standard circumvents any public input. And while OSHA says its projected costs are much lower than petitioners', the projected costs are not *de minimis*, ranging from as little as $2,000 to almost $900,000 per entity, with a combined projected cost of almost $3 billion. 86 Fed. Reg. at 61,493.

Would the stay substantially injure OSHA and where does the public interest lie? *Nken*, 556 U.S. at 434. These two factors merge when the government is a party. *Id.* at 435. It is hard to find harm to OSHA from delay, as it waited almost two years since the pandemic began, and nearly a year after vaccines became publicly available, to issue the mandate. That is not to mention the almost two-month delay between the President's mandate announcement and the issuance of the emergency standard.

As for the societal costs of the pandemic, few could dispute their size and scope. To focus on just one, in many states, the healthcare system is being overrun and many healthcare workers report both a physical and emotional toll from the relentless effort of caring for the sick and dying. *See Michigan's Hospitals Near Breaking Point: 'We Can't Take Care of Our Patients as We Need'*, The Detroit News (last visited Dec. 15, 2021), https://www.detroitnews.com/in-depth/news/nation/coronavirus/2021/12/15/michigan-hospitals-crisis-health-care-workers-exhausted-covid-19-pandemic/6462036001/. The agency record in this case contains substantial evidence that we could give them some rest if more of us rolled up our sleeves. But the Secretary himself claims no authority to regulate for these ends. He cannot even regulate for the sake of the vaccinated; they are not in "grave danger." Instead, the mandate is aimed directly at protecting the unvaccinated from their own choices. Vaccines are freely

available, and unvaccinated people may choose to protect themselves at any time. And because the Secretary likely lacks congressional authority to force them to protect themselves, the remaining stay factors cannot tip the balance. *See Tiger Lily*, 992 F.3d at 524.

* * *

I would deny OSHA's motion to dissolve the stay.

Appendix B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0283p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402.

MASSACHUSETTS BUILDING TRADES COUNCIL, et al. (21-7000); BENTKEY SERVICES, LLC (21-4027); PHILLIPS MANUFACTURING & TOWER COMPANY, et al. (21-4028); COMMONWEALTH OF KENTUCKY, et al. (21-4031); ANSWERS IN GENESIS, INC. (21-4032); SOUTHERN BAPTIST THEOLOGICAL SEMINARY, et al. (21-4033); BST HOLDINGS, LLC, et al. (21-4080); REPUBLICAN NATIONAL COMMITTEE (21-4082); ASSOCIATED BUILDERS AND CONTRACTORS, INC., et al. (21-4083); MASSACHUSETTS BUILDING TRADES COUNCIL (21-4084); UNION OF AMERICAN PHYSICIANS AND DENTISTS (21-4085); ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (21-4086); NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO (21-4087); STATE OF MISSOURI, et al. (21-4088); UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (21-4089); STATE OF INDIANA (21-4090); TANKCRAFT CORPORATION, et al. (21-4091); NATIONAL ASSOCIATION OF HOME BUILDERS (21-4092); JOB CREATORS NETWORK, et al. (21-4093); UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL/CIO-CLC, et al. (21-4094); SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ (21-4095); MFA, INC., et al. (21-4096); STATE OF FLORIDA, et al. (21-4097); AFT PENNSYLVANIA (21-4099); DENVER NEWSPAPER GUILD, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 37074, AFL-CIO (21-4100); DTN STAFFING, INC., et al. (21-4101); FABARC STEEL SUPPLY, INC., et al. (21-4102); MEDIA GUILD OF THE WEST, THE NEWS GUILD-COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 39213 (21-4103); NATURAL PRODUCTS ASSOCIATION (21-4108); OBERG INDUSTRIES, LLC (21-4112); BETTEN CHEVROLET, INC. (21-4114); TORE SAYS LLC (21-4115); KENTUCKY PETROLEUM MARKETERS ASSOCIATION, et al. (21-4117); AARON ABADI (21-4133),

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, et al.,

Respondents.

Nos. 21-7000 /4027 /4028 /4031 /4032 /4033 /4080 /4082 /4083 /4084 /4085 /4086 /4087 /4089 /4088 /4090 /4091 /4093 /4092 /4095 /4094 /4096 /4097 /4099 /4100 /4101 /4102 /4103 /4108 /4112 /4114 /4115 /4117 /4133

On Petitions for Initial Hearing En Banc.

Multi-Circuit Petitions for Review from an Order of the U.S. Department of Labor, Occupational Safety and Health Administration, No. OSHA-2001-0007.

Decided and Filed: December 15, 2021

Before: SUTTON, Chief Judge; MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER and MURPHY, Circuit Judges.

COUNSEL

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The En Banc Court of the Sixth Circuit Court of Appeals delivered an order. MOORE, J. (pp. 4–5), delivered a separate opinion concurring in the denial of the petitions for initial hearing en banc in which COLE, CLAY, WHITE, and DONALD, JJ., joined. SUTTON, C.J. (pp. 6–32), in which KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER, and MURPHY, JJ., joined, and BUSH, J. (pp. 33–42), delivered separate opinions dissenting from the denial of the petitions for initial hearing en banc.

ORDER

The court having received petitions for initial hearing en banc, and the petitions having been circulated to all active judges of this court, and less than a majority of the active judges of this court having voted in favor of initial hearing en banc,

IT IS ORDERED that the petitions be, and hereby are, DENIED.

CONCURRING IN THE DENIAL OF INITIAL HEARING EN BANC

KAREN NELSON MOORE, Circuit Judge, concurring in the denial of initial hearing en banc. This is an important case on an accelerated timeframe. And yet, many challengers proposed initial hearing en banc, an "often unproductive, always inefficient process." *See Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in denial of en banc review). Because a three-judge panel of our court has already devoted significant time to this case, and because initial hearing en banc would subvert our normal process and require the full court to grapple with a sprawling record, I concur in the denial of initial hearing en banc.

Courts have repeatedly recognized that en banc hearing is an inefficient process. *See Mitts*, *supra*; *Hart v. Massanari*, 266 F.3d 1155, 1172 & n.29 (9th Cir. 2001) (calling en banc proceedings "unwieldy and time-consuming") (internal quotation omitted); *Bartlett ex rel. Neumann v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in the denial of rehearing en banc) (noting that en banc rehearing "substantially delays the case being reheard"). This potential for delay "is magnified when there has been no prior panel consideration of a case." *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 854 (4th Cir. 2000) (Wilkinson, C.J., concurring in denial of initial hearing en banc).

This case shows the folly of initial hearing en banc. The massive docket and profusion of briefs, as in an especially complex matter before a district court, require focused consideration by a devoted panel. En banc hearing does indeed put "all hands on deck." C.J. Sutton Dissent at 11. In a case as important, accelerated, and briefing-filled as this one, however, gathering all hands on deck would have strained the resources of the sixteen active judges, requiring each of us to review the voluminous record and the relevant underlying legal doctrines. What's more, it would have done so for no discernable purpose: the case already sits before three thoughtful, independent judges on the panel who have spent the past weeks steeped in this matter. We properly leave the matter in their hands.

Our decisions "warrant the utmost respect when they are perceived by the public to have been reached in the most regular and careful manner." *Belk*, 211 F.3d at 856 (Wilkinson, C.J., concurring in denial of initial hearing en banc). I am relieved that this court adheres to those standards of regularity and care today.

DISSENTING FROM THE DENIAL OF INITIAL HEARING EN BANC

SUTTON, Chief Judge, dissenting from the denial of initial hearing en banc. When much is sought from a statute, much must be shown. The Secretary of Labor asks a lot of the Occupational Safety and Health Act. He claims authority to issue an emergency rule, scheduled to go into effect on January 4, 2022, that will require roughly 80 million workers to become vaccinated or face a weekly self-financed testing requirement and a daily masking requirement. At the same time, he assumes authority to regulate an area—public health and safety—traditionally regulated by the States. If valid, the rule would nullify all contrary state and local regulations, as the power to regulate nationally is the power to preempt locally. Such broad assertions of administrative power demand unmistakable legislative support. The federal courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance'" and to use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted).

Congress did not "clearly" grant the Secretary of Labor authority to impose this vaccinate-or-test mandate. *First*, as a threshold matter, the Occupational Safety and Health Act gives the Secretary power to address only *occupational* health and safety risks. But it is by no means clear that this authority extends to all hazards that might affect employees at some point during the 16 hours of each weekday and the 48 hours of each weekend when they are not at work, whether the hazard arises from a coronavirus of one sort or another, a virulent flu, traffic safety, air pollution, vandalism, or some other risk to which people are equally exposed at work and outside of work. It is one thing to tell a worker to don a mask at the start of a hazard-filled shift and doff it at the end. It is quite another to tell a worker to vaccinate on the basis of a risk that exists whether he is on the clock or off and that amounts to a medical procedure that cannot be removed at the end of the shift. Confirming the point, the Secretary of Labor has never imposed a vaccine mandate or for that matter a vaccinate-or-test mandate on American workers.

The Act does not clearly give the Secretary power to regulate all health risks and all new health hazards, largely through off-site medical procedures, so long as the individual goes to work and may face the hazard in the course of the workday.

