

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. DEPARTMENT OF
LABOR
142 S.CT. 661 (2022)

PER CURIAM.

The Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), recently enacted a vaccine mandate for much of the Nation’s work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here. Many States, businesses, and nonprofit organizations challenged OSHA’s rule in Courts of Appeals across the country. The Fifth Circuit initially entered a stay. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA’s rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA’s mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

I
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Congress enacted the Occupational Safety and Health Act in 1970. * * * The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. As its name suggests, OSHA is tasked with ensuring occupational safety - that is, “safe and healthful working conditions.” 29 U.S.C. §651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. §655(b). Such standards must be “reasonably necessary or appropriate to provide safe or healthful employment.” §652(8). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. §655(b). The Act contains an exception to those ordinary notice and-comment procedures for “emergency temporary standards.” §655(c)(1). Such standards may “take immediate effect upon publication in the Federal Register.” Ibid. They are permissible, however, only in the narrowest of circumstances: 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.” Ibid. Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full. * * *

II

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Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no “everyday exercise of federal power.” * * * It is instead a significant encroachment into the lives—and health—of a vast number of employees. “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” * * * There can be little doubt that OSHA’s mandate qualifies as an exercise of such authority. The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not. The Act empowers the Secretary to set **workplace** safety standards, not broad public health measures. See 29 U. S. C. §655(b) (directing the Secretary to set “**occupational** safety and health standards” (emphasis added)); §655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect “employees” from grave danger in the workplace). Confirming the point, the Act’s provisions typically speak to hazards that employees face at work. See, e.g., §§651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA’s sphere of expertise. * * *

The Solicitor General does not dispute that OSHA is limited to regulating “work-related dangers.” * * * She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.

The dissent contends that OSHA’s mandate is comparable to a fire or sanitation regulation imposed by the agency. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, “cannot be undone at the end of the workday.” * * * Contrary to the dissent’s contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not “part of what the agency was built for.” * * *

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal

sense, from the workplace. This “lack of historical precedent,” coupled with the breadth of authority that the Secretary now claims, is a “telling indication” that the mandate extends beyond the agency’s legitimate reach.

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, concurring.

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing work place safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people’s elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land. * * * There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the “general power of governing,” including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. And in fact, States have pursued a variety of measures in response to the current pandemic.

The federal government’s powers, however, are not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution’s separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: “We expect Congress to speak clearly” if it wishes to assign to an executive agency decisions “of vast economic and political significance.”

OSHA’s mandate fails that doctrine’s test. The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA. Approximately two years have passed since this pandemic began; vaccines have been available for more than a year. Over that span, Congress has adopted several major pieces of legislation aimed at combating COVID–19. But Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. * * *

What is OSHA’s reply? It directs us to 29 U.S.C. § 655(c)(1) [which authorizes the agency to issue emergency standards]. * * * The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA’s mandate. Section 655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA’s creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. [The concurring Justices then argued that the language

of the emergency standard section did not clearly authorize OSHA to issue the vaccine or mask mandate.] * * *

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. * * * The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority." * * *

The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA.

JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, dissenting.

Every day, COVID-19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID-19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID-19's continuing threat in those spaces. * * *

III
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OSHA’s rule perfectly fits the language of the applicable statutory provision. Once again, that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard whenever it determines “(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.” 29 U. S. C. §655(c)(1). Each and every part of that provision demands that, in the circumstances here, OSHA act to prevent work place harm.

The virus that causes COVID–19 is a “new hazard” as well as a “physically harmful” “agent.” Merriam-Webster’s Collegiate Dictionary 572 (11th ed. 2005) (defining “hazard” as a “source of danger”); *id.*, at 24 (defining “agent” as a “chemically, physically, or biologically active principle”); *id.*, at 1397 (defining “virus” as “the causative agent of an infectious disease”).

The virus also poses a “grave danger” to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID–19 and millions more had been hospitalized. * * * Since then, the disease has continued to work its tragic toll. In the last week alone, it has caused, or helped to cause, more than 11,000 new deaths. * * * And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces.

Finally, the Standard is “necessary” to address the danger of COVID–19. OSHA based its rule, requiring either testing and masking or vaccination, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that “[t]he science of transmission does not vary by industry or by type of workplace”; that testing, mask wearing, and vaccination are highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID–19 as compared to their vaccinated peers. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the Standard would. * * *

B

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. * * * Instead, the majority claims that the Act does not “plainly authorize[]” the Standard because it gives OSHA the power to “set workplace safety standards” and COVID–19 exists both inside and outside the workplace. *Ante*, at 6. In other

words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting. * * *

Consistent with Congress’s directives, OSHA has long regulated risks that arise both inside and outside of the workplace. For example, OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits— even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities (e.g., stadiums, schools, hotels, even homes). Similarly, OSHA has regulated to reduce risks from excessive noise and unsafe drinking water—again, risks hardly confined to the work place. A biological hazard - here, the virus causing COVID-19- is no different. * * *

The result of [the majority’s ruling] is squarely at odds with the statutory scheme. As shown earlier, the Act’s explicit terms authorize the Standard. * * * The enacting Congress of course did not tell the agency to issue this Standard in response to this COVID–19 pandemic—because that Congress could not predict the future. But that Congress did indeed want OSHA to have the tools needed to confront emerging dangers (including contagious diseases) in the workplace. We know that, first and foremost, from the breadth of the authority Congress granted to OSHA. And we know that because of how OSHA has used that authority from the statute’s beginnings—in ways not dissimilar to the action here. OSHA has often issued rules applying to all or nearly all workplaces in the nation, affecting at once many tens of millions of employees. It has previously regulated infectious disease, including by facilitating vaccinations. And it has in other contexts required medical examinations and face coverings for employees. * * * If OSHA’s Standard is far-reaching - applying to many millions of American workers - it no more than reflects the scope of the crisis. * * * It is perverse, given these circumstances, to read the Act’s grant of emergency powers in the way the majority does - as constraining OSHA from addressing one of the gravest workplace hazards in the agency’s history. The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA’s authority. It is part of what the agency was built for. * * *

IV

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Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the

extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate. OSHA, that is, has responded in the way necessary to alleviate the “grave danger” that workplace exposure to the “new hazard[]” of COVID–19 poses to employees across the Nation. 29 U. S. C. §655(c)(1). The agency’s Standard is informed by a half century of experience and expertise in handling workplace health and safety issues. The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we “lack[] the background, competence, and expertise to assess” workplace health and safety issues. When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.