Second, even apart from the workplace-anchored scope of the Act, the Secretary of Labor's power to issue "emergency temporary standards" does not justify the first vaccinate-or-test mandate in federal labor law history. This emergency power extends only to "necessary" measures, namely measures indispensable or essential to address a "grave" danger in the workplace. But this set of preconditions does not apply (1) when the key population group at risk from COVID-19—the elderly—in the main no longer works, (2) when members of the working-age population at risk—the unvaccinated—have chosen for themselves to accept the risk and any risk is not grave for most individuals in the group, and (3) when the remaining group—the vaccinated—does not face a grave risk by the Secretary's own admission, even if they work with unvaccinated individuals. Countless lesser and more focused measures were available to the Secretary: targeting certain industries susceptible to high risk, focusing on protections for workers most vulnerable to the virus, and varying any requirements to account for the wide range of settings in which people work. A blunt national vaccine mandate for 80 million workers with little regard to the relevant employment circumstances—well-spaced or not, together or apart, high risk individuals or not, indoors or mainly outdoors—was not necessary under the Act, and Congress did not clearly say otherwise.

Third, the setting of these requirements—authority to set "emergency temporary standards" without complying with the notice-and-comment process—confirms the narrowness of this authority and its inapplicability here. Start with "emergency." The Secretary does not invoke this power based on a sudden revelation that the virus presents a serious health risk. How could he? He relies on something else—the increased availability of vaccines. That development, however, does not heighten health risks; it alleviates them—and it's hardly a new development anyway. What, moreover, is "temporary" about a vaccination? A reluctant or coerced vaccination cannot be undone if the Secretary changes course during the notice-and-comment process or if the proposed rule exceeds the Secretary's authority. All of the Secretary's

emergency decrees to date, even the ones invalidated by the courts, have involved truly temporary measures to protect workers from certain hazards at work until the notice-and-comment process ends. Ready access to free vaccinations may not have quelled the pandemic as quickly as the Secretary, or any of us, would like. But that reality does not justify, much less justify clearly, a sudden invocation of an emergency medical power at roughly the two-year anniversary of the pandemic merely because the Secretary determines that not enough Americans are vaccinated.

For my part, the resolution of this conflict between existing law and the Secretary's proposed policy is not particularly hard. What makes the case difficult are the ongoing challenges of the pandemic and the health-and-safety benefits of obtaining vaccinations. The challenges presented by the pandemic are serious, no one can deny. The record confirms what common experience shows—"that the public has a strong interest in combating the spread" of a virus that has prematurely ended over three-quarters of a million American lives. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. The record also shows the utility of vaccinations. The medical studies to date show that vaccinated individuals face fewer risks of getting the virus and, for those who still suffer breakthrough infections, fewer risks of serious symptoms or death. It is the rare federal judge, indeed the rare employee in the third branch, I suspect, who has not gotten the message.

But the issue here is not that simple. No matter the policy benefits of a well-intended regulation, a court may not enforce it if the agency's reach exceeds a statute's grasp. Once before, in the throes of another threat to the country, the executive branch claimed it needed to seize control of the country's steel mills as a "necessary" measure "to avert a national catastrophe." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). But that threat, like this one, did not permit the second branch to act without authorization from the first branch. *Id.* at 588–89. As the Supreme Court recently explained in invalidating an eviction moratorium promulgated by the Center for Disease Control, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. Shortcuts in furthering preferred policies, even urgent policies, rarely end well, and

they always undermine, sometimes permanently, American vertical and horizontal separation of powers, the true mettle of the U.S. Constitution, the true long-term guardian of liberty.

For these reasons and those elaborated below, the challengers are likely to prevail on the merits when it comes to their petitions targeting the emergency rule. That reality together with the other stay factors show that the emergency rule should remain stayed. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

I.

Congress passed the Occupational Safety and Health Act in 1970. Pub. L. No. 91-596, 84 Stat. 1590. With the Act, Congress created an agency to administer the statute—the Occupational Safety and Health Administration, called OSHA for short—which sits within the Department of Labor. From the outset, the Act was designed to ensure "safe and healthful working conditions" for employees. 29 U.S.C. § 651(b). The Act empowers the Secretary of Labor, through OSHA, to create health and safety regulations for workplaces across the country. *Id.* § 655(b). Before such regulations go into effect, they must withstand a rigorous process. The Secretary must provide notice of any proposed regulation and give 30 days for any affected entity to submit data or offer comment about the costs, benefits, feasibility, legality, or any other reason for rejecting, adopting, or modifying the proposed rule. *Id.* § 655(b)(2). Those who object to the rule may request a public hearing. *Id.* § 655(b)(3). Within 60 days of the end of the period for submitting comments or the completion of a requested hearing, the Secretary must publish a rule or decide not to issue one. *Id.* § 655(b)(4). Still more process is called for if the proposed rule involves, as this one allegedly does, "toxic materials or harmful physical agents," in which case its development must be "based upon research, demonstrations, experiments, and such other information as may be appropriate." *Id.* § 655(b)(5).

An exception exists. The Act allows the Secretary to create an "emergency temporary standard" without undergoing all of these notice-and-comment requirements. *Id.* § 655(c). To allow an "emergency" regulation to go into immediate effect, the Secretary must show (1) 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 (2) that the "emergency standard is necessary to protect employees from such danger." *Id.* § 655(c)(1).

Since 1970, the Secretary of Labor has used these emergency powers infrequently—and never to require a medical procedure. Over more than a half-century, the agency has used this power just nine times before this year. *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 609 (5th Cir. 2021). Six of these standards were challenged in court. *Id.* Just one was allowed to go into effect. *Id.*; *see also* 79 Fed. Reg. 61,384, 61,419 (Oct. 10, 2014) (noting that "OSHA has not successfully adopted an emergency temporary standard for over thirty years"). In a more recent exercise of this power, which a court has not yet addressed, the Secretary issued an emergency regulation in June 2021, which imposed requirements on the healthcare industry to reduce transmission of COVID-19, mainly protective clothing and physical distancing. 86 Fed. Reg. 32,376 (June 21, 2021). The emergency rule did not require workers to get vaccinated or subject themselves to uncompensated weekly tests.

At issue is OSHA's November 5 emergency standard, entitled "COVID-19 Vaccination and Testing; Emergency Temporary Standard." 86 Fed. Reg. 61,402 (Nov. 5, 2021). It applies to employers with 100 or more employees, what comes to roughly 80 million employees nationwide. *Id.* at 61,467. And it contains a narrow exemption for employees who "work[] remotely 100 percent of the time" or who "perform their work exclusively outdoors." *Id.* at 61,419, 61,467.

The emergency rule also applies to the 26 States in the country that administer their own state OSHA Plans, which means that those States must enforce the vaccinate-or-test mandate against any covered public employees and private businesses in their jurisdiction. *Id.* at 61,462. Although Congress did not require state and local governments to adhere to the Act, *see* 29 U.S.C. §§ 652(5), 654(a)(2), it used its spending power to encourage States to accept federal funding—up to 50% of the total cost of each state plan—in return for adopting an OSHA-approved state plan, *id.* § 672(g). Under the Act, state plans must be at least as effective as the federal standards required by the Secretary. *Id.* § 667(b), (c)(2).

Under the emergency rule, the employer must verify "the vaccination status of each employee," "maintain a record of each employee's vaccination status," and "preserve acceptable proof of vaccination." 86 Fed. Reg. at 61,552. For employees who opt not to get vaccinated, the employer must require a test every seven days, one that neither the Federal Government nor the employers must pay for and one that the employees may not take without the supervision of an authorized person. *Id.* at 61,530, 61,532, 61,551, 61,553. Unvaccinated employees who do not comply must be "removed from the workplace." *Id.* at 61,532. Unvaccinated employees must wear masks at work with few exceptions. *Id.* at 61,553. The testing and masking requirements do not apply to vaccinated employees. *Id.* Employers who violate the Act face penalties imposed by OSHA: up to $13,653 for each violation and up to $136,532 for each willful violation. 29 C.F.R. § 1903.15(d).

Several companies, organizations, individuals, and 27 States filed challenges to the emergency rule, raising a variety of claims in the various courts of appeals. On November 12, in one of those cases, the U.S. Court of Appeals for the Fifth Circuit stayed the vaccinate-or-test mandate. *BST Holdings*, 17 F.4th at 619. After our circuit was selected to handle the petitions for review on a consolidated basis, we received two sets of pertinent motions: a motion by the Secretary of Labor to vacate the Fifth Circuit's stay order, *see* 28 U.S.C. § 2112(a)(4), and requests by various parties to grant initial hearing en banc.

II.

A few words are in order about the en banc motions in front of us—requests by roughly 59 parties that the full Court hear this case at the outset. At one level, granting the motion makes considerable sense. This is an extraordinary case, suitable for an extraordinary procedure. Given the unusual setting of these consolidated cases—a statutory delegation of authority over countless appeals to one regional court of appeals, 28 U.S.C. § 2112(a)—there is something to be said for putting all hands on deck, particularly when it comes to handling the stay motion, which could turn out to be the key decision point in all of these petitions for review. If the stay motion is the main event in a case about the legitimacy of a six-month emergency rule that ends on May 5, 2022, little opportunity for traditional en banc review will exist at the back end of the case.

All of this explains why we favor granting the motion. But at another level, it makes little difference that our Court has divided 8-8 on whether to grant the en banc motion. We likely will not be the final decisionmakers in this case, given the prospect of review by the U.S. Supreme Court. And the existence of the en banc motion gives the judges of our Court the option to offer their perspectives on the stay motion, in opinions concurring in the denial of initial hearing en banc or dissenting from it.

III.

In evaluating a stay motion, we ask four questions: Which side is likely to prevail on the merits? What are the costs to the challengers of allowing the emergency rule to go into effect? What are the costs to the Secretary of Labor and others of barring the emergency rule from going into effect? What does the public interest favor? *Nken*, 556 U.S. at 434. In this instance, as in many others, we focus primarily on the likelihood-of-success inquiry. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

IV.

The challengers should prevail for two main reasons. A clear-statement rule applies to this wide-ranging and unprecedented assertion of administrative power, and the Secretary of Labor has failed to show that Congress clearly delegated this authority to him.

A.

Today's emergency rule is not an everyday exercise of federal power. The Secretary claims authority to require 80 million Americans—in virtually every type of American business there is—to obtain a COVID-19 vaccine or, in the alternative, to undertake a weekly COVID-19 test and wear a mask throughout each workday. Because the Federal Government pays for the vaccine but not the weekly test, it is fair to say that the Secretary is prioritizing the vaccine mandate over the test-and-mask mandate, if not coercing vaccinations. *See* 86 Fed. Reg. at 61,434 (acknowledging that the emergency rule "is designed to strongly encourage vaccination"). Further pressure on employees comes from other features of the rule:

(1) Employers must provide time off for employees to get vaccinated and to recover from any side effects, *id.* at 61,457, while the rule does not require them to do so for employees who must undergo weekly tests, even if that requires considerable travel in rural areas, *see id.* at 61,484; (2) the agency normally requires employers to compensate employees for occupational safety gear and required testing but not in this instance, *compare* 29 C.F.R. § 1910.132(h), *with* 86 Fed. Reg. at 61,407 & n.2; and (3) employers can escape many of the administrative burdens of administering the rule if *they* require their employees to get vaccinated, 86 Fed. Reg. at 61,437. Either way, whether treated as a vaccine mandate or a vaccinate-or-test mandate, the Secretary must answer mandates of his own if he wishes to regulate large swaths of Americans with respect to substantial public policy, medical, and economic matters customarily regulated by the States.

In the first place, the federal courts "expect Congress to speak clearly when authorizing an agency to exercise powers" over large numbers of Americans with respect to contested public policy choices of vast significance. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Skeptical of mismatches between invocations of power by agencies and the statutes that purport to delegate that power, the federal courts require broad assertions of policymaking authority to be premised on direct and specific congressional delegations of that power. Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation omitted); *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). What Justice Stevens said in 1980 in rejecting the "Benzene rule," designed by OSHA to protect American workers from cancer, applies with equal force to today's rule: "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view" of the statute. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion). Notably, OSHA initially attempted to issue the Benzene Rule as an emergency rule, but it abandoned that approach in favor of notice-and-comment rulemaking after the Fifth Circuit stayed the rule. *Id.* at 623.

A national vaccinate-or-test mandate likewise is unprecedented, whether with respect to OSHA or any other federal agency, presumably because the intrusion on individual liberty is serious and because, in OSHA's case, the required medical procedures do not comfortably map onto workplace-specific protective remedies. *See* Cong. Rsch. Serv., *Mandatory Vaccinations: Precedent and Current Laws* 9 (May 21, 2014); *see also* 86 Fed. Reg. at 61,436. If OSHA "claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," it should not be surprised if courts "greet its announcement with a measure of skepticism." *Util. Air Regul. Grp.*, 573 U.S. at 324 (quotation omitted). As with the eviction moratorium created by the federal Center for Disease Control and invalidated by the Supreme Court, today's "claim of expansive authority" under this provision "is unprecedented." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *see Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 668 (6th Cir. 2021). If federal courts have been skeptical when a medically based agency (the CDC) issues broad mandates with respect to housing, they should be equally skeptical when a workplace agency (OSHA) issues broad mandates with respect to medical procedures.

In the second place, the States, not the Federal Government, are the traditional source of authority over safety, health, and public welfare. In the context of a vast attempt to assume these police powers by the Federal Government, Congress must speak unequivocally. Whether it is seizing authority to regulate "the landlord-tenant relationship," *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, to regulate private property, *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020), to enact run-of-the-mine criminal laws, *Jones v. United States*, 529 U.S. 848, 858 (2000), to enact out-of-the-ordinary criminal laws, *Bond v. United States*, 572 U.S. 844, 848 (2014), or to regulate the retirement age of state court judges, *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991), Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power," *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quotation omitted).

In applying this federalism clear-statement canon, it's worth remembering that the only Supreme Court cases that permitted a government to impose a vaccination mandate on

individuals arose from the States, not the National Government. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174 (1922). In upholding a vaccination requirement against a substantive due process challenge, the U.S. Supreme Court reasoned that "[t]he safety and the health of the people of [a state] are, in the first instance, for that [state] to guard and protect" and "are matters that do not ordinarily concern the national government." *Jacobson*, 197 U.S. at 38. It's worth remembering that the power of a federal agency to regulate is the power to preempt—to nullify the sovereign power of the States in the area—which explains why 27 States oppose the emergency rule. And it's worth remembering that, if one casually accepts congressional authority to regulate in this area, that recalibration of power comes with easy-to-overlook risks. It would mean that another administration could destroy the trial-and-error benefits of federalism in a different direction, say by adopting a federal law that banned state and local governments from issuing all kinds of health-protective orders: stay-at-home orders, mask mandates, vaccine mandates, and many other measures besides. The power to give with preemptive national regulation includes the power to take away.

B.

In passing the Occupational Safety and Health Act, Congress did not clearly give the Secretary authority to require workers to undertake a medical procedure like a vaccine or a medical test, whether under his general authority to regulate "employees" in the workplace or under his specific authority to issue "emergency temporary standards."

1.

The Occupational Safety and Health Act covers only workplace-specific hazards and permits only workplace-specific safety measures. As a threshold matter, the Act is designed to protect "employees" from dangers that arise directly out of the workplace and addresses only workplace conditions, as the title of the Act suggests (the "Occupational Safety and Health Act") and as the rest of the Act confirms. The language of the Act covers dangers arising out of work, say a chemical used to make a plastic product or the heat generated at a steel foundry, not any risk facing the country and every citizen in it. Any other approach would facilitate a

breathtaking expansion of the Secretary of Labor's power. Whatever the health and safety challenges of today (air pollution, violent crime, obesity, a virulent flu, all manner of communicable diseases) or tomorrow (the impact of using the internet on mental health), the Secretary does not have emergency authority to regulate them all simply because most Americans who face such endemic risks also have jobs and simply because they face those same risks on the clock. By going to work each day, American workers do not transform these other risks into "hazards" or "grave dangers" to which "employees are exposed." The Secretary's authority to regulate workplace safety is simply too "indirect[]" to cover this nearly horizonless assertion of power. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488.

A comparison between the Secretary's emergency proposal (a vaccinate-or-test mandate) and the kinds of requirements he has previously imposed on various industries during the pandemic (a mask mandate) illustrates the problem. Accept for now that, under some circumstances and in some places, the Secretary could impose a mask mandate. That would be a workplace requirement at least. It is one thing for the Secretary to require masks to minimize dangers to which "employees are exposed" during the workday and at the workplace. It is quite another to make an across-the-board judgment that the employee is "strongly encouraged"—emphasis on strongly—to undertake a medical procedure (a vaccination) that cannot be undone at the end of the workday.

Whether it's the Act as a whole or the narrow exception for emergency rulemaking, they both apply, in the words of the D.C. Circuit, only to dangers arising out of "work or work-related activities," *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984), not all hazards working people may face in their daily lives. That explains why the D.C. Circuit found another medical procedure—the sterilization of women who otherwise would encounter chemicals at work dangerous to the unborn—to be beyond the Act's scope. *Id.*; *see also Steel Joist Inst. v. Occupational Safety & Health Admin.*, 287 F.3d 1165, 1167 (D.C. Cir. 2002) (noting that "the Act authorizes OSHA to regulate only the employer's conduct at the worksite"). "[F]or coverage under the Act to be properly extended to a particular area," seconds the Eleventh Circuit, "the conditions to be regulated must fairly be considered *working*

conditions, the safety and health hazards to be remedied *occupational*, and the injuries to be avoided *work-related*." *Frank Diehl Farms v. Sec'y of Lab.*, 696 F.2d 1325, 1332 (11th Cir. 1983).

Other provisions of the Occupational Safety and Health Act reinforce the message. The Act, it is true, refers to "hazards," "substances," and "agents," terms that read in isolation might suggest that the Secretary could regulate *any* hazardous substance or agent. But context illuminates meaning. Throughout the Act, it speaks to hazards facing employees in work-specific contexts and to occupational risks faced due to work:

- The Act's preamble says it is designed "to assure . . . safe and healthful working conditions," 29 U.S.C. § 651(b), and to avoid "personal injuries and illnesses arising out of work situations," *id.* § 651(a).
- A provision says that the Act applies "to employment performed in a workplace" and "to working conditions of employees." *Id.* § 653(a), (b).
- A provision tells the Secretary to make rules "for developing information regarding the causes and prevention of occupational accidents and illnesses," *id.* § 657(c)(1), or "work-related deaths, injuries and illnesses," *id.* § 657(c)(2).

The agency's regulations reflect this understanding too. In general, OSHA requires employers to compensate employees for protective gear and tests needed for work safety. 29 C.F.R. § 1910.132(h). An exception exists for costs that are not specific to the workplace, say sunscreen or steel-reinforced boots. *Id.* § 1910.132(h)(2), (4)(iii). In this instance, the Secretary's decision not to require employers to pay for employees' weekly COVID-19 tests depletes his claim that this emergency rule arises from a work-focused, as opposed to society-focused, imperative. *See* 86 Fed. Reg. at 61,437. The Secretary conceded that, while OSHA usually requires employers to bear such costs "in order to remove barriers to employee participation," the agency has not done so here in order to "strongly encourage" vaccination. *Id.* at 61,407.

OSHA also requires employers to give their employees and the agency access to "relevant exposure and medical records" to identify, handle, and prevent "occupational disease." 29 C.F.R. § 1910.1020(a). The agency requires employers to keep records that "monitor[] the

amount of a toxic substance or harmful physical agent to which the employee is or has been exposed." *Id.* § 1910.1020(e)(2)(i)(A)(1). But these exposure risks do not cover "situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations." *Id.* § 1910.1020(c)(8). As still another example, the agency has rules about occupational noise exposure, which require employers with affected employees to administer a testing program that determines the employee's hearing loss. *Id.* § 1910.95(g). If the hearing loss is determined not to be "work related," however, the employer does not have to provide assistance. *Id.* § 1910.95(g)(8). With respect to the recordkeeping requirements, moreover, an employer "must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." *Id.* § 1904.5(a). In OSHA's rules concerning air contaminants, the rules center on the amount of an employee's exposure to a substance "during an 8-hour shift." *Id.* § 1910.1000(a)–(c).

The agency in the past has understood its authority in this work-anchored way. An examination of the nine "emergency temporary standards" promulgated before 2021, even the five of six that were successfully challenged, reveals only regulations addressing exposures solely because of, not in spite of or in addition to, the workplace. *See* 36 Fed. Reg. 23,207 (Dec. 7, 1971) (workplace protection from asbestos); 38 Fed. Reg. 17,214 (June 29, 1973) (workplace protection from pesticides); 38 Fed. Reg. 10,929 (May 3, 1973) (workplace protection from carcinogenic substances in "area[s] to which access is restricted and controlled by the employer"); 39 Fed. Reg. 12,342 (Apr. 5, 1974) (workplace protection from vinyl chloride); 41 Fed. Reg. 24,272 (June 15, 1976) (workplace protections for diving operations, while noting that "diving by persons engaged in recreational or sport diving or other diving not in an employment context are beyond the jurisdiction of the Act"); 42 Fed. Reg. 22,516 (May 3, 1977) (workplace protections from benzene); 42 Fed. Reg. 45,536 (Sept. 9, 1977) (workplace protection from manufacturing pesticides); 43 Fed. Reg. 2586 (Jan. 17, 1978) (workplace protection from acrylonitrile); 48 Fed. Reg. 51,086 (Nov. 4, 1983) (workplace protection from asbestos).

All in all, the Secretary might have authority to impose mandates of some sort on doctors and nurses who treat COVID-19 patients or researchers who work with the underlying virus given the workplace "exposure" risks caused by that work. And it might give the Secretary authority to impose workday masking requirements in other settings vulnerable to COVID-19 exposures. But the emergency rule extends well beyond such workplace-specific hazards and workplace-specific remedies.

2.

Not only is it doubtful that Congress gave the Secretary of Labor clear authority to impose this vaccinate-or-test mandate through the general provisions of the Act, but Congress also failed to do so clearly under the provision for "emergency temporary standards." In relevant part, the provision for emergency rules says:

> The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he 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).

The statute applies only to "necessary" provisions that address "grave" workplace dangers. The term "necessary" has one of two meanings, either "useful" or "indispensable"/"essential." *Black's Law Dictionary* 928 (5th ed. 1979); *American Heritage Dictionary of the English Language* 877 (1975). Picking between the options might be difficult if the word appeared alone. But it does not. It appears in the context of a provision dealing with an "emergency" and "grave" danger. Understanding words, like filling in crossword puzzles, works best by attending to context—what is nearby, what is known. *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000). Once connected, the reference to "necessary" powers to address "grave" dangers in an "emergency" clarifies that "necessary" has the narrower meaning. It refers only to indispensable or essential measures, not to whatever the Secretary determines is useful or beneficial.

A comparison to the Secretary's authority to impose permanent standards confirms this reading. When he puts a rule through notice and comment, the standard need not be "necessary to protect employees," 29 U.S.C. § 655(c)(1), only "reasonably necessary or appropriate to provide safe or healthful employment," *id.* § 652(8); *see id.* § 655(b). An emergency measure thus must be more than just appropriate; it must be indispensable or essential.

Turn to "grave" dangers, which refer to "serious" workplace dangers. *Webster's Ninth New Collegiate Dictionary* 534 (1984). Taken by itself, there is room for debate about the meaning of a serious workplace danger, particularly one that the statute allows the Secretary to "determine[]" himself. But the record in this case and the Secretary's position in describing his rulemaking narrow the range of debate. Whatever a grave or serious workplace danger might mean in the abstract, the Secretary concedes that vaccinated individuals who get the virus do not face that risk, even though they can contract it while going to work with unvaccinated individuals. 86 Fed. Reg. at 61,434. Else, the Secretary would require vaccinated Americans to work at home or stay home altogether.

This interpretation of the statute and the Secretary's concession make it exceedingly difficult to maintain under any standard of review that the emergency mandate is necessary or indispensable to address a grave danger. One problem arises from a core tenet of administrative law. The Secretary never considered this meaning of the statute—that it requires indispensable or essential measures, not simply useful or beneficial ones—in proposing the emergency rule. It is a staple of administrative law that federal courts may not uphold a rule on a ground never addressed by the agency. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). The Secretary to date has explained only why he thinks the vaccinate-or-test mandate is beneficial to protect workers and society as a whole. He has not explained why it is the indispensable or essential way to protect workers. We have no authority to uphold a rule as "necessary" when the Secretary has not made that finding himself under the correct interpretation of the law. *See* 5 U.S.C. § 706(2).

The other problem is that the Secretary cannot satisfy this interpretation of the statute. Consider the many less intrusive, more tailored protective measures that address grave dangers on the Secretary's own terms. Just as the Secretary targeted the healthcare industry in June 2021

with mask and other protective-gear requirements, he could do the same for industries that face high spreading risks. The record does not show that full vaccination or weekly testing is necessary on top of a tailored mask mandate. The Secretary could focus any requirements on the workers most at risk—those over 65, those with pre-existing conditions most vulnerable to the virus, those who have not already gotten the virus. The Secretary could create exemptions for those least at risk, say cohorts from age 18 to 49, a population range that faces healthcare risks from COVID-19 at roughly the same level as the Secretary's own assessment of what is not a grave risk, with some slightly above and some slightly below. *See* 86 Fed. Reg. at 61,434; Ctr. for Disease Control, Rates of COVID-19 Cases and Deaths by Vaccination Status, https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status. Or the Secretary could impose requirements that account for the many environments in which Americans work. Consider the range of possibilities—from the two-person janitorial staff working the night shift, to the consultant who comes into the office a few times a week, to the company that already requires masks (but not weekly tests) and requires significant separation of workers protected by up-to-date ventilation systems, to the firm that rotates workers between telework and in-person to minimize contact. But that is not what the rule does. "Applying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself, the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees." *BST Holdings*, 17 F.4th at 615.

In the face of the many less intrusive options available to the Secretary, the idea that a national vaccinate-or-test mandate for 80 million workers is necessary is hard to maintain. And that is true under any standard of review: fresh review of the language of the statute, substantial evidence review, arbitrary or capricious review, or the "harder look" review due emergency rules. *Asbestos Info. Ass'n v. Occupational Safety & Health Admin.*, 727 F.2d 415, 421 (5th Cir. 1984).

The statute covers only an "emergency" and only "temporary" requirements. In construing statutes, courts frequently look to the context in which they arise—here authority to set "emergency temporary standards" that sidestep the notice-and-comment process. *See, e.g.*,

Bond, 572 U.S. at 861–63; *Johnson v. United States*, 559 U.S. 133, 139–40 (2010). Whether one looks to the Secretary's strongly encouraged preference (vaccinate) or discouraged alternative (test and wear a mask), it is difficult to understand how on November 5, 2021, an "emergency" suddenly took hold requiring the imposition of a vaccinate-or-test mandate by January 4, 2022. Start with the mask requirement. As the Secretary well knows, masks are not a new idea. They have been a protective tool from the outset. Given the wide availability of this option since the beginning, the view that this requirement counts as an "emergency" measure, all at a time when fewer people face lethal risks from COVID-19, sucks the concept dry of meaning.

Vaccines are newer, to be sure. But they hardly are a revelation. They have been readily available since last spring, and they alleviate the health risks from the pandemic rather than make them worse. Why now? Why above all immediately impose such a controversial mandate on 80 million workers without undergoing the give and take that comes with the notice-and-comment process—and that usually leads to better rulemaking and always leads to more transparency about the costs and benefits of any new rule for workers and companies. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). The "more expansive" a rule's reach, "the greater the necessity for public comment." *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

How, moreover, is a vaccine "temporary"? That approach conveys considerable insensitivity to those who, for reasons of their own, are reluctant to roll up their sleeves. By any measure, a vaccine injection is not temporary.

Making the invocation of this emergency temporary power odder still is the nature of the risks presented by COVID-19 today. It is not working men and women in the main who face the most serious risks. It is older men and women, most of whom are retired and who no longer are subject to the Secretary's oversight. The key risks to individuals who do work and who remain unvaccinated are to them, not to their vaccinated colleagues. Sure, there have been, and likely will continue to be, breakthrough cases that infect vaccinated individuals, some no doubt facilitated by unvaccinated individuals. But the Secretary agrees that this risk is not serious. During the rulemaking process, he acknowledged that the risk to vaccinated employees of

continuing to work with unvaccinated employees is "not" a "grave danger." 86 Fed. Reg. at 61,434.

That leaves the Secretary with the burden of answering this question: Is it really an emergency to protect retired individuals from a workplace they no longer visit, to protect vaccinated working people from a risk the Secretary does not consider grave, and to protect unvaccinated working people from themselves based on highly personal medical decisions? That is a heavy lift, one that is highly unlikely to withstand any standard of review.

Equally unavailing is the Secretary's other explanation for the emergency rule. Education, public-health advocacy, and easy-to-obtain free vaccinations, he points out, have not worked as well as or as quickly as the Federal Government hoped—because just 70% or so of Americans have received one shot and just 60% or so of Americans are fully vaccinated. Ctr. for Disease Control, COVID-19 Vaccinations in the United States, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total; *see* 86 Fed. Reg. at 61,431–32. The Secretary projects that the "strongly encourage[d]" vaccination option would lead an additional 22.7 million workers to get vaccinated, increasing the vaccination rate in the covered workforce from 62% to 89%. 86 Fed. Reg. at 61,433, 61,472. These estimates as an initial matter lift the veil on the Secretary's understanding of the rule, revealing that he thinks it will operate much more like a vaccine mandate than a vaccine option. Another problem lurks as well. In the context of new viruses, new variants, and other challenges presented by communicable diseases, there will always be a spectrum of medical developments and innovations, whether it is new types of vaccinations, booster shots, medical treatments, or something else. That ongoing reality does not give one national agency the option of labeling something an "emergency" in perpetuity, immediately imposing a one-size-fits-all-companies solution on the country, preempting all contrary approaches to the matter in our States and cities, and circumventing the notice-and-comment process. "In case of emergency break glass" this is not—unless we wish to sideline the notice-and-comment process and the trial-and-error benefits of American federalism with respect to every future medical innovation concerning COVID-19 for this federal agency and other ones too.

One last point on this score. The statute gives the Secretary authority to issue an emergency rule only for six months. 29 U.S.C. § 655(c)(2)–(3). It does not mention any authority to extend the rule for another six months. To our knowledge, the Secretary has never used this narrow authority to extend an emergency rule for another six months. All of this prompts a question: Does the Secretary expect to finish the notice-and-comment process with respect to this uniquely important and uniquely wide-ranging rule by May 5, 2022, when the emergency rule dissolves? That seems improbable. As our circuit has come to appreciate, this rule affects a lot of industries and a lot of people. Consistent with that reality, the Secretary has already granted one 45-day extension of time, extending the end of the public comment period from December 6, 2021, to mid-January 2022. The six-month nature of the Secretary's emergency-rule authority highlights the unusual nature of its exercise today.

In view of this conclusion, we need not address several serious constitutional claims raised by the challengers. Among others, there are at least these three that would need to be addressed before the emergency rule could be enforced. One, does this regulation of non-commercial inactivity—a requirement that the unvaccinated get shots or weekly tests—exceed Congress's Commerce Clause power? *See Nat'l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519, 550–52 (2012); *infra* at 33 (Bush, J., dissenting); *BST Holdings*, 17 F.4th at 619 (Duncan, J., concurring). Two, if we accepted the Secretary's sweeping reading of the Act—permitting him to regulate any substance, whether unique to work or not, so long as the Secretary finds it dangerous—would that amount to an unconstitutional delegation of power? *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019); *id.* at 2135–37 (Gorsuch, J., dissenting). *Compare Indus. Union Dep't*, 448 U.S. at 645 (plurality opinion) (avoiding this constitutional question by construing the statute to narrow OSHA's authority), *with id.* at 687 (Rehnquist, J., concurring in the judgment) (finding an unconstitutional delegation because "[i]t is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible"). Three, does compelling faith-sensitive employers to administer these mandates violate the Free Exercise Clause or the Religious Freedom Restoration Act by interfering with their employment decisions or religious mission? *See Burwell v. Hobby*

Lobby Stores, Inc., 573 U.S. 682, 719–20 (2014); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060–61 (2020). Because our interpretation of the relevant statutes avoids these constitutional claims and any others, we need not address them. *See United States v. Erpenbeck*, 682 F.3d 472, 476 (6th Cir. 2012). By contrast, anyone who takes the view that the Fifth Circuit's stay should be lifted must come to grips with each of the statutory imperatives, each of the clear statement requirements, and all of the constitutional claims.

C.

The Secretary insists that any ambiguity in the statute favors him, not the challengers. He claims that uncertainty about the meaning of the statute allows him to construe the statute to exercise more power, not less. Resp. Mot. to Dissolve Stay at 17; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843–44 (1984). But ambiguity for *Chevron* purposes comes at the end of the interpretation process, not at the beginning. *Id.* at 843 n.9. The clear-statement canons eliminate any power-enhancing uncertainty in the meaning of the statute. With "significant constitutional and federalism questions raised" and a federalism-protecting interpretation of the statute not clearly ruled out, we must accept that interpretation and "reject the request for administrative deference." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

A contrary approach leads to a characterization of administrative law under which significant decisions of the U.S. Supreme Court were one emergency regulation, no notice, no comment, away from oblivion, indeed from effectively being overruled. If the Secretary is right, the federal office of civil rights suddenly could have construed the ambiguity in the ADEA to cover state court judges. *Cf. Gregory*, 501 U.S. at 460–61. If true, the Department of the Interior suddenly could have construed the ambiguity in the Mineral Leasing Act and National Trails System Act to regulate all manner of private property. *Cf. Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1848–50. If true, the SEC suddenly could have construed the Securities and Exchange Act to apply outside the United States. *Cf. Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 272–73 (2010). And so on. *Chevron* has no role to play in this case.

The Secretary counters that he is entitled to issue an emergency rule given new knowledge about the dangers of COVID-19 and the increased risk of infection and transmission due to the Delta variant. But the Delta variant has dominated our country's COVID-19 statistics since June. *See* 86 Fed. Reg. at 61,408–09. Even then, the Secretary found that vaccinated workers do not face a "grave danger" from COVID-19, with or without the existence of Delta. *Id.* at 61,434.

The Secretary emphasizes that he *is* regulating the workplace because the virus creates risks for working men and women. But authority to regulate the workplace with protective gear designed to handle on-the-job exposures to substances and tailored to the circumstances of that job is one thing; authority to require medical procedures or tests for two-thirds of American workers, no matter their work circumstances or individual risks, is quite another. This is precisely the kind of broad assertion of administrative power that should be accompanied by clear, direct, and channeled delegations by Congress. It is hard to think of a better example of the need for a clear statement of congressional authority than this one.

The Secretary and some of his supporters claim that regulating infectious diseases through vaccines is not as unusual as the challengers maintain, pointing to a bloodborne pathogen regulation from 1991. *See* 29 C.F.R. § 1910.1030. But that regulation shows what works and what does not. The 1991 regulation required employers to make the hepatitis B vaccine "available" to employees "who have occupational exposure" to bloodborne pathogens at no cost to the employee and at a reasonable time and place. *Id.* § 1910.1030(f)(1)(i)–(ii). Consider all of the differences between that regulation and this one. It narrowly targeted "health care workers" for protection "from viruses, particularly those causing Hepatitis B and AIDS, that can be transmitted in the blood of patients." *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 824 (7th Cir. 1993). It did not regulate all American businesses, no matter the nature of the industry, product, or service, so long as 100 employees or more work there. It was "[p]romulgated after a protracted notice-and-comment rulemaking proceeding." *Id.* It did not sidestep that process. And it appreciated the personal nature of the decision whether to get a vaccine—that a truly voluntary program, in OSHA's words, would "foster greater employee cooperation and trust in

the system." 56 Fed. Reg. 64,004, 64,155 (Dec. 6, 1991). It did not pressure or coerce unvaccinated employees by imposing significant costs and burdens on them alone. Instead of helping the Secretary's cause, a comparison between the 1991 rule and the 2021 rule undermines it.

The Secretary relatedly points to a different part of the statute to suggest that Congress contemplated immunization when delegating its authority. In a section on "Research and Related Activities," Congress gives the Secretary of Health and Human Services authority to establish programs to examine and test the workplace to "determin[e] the incidence of occupational illnesses." 29 U.S.C. § 669(a)(5). The authorization comes with this caveat: "Nothing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." *Id.* This argument tries to squeeze a lot of power out of a very small statutory tube. It involves a single reference to immunizations, a reference that explains when they are prohibited. It comes from a different part of the statute and concerns the Secretary of Health and Human Services, not OSHA and not the Secretary of Labor. If this is a "clear statement" of congressional authority that OSHA may impose a vaccinate-or-test mandate on the American workforce, we should call it a "nearly silent" rule, not a "clear statement" rule.

What of the Secretary's claim that he should not be second-guessed for applying the emergency rule just to companies with 100 employees or more? The problem is not second-guessing; it is matching the Secretary's explanations for this emergency rule with its scope. If the explanation for announcing an emergency rule is the "grave dangers" that American workers face on the job from getting the virus, that risk applies to all companies in which employees work together inside. Nor does it answer the point to say, as the Secretary does, that he was concerned about imposing administrative burdens on smaller companies. Think of how that argument would fare in another context. If the Secretary suddenly realized that exposure to a new chemical created a "grave" danger of cancer, it is difficult to imagine that anyone would

permit an emergency rule targeting the problem to apply only to companies with over 100 employees in order to save the other companies money.

What of a related reality—that federal agencies historically have been able to impose drug tests on workers? But, again, those regulations illustrate the permitted and forbidden sides of the line. The Department of Transportation, to be sure, may require employees in a few industries—airlines, railroads, motor carriers, public transit—to take periodic drug tests given the flat-line risks to the public of having impaired pilots, conductors, truckers, or bus drivers. *See, e.g.*, 49 U.S.C. §§ 45102(a)(1), 20140(b)(1)(A), 31306(b)(1)(A), 5331(b)(1)(A). But that authority, specific to a few industries and clearly delegated by Congress, would not give the Department of Transportation power to require American workers to take a drug test to end the opioid crisis—even if such tests could save up to 100,000 lives a year.

This last question and answer largely take care of the next objection—that the emergency rule is needed to deal with certain types of private employers that have been devastated by virus break-outs. A good example, as the Secretary and many others point out, is the meatpacking industry, where many of the largest spreading events initially occurred. Two responses. As with the special risks facing the transportation industry, Congress and OSHA may wish to focus on special risks facing healthcare workers and the workers in other high-risk industries. But that is not what this rule does. The other response is to note that the industries most at risk happen to be the ones most proactive in addressing the risks of the pandemic. How could an emergency rule be necessary to protect meatpacking workers when, so far as the record shows, that industry has obtained high vaccination rates on its own? *See, e.g.*, Am. Pub. Health Ass'n et al. Amicus Br. at 16 (noting that more than 96% of Tyson Food's 120,000 U.S. workers are vaccinated); 86 Fed. Reg. at 61,435. Just as the Secretary must match his assertion of power with the statute, he must match his exercise of power with explanations in the record that fit the bill.

What of the collective-action problem at the root of this assertion of power? Doesn't the agency have authority to deal with the external costs created by vaccination decisions—the cost to others created by individuals who choose not to get vaccinated and the cost to society of slowing down efforts to bring the virus to heel? *See* 86 Fed. Reg. at 61,539 (explaining that

vaccination reduces the risks that workers "present to others given the reduced likelihood of transmission"); *id.* at 61,520 (noting that "[c]urrent efforts to increase the proportion of the U.S. population that is fully vaccinated against COVID-19 are critical to ending the COVID-19 pandemic"). But, as shown, the risk to vaccinated workers from unvaccinated workers is one that the Secretary agrees is not a grave danger. No less significantly, it's doubtful this federal power sweeps this broadly given the vertical separation of powers embedded in our Constitution. There is a Commerce Clause, yes. It gives Congress broad powers, to be sure. And it helps the Federal Government to resolve some collective-action problems affecting interstate commerce, no doubt. But through it all, it remains a Commerce Clause, not a collective-action clause—and not a clause that grants the national government all of the police powers customarily associated with state governments in order to fix any new societal challenge.

That the Constitution permits the Federal Government to resolve some collective-action problems facing society but not all of them simply confirms that "there are two sides to today's story." *Tiger Lily*, 5 F.4th at 675 (Thapar, J., concurring). On one side, yes, the Federal Government has considerable authority to regulate and sometimes mandate what individuals may do. But the other side reveals many libertarian guarantees of the U.S. Constitution, each empowering individuals to resist national solutions to pedestrian and urgent policy problems alike. Before we rush to lament the reality that American individualism may present obstacles to quelling the pandemic as quickly as we would like, it's worth keeping in mind that it is a national trait that has done the country some good from time to time. Perhaps indeed Americans' non-conformist ways have had something to do with American businesses bringing vaccines to market more quickly than any vaccine in history and doing so more quickly than any other country, collectivist or not, has been able to do. *See* Drew Armstrong, *The World's Most Loathed Industry Gave Us a Vaccine in Record Time*, Bloomberg Businessweek (Dec. 23, 2020), https://www.bloomberg.com/news/features/2020-12-23/covid-vaccine-how-big-pharma-saved-the-world-in-2020; Jared S. Hopkins, *How Pfizer Delivered a Covid Vaccine in Record Time: Crazy Deadlines, a Pushy CEO*, Wall St. J. (Dec. 11, 2020), https://www.wsj.com/articles/how-pfizer-delivered-a-covid-vaccine-in-record-time-crazy-deadlines-a-pushy-ceo-11607740483.

What of the concern that the federal courts should take a low-impact approach to the public policy exigencies created by a crisis like the pandemic? It is a fair question. But it submits to fair answers. One is that, in the absence of a notice-and-comment process, the federal courts are all that's left. Who else, what else, is there to assess unfounded assertions of emergency powers by a federal agency that will have irreversible consequences for American workers and companies? The other answer is that overlooking rule-of-law limitations on federal power usually increases—it does not ameliorate—the footprint of the federal courts. It is the rare accretion of power to the President, Congress, or a federal agency that does not eventually take the federal courts along for the ride.

V.

The other stay factors largely favor the challengers as well. Because OSHA's authority extends only to regulating the workplace, the equities embedded in the stay factors do not extend to the costs to society of having unvaccinated Americans. They extend only to the risks to workers and companies.

From the perspective of the challengers, there are serious irreversible costs if the emergency rule is immediately allowed to go into effect. Start with employees. The vaccinate-or-test mandate has costs for them that cannot be undone. Whether it is an irreversible vaccination, uncompensated testing costs, or a lost job, the affected employees face considerable jeopardy if the federal courts mistakenly allow this rule to go into effect. The same is true of employers, whether one focuses on the estimated $3 billion in compliance costs or the difficulties small companies (with just over 100 workers) will face in competing with smaller companies who can attract workers disinterested in complying with the mandate. From the perspective of the Secretary of Labor and other parties that support the emergency rule, the main risk of staying the rule is to unvaccinated American workers. But as we near the two-year anniversary of the pandemic, it is hard to see why American workers are not allowed to assess the risk-benefit choice of this personal medical decision for themselves. Even if the mandate would have ancillary benefits for Americans who come into contact with unvaccinated workers outside the workday, that consideration is not OSHA's to regulate. From the perspective of the

public interest, it is both wise and beneficial to stick with historical norms—that the default rule in agency rulemaking should be the notice-and-comment process, particularly when a rule imposes highly consequential new regulations on American workers and companies and when the agency has never invoked such a power before. A "lack of historical precedent" tends to be the most "telling indication" that no authority exists. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quotation omitted).

All of this undermines the Secretary's view that we should lift the stay issued by the Fifth Circuit. But it leaves unmentioned one other part of the stay calculation—that the Secretary estimated during the rulemaking process that the emergency rule would save 6,500 lives—a point unmentioned until now because it is never easy for judges to deal with. In one sense, it is far better to have the President, Congress, an authorized federal agency, or the States making cost-benefit decisions when American lives are at stake. Who are we to say when an emergency rule should go into effect if the rule would save lives? The only thing that prevents such a job from being unbearable is to appreciate that not every such decision is for us to make.

In this instance, the first answer is that the Secretary has assumed a power he does not have. Even though the CDC's eviction moratorium was defended on the same ground—that it would save thousands of lives—the Supreme Court refused to allow the agency to enforce it. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. So also when States defended stay-at-home orders that restricted religious services on the ground that they would save lives. These orders, too, were stayed. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (per curiam). The second answer is that, once judges go beyond the modest task of determining whether statutes permit agency action, these broader considerations become exceedingly complicated—and well beyond our ken. Even the Secretary's own actions illustrate this complexity, especially if saving lives is the only consideration. Look back on the many times when a vaccinate-or-test mandate was not pressed by the Secretary: not in June 2021, when he issued the protective-gear orders with respect to the healthcare industry; not in September 2021, when he initiated this rulemaking procedure; and not on November 5, 2021, when he announced this six-month rule and said it would not go into effect until January 4, 2022. Consider too the many Americans still

unprotected by this emergency rule: workers in companies with fewer than 100 employees and all customers who visit any American retail store or business. But it would be no more fair to criticize the Secretary of Labor on this ground than it would be to register a similar criticism against the Fifth Circuit for staying the emergency rule. That takes us back to where we started: The Secretary's emergency rule likely exceeds his authority.

The Court should grant the petition for initial hearing en banc and leave the Fifth Circuit's stay of the emergency rule in place.

DISSENTING FROM THE DENIAL OF INITIAL HEARING EN BANC

BUSH, Circuit Judge, dissenting from the denial of initial hearing en banc. This is a case about the Occupational Safety and Health Administration, but it is really a case about power. Specifically, it concerns the attempted exercise of a purported power—to impose a *de facto* national vaccine mandate[1] upon some eighty-million Americans—that OSHA was never given and that Congress likely could never have given to it. Chief Judge Sutton's dissent ably explains the former defect, and so I join it in full. I write separately to address the latter.

Whether it uses a clear statement or not, Congress likely has no authority under the Commerce Clause to impose, much less to delegate the imposition of, a *de facto* national vaccine mandate upon the American public. Such claimed authority runs contrary to the text and structure of the Constitution and historical practice. The regulation of health and safety through compulsory vaccination is a traditional prerogative of the states—not the domain of Congress and certainly not fodder for the diktat of a federal administrative agency. Because we should have granted initial hearing en banc to vindicate the correct understanding of the Constitution and to cabin OSHA to its legitimate role, I respectfully dissent.

I.

This case has a veneer of complexity, so it is useful to start with some first principles of constitutional adjudication. It may seem paradoxical that some of the most effusive guarantees of liberty can be found in the bills of rights of some of the world's most savage dictatorships. *See* Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 N.D. L. Rev. 1417, 1418 (2008). Why do *we* seem to respect our bill of rights, at least in the main, while other attempts have faltered the world over? The answer is structure. *Id.* Our Framers understood that the true bulwark of liberty is not a "parchment guarantee[ ]," but the diffusion of power both horizontally and vertically. *Id.* (quoting The Federalist No. 51, at 323

[1]For a discussion of why I apply this label to OSHA's standard, *see infra* pages 35–36.

(James Madison) (Clinton Rossiter ed., 1961)); *see also United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power.").

James Madison called our constitutional structure a "double security" for "the rights of the people." The Federalist No. 51, *supra*, at 320 (James Madison). Power was first divided by the Constitution "between two distinct governments"—federal and state. *Id.* And that power was then "subdivided among distinct and separate departments"—legislative, executive, and judicial. *Id.* Thus, just as each government was "controlled by itself," the federal and state governments "would control each other." *Id.* The "extensive portion of active sovereignty" the Constitution left to the states would prevent our institutions from degenerating "into one consolidated government" and would thereby check the resulting infringement on the people's liberty. The Federalist No. 45, *supra*, at 286–87 (James Madison); *see also New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (cleaned up)).

The constitutional text bears out that original design. Congress inherited from the Constitutional Convention no roving warrant to legislate on whatever matter it sees fit. Indeed, the Framers directly rejected such sweeping authority. *See* 2 The Records of the Federal Convention of 1787, at 21–27 (Max Farrand, ed. 1911). That was not because the idea lacked a proponent—Gouverneur Morris took "the controversial position that the federal government should possess the police power." William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 Mich. L. Rev. 1, 28 (2021). But he was alone in that view. "No one else at the . . . Convention argued that the national government should have the 'police' power." *Id.* at 29. Rather, Morris's fellow delegates spoke of it only "as a power of the states." *Id.* And so our limited Constitution emerged, carefully enumerating and thus carefully cabining each federal branch's respective powers. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) ("The enumeration

of powers is also a limitation of powers[.]"). As a result, when Congress wishes to legislate, it must show "that a constitutional grant of power authorizes each of its actions." *Id.* at 535.

But "[t]he same does not apply to the States, because the Constitution is not the source of their power." *Id.* States instead enjoy a residual authority to regulate within their borders—a power that pre-dates the Constitution and does not derive from it. *Id.* at 535–36. The Tenth Amendment memorializes that point, clarifying that those "powers *not* delegated to the United States by the Constitution" are "reserved to the States respectively, or to the people." U.S. Const. amend. X (emphasis added); *see also* Joseph Story, *Commentaries on the Constitution of the United States* 711–12 (Ronald D. Rotunda & John E. Nowak, eds. 1987). The states under our federated system thus enjoy a "general power of governing"—what the Supreme Court has repeatedly termed their "police power." *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 536.

Part and parcel of that traditional police power—and thus an authority "reserved to the States"—is the power to regulate public health. U.S. Const. amend. X; *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). Indeed, the Court has called it a "settled principle[ ]" that states enjoy a police power to promulgate "legislative enactment[s to] protect the public health and the public safety." *Jacobson*, 197 U.S. at 25; *see also Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906) (holding that "the police power of a State embraces . . . regulations designed to promote the public health"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (describing regulation of "public health" as a "traditional application of the police power"). And in the specific context of compulsory vaccination, the Court has twice confirmed that the propriety of such mandates is a matter vested to the police power of the states. *See Jacobson*, 197 U.S. at 24–25; *Zucht v. King*, 260 U.S. 174, 176 (1922) (describing it as "within the police power of a State to provide for compulsory vaccination").

Those holdings notwithstanding, OSHA invokes the Commerce Clause to suggest that it is really the *federal* government, not the states, that enjoys the authority to mandate vaccination for employees nationwide. Before I explore the constitutional validity of that position, let me first explain why I label the standard a *de facto* national vaccine mandate for eighty-million Americans. OSHA has not minced words about the purpose and effect of its standard; according

to OSHA itself, "[c]overed employers *must* develop, implement, and enforce a *mandatory* COVID-19 vaccination policy" for their employees. 86 Fed. Reg. 61,402 (Nov. 5, 2021) (emphases added). Thus, some half of our workforce must either become vaccinated or both (1) "wear a face covering at work in lieu of vaccination" and (2) submit to weekly testing for COVID-19. *Id.* Neither OSHA nor the employer is required to bear the expense. *Id.* at 61,532. Rather, it falls on the unvaccinated employee to shoulder the costs of compliance. *Id.* And if states do not adopt OSHA's standard or some other plan that is "at least as effective," they face penalties like the revocation of approval of their State Plans and the associated loss of millions in federal funding. *See* "Emergency Temporary Standard," Occupational Safety and Health Administration, https://www.osha.gov/coronavirus/ets2/faqs (last visited Dec. 14, 2021) (explaining that if a State Plan is not "at least as effective" as OSHA's emergency rule, consequences include "OSHA's reconsideration and possible revocation of the State Plan's final approval status"); *see also* "What is an OSHA-Approved State Plan?", *id.*, https://www.osha.gov/stateplans/faqs (last visited Dec. 14, 2021) ("OSHA approves and monitors all State Plans and provides as much as 50 percent of the funding for each program.").

So again, what constitutional warrant does OSHA possess for this scheme? The agency appeals to commerce. But the Commerce Clause likely cannot be read to grant such an authority, because it cannot be read to confer a general police power upon the national government. True, the Court has at times read the Clause broadly, stretching its meaning to the edge of plausibility. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942). Yet the Court has *never* crossed the Rubicon of declaring a federal police power. Time after time, it has rejected the notion that such a power exists. *See United States v. Lopez*, 514 U.S. 549, 566 (1995) (explaining that the Constitution "withhold[s] from Congress a plenary police power"); *id.* at 584 (Thomas, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power[.]"); *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 536 ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'"). So the Commerce Clause, which generated "no apprehensions" upon its addition to the Constitution, cannot be read to effect a late-breaking revolution in state-federal affairs by granting a federal agency the right

to regulate a core area of traditional state concern. The Federalist No. 45, *supra*, at 290 (James Madison).

What first principles dictate, fresh precedent confirms. The Supreme Court in recent years has squarely rejected a view of the commerce power under which "individuals may be regulated . . . whenever enough of them are not doing something the Government would have them do." *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 553 (opinion of Roberts, C.J.); *accord id.* at 649–60 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The case I mention involved an individual mandate to coerce those without health insurance to purchase it. *Id.* Congress claimed the power to regulate the failure to engage in a commercial activity—the buying of insurance—because uninsured persons' failure to do so had a substantial aggregate effect on interstate commerce. *Id.* at 554. Here, by contrast, OSHA claims the power to regulate the failure to engage in a *non-commercial* activity—the taking of a vaccine—because unvaccinated persons' failure to do so may affect interstate commerce. OSHA's theory of the commerce power is thus even more extravagant than what the Supreme Court has already rejected. If Congress cannot solve a perceived commercial problem with a "mandatory purchase," then how can it possess the authority, much less delegate it, to solve a perceived commercial problem by mandating that Americans engage in a *non-commercial* activity?[2] *Id.* at 553. The answer, of course, is that it likely cannot.

Before I turn to history, let me close with a final word on precedent, lest I be misunderstood. Here, I do not question the constitutionality of OSHA itself, or of federal workplace-safety regulations more broadly. *But see* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407 (2008) (questioning OSHA's constitutionality on non-delegation grounds). For even accepting that Congress (and thus, perhaps, OSHA) has the power to regulate a *workplace* hazard that affects interstate commerce, that is not what OSHA has done. OSHA has instead pretextually redefined what is at this point a hazard of *life* in the United States

[2] The states arguing in support of the stay put it this way: If Congress does not have the power under the Commerce Clause to force individuals to buy health insurance, could it make an end-run around that rule by telling employers that they cannot retain uninsured employees? And if Congress cannot do so, then why can it tell employers that they cannot retain *unvaccinated* employees?

and throughout the world—COVID-19—as a hazard of the workplace. *See, e.g.*, 86 Fed. Reg. at 61,545 (misleadingly characterizing COVID-19 as a "workplace hazard"). It engages in this pretext in its attempt to bring a traditional matter of state concern—compulsory vaccination—within the ambit of federal jurisdiction. But caselaw is clear. Neither Congress nor OSHA may pretextually relabel such an area as "commerce" to gain what is, in effect, a novel police power of the national government. *See Morrison*, 529 U.S. at 616–18 (rejecting the notion that Congress may regulate domestic violence merely because of a purported "effect on interstate commerce"); *see also id.* at 617–18 ("The Constitution requires a distinction between what is truly national and what is truly local."); *Lopez*, 514 U.S. at 567–68 (rejecting Congress's attempt to relabel firearms near schools a problem of interstate commerce).

II.

Given that OSHA is so disarmed of precedent, one might reasonably have expected it to come into court bearing historical examples of the power it seeks to exercise—the federal imposition of a *de facto* nationwide vaccine mandate. Yet it has none. To the contrary, the relevant history actually undercuts OSHA's position. For while Congress has long sought to *facilitate* safe and effective vaccines, it has never invoked the commerce power to *mandate* their administration upon the public at large.[3]

In the early years of the Republic, Congress did little to respond to epidemics.[4] In the summer of 1793, for example, yellow fever descended on Philadelphia, then the nation's capital. *See* Letter from Thomas Jefferson to Martha Jefferson Randolph (Sept. 8, 1793), Founders

[3]To be sure, the federal government has, at one time or another, mandated vaccination for discrete segments of the population, such as for soldiers or members of the foreign service working abroad. George Washington himself ordered that his soldiers in the Continental Army receive variolation against smallpox in the winter of 1777. *See* Ann M. Becker, *Smallpox in Washington's Army: Strategic Implications of the Disease During the American Revolutionary War*, 68 J. of Mil. Hist. 381, 427–28 (2004). But the relevant question is not whether the federal government has the authority to order the vaccination of certain populations in a special relationship with it. What is at stake here is whether Congress has a general police power to mandate vaccination for tens of millions of private citizens with *no* special relationship to the federal government. History suggests that it has no such power.

[4]And when it did intervene, it did not impose unilateral mandates upon the states, but instead assisted in a cooperative fashion. *See* Act of May 27, 1796, 4 Cong. Ch. 31, 1 Stat. 474 (authorizing the President to "aid in the execution of quarantine, and also in the execution of the health-laws of the states" during a yellow-fever epidemic).

Online, https://founders.archives.gov/documents/Jefferson/01-27-02-0060 (last visited Dec. 12, 2021); *see also* Letter from George Washington to Edmund Randolph (Sept. 30, 1793), Founders Online, https://founders.archives.gov/documents/Washington/05-14-02-0105 (last visited Dec. 12, 2021); James Higgins, "Public Health," Encyclopedia of Greater Philadelphia, https://philadelphiaencyclopedia.org/archive/public-health/ (last visited Dec. 12, 2021); Mathew Carey, *A Short Account of the Malignant Fever, Lately Prevalent in Philadelphia* 11 (1794), available at Harv. Univ. Lib. Viewer, https://iiif.lib.harvard.edu/manifests/view/drs:7374219$11i (last visited Dec. 14, 2021) (describing the "destroying scourge, the malignant fever," that had "crept in among us"). The federal government's response was primarily to leave town for the countryside. *See* Letter from Thomas Jefferson to Martha Jefferson Randolph, *supra.* President Washington chose to work remotely at Mount Vernon; the Secretary of State, Thomas Jefferson, fled to Monticello. *Id.*

There was no vaccine available in the 1790s for yellow fever but, in 1796, Sir Edward Jenner discovered a vastly improved vaccination for smallpox—rather than use live virus as had the earlier "variolation" process, Jenner used cowpox instead. *See* Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 Baylor U. Med. Ctr. Proceedings 21, 23–24 (2005). That discovery led Congress less than two decades later, in 1813, to enter the vaccine arena. *See* Tess Lanzarotta & Marco A. Ramos, *Mistrust in Medicine: The Rise and Fall of America's First Vaccine Institute*, 108 Am. J. of Pub. Health 741 (2018). In response to an outbreak of smallpox, Congress passed "An Act to Encourage Vaccination," sometimes called the Vaccine Act of 1813. *Id.* at 742; *see also* James Colgrove, *Immunity for the People: The Challenge of Achieving High Vaccination Coverage in American History*, 122 Pub. Health Rep. 248, 249 (2007).

The Act had three salient features: it created the position of a federal vaccine agent, gave him the authority to curate an unadulterated supply of smallpox vaccine, and gave him a franking privilege to distribute vaccines to those who requested them, free of charge, through the U.S. mail. *Id.* Noted Maryland physician James Smith served as the nation's first (and only) vaccine agent for nine years, overseeing "twenty agents nationwide who inoculated around 100,000

people" during his tenure. *See* Letter from James Smith (of Baltimore) to Thomas Jefferson (Mar. 28, 1818), Founders Online, https://founders.archives.gov/documents/Jefferson/03-12-02-0472 (last visited Dec. 12, 2021). Yet Smith's role as vaccine agent—and the Vaccine Act itself—came to a tragic end in 1822. *See* Lanzarotta & Ramos, *supra*, at 742. Smith accidentally shipped packages of live smallpox (rather than cowpox vaccine) to the town of Tarboro, North Carolina, resulting in ten fatalities. *Id.* Two months later, President Monroe dismissed Smith from his position and Congress repealed the Act, relinquishing further vaccination efforts to the states. *Id.*

Public response to the vaccine was strikingly similar to modern attitudes about the COVID vaccine. Many voluntarily took the smallpox vaccine and gave it to their children. *See, e.g.*, The Diaries of Gouverneur Morris: New York 1799–1816, 777 (Melanie Randolph Miller, ed. 2018); *see also* Letter from Abigail Adams to John Adams (July 13, 1776), Mass. Hist. Society, https://www.masshist.org/digitaladams/archive/doc?id=L17760713aa (last visited Dec. 14, 2021). But others, like some today, were suspicious of a vaccine. *See* Cynthia M.A. Geppert & Reid A. Paul, *The Shot That Won the Revolutionary War and Is Still Reverberating*, Fed. Practitioner 298, 298 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6654165/pdf/fp-36-07-298.pdf (last visited Dec. 14, 2021). And smallpox was as devastating and transmissible, if not more so, than COVID-19. *See* "History of Smallpox," Centers for Disease Control and Prevention, https://www.cdc.gov/smallpox/history/history.html (last visited Dec. 12, 2021). Yet there is no indication that anyone in the 1813 Congress thought the federal government had a general police power to nationally mandate vaccination.

Congressional involvement in vaccination ever since has followed the basic contours of the 1813 regime. Congress has passed many laws to regulate the purity of vaccines, facilitate their distribution with information and funding, and compensate those injured by their administration, but it has apparently never invoked the commerce power[5] to *mandate* their

[5] I pause to note a seeming counterexample that is, upon further inspection, no counterexample at all. In 1832, Congress passed the Indian Vaccination Act—a functional vaccine mandate for those tribes selected for smallpox vaccination by federal Indian agents. *See* J. Diane Pearson, *Lewis Cass and the Politics of Disease: The Indian Vaccination Act of 1832*, 18 Wicazso Sa Rev. 9, 12 (2003) (noting that "it was left to the secretary of war to

imposition upon the general public. *See, e.g.*, Biologics Control Act, Pub. L. No. 57-244, 32 Stat. 728 (1902) (current version at 42 U.S.C. § 262 (2006)); *see also* Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768; Virus-Serum-Toxin Act, ch. 145, § 1, 37 Stat. 832 (1913) (current version at 21 U.S.C. §§ 151–159); Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938); Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944); Poliomyelitis Vaccination Assistance Act of 1955, Pub. L. No. 277, 69 Stat. 704; National Childhood Vaccine Injury Act, Pub. L. No. 99-660, 100 Stat. 3755 (1986); Food and Drug Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296.

The Poliomyelitis Vaccine Assistance Act of 1955 provides a good example. Soon after Dr. Jonas Salk developed the first effective polio vaccine in 1955, Congress responded with millions of dollars in "grants to assist states in vaccinating children under 20 and expectant mothers," with funds "allotted to the states" according to their respective needs. *See* Otis L. Anderson, *The Polio Vaccine Assistance Act of 1955*, 45 Am. J. Pub. Health 1349, 1349 (1955). Yet it was "the *states* [that had] responsibility for the intrastate distribution of the vaccine through both public agency and normal commercial channels." *Id.* (emphasis added); *see also* 42 U.S.C. § 243(a) (directing the Secretary of Health and Human Services to "*assist* States . . . in the prevention and suppression of communicable diseases" and to "*cooperate with* and *aid* State and Local authorities." (emphases added)).

OSHA would turn this history on its head. It proposes not a partnership in which the federal government simply encourages vaccination, but an unfunded mandate in which half our workforce must either become vaccinated or subject itself to regular out-of-pocket testing. *See* 86 Fed. Reg. at 61,532. If Congress purported to delegate such a sensitive "money or lives"

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determine which American Indians were vaccinated and when and where they would be vaccinated. American Indians had no input into any of the political or decision-making processes involved with the bill or into implementation of the act."). The Act's marketing was beneficent, *id.* at 10, but its administration was sinister. Indian agents selected for vaccination (1) those tribes scheduled for removal, so that smallpox would not derail the journey, *id.* at 25, and (2) tribes that were considered valuable trading partners of the United States. *Id.* at 19–23. By contrast, tribes considered "beyond the pale of civilization" were deliberately excluded from vaccination. *Id.* at 20. Even if a modern agency were inclined to rely on this poisoned precedent, *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 & n.44 (2020), it would do nothing to advance an interpretation of the Commerce Clause. Congress regulates Indian tribes' internal affairs under a supposed "plenary power"—much as a state would regulate its own citizens—rather than under its commerce authority. *See Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 70 (2016).

determination to an unaccountable agency, we would have to think hard about the propriety of that delegation. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment). Yet here there likely existed no authority to delegate.

III.

I have no doubt that the pandemic imperils our society, and I recognize that there is sometimes a "judicial impulse to stay out of the way in times of crisis." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring). But while an "emergency may afford a reason for the exertion of a living power already enjoyed," it cannot "call into life a power which has never lived." *Wilson v. New*, 243 U.S. 332, 348 (1917). OSHA claims just such a power—history and precedent notwithstanding. It is surely incumbent on the third branch in these circumstances to check the actions of the "fourth." And because the full court should have had the opportunity to do so, I respectfully dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk