

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL FEDERATION OF INDEPENDENT)
BUSINESS, ET AL.,)
) Applicants,)
) v.) No. 21A244
DEPARTMENT OF LABOR, OCCUPATIONAL)
SAFETY AND HEALTH ADMINISTRATION,)
ET AL.,)
) Respondents.)
) and)
OHIO, ET AL.,)
) Applicants,)
) v.) No. 21A247
DEPARTMENT OF LABOR, OCCUPATIONAL)
SAFETY AND HEALTH ADMINISTRATION,)
ET AL.,)
) Respondents.)

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19 - - - - -
20 Washington, D.C.
21 Friday, January 7, 2022
22
23 The above-entitled matter came on for oral
24 argument before the Supreme Court of the United
25 States at 10:00 a.m.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Sotomayor is participating remotely this morning, as, in this application, Mr. Flowers from Ohio will also be participating remotely.

And we will hear argument first this morning in Application 21A244, National Federation of Independent Business versus the Department of Labor, and the consolidated case.

Mr. Keller.

ORAL ARGUMENT OF SCOTT A. KELLER

ON BEHALF OF THE APPLICANTS IN NO. 21A244

MR. KELLER: Mr. Chief Justice, and may it please the Court:

OSHA's economy-wide one-size-fits-all mandate covering 84 million Americans is not a necessary, indispensable use of OSHA's extraordinary emergency power which this Court has recognized is narrowly circumscribed.

Just three days ago, the U.S. Postal Service told OSHA that this ETS's requirements are so burdensome for employers that the federal government is now seeking an exemption from its own mandate for the Postal Service.

1 That's because OSHA's economy-wide mandate
2 would cause permanent worker displacement
3 rippling through our national economy, which is
4 already experiencing labor shortages and
5 fragile supply lines.

6 OSHA has never before mandated
7 vaccines or widespread testing, much less
8 across all industries. In fact, the June
9 healthcare COVID ETS and the 1991 blood-borne
10 pathogen rule both rejected vaccine mandates
11 and widespread testing, and those were even
12 just for targeting healthcare workers.

13 And, here, OSHA's vaccine-and-testing
14 mandate treats virtually all industries'
15 workplaces and workers the same. But even
16 Congress's rescue plan identified high-risk
17 workplaces, and OSHA itself here recited state
18 data confirming that certain industries, like
19 healthcare and correction facilities, are
20 higher risk.

21 Our nation's businesses have
22 distributed and administered hundreds of
23 millions of COVID vaccines to Americans.
24 Businesses have encouraged and incentivized
25 their employees to get vaccines. But a single

1 federal agency tasked with occupational
2 standards cannot commandeer businesses
3 economy-wide into becoming de facto public
4 health agencies.

5 So this Court should immediately stay
6 OSHA's unprecedented ETS before Monday, when
7 OSHA begins enforcement.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Keller, how are
10 we to decide when an Emergency Temporary
11 Standard or Emergency Temporary Standards are
12 necessary? What factors do you think we should
13 use?

14 MR. KELLER: Justice Thomas, I think
15 the first factor that you would have to look at
16 is, is it an indispensable or essential
17 measure, and that necessarily would require
18 looking at what are the alternatives available.
19 You would have to also look at, necessary to
20 what end? And it's to abate a grave danger.
21 And it's for an emergency. It's in a temporary
22 setting. So the factors you'd want to consider
23 are, what are the risks, and not only what are
24 the risks for any isolated situation but
25 compared to an everyday risk?

1 And, here, when OSHA itself has never
2 mandated vaccines or widespread testing before,
3 that itself, even in its 10 prior ETSs, which
4 courts blocked almost all of the challenges to
5 these prior ETSs, all of those are factors that
6 would absolutely determine the scope of what
7 OSHA could do here.

8 In fact, in the June ETS, what OSHA
9 said was: "OSHA recognizes that many states
10 have taken action to protect employees with
11 mandatory requirements that may not be
12 appropriate for an ETS on a national level."

13 JUSTICE THOMAS: The -- the -- you
14 know, when -- in -- in McCulloch versus
15 Maryland, Chief Justice Marshall, in looking at
16 necessary and proper, saw "necessary" as more
17 expansive than that as certainly modified by
18 "proper" or in the context of "proper." So it
19 just suggests that "necessary" can be really
20 necessary or not necessarily really necessary.

21 MR. KELLER: And -- and --

22 JUSTICE THOMAS: The -- and -- and I
23 just think that, you know, the -- you need more
24 than to say, oh, a lot of bad things could
25 happen to interpret what that means. Is it

1 restrictive? Is it very firm? Is it
2 super-necessary? And if it is, why?

3 MR. KELLER: Justice Thomas, the --
4 the reason why it would be something
5 approaching the indispensable or essential
6 definition of "necessary" here is there's a
7 very key intrastatutory textual clue. The
8 emergency power must be necessary. The regular
9 power that OSHA wields has to be reasonably
10 necessary or appropriate.

11 JUSTICE THOMAS: So when do we
12 determine that? Suppose -- you argue also this
13 is -- the vaccine's been around quite some
14 time. COVID has been around even longer. So
15 the -- the government could have had a -- a
16 notice and comment. So, if it's been -- if you
17 have -- if it's susceptible to notice and
18 comment, then how do you analyze it in that
19 context? You can't just say, well, it's
20 emergency; therefore, it has to be absolutely
21 necessary. It would seem that that would
22 undermine your definition or your notion of
23 "necessary."

24 MR. KELLER: Well, I think Judge
25 Larsen for the Sixth Circuit was absolutely

1 correct in saying that just because something's
2 temporary doesn't mean that there could somehow
3 be more power. And what this Court has said is
4 this emergency power is narrowly circumscribed.
5 And regardless of wherever the line would be
6 drawn, I think this ETS is far past it.

7 And I think the federal government has
8 some serious line-drawing problems of its own.
9 I believe OSHA, under the theory that's been
10 advanced, could have shut down and had a
11 national work lockdown at the beginning of the
12 pandemic. I would submit that this Court in
13 Industrial Union, in saying that OSHA had no
14 clear mandate in the Act to have that wide a
15 power over the American industry, is also a
16 factor that would go into this Court construing
17 what "necessary" means in light of that.

18 JUSTICE THOMAS: So the fact that it
19 is temp -- that it's emergency sort of ups the
20 ante, that "necessary" has to be more
21 restrictive?

22 MR. KELLER: Yes, because of plain
23 text, the comparison within the OSH Act, also
24 statutory context --

25 JUSTICE KAGAN: I --

1 MR. KELLER: -- the major questions
2 doctrine.

3 JUSTICE KAGAN: -- I guess, Mr.
4 Keller, I -- I don't understand the point.
5 Whatever "necessary" means, whether it's
6 necessary and proper or whether it's something
7 more than that, why isn't this necessary to
8 abate a grave risk?

9 This is a pandemic in which nearly a
10 million people have died. It is by far the
11 greatest public health danger that this country
12 has faced in the last century. More and more
13 people are dying every day. More and more
14 people are getting sick every day. I don't
15 mean to be dramatic here. I'm just sort of
16 stating facts.

17 And this is the policy that is most
18 geared to stopping all this. There's nothing
19 else that will perform that function better
20 than incentivizing people strongly to vaccinate
21 themselves.

22 So, you know, whatever "necessary"
23 means, whatever "grave" means, why isn't this
24 necessary and grave?

25 MR. KELLER: Because, Justice Kagan,

1 the standard for what would be necessary for
2 this extraordinary use of emergency power is
3 not what is the best way of accomplishing it.

4 JUSTICE KAGAN: It's an extraordinary
5 use of emergency power occurring in an
6 extraordinary circumstance, a circumstance that
7 this country has never faced before.

8 MR. KELLER: What OSHA needed to do
9 here, though -- and we do not contest that
10 COVID is a grave danger, but when -- a power
11 for it to be necessary, for instance, the Third
12 Circuit said in wielding what is supposed to be
13 a delicately exercised extraordinary power, the
14 agency has to consider and explain
15 alternatives.

16 The agency here complained that its
17 non-mandatory guidance wasn't being followed
18 and then instead of saying that maybe some of
19 those mandatory guidance -- some of those
20 guidances could have been made mandatory, it
21 jumped immediately to a vaccine-or-testing
22 mandate.

23 Moreover, OSHA typically --

24 JUSTICE KAGAN: Mr. Keller, I -- I
25 guess I -- I just don't see this as a

1 situation, you know, a typical arbitrary,
2 capricious situation where we say, oh, you
3 didn't consider an alternative carefully
4 enough.

5 We all know what the best policy is.
6 I mean, by this point, two years later, we know
7 that the best way to prevent spread is for
8 people to get vaccinated and to prevent
9 dangerous illness and death is for people to
10 get vaccinated. That is by far the best.

11 The second best is to wear masks. So
12 this is a policy that basically says, we are
13 still confronting thousands of people dying
14 every time we look around, and so we're going
15 to put into place the policy that we know works
16 best, which is to strongly incentivize
17 vaccination and to insist that unvaccinated
18 people will wear masks and test.

19 I mean, that's just -- like, why isn't
20 that necessary? What else should be done?
21 It's -- it's obviously the policy that's --
22 that's geared to preventing most sickness and
23 death, and the agency has done everything but
24 stand on its head to show quite clearly that no
25 other policy will prevent sickness and death to

1 anywhere like the degree this one will.

2 MR. KELLER: Justice Kagan, first of
3 all, states could have policies like this.
4 Private businesses could have policies like
5 this. And even OSHA in its June healthcare
6 COVID ETS -- and that was only for healthcare
7 workers -- did not mandate vaccines.

8 Instead, what it did there, similarly
9 to how OSHA proceeds in many contexts, is it
10 says, employers, give us a plan, and then, if
11 there are heightened needs in particular
12 workplaces, then additional measures can be put
13 into place. But this is covering economy-wide,
14 all industries, 84 million Americans --

15 JUSTICE KAGAN: Well, that's if that
16 rule --

17 CHIEF JUSTICE ROBERTS: That's one of
18 your main -- that -- that's one of your main
19 objections, that this is not a workplace issue,
20 it's -- it's an out-in-the-world issue, is that
21 right?

22 MR. KELLER: That's right, Mr. Chief
23 Justice.

24 CHIEF JUSTICE ROBERTS: Well, but how
25 focused on the workplace does something have to

1 be before you will say that OSHA can regulate
2 it?

3 Think, for example, of an assembly
4 line, you know, workers sitting next to each
5 other for a significant length of time, working
6 together in close -- close contact. That
7 presents a different kind of risk than is
8 typical in the outside world.

9 So could OSHA say that for businesses
10 with assembly lines, the workers must be
11 vaccinated?

12 MR. KELLER: No, not vaccinated.
13 OSHA, though, could potentially, going by
14 industry by industry or workplace by workplace,
15 have measures such as what some of their
16 guidance have suggested, like, you know,
17 potentially barriers, but I think all of this
18 would be kind of --

19 CHIEF JUSTICE ROBERTS: Well, but
20 those are sort of -- as Justice Kagan has been
21 -- been discussing, those are sort of, you
22 know, not as good. And why wouldn't OSHA have
23 the authority to do the best approach possible
24 to address what I guess you agree is a special
25 workplace problem?

1 MR. KELLER: Well, Mr. Chief Justice,
2 I don't think the standard here can be the best
3 because, if it was the best, then that would
4 mean that OSHA could ban all people from coming
5 into the workplace. I think that is a power
6 that Congress, when it created OSHA, was --

7 CHIEF JUSTICE ROBERTS: Well, so
8 the -- so the agency is acting, you know, less
9 aggressively than it might otherwise do but in
10 an effective way to address the problem.

11 MR. KELLER: But, as soon as we get to
12 the point where we're talking about a less
13 aggressive way, there are other alternatives.
14 There could have been plans. There could have
15 been the man -- the non-mandatory guidance that
16 was then put into place. Jumping to a
17 vaccine-or-testing mandate when OSHA has never
18 exercised that power is --

19 CHIEF JUSTICE ROBERTS: Well, it is a
20 pressing -- there is some pressing urgency to
21 addressing the problem and to have them sit
22 down and say, okay, what else could we do? We
23 have to have notice -- well, notice and
24 comment, which I guess -- are you insisting
25 that that be part of the process?

1 MR. KELLER: In this situation, yes.
2 I mean, you have the Postal Service and Amtrak
3 saying many employees will be -- will quit.
4 Here, there are reports --

5 CHIEF JUSTICE ROBERTS: Well, just
6 because --

7 MR. KELLER: -- and we have --

8 CHIEF JUSTICE ROBERTS: -- the post
9 office can't do it efficiently doesn't mean
10 that private industry can't.

11 MR. KELLER: But I think what this
12 shows is workplaces are different. And instead
13 of doing an economy-wide vaccine-or-testing
14 mandate for all purposes, OSHA needed to at
15 least consider, as it identified, there are
16 certain instances where healthcare workers and
17 otherwise -- in those industries where there is
18 a heightened risk, that's where there's a
19 workplace occupational --

20 JUSTICE BREYER: Well, it is -- it's
21 -- well, okay, I -- I want to ask a provisional
22 question. Are -- are you still really asking
23 this Court now today -- I mean, I assume your
24 arguments are -- you have good arguments in
25 your brief, and so does the government.

1 So I'll assume for the sake of
2 argument that they're both fairly good
3 arguments, okay?

4 MR. KELLER: Thank you.

5 JUSTICE BREYER: All right. Now
6 notice that's an assumption, right, but make
7 that assumption with me. Are you still asking
8 us to issue a stay and stop this from taking
9 effect, like issue a stay today or tomorrow or
10 Sunday or Monday or Tuesday?

11 I mean, the reason I ask that is there
12 are several elements, we have some discretion
13 there, and -- and you know it was brought up.

14 I mean, there -- there were
15 three-quarters of a million new cases
16 yesterday. New cases. Nearly three-quarters,
17 700-and-some-odd thousand, okay? That's 10
18 times as many as when OSHA put this rule in.

19 The hospitals are today, yesterday,
20 full, almost to the point of the maximum
21 they've ever been in this disease, okay?

22 And you heard references, studies, I
23 mean, they -- they vary, but some of them say
24 that the hospitalization is 90 percent or maybe
25 60 percent or maybe 80 percent, but a big

1 percent, filled up yesterday or the day before
2 with people who are not vaccinated, okay?

3 So that's -- we're talking about now.
4 And think of the stay requirements. It's both
5 a balance of harms, it's also public interest.
6 Can you ask us -- is that what you're doing
7 now, to say it's in the public interest in this
8 situation to stop this vaccination rule with
9 nearly a million people -- let me not
10 exaggerate -- nearly three-quarters of a
11 million people, new cases every day? I mean,
12 to me, I would find that unbelievable.

13 MR. KELLER: Justice Breyer, we are
14 asking for a stay before enforcement takes
15 effect Monday. And the reason for that is this
16 is an unprecedented agency action.

17 JUSTICE BREYER: Yeah, yeah --

18 MR. KELLER: We do not --

19 JUSTICE BREYER: -- I know you have
20 all good arguments that it isn't good. They
21 have arguments that it is good.

22 Okay. I'm asking you a different
23 question, and the question is: How can it
24 conceivably be in the public interest with
25 three-quarters of a million people yesterday,

1 goodness knows how many today -- I don't want
2 to repeat myself, but you have the
3 hospitalization figures growing by factors of
4 -- of 10, 10 times what it was.

5 You have hospitalization at the
6 record, near the record. You have -- you have
7 -- I mean, you understand the thing -- things
8 as well as I. And so I repeat my question, to
9 me, it's unbelievable, but I want to hear what
10 you say.

11 How can it be in the public interest,
12 which is a requirement, how can it be a balance
13 of harms in this case, assuming the arguments
14 aren't off the wall on the government's side,
15 and believe me, they're not. Okay, that's what
16 I want to hear the answer to.

17 MR. KELLER: Justice Breyer, states
18 can act, private businesses have acted on
19 historic levels. This is going to cause a
20 massive economic shift in the country, billions
21 upon billions of non-recoverable costs.
22 Testing also is not frequently available. This
23 is in our appendix at page 374.

24 Among those employers who have
25 attempted to do so, only 28 percent are able to

1 find adequate providers to ensure that weekly
2 testing is available for the employees.

3 If Congress intended to give an
4 occupational health agency the power to mandate
5 vaccines across the country, it needed to do so
6 clearly. States can do it. Businesses have
7 done it and are able to do it.

8 The question is not what is this
9 country going to do about COVID. It's who gets
10 to decide that.

11 JUSTICE KAGAN: Well, who does get --

12 JUSTICE ALITO: And, Mr. Keller --

13 CHIEF JUSTICE ROBERTS: Maybe, at this
14 point, we can go justice by justice.

15 Justice Thomas, anything further?

16 JUSTICE THOMAS: Not for me.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 JUSTICE GORSUCH: Oh. I do have a
20 couple of questions, Mr. Keller.

21 First, the government says that the
22 major questions doctrine and the federalism
23 canon, for example, don't apply to this Court's
24 consideration of this case or any other unless
25 the statute before us is first found to be

1 ambiguous.

2 What's your understanding?

3 MR. KELLER: Well, two points.

4 If you need to even reach the question
5 of whether there's ambiguity -- and we think
6 the term "necessary" is clear in context, it
7 has to mean indispensable or essential -- that
8 would be a term where potentially the
9 government in their interpretation would reach
10 ambiguity.

11 But, regardless, the major questions
12 doctrine is also in service of avoiding
13 non-delegation concerns, and the non-delegation
14 concerns that this Court recognized in
15 Industrial Union and citing Sharepoint --

16 JUSTICE GORSUCH: I -- I -- I'm -- I'm
17 sorry to interrupt you, but that might -- that
18 wasn't quite my question. I apologize if I
19 didn't make it clear enough.

20 But the government says that we only
21 consult those doctrines, the federalism canon
22 and the major questions doctrine -- I think the
23 Court understands what they are but only
24 consults them after finding a statutory
25 ambiguity. Do you disagree?

1 MR. KELLER: I disagree in that the
2 major questions doctrine is also a -- a -- a
3 doctrine that would avoid non-delegation
4 concerns. So even if there were a clear
5 statutory term, non-delegation concerns and how
6 to interpret that statute would factor in.
7 Regardless, I think the term "necessary" here,
8 there's plenty of room to implement the major
9 questions doctrine there, in addition to all of
10 the workplace-tethered language in the plain
11 text and statutory context.

12 JUSTICE GORSUCH: And then, secondly,
13 I would like to understand your argument and
14 your colleague's argument from Ohio, I believe
15 it is, why the Court should enter a stay
16 immediately. I -- you've asked for immediate
17 relief. Why should the Court grant immediate
18 relief?

19 MR. KELLER: The short version is, as
20 soon as businesses have to put out their plans
21 and this takes effect, workers will quit. That
22 itself will be a permanent worker displacement
23 that will ripple through the national economy.

24 So we can talk about the billions in
25 non-recoverable costs that the government even

1 concedes, and we can talk about the lost
2 profits and lost goodwill and lost business
3 reputation, and we can talk about the
4 businesses that are going to be put out of
5 business. Our appendix at pages 375 to 80
6 quotes many businesses saying this would be
7 catastrophic, it would bankrupt our -- our
8 company, it would be the most devastating event
9 our company has ever experienced.

10 That's why we're here. We're asking
11 for an extraordinary stay. We understand the
12 gravity of the situation. But, in balancing
13 the sheer size and scope of this emergency
14 power that is supposed to be exercised
15 delicately and the national economic
16 implications of this when states and businesses
17 can and have acted, we are entitled to a stay
18 in this posture.

19 CHIEF JUSTICE ROBERTS: Justice Alito?
20 Sorry to have gone out of order.

21 JUSTICE ALITO: No, no, fine.

22 Mr. Keller, I just want to make sure I
23 understand what we should focus on here. Is
24 the question whether this ETS is necessary to
25 protect the health of the general public, or is

1 it whether it is necessary to protect just
2 employees and not even all employees but only
3 unvaccinated employees, people who have chosen
4 independently not to be vaccinated and do not
5 want to be vaccinated? Is that the proper
6 focus?

7 MR. KELLER: Correct, the latter,
8 Justice Alito. As OSHA has said, the grave
9 danger here is to the unvaccinated worker who
10 is exposed to COVID.

11 JUSTICE ALITO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor.

14 JUSTICE SOTOMAYOR: Yes, counsel. I
15 -- I quibble with that in part. The
16 unvaccinated worker affects other unvaccinated
17 workers but affects vaccinated workers. We
18 have proof of that with Omicron. And it's not
19 just death, but there is illness, and for many
20 with preexisting conditions or immunological
21 problems, there are severe consequences even
22 when vaccinated. So I think the grave danger
23 is to both.

24 But, Mr. Fletcher, are you -- you seem
25 to be importing into "necessary" a concept of

1 strict scrutiny. Am I correct?

2 MR. KELLER: No, Justice Sotomayor.
3 The "necessary" analysis does have to account
4 for alternatives, but we're not asking anything
5 close to a least restrictive means analysis.
6 What we're saying is the agency --

7 JUSTICE SOTOMAYOR: All right. So, if
8 you're not, I know that your experts are
9 predicting catastrophes, but they've done --
10 experts opposed to OSHA regulations have done
11 the same for decades, and the catastrophes have
12 failed to happen. And there are exemptions.
13 The Post Office -- the -- the Postal Service is
14 looking for them -- is looking at one of them.
15 I'm sorry, OSHA is looking at one from -- from
16 the Postal Service, and there are probably
17 other private and public entities who can seek
18 exemptions as well.

19 But putting all of that aside, who
20 makes that judgment about the seriousness of
21 the effect? I always thought it was the
22 agency. It's not judges. And it's not experts
23 because experts have conflicting opinions.

24 I always thought that all we had to
25 look at was whether an agency had substantial

1 evidence before it to conclude that all of the
2 economic ramifications that you're speaking
3 about -- and this is what I think they found in
4 Earl Rebone. Where am I wrong that that's an
5 agency judgment? There is certainly
6 substantial evidence to -- to support their
7 judgment. It's a very huge record they
8 compiled. They looked at a massive amount of
9 data across many, many industries and in many,
10 many different states. Please tell me why, if
11 we're going to issue a temporary stay -- and I
12 think this was Justice Breyer's question -- we
13 would have to accept your version of the facts
14 as opposed to the agency's? Aren't we supposed
15 to accept the agency's?

16 MR. KELLER: I think even if you
17 accept the agency's facts, there are now, as
18 Your Honor just mentioned, CDC guidance
19 contradicting foundational assumptions of this
20 ETS. That's in our reply brief at page 7, and
21 Your Honor just mentioned that.

22 But, regard -- regardless, even OSHA
23 has said that 1 to 3 percent of employees will
24 quit. That is significant. Our declarations
25 at Appendix 308, 316, 320 --

1 JUSTICE SOTOMAYOR: Counsel, yes, that
2 may be true. But we are now having deaths at
3 an unprecedented amount. Catching COVID keeps
4 people out of the workplace for extraordinary
5 periods of time. And there have been proof in
6 certain industries, like the medical industry,
7 that when vaccines are mandated -- and there's
8 no mandate here for a vaccine. There is a
9 masking mandate, no different than there is
10 when we tell people that if there are sparks
11 flying in the workplace, wear -- you have --
12 workers have to be provided -- have to wear a
13 mask. So that's no different in my mind than
14 this.

15 So this is not a vaccine mandate.
16 There are costs and deaths and other things
17 countervailing to the fact that there might be
18 1 to 3 percent of workers who leave.

19 MR. KELLER: And, here, vaccines have
20 been made available. I also think there's a
21 textual clue within the OSH Act at 29 U.S.C.
22 655 that --

23 JUSTICE SOTOMAYOR: You forget that
24 there are certain states now that are stopping
25 employers from requiring vaccines. There are

1 certain states stopping employers from
2 requiring masks. Why shouldn't the federal
3 government, which it has already decided in
4 OSHA, to give -- Congress has decided to give
5 OSHA the power to regulate workplace safety,
6 have a national rule that will protect workers?

7 MR. KELLER: Congress would have to
8 clearly state in a statute if it wanted to give
9 an occupational health agency the power to
10 require employees to get certain medical
11 treatment. It's one thing to say --

12 JUSTICE SOTOMAYOR: There's no
13 requirement here. It's not a vaccine mandate.

14 MR. KELLER: Well --

15 JUSTICE SOTOMAYOR: It's something
16 totally different.

17 MR. KELLER: -- it --

18 JUSTICE SOTOMAYOR: And I don't know
19 how much clearer than 651 Congress -- Congress
20 could have been. It charges OSHA with
21 developing innovative methods, techniques, and
22 approaches to dealing with occupational safety
23 -- occupational safety and health issues.

24 I don't know how much clearer you can
25 be, if you're Congress, to tell an agency in an

1 emergency do what's necessary. I don't think
2 Congress can do it. Do you?

3 MR. KELLER: If Congress was going to
4 give an occupational health agency this type of
5 power to essentially regulate directly the
6 employee, rather than telling employers these
7 are the types of things that you would want to
8 do within your workplace, it would have had to
9 provide that clearly. And my understanding was
10 --

11 JUSTICE SOTOMAYOR: So what's the
12 difference between this and telling employers,
13 where sparks are flying in the workplace, your
14 workers have to be -- wear a mask?

15 MR. KELLER: When sparks are flying in
16 the workplace, that's presumably because
17 there's a machine that's unique to that
18 workplace. That is the --

19 JUSTICE SOTOMAYOR: Why is the human
20 being not like a machine if it's spewing a
21 virus, blood-borne viruses? Are you
22 questioning Congress's power or desire that
23 OSHA do this? It already in 1991 told OSHA to
24 issue regulations with respect to Hep C and B.

25 MR. KELLER: Justice Sotomayor, I

1 think that exactly proves our point, that
2 Congress knows how to enact a statute when it
3 wants to give OSHA power --

4 JUSTICE SOTOMAYOR: It didn't enact a
5 statute. OSHA proposed regulations, it didn't
6 act fast enough, and Congress told it to act
7 faster.

8 MR. KELLER: And --

9 JUSTICE SOTOMAYOR: So it wasn't
10 Congress who proposed it. It wasn't Congress
11 who devised it. Congress gave OSHA the
12 responsibility to do these things, and Congress
13 was saying get to it.

14 MR. KELLER: And what Congress said in
15 there was not you now have statutory authority
16 to regulate all communicable diseases. It was
17 blood-borne pathogens, and even that rule did
18 not mandate vaccines or widespread testing.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Mr. Keller, your --
21 your very last comment in your first part of
22 your argument I want to come back to because
23 your very last sentence, you said the question
24 is, who decides? And I think that that's
25 right. I think that that is the question.

1 Respectfully, I -- I think it has a
2 different answer than the one that you give, so
3 I'll just sort of put a different version of it
4 to you, which is, you know, you're -- I'm sure
5 you're right that there are all kinds of public
6 health and economic tradeoffs that have to be
7 made in a policy like this, all kinds of
8 judgments on the public health side, on the
9 economic side, how those two things ought to be
10 balanced against each other.

11 So who decides? Should it be the
12 agency full of expert policymakers and
13 completely politically accountable through the
14 President? This is not the kind of policy in
15 which there's no political accountability. If
16 people like this policy, they'll go to the
17 polls and vote it that way. If people don't
18 like it, they'll vote that way.

19 This is a publicly -- a politically
20 accountable policy. It also has the virtue of
21 expertise. So, on the one hand, the agency
22 with their political leadership can decide.
23 Or, on the other hand, courts can decide.
24 Courts are not politically accountable. Courts
25 have not been elected. Courts have no

1 epidemiological expertise.

2 Why in the world would courts decide
3 this question?

4 MR. KELLER: Congress and states and
5 governors wielding emergency power are the ones
6 that have the power -- and we acknowledge
7 that -- over vaccines. The idea that OSHA
8 would be the agency in the federal government
9 that's not even under the Department of Health
10 and Human Services, that does not have
11 expertise over communicable diseases like the
12 FDA or CDC maybe, that would just be a very odd
13 place for Congress to large -- to lodge such a
14 sweeping power over the American people.

15 JUSTICE KAGAN: Well, OSHA has a lot
16 of expertise about workforces and about the
17 dangers that workforces can confront individual
18 employees with. And I'm sure OSHA also talked
19 to other agencies within the federal government
20 to consider public health issues and brought
21 that knowledge to bear as well with its
22 knowledge of -- of how workplaces function and
23 -- and, again, came out with a -- a
24 well-supported policy that has political
25 leadership behind it and all the political

1 accountability that one could wish for.

2 And why is it that courts would
3 displace that judgment and say it is up to us
4 to decide about vaccination policy in the
5 employment settings of this country?

6 MR. KELLER: Well, first of all, what
7 OSHA did here was not an industry-by-industry
8 analysis. I mean, the line it drew, for
9 instance, with the 100 or more employee lines,
10 they said they were doing that because they
11 thought the larger companies were the ones that
12 had the administrative capacity to do it. It
13 wasn't because they were denser working
14 environments. You could have a company with a
15 hundred employees and every single person is
16 working somewhere else.

17 Even the narrow exception that they
18 have raised, even they say that 9 percent of
19 landscapers and 5 percent of highway workers
20 are the only ones that would qualify for their
21 exclusively working outside exemption. So even
22 occupations in which you would think someone is
23 almost exclusively working outside, they are
24 still covered by this ETS.

25 It's those types of internally

1 inconsistent positions that aren't taking
2 account of the full problem that could have
3 been explained and should have been explained.

4 JUSTICE KAGAN: Thank you, Mr. Keller.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: I want to follow
8 up on Justice Kagan's who decides question
9 because I do think that gets to the -- the
10 heart of this.

11 You're relying on the major questions
12 canon in saying that when an agency wants to
13 issue a major rule that resolves a major
14 question, it can't rely on statutory language
15 that is cryptic, vague, oblique, ambiguous.

16 But the critique of -- of that canon
17 and the difficulty in applying it is figuring
18 out when something is major enough. We've
19 applied it five or six times in the last 40
20 years, and you know the cases, and they're
21 important, and we'll talk about them, I'm sure,
22 as the argument goes on.

23 But how -- how -- what should we look
24 at to say this one is the kind of rule that
25 rises to the level of the benzene rule or the

1 tobacco rule that we found to be major?

2 What -- what should we look at?

3 MR. KELLER: So Alabama realtors just
4 said the sheer size and scope. Size would
5 account for the overall economic impact. This
6 covers 1.8 million establishments. The number
7 of people affected would be another factor.
8 This covers 84 million or two-thirds of the
9 private workforce. The amount of money, King
10 versus Burwell said billions in cost, and,
11 here, we have that even conceded by OSHA.

12 The scope also. All of the 10 prior
13 ETSs that OSHA has done, none of them have
14 mandated vaccines. None of them have mandated
15 widespread testing. Only one in June even
16 dealt with COVID. The rest were all workplace
17 toxins, and most of those challenges were
18 upheld -- or, sorry, most of those challenges
19 were vindicated by the courts.

20 And so the scope of what the agency
21 has done before, in addition to the widespread
22 effects, those would be the factors that you'd
23 analyze.

24 Also, is this a profound and earnest
25 debate over a question of vast politically --

1 vast political and economic significance? I
2 don't at this point believe that the federal
3 government is contesting that this absolutely
4 satisfies that.

5 JUSTICE KAVANAUGH: And one follow-up
6 question. Suppose it is major enough, so
7 accept that position for the sake of this
8 question, suppose the statutory language is
9 general, broad, but doesn't speak specifically
10 to the issue in question, but it is general and
11 broad language.

12 How do we sort out -- so you don't
13 necessarily say the language is ambiguous. But
14 it also doesn't speak specifically to the
15 issue. How -- how would you suggest we sort
16 out that kind of question? I realize you're
17 going to say this language is different, but
18 how would you sort out that kind of question?

19 MR. KELLER: You look at the plain
20 text. From *Brown & Williamson*, we know you'd
21 also look at the statutory context, and I also
22 think the statutory context here is incredibly
23 important.

24 When you have the distinction between
25 the emergency power and the regular power --

1 this was the dialogue earlier with Justice
2 Thomas about necessary versus reasonably
3 necessary or appropriate -- all of those
4 textual clues, where powers have been lodged
5 within the federal government, the fact that
6 this is within the Department of Labor rather
7 than Department of Human and Health -- Health
8 and Human Services, also King versus Burwell
9 too on, is this the agency that has expertise
10 over communicable diseases? No, it's not.

11 JUSTICE KAVANAUGH: Do you think the
12 agency could do this under its general power
13 then?

14 MR. KELLER: No, I do not think that
15 the agency could do an economy-wide
16 vaccine-or-testing mandate across the entire
17 economy. It has never done that even through
18 its regular power. It didn't do that in June
19 in an ETS targeting healthcare workers,
20 arguably the most heightened high-risk
21 workplace.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: Mr. Keller, I want

1 to return to the discussion you were having
2 with both the Chief Justice and Justice Kagan
3 earlier about whether the vaccine-or-test
4 requirement addresses -- is necessary to
5 address a grave danger in the workplace.

6 I think you would be hard pressed to
7 contest the Chief's point that there are some
8 workplaces in which the danger to employees is
9 different than that that they face out in the
10 world. A meat-packing plant or a healthcare --
11 the dentist.

12 And I think what you're saying --
13 well, I think this is what you're saying and I
14 want to be sure that I understand it, that I'm
15 correct. I think what you're saying is that
16 even if there are some industries or some
17 people who would face a great risk and this
18 might be necessary to address that risk, so, in
19 other words, if OSHA had adopted a more
20 targeted rule, you might not be contesting that
21 or you would not be contesting that, that the
22 problem here is its scope and that there's no
23 differentiation between the risk faced by
24 unvaccinated 22-year-olds and unvaccinated
25 60-year-olds or industries, you were just

1 talking about landscapers and people who work
2 primarily outdoors, those, and workers who work
3 in an inside environment all day long.

4 So is that the distinction that you're
5 making? You're not disputing what Justice
6 Kagan said, that, you know, this is a grave
7 danger and that in some circumstances, this
8 rule might be necessary, but just the scope of
9 it makes it different?

10 MR. KELLER: That's right, Justice
11 Barrett. But -- but I just want to be very
12 clear about this. Wherever that line is, this
13 ETS is so far beyond that line. Congress
14 identified and even OSHA identified, for
15 instance, certain healthcare scenarios. For
16 instance, you know, if you're treating COVID
17 patients or you're a scientist in a laboratory
18 handling COVID samples and researching them, of
19 course, that's going to be a very different
20 case.

21 But, here, what OSHA did was
22 economy-wide. It said it --

23 JUSTICE BARRETT: Well, I understand
24 that. And you're saying that that's the
25 problem. You're not contesting that if we were

1 talking about healthcare workers or a
2 meat-packing plant, you're not contesting that
3 OSHA could rely on its emergency power to
4 impose this kind of requirement in that
5 context.

6 MR. KELLER: That's right. I would
7 still want to know what their explanation was
8 --

9 JUSTICE BARRETT: Sure.

10 MR. KELLER: -- and all of the
11 substantial evidence, but, yeah, of course,
12 that's a very different case. And I know
13 that's always not a satisfactory answer. But,
14 here, this ETS is so far beyond healthcare
15 workers and what Congress identified in the
16 rescue plan as truly high-risk workplaces.

17 JUSTICE BARRETT: Right. So you're
18 saying that when we take the definition of
19 "necessary," particularly when contrasted with
20 "reasonably necessary" and the general grant of
21 authority, that it means something more and
22 that when we're looking at grave danger, there
23 had to be a more targeted industry-by-industry
24 analysis?

25 MR. KELLER: Yes.

1 JUSTICE BARRETT: Okay. And a
2 follow-up. Would you be here making these same
3 arguments if this were just a masking and
4 testing requirement and not the vaccine portion
5 of it?

6 MR. KELLER: Yes, I think that
7 mandatory testing is still a mandatory medical
8 procedure. OSHA has never, even in a regular
9 rule, done a blanket, widespread testing regime
10 over 84 million Americans.

11 JUSTICE BARRETT: What if it was just
12 masking?

13 MR. KELLER: I think we -- I don't
14 think OSHA has the ability to set by emergency
15 rule nationwide COVID policy. You know, the
16 more that we back out of this and the more we
17 say, well, if it's not an emergency rule or if
18 it's targeted to a particular workplace, you
19 know, I think there can be debates about that.
20 But, as long as they're trying to set a
21 blanket-wide -- economy-wide policy by an
22 emergency rule, OSHA does not have that power.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Flowers, I don't quite know where
2 to look, but are you still on the line?

3 MR. FLOWERS: I am, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: Thank you.

5 You may proceed.

6 ORAL ARGUMENT OF BENJAMIN M. FLOWERS
7 ON BEHALF OF THE APPLICANTS IN NO. 21A247

8 MR. FLOWERS: Mr. Chief Justice, and
9 may it please the Court:

10 OSHA typically identifies a workplace
11 danger and then regulates it. But, here, the
12 President decided to regulate a danger and then
13 told OSHA to find a work-related basis for
14 doing so. This resulted in the vaccine
15 mandate, a blunderbuss rule, nationwide in
16 scope, that requires the same thing of all
17 covered employers, regardless of the other
18 steps they've taken to protect employees,
19 regardless of the nature of their workplaces,
20 regardless of their employees' risk factors,
21 and regardless of local conditions that state
22 and local officials are far better positioned
23 to understand and accommodate.

24 So sweeping a rule is not necessary to
25 protect employees from a grave danger as the

1 emergency provision requires. And I want to be
2 clear that states share OSHA's desire to bring
3 this pandemic to a close, but the agency cannot
4 pursue that laudable goal unlawfully.

5 I welcome your questions.

6 JUSTICE THOMAS: So you're saying,
7 Mr. Flowers, that the first step in OSHA's
8 regulation is to identify the workforce, the
9 problem in that workforce, and then regulate
10 that?

11 MR. FLOWERS: That is typically how
12 OSHA proceeds. I don't know that there's a
13 requirement that says they must do that, but I
14 think part of the problems we're seeing with
15 this rule is it's not truly intended to
16 regulate a workplace danger; it's -- it's --
17 it's a danger that we all face simply as a
18 matter of waking up in the morning.

19 JUSTICE THOMAS: Well, but --

20 MR. FLOWERS: And I -- and I -- I'm
21 sorry.

22 JUSTICE THOMAS: I'm sorry to
23 interrupt you, but I -- the other part of my
24 question is, can a danger be so acute in the
25 society that it is brought into the workforce

1 and could hence be regulated by its mere
2 presence there and by the fact that it is so
3 acute?

4 MR. FLOWERS: It -- I think what they
5 need -- let -- all right. Let me answer this
6 in two steps. I can first define what we mean
7 by "work-related danger" and then talk about
8 how that applies here, and I think that'll get
9 to your question.

10 So, in terms of what we mean by
11 "work-related danger," I think one way to think
12 about that is, has the employer done or failed
13 to do something that creates a risk the
14 employee faces? And then the problem with
15 applying that here is, if you look at their own
16 explanation for what the risk is -- this is at
17 61411 of the Federal Register -- they say the
18 reason there's a risk in every workplace is you
19 interact, you come into contact with people at
20 the workplace.

21 When you define the risk that broadly,
22 that is not something that's arising out of the
23 workplace. That's a risk we face when we wake
24 up, when we're with our families, when we stop
25 to get coffee on the way to work, at work, when

1 we go to lunch, and in the evening if we go to
2 a sporting event or a concert.

3 So this kind of goes to Justice
4 Barrett's question, I believe, that if they
5 were to focus on a risk arising out of a -- a
6 particular aspect of the workplace that creates
7 a -- a risk of a different nature, like being
8 packed closely together in a meat-packing
9 plant, that could fairly be described as a
10 work-related danger.

11 JUSTICE KAGAN: Mr. Flowers --

12 MR. FLOWERS: But this cannot.

13 JUSTICE KAGAN: Sorry. Sorry to
14 interrupt. Do you know of any workplaces that
15 have not fundamentally transformed themselves
16 in the last two years? I mean, maybe like --

17 MR. FLOWERS: I --

18 JUSTICE KAGAN: -- landscapers, they
19 work outside. But, I mean, this idea that
20 there are only a few select workplaces that are
21 affected by COVID, I would have thought every
22 workplace has been affected by COVID. Every
23 workplace sent their workers home. Every
24 workplace had to make adjustments to the way
25 they do their business.

1 I'm trying to figure out, like, why
2 this is a blunderbuss approach when everybody
3 knows from living their normal lives that every
4 workplace has been affected by this, save for,
5 you know, a few here and there.

6 MR. FLOWERS: So the way I would
7 answer that is to say just about every
8 workplace has been affected, but that doesn't
9 mean the work is arising from the workplace.
10 To take another example, if we look at
11 terrorism, there's some risk of terrorism that
12 we face when we wake up in the morning. We
13 face it at home, in public, and at work. And
14 we adjusted to that after 9/11. If you see
15 something, say something. Ideas like that.

16 Now the fact that you face that work
17 -- that risk when you go to work doesn't make
18 it a workplace risk. It means it's an
19 ever-present risk.

20 JUSTICE KAGAN: Well, why -- why not?
21 I mean, this is a -- the combination of lots of
22 people all going into one indoor space and
23 having to deal with each other for eight hours,
24 10 hours, however many hours a day, in those
25 settings, the combination of the environment

1 and the people that are in that environment
2 create a risk, I would think. I mean, tell me
3 if I'm wrong about this. I would think that
4 workplace risk is about the greatest, least
5 controllable risk with respect to COVID that
6 any person has.

7 You know, everything else a person can
8 control. You can go to the baseball game or
9 not go to the baseball game. You can decide
10 who to go to the baseball game with. But you
11 can't do any of that in workplaces. You have
12 to be there. You have to be there for eight
13 hours a day. You have to be there in the exact
14 environment that the workplace is set up with.
15 And you have to be there with a bunch of people
16 you don't know and who might be completely
17 irresponsible.

18 Where else do people have a greater
19 risk than at the workplace?

20 MR. FLOWERS: Well, I think one thing,
21 with their families, which they have to spend
22 even more time with, especially if they have
23 children going to school and things of that
24 nature. But, in response to does the risk -- I
25 mean, of course, the risk arises at the

1 workplace, but it's important to focus on the
2 risk they're talking about. They're not
3 talking about jobs where people do congregate
4 in settings like that that changes the nature
5 of the risk.

6 They say every single workplace where
7 people come inside for even a little bit is
8 covered. And so they've defined the risk to
9 mean simple human contact. And it could be no
10 more contact than you have at the grocery store
11 or when you drop your kids off at school or
12 when you go to a -- a friend's house.

13 JUSTICE KAGAN: Well, Mr. Flowers, in
14 fact --

15 MR. FLOWERS: And that's the problem.
16 We're not --

17 JUSTICE KAGAN: -- in fact, what --
18 what this rule does is it says we're not going
19 to regulate some people. People who work
20 outdoors, forget about it. People who work
21 alone, we don't have to worry about them. But
22 people who work in the way that lots and lots
23 and lots of people work, which is surrounded by
24 other people in indoor spaces, you know, with
25 -- without their own offices, you know, with

1 cubicles or with -- in -- in -- in other mass
2 settings, you know, that's where the greatest
3 risk is. Not just that's where the risk of
4 ordinary life is. That is, in fact, where the
5 greatest risk is.

6 MR. FLOWERS: And if they had taken
7 that approach, they would have a much better
8 argument, but they don't because there are many
9 jobs here, including, for example, landscapers,
10 who may spend a little bit of time inside, five
11 minutes a day, to get the keys or punch their
12 time card --

13 JUSTICE BREYER: Well, is this right?
14 Is this right?

15 MR. FLOWERS: -- but who are covered
16 --

17 JUSTICE BREYER: What this says, what
18 I -- I mean, my law clerks have been busy
19 beavers on this case, I promise you, and what
20 they have on this issue is that there are
21 exceptions here. There aren't exceptions
22 business by business, but there are exceptions,
23 those who work from home, alone, or
24 substantially outdoors, or those who can show
25 that their conditions, practices, means,

1 methods, operations, or processes make their
2 workplaces as safe and healthful as the ETA --
3 as the ETS can obtain a variance, okay?

4 So they did make some distinctions.

5 MR. FLOWERS: Well --

6 JUSTICE BREYER: Not industry by
7 industry, but my question really is, that I'd
8 like to turn this to, is a stay. You heard
9 what I asked. I mean, you know, 750 million
10 new cases yesterday or close to that is a lot.
11 I don't mean to be facetious.

12 But that -- that -- that's why I said
13 I would find it, you know, unbelievable that it
14 could be in the public interest to suddenly
15 stop these vaccinations. And the only answer
16 that was given was a lot of people will quit.

17 Well, OSHA considered that. My
18 wonderful law clerk has 61,475, 63,422, 61,466,
19 61,474 and 475, those are pages. I don't think
20 you should read all 61,000, but, nonetheless,
21 there are at least five or 10 pages where they
22 went into this. And they said, in our view,
23 hmm, yeah, that's right, some people may quit,
24 maybe 3 percent. But more may quit when they
25 discover they have to work together with

1 unvaccinated others because that means they may
2 get the disease. Okay?

3 And more will quit because they'll be
4 -- maybe die or maybe they'll be in the
5 hospital or maybe they'll be sick and have to
6 stay home for two weeks. So they did the pros
7 and cons.

8 So I'd like to take Justice Kagan's
9 questions, which I think I share on the merits,
10 and just ask you, are you asking us both still
11 to issue a stay today, tomorrow, Monday, and
12 why, if you are?

13 MR. FLOWERS: We are seeking an
14 immediate -- thanks for the question. We are
15 seeking an immediate stay.

16 As an initial matter, I think Alabama
17 Realtors takes their argument about the
18 beneficial effects of their legal action off
19 the table. If the Court considers it illegal,
20 then it's not in the public interest and it's
21 proper to enjoin it.

22 Now the Court may say -- or stay it,
23 rather. The Court may decide that there's a
24 better way to unwind the illegal action than a
25 judicial action, and I think that's what

1 Justice Kavanaugh's concurrence in the first
2 Alabama Realtors got to.

3 But what it can't do is say we judge
4 that these are very -- in our view, this
5 illegal action will lead to good effects, and
6 so we will allow that to happen.

7 To Justice Kagan's question about the
8 who decides point, Congress tell -- told us who
9 decides at 2112 -- 28 USC 2112 says that courts
10 can issue stays, and the reason for that is
11 they recognize that this was without notice and
12 comment, and unless the courts could step in to
13 abate illegal actions, nobody would be able to
14 do so.

15 And that's especially important here,
16 where the -- the action they're, in our view,
17 mandating but at least strongly encouraging,
18 vaccination, cannot be undone.

19 Finally, the other point in the public
20 interest is that one awkwardness of this
21 situation is that the ETS is focused on what
22 was really a different pandemic. It's all
23 about the Delta variant. Now we are on to
24 Omicron.

25 And as my presence here as a triple

1 vaccinated individual by phone suggests and as
2 Justice Sotomayor suggests and as the amicus
3 brief from the American Commitment Foundation
4 shows, vaccines do not appear to be very
5 effective in stopping the spread or
6 transmission.

7 They are very effective in stopping
8 severe consequences, and that's why our states
9 strongly urge people to get them. But I think
10 that makes it very hard to look at the numbers
11 they give and assume that they still apply
12 today --

13 JUSTICE SOTOMAYOR: Counsel --

14 MR. FLOWERS: -- where things are
15 entirely different --

16 JUSTICE SOTOMAYOR: -- counsel, those
17 numbers show that Omicron is as deadly and
18 causes as much serious disease in the
19 unvaccinated as Delta did. The numbers, look
20 at the hospitalization rates that are going on.
21 We have more affected people in the country
22 today than we had a year ago in January.

23 We have hospitals that are almost at
24 full capacity with people severely ill on
25 ventilators. We have over 100,000 children,

1 which we've never had before, in -- in serious
2 condition and many on ventilators.

3 So saying it's a different variant
4 just underscores the fact that without the --
5 without some workplace rules with respect to
6 vaccines and encouraging vaccines, because this
7 is not a vaccine mandate, and -- and requiring
8 masking and requiring isolation of people who
9 have tested for COVID, because none of you have
10 addressed that part of the ETS is to say
11 something that should be self-evident to the
12 world but is not, which is, if you're sick, you
13 can't come into work. The workplace can't let
14 you into the workplace and you shouldn't go on
15 unmasked.

16 Tell me what's irrational about rules
17 of that nature when it is the workplace that
18 puts you into contact with people that will put
19 you at risk.

20 MR. FLOWERS: I don't know that we've
21 argued that the requirement is irrational.
22 And, indeed, there may be many states subject
23 to their own state laws that could impose this
24 themselves or private businesses. So we're not
25 making that there's still some --

1 JUSTICE SOTOMAYOR: So, if it's within
2 the police power to protect the health and
3 welfare of workers, you seem to be saying the
4 states can do it, but you're saying the federal
5 government can't even though it's facing the
6 same crisis in interstate commerce that states
7 are facing within their own borders.

8 I -- I'm not sure I understand the
9 distinction why the states would have the power
10 but the federal government wouldn't.

11 MR. FLOWERS: The federal government
12 has no police power if we're asking about that.

13 JUSTICE SOTOMAYOR: Oh, it does have
14 power with respect to protecting the health and
15 safety of workers. We have -- we have --
16 accept the constitutionality of OSHA.

17 MR. FLOWERS: Yes. I took you to be
18 asking if they had a police power to protect
19 public health. They -- they absolutely have
20 the --

21 JUSTICE SOTOMAYOR: No, they have a
22 police power to protect workers.

23 MR. FLOWERS: I would not call it a
24 police power. I think the Commerce Clause
25 power allows them to address health -- sorry,

1 is there a question?

2 CHIEF JUSTICE ROBERTS: No. But it's

3 --

4 MR. FLOWERS: It allows them to
5 address health in the context of the workplace.

6 JUSTICE SOTOMAYOR: Exactly.

7 CHIEF JUSTICE ROBERTS: It's a good
8 time to move to our sequential questioning.

9 Justice Thomas?

10 JUSTICE THOMAS: Mr. Flowers, there's
11 been some talk -- suggestion or at least it
12 seems to be implied that the vaccinations are
13 efficacious in preventing some degree of
14 infection to others.

15 Could you talk about that,
16 particularly as I remember in the filings that
17 the 18 to -- that the younger workers, the
18 20-year-olds who are unvaccinated are actually
19 safer than the older workers who are
20 vaccinated. So there are obviously some
21 differences.

22 Would you just talk about how
23 efficacious the vaccine is in the workplace?

24 MR. FLOWERS: So I want -- first, I
25 want to be very clear. We're -- we are strong

1 promoters of vaccination because they do stop
2 serious illness.

3 In terms of stopping infection and
4 transmission, at least with the current
5 variant, it appears the numbers suggest to be
6 far less effective. But -- but -- and then, in
7 terms of the comparison you were asking about,
8 I think it's hard to define "grave," what the
9 grave danger in the abstract. What we can at
10 least mandate or at least demand from the
11 agency is internal consistency.

12 And if you look at their own data, the
13 CDC data from the last week of October,
14 unvaccinated individuals 18 to 29 were as
15 likely to die as vaccinated 50 to 64-year-olds
16 and five times less likely to die than
17 vaccinated 65 and up. Hospitalization was --
18 between 18 and 49, that's not even just the
19 young -- was about as likely as vaccinated 65
20 and up.

21 If you look at the Griffin study that
22 they cite at 61,418 of the federal -- of the
23 Federal Register, unvaccinated and vaccinated
24 both had low risks of death and ICU.

25 As a societal matter, we are not

1 debating that COVID is serious, and it has
2 incredibly grave risk for some people, not for
3 everybody. And, finally, I'd point you to the
4 Scovy Study. Again, they cite that at 61,418
5 of the Federal Register. It showed that
6 vaccinated individuals who are 65 or older are
7 twice as likely to die as unvaccinated
8 individuals 18 to 49. And keep in mind that's
9 18 to 49, not 18 to 29. So that's -- it would
10 probably be even more skewed if you looked at
11 the -- the younger demographic.

12 JUSTICE THOMAS: Would the State of
13 Ohio have the -- in your -- I'm not saying this
14 would be an approach you would take, but we --
15 you had earlier a discussion about whether or
16 not the federal government had police powers in
17 the workforce, and you suggested that the state
18 has those police powers.

19 Could the State of Ohio do what you
20 say OSHA cannot do?

21 MR. FLOWERS: In terms of -- yes, my
22 position is the State of Ohio at least could
23 mandate vaccinations not only for workers but
24 for all individuals.

25 Now I think that's an important point

1 to stress is we're talking here as though OSHA
2 is the only entity that can regulate this, an
3 agency that no one thought had anything to do
4 with the pandemic until months, if not years,
5 into it.

6 But we have the states and we have
7 private businesses and they're not sitting on
8 their hands. And -- and individuals are doing
9 things to try and bring this pandemic to a
10 close or at least learn to live with it.
11 Indeed, this Court, without any requirement
12 from OSHA, has found ways to -- to safely
13 conduct business.

14 JUSTICE THOMAS: I think my point is
15 rather that there seemed to be -- seems to be a
16 suggestion that this is all or nothing, that
17 the other governmental bodies do not have
18 police powers to regulate certain activities.
19 And you've answered my question. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer?

22 JUSTICE BREYER: A quick question, I'm
23 just curious. I was searching for an example.
24 Universal risk inside and outside the
25 workplace, including the workplace, can OSHA

1 regulate it? Can OSHA regulate fire risks?

2 MR. FLOWERS: Yes. We don't draw the
3 distinction between in -- in the workplace and
4 out of work.

5 JUSTICE BREYER: Okay. If they can
6 regulate fire risks, then why can't they
7 regulate this risk?

8 MR. FLOWERS: Because the difference
9 with the fire is that there's something about
10 the workplace, for example, not providing
11 safety equipment to put out the -- put out the
12 fire.

13 JUSTICE BREYER: Well, people throw
14 matches.

15 MR. FLOWERS: They smoke.

16 JUSTICE BREYER: They smoke. Sometime
17 -- oh, they shouldn't, but they do. And -- and
18 -- or they throw a match or they -- you know, a
19 lot of causes, such as --

20 MR. FLOWERS: Right. That's right.

21 JUSTICE BREYER: -- fall --
22 crushing -- crushing people into -- not
23 crushing them. They come in the same room.
24 You understand the point. Okay. The
25 difference is?

1 MR. FLOWERS: I do.

2 JUSTICE BREYER: Say it again so I
3 catch it.

4 MR. FLOWERS: Sure. I want to be -- I
5 want to be very clear about this. We accept
6 the line that's been drawn for every important
7 industry that simply the fact that a risk
8 exists outside the workplace doesn't mean you
9 can't address it when it's inside the
10 workplace.

11 What we dispute is the idea that a
12 risk that is ever present in all places can be
13 regulated simply because it's also in the
14 workplace.

15 And so you can regulate -- to be
16 clear, OSHA could regulate COVID-19 in the
17 workplace when the employer does something like
18 packing individuals very closely together in a
19 poorly ventilated area that -- that -- that
20 enhances or changes the nature of the risk, I
21 should say. But that's not the risk they say
22 they're regulating. Again, 61,411 of the
23 Federal Register, they say the risk is you'll
24 come into contact with individuals.

25 And the risk of encountering an

1 individual is an ever-present risk we face at
2 home, at work, and everywhere else.

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 JUSTICE ALITO: I want to come back to
5 the question I asked Mr. Keller in light of all
6 that's been said this morning so far about
7 public health, about the value of vaccine to --
8 vaccines to the general public, because I want
9 to make sure I understand precisely what the
10 question is before us.

11 And what I took from Mr. Keller's
12 answer, which seems to be right, is that the
13 question is whether there is a grave danger for
14 unvaccinated workers, period.

15 What the Secretary said was "employees
16 who are unvaccinated are in grave danger from
17 SARS COVID virus, but employees who are fully
18 vaccinated are not." So the -- the purpose --
19 if this is to be sustained, it has to be on the
20 ground that it presents a grave danger to
21 unvaccinated workers who have chosen to be
22 unvaccinated.

23 That's my understanding of the issue,
24 but maybe I haven't understood it correctly.
25 Is that your understanding? And I'll ask the

1 Solicitor General the same question, or at
2 least I hope she will address it.

3 MR. FLOWERS: That is my
4 understanding. And I don't see how there could
5 be another understanding because the emergency
6 provision specifically says that such emergency
7 standard, meaning the precise one at issue,
8 must be necessary to protect employees from the
9 danger at issue. So the broad societal effects
10 are not -- are not at issue.

11 JUSTICE ALITO: And protection of
12 vaccinated employees, who may face some danger
13 of contracting the virus, was not the basis for
14 this rule, is that correct?

15 MR. FLOWERS: Correct. And I would go
16 further and say they cannot rely at all on the
17 risk to vaccinated workers because they
18 concluded -- this is 61,419 of the Federal
19 Register -- that no one who's vaccinated is --
20 is in grave danger.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel,
25 unvaccinated people you showed or you -- you

1 pointed to young people who had a different --
2 or had the same death rate as vaccinated older
3 people.

4 But the point is that it's not the
5 risk to the individual that's at question; it's
6 that risk plus the risk to others. And
7 unvaccinated people -- and the agency has shown
8 in its studies that unvaccinated people affect
9 other unvaccinated people. And they vary in
10 age and can be of ages and of conditions where
11 the effect will be serious, if not death. So
12 we're not talking -- I -- I -- I don't know how
13 comparing apples to oranges in terms of the
14 risk factors makes any sense.

15 But, secondly, if the grave risk is to
16 unvaccinated people, then how do we take that
17 out of the equation, that it's not the risk
18 just to them but the risk that they pose to
19 others, including unvaccinated people?

20 MR. FLOWERS: So I'll -- I'll answer
21 in two steps. On the apples to oranges, I
22 think it's vital because their -- they have to
23 be internally consistent. And their own logic
24 is that nobody who's vaccinated faces a grave
25 danger. So unvaccinated folks of certain ages

1 are at lower risk of death and even
2 hospitalization, that has -- that is relevant
3 to calculating --

4 JUSTICE SOTOMAYOR: But lower risk
5 doesn't --

6 MR. FLOWERS: -- the overall grave
7 danger.

8 JUSTICE SOTOMAYOR: -- lower risk
9 doesn't mean no risk. And lower risk can go
10 into the calculus of saying I -- we see -- and
11 that's what they said -- the risk to
12 unvaccinated people of all ages and all
13 conditions, and when you remain unmasked or
14 unvaccinated, you put yourself at risk, but you
15 put others.

16 MR. FLOWERS: Right.

17 JUSTICE SOTOMAYOR: Others,
18 unvaccinated people at risk and people who are
19 vaccinated. They may be at a lesser risk, but
20 the grave risk remains to people of all ages
21 and conditions that are unvaccinated.

22 MR. FLOWERS: Right, but -- but the
23 problem is they've defined numerical
24 probabilities that are equal to be grave in one
25 case and not grave in the other, and that is

1 the definition of irrational.

2 In terms of spread, their own ETS says
3 it's unclear the degree to which vaccinations
4 reduce transmission. They appear to have a
5 positive effect, and they appear, at least with
6 Delta and previous variants, to stop
7 contracting it in the first place. So, again,
8 if you look at the American Commitment
9 Foundation brief, it's highly doubtful that
10 that -- that the numbers are going to be
11 comparable when it comes to the Omicron
12 variant.

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

14 JUSTICE KAGAN: Mr. Flowers, just
15 continuing on that, if I understand your
16 answers to Justice Thomas and to Justice
17 Sotomayor, you basically said a couple things.
18 You said: Well, you know, we understand that
19 18- to 29-year-olds, even though they're not
20 going to die or wind up with very serious
21 injuries, that they can spread. You don't --
22 you don't doubt that, that those people spread
23 to other people who might be more vulnerable?
24 You don't doubt that, right?

25 MR. FLOWERS: That's right, but the

1 problem for -- for --

2 JUSTICE KAGAN: Okay. So just -- I --
3 I'm sorry to cut you off, but I just wanted to
4 state that as, like, the premise. And then the
5 question is: Well, you said, well, the agency
6 itself says that the danger is to other
7 unvaccinated people, older people,
8 immunocompromised people, whatever. And -- and
9 -- and you seem to be saying that because it's
10 to other unvaccinated people, kind of they
11 assumed the risk and the agency's power runs
12 out. Is that what you're saying?

13 Because I don't know about that kind
14 of doctrine in the OSH Act or any place else in
15 administrative law, that because you can say
16 that, you know, somebody would prefer not to be
17 regulated, the agency loses its power.

18 MR. FLOWERS: That's not -- that's not
19 quite the point we're making. It's -- one --
20 it goes to two points. The first is necessity.
21 So, if everyone who's vaccinated is not in
22 grave danger, then a narrower solution is, if
23 they think have the power to vaccinate, to
24 require the people in grave danger to be
25 vaccinated, and they are -- they are removed

1 from the grave danger and the other individuals
2 are -- are not affected. So I think that's the
3 key point there.

4 JUSTICE KAGAN: Okay. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Mr. Flowers, I'd
8 like to return to the question of -- of who
9 decides. And I think we've all kind of come to
10 the point where we all agree that states have
11 -- have a wide police power under our
12 constitutional system that Congress has to
13 regulate consistent with the Commerce Clause
14 and -- and make the major decisions while
15 agencies can do the work that Congress has
16 given them to do but not other kinds of work.
17 And the major questions doctrine kind of
18 regulates that interaction between Congress and
19 agencies.

20 So it's not that judges are supposed
21 to decide some question of public health. It's
22 about regulating the rules of the system to
23 ensure that the appropriate party does.

24 And so the question in my mind really
25 turns a lot on the major questions doctrine in

1 this case. Is this one that has been given to
2 the agencies to decide or one that Congress has
3 to make as a major question under our federal
4 system? And I haven't heard a lot of
5 discussion about that.

6 The Solicitor General says that the
7 major questions issue only comes into play when
8 a statute's ambiguous, and I'd like to give you
9 an opportunity to explain your view.

10 MR. FLOWERS: I -- I -- I think you
11 can view the major -- the major question
12 doctrine, the phrase is sometimes used in
13 different contexts, and sometimes it is used as
14 kind of an ambiguity clarifier, an elephants in
15 mouse holes point.

16 But another way to look at it is
17 something of a constitutional doubt canon where
18 we recognize that although our non-delegation
19 doctrine is not especially robust today, there
20 are limits on the amount of authority that
21 Congress can -- can give away.

22 And with respect to these major
23 questions that are going to affect people from
24 coast to coast and cost, you know, millions and
25 millions of dollars and potentially many jobs

1 and potentially infect -- affect public health,
2 we would expect Congress -- we would demand
3 Congress to at least speak clearly before we
4 will say an agency can exercise that power and
5 therefore before we're into the non-delegation
6 issue.

7 I -- I do want to stress
8 non-delegation. I mean, if they're right about
9 work-related danger, because I understand their
10 rule, it's any danger you could possibly face
11 at work. A grave danger is any danger that
12 could even conceivably result in death,
13 "necessary" means useful, and through a
14 temporary and emergency standard, you can
15 require permanent abatement.

16 If you put all that together, this is
17 among the broadest and most standardless
18 delegations of authority to an agency in the
19 United States Code.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh.

22 JUSTICE KAVANAUGH: Yeah, I want to
23 follow up on Justice Gorsuch's questions, which
24 I think are important, and also Justice Kagan's
25 questions about the policy arguments that are

1 present here, especially in an emergency
2 situation.

3 So, as I understand it, you're
4 invoking the major questions doctrine and your
5 statutory argument to say that based on the
6 Constitution's separation of powers, Congress
7 must act or the states must act and OSHA lacks
8 authority under the current statutes to do
9 this.

10 That's your basic pitch, I think.

11 MR. FLOWERS: I -- I think so as long
12 as "this" means the vaccine mandate. We're not
13 -- we're not disputing that they can regulate
14 COVID-19 to some degree.

15 JUSTICE KAVANAUGH: Okay. Yes, that's
16 what I meant by "this." I want to give you an
17 opportunity to explain the value of insisting
18 on that congressional action for something like
19 this at the federal level in an emergency
20 situation and explain why we shouldn't defer
21 more to the executive or defer to the executive
22 in what has been characterized, I think
23 appropriately, as -- as a crisis or an
24 emergency kind of situation.

25 What's the value of insisting on that

1 here?

2 MR. FLOWERS: Well, one -- one value
3 of it is that when there's an emergency, it's
4 especially important that it be a considered,
5 thoughtful process, and legislation is more
6 likely to yield that. And in an emergency,
7 you're more likely to get broad agreement on --
8 on certain principles that can be enacted
9 through Congress. And, indeed, Congress has
10 taken many steps to ensure that there are to
11 address COVID-19.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: No questions.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Prelogar.

19 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

20 ON BEHALF OF THE RESPONDENTS

21 GENERAL PRELOGAR: Mr. Chief Justice,
22 and may it please the Court:

23 COVID-19 is the deadliest pandemic in
24 American history and it poses a particularly
25 acute workplace danger. Workers are getting

1 sick and dying every day because of their
2 exposure to the virus at work.

3 OSHA amassed substantial evidence of
4 wide-sprayed -- widespread workplace outbreaks
5 across all industries. It studied the science
6 of how this virus is transmitted and found that
7 workers are exposed to danger when they're
8 inside together for as little as 15 minutes,
9 and OSHA considered the extensive evidence that
10 unvaccinated employees are at heightened risk
11 of contracting the virus, of transmitting it to
12 others and infecting their coworkers, and of
13 suffering the gravest consequences,
14 hospitalization and even death.

15 To protect against that grave danger,
16 the standard requires employers to adopt a
17 policy that unvaccinated employees either get
18 vaccinated or mask and test. Those are
19 commonplace and highly effective measures that
20 OSHA determined were essential to stopping the
21 spread of this dangerous disease at work.

22 The Applicants try to portray this
23 standard as unprecedented. But this lies in
24 the heartland of OSHA's regulatory authority.
25 Congress charged the agency with setting

1 nationwide standards to protect the health and
2 safety of employees throughout the nation, and
3 Congress specifically appropriated money to
4 OSHA to address COVID-19 in the workplace.

5 Nothing in the statute or the agency's
6 regulatory history bars the use of these
7 measures. Just the opposite.

8 Section 669(a)(5) of the OSH Act specifically
9 contemplates that immunization requirements can
10 be imposed under the Act, and OSHA has
11 previously protected workers with measures like
12 masking, testing, and encouraging vaccination.

13 OSHA had statutory authority to rely
14 on those measures here, which it found would
15 save 6,500 lives and prevent 250,000
16 hospitalizations in just six months.

17 As the preamble to the standard
18 explains, exposure to COVID-19 on the job is
19 the biggest threat to workers in OSHA's
20 history.

21 The Court should reject the argument
22 that the agency is powerless to address that
23 grave danger. I welcome the Court's questions.

24 JUSTICE THOMAS: General, the --
25 what's the -- the -- the problem you're getting

1 at? Is it the employer not providing -- making
2 sure that employees are vaccinated or masked,
3 or is it the employees who decline to be
4 vaccinated or masked?

5 GENERAL PRELOGAR: Well, it's the
6 grave danger to exposure to COVID-19 --

7 JUSTICE THOMAS: But who's --

8 GENERAL PRELOGAR: -- at work, Justice
9 Thomas.

10 JUSTICE THOMAS: -- who -- who is
11 trying -- who refuses to do that?

12 GENERAL PRELOGAR: Ultimately, what
13 the agency is doing with these standards is
14 requiring that either through a vaccination
15 requirement or through a masking-and-testing
16 policy that unvaccinated workers who stand the
17 highest chance of contracting the virus at
18 work, of infecting others at work, and then,
19 ultimately, if they get -- if they catch COVID
20 at work, of then suffering death possibly or
21 even hospitalization are protected in all of
22 those circumstances.

23 So I think what this standard does is
24 it regulates employers by requiring them to
25 adopt a policy that will directly target that

1 grave danger.

2 JUSTICE THOMAS: I -- I understand
3 that. But who is declining to do that? Is it
4 the employer or the employee?

5 GENERAL PRELOGAR: I think it can be
6 both. There are many employers around the
7 country that have voluntarily imposed these
8 kinds of requirements with their workers in
9 recognition that vaccination is the single most
10 effective way to protect workers in the
11 workplace or that have used masking and testing
12 requirements to the same end, so many employers
13 are doing it, but part of OSHA's function and
14 what Congress charged the agency with doing is
15 to look at those kinds of best practices and
16 impose them through standards to ensure that
17 workers, no matter what specific controls their
18 employers have in place, are maximally
19 protected.

20 JUSTICE THOMAS: One last question.
21 You make -- I think you put quite a bit of
22 weight on the acute crisis that we're in. But
23 do you -- would your argument also be -- would
24 your argument be the same for any infectious
25 disease that is taken into the workplace?

1 GENERAL PRELOGAR: No. I think that
2 with respect to other infectious diseases it
3 would be necessary for OSHA to develop the
4 record to demonstrate that the requisite risk
5 level that the statute requires --

6 JUSTICE THOMAS: But you could --

7 GENERAL PRELOGAR: -- is satisfied.

8 JUSTICE THOMAS: -- it's not that you
9 would do it, but could you do it?

10 GENERAL PRELOGAR: If there were, in
11 fact, a grave danger to employees posed by
12 another infectious disease, then, yes, we think
13 that Congress clearly contemplated that OSHA is
14 -- is obligated and charged with a
15 responsibility to protect workers.

16 JUSTICE THOMAS: Have you -- has OSHA
17 ever done that?

18 GENERAL PRELOGAR: OSHA has enacted
19 any number of standards --

20 JUSTICE THOMAS: Example?

21 GENERAL PRELOGAR: -- that address
22 those kinds of threats. For example, the
23 blood-borne pathogen standard that we have
24 pointed to before was intended to protect
25 employees from the risk of viruses that they

1 can contract through blood-borne transmission.

2 So it's not --

3 JUSTICE THOMAS: Is that in -- is that
4 in the general workplace or just in healthcare
5 sectors?

6 GENERAL PRELOGAR: That standard
7 applied anywhere where employees can
8 predictably encounter blood-borne pathogens.
9 So it wasn't just the healthcare context. It
10 can apply to flight attendants. It can apply
11 to janitors. It was a standard that directly
12 targeted the exposure wherever it exists, just
13 like this one does.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: General, you
16 said just a short while ago that this presented
17 -- COVID presented a grave danger to people in
18 the workplace. In a few minutes, we'll hear an
19 argument in the CMS case, and it will be that
20 it presents a grave danger in Medicare and
21 Medicaid facilities.

22 Not here, but in the lower courts, the
23 federal contractor mandate, the argument is
24 going to be it's a grave danger to federal
25 contractors.

1 Could you give me examples of some
2 federal agencies where you would be willing to
3 say COVID is not a grave danger in their -- in
4 that context?

5 GENERAL PRELOGAR: Well, Mr. Chief
6 Justice, I haven't, of course, surveyed the
7 landscape of all of the different authorities
8 that federal agencies can invoke. I -- I take
9 the point of the question --

10 CHIEF JUSTICE ROBERTS: Well, but you
11 represent them on a regular basis here, so you
12 have a pretty general idea of some other
13 examples of federal agencies.

14 And my point obviously is that I don't
15 think, as more and more mandates, more and more
16 agencies come into place, it's a little hard to
17 accept the idea that this is particularized to
18 this thing, that it's an OSHA regulation, that
19 it's a CMS regulation, that it's a federal
20 contractor regulation.

21 It seems to me that it's that the
22 government is trying to work across the
23 waterfront and it's just going agency by
24 agency. I mean, this has been referred to, the
25 approach, as a work-around, and I'm wondering

1 what it is you're trying to work around.

2 GENERAL PRELOGAR: What we're trying
3 to do here and what OSHA did was rely on its
4 express statutory authority to provide -- to
5 provide protection to America's workforce from
6 grave dangers like this one.

7 So I take the point and don't dispute
8 that COVID-19 is a danger in many contexts and
9 falls within the jurisdiction of other agencies
10 as well, but I think to suggest that because
11 this disease is so prevalent, because it
12 presents such a widespread harm, somehow OSHA
13 has less power to do anything about it with
14 respect to the --

15 CHIEF JUSTICE ROBERTS: No, it's not
16 so much that OSHA has less power. It's that
17 the idea that this is specific to particular
18 agencies really doesn't hold much water when
19 you're picking them off one by -- one by one.

20 I think maybe it should be analyzed
21 more broadly as this is, in effect, an effort
22 to cover the waterfront. I'm not saying it's a
23 bad thing.

24 But I don't know that we should try to
25 find, okay, what specific thing can we find to

1 say, oh, this is covered by OSHA? What
2 specific thing can we find to say that this is
3 covered by the hospitals? What specific thing
4 can we find to say, oh, no, we're doing this
5 because this is a federal contractor?

6 It seems to me that the more and more
7 mandates that pop up in different agencies,
8 it's fair -- I wonder if it's not fair for us
9 to look at the Court as a general exercise of
10 power by the federal government and then ask
11 the questions of, well, why doesn't Congress
12 have a say in this, and why don't the -- why
13 doesn't this be the primary responsibility of
14 the states?

15 GENERAL PRELOGAR: Congress absolutely
16 has a say in this, and it spoke here. It
17 passed the OSH Act and -- and promulgated
18 Section 655(c) specifically to empower OSHA to
19 take action to protect workers from grave
20 dangers from physically --

21 CHIEF JUSTICE ROBERTS: When did it --
22 when did it do that?

23 GENERAL PRELOGAR: The OSH Act was
24 enacted in 1970, I believe. And the agency, as
25 it explained in the preamble to this rule,

1 documented substantial evidence to show why
2 this constitutes a grave danger in the
3 workplace.

4 CHIEF JUSTICE ROBERTS: Well, I don't
5 think you can say that that specifically
6 addressed it -- addressed to this problem.

7 GENERAL PRELOGAR: Well, Mr. Chief
8 Justice, the Court obviously has a statute in
9 front of it that it needs to examine. I think
10 that there is no doubt that COVID-19
11 constitutes a physically hazardous agent within
12 the meaning of this provision. I think that
13 the immediacy and magnitude of harm here
14 clearly constitutes a grave danger.
15 Unvaccinated workers stand a 1-in-14 chance of
16 being hospitalized, a 1-in-200 chance of dying.
17 The country hasn't --

18 CHIEF JUSTICE ROBERTS: It sounds like
19 the sort of thing --

20 GENERAL PRELOGAR: -- seen numbers
21 like that --

22 CHIEF JUSTICE ROBERTS: -- it sounds
23 like the sort of thing that states will be
24 responding to or should be or -- and that
25 Congress should be responding to or should be,

1 rather than agency by agency, the federal
2 government, the executive branch, acting alone,
3 is responding to it. And we're supposed to
4 say, well, yes, this is a CMS problem; yes,
5 this is an OSHA problem; yes, this is a federal
6 contractor problem. The military is on its
7 own; they take orders.

8 But, again, I guess I'm just repeating
9 myself. It seems to me that we should be
10 looking at it as an across-the-board issue, as
11 opposed to let's see what OSHA looks like,
12 let's see what CMS looks like.

13 GENERAL PRELOGAR: Well, I think that
14 you --

15 JUSTICE SOTOMAYOR: General, this
16 is -- I'm sorry. Go ahead.

17 CHIEF JUSTICE ROBERTS: Go ahead.

18 GENERAL PRELOGAR: I was just going to
19 say, Mr. Chief Justice, that I think the Court,
20 in approaching issues of statutory
21 interpretation and looking at agencies'
22 regulatory authority, has always started with
23 the text that Congress enacted for purposes of
24 understanding whether the agency has power to
25 act. And the fact that there are other

1 agencies here that likewise, we think, are
2 empowered to act to present -- to protect
3 America against what is -- what is happening in
4 this country right now shouldn't diminish the
5 force of the express statutory
6 authorization here.

7 JUSTICE BREYER: Yeah, but I think the
8 question is this. I mean, it is a rather deep
9 -- in a sense, a deep question. Can you -- or
10 maybe you did. Could the White House, say,
11 issue an order to all federal employees, and
12 what it says is every federal employee in any
13 agency who has authority under a statute, which
14 means all of them, to require those whom they
15 regulate to insist that their employees be
16 vaccinated, do it?

17 Now they can't legally tell you do it.
18 But it's a strong policy. And that's what's
19 happened. Now I don't know the implications of
20 that. I never thought of that. But I think
21 that's what you're being asked, is that -- is
22 that -- and -- and I don't know if you ever
23 thought of it. But, I mean, has that happened?

24 GENERAL PRELOGAR: I think it's
25 incorrect to say that that is what is happening

1 here. This policy clearly --

2 JUSTICE BREYER: Yeah, but, I mean,
3 has that happened generally? Has that
4 happened? Did somebody issue such an order?

5 GENERAL PRELOGAR: Justice Breyer,
6 standing before you today, I'm not sure that I
7 can think of a precise historical example of
8 that kind of order.

9 JUSTICE BREYER: No, no, I mean in
10 this instance. The answer -- your answer, I
11 take it, is no, there is no such order.

12 GENERAL PRELOGAR: That's right. I
13 mean, certainly, I think that -- that
14 throughout this nation there is --

15 JUSTICE BREYER: I don't want to put
16 words in your mouth. Don't tell me there isn't
17 such an order if there is.

18 GENERAL PRELOGAR: No, I'm not aware
19 of any such order.

20 JUSTICE BREYER: All right. Or
21 something like that, okay. I have one other
22 question, which is because I'm operating
23 between two things. One is the -- the merits,
24 which might be difficult. I don't know. I'm
25 not taking a view on that, but at least they're

1 difficult and could take time.

2 And the other is the question of a
3 stay. Now, on the question of a stay, I read
4 from research that we've done, but I don't know
5 if it's right, that the argument was -- what
6 about the argument that they've made? One is
7 that, well, if we issue a stay today, tomorrow
8 more people will stay home and things will get
9 worse. See? That was one of their arguments.

10 And the other argument -- well, all
11 right, what about that? That seemed to me to
12 be the main one.

13 GENERAL PRELOGAR: As I understand the
14 argument, they're concerned about worker
15 attrition with respect to that -- that
16 particular claim.

17 JUSTICE BREYER: Yeah.

18 GENERAL PRELOGAR: And the agency gave
19 sustained attention to this very issue. It
20 spanned several pages of the Federal Register.
21 The agency looked at surveys that attempt to
22 analyze how workers will respond and looked at
23 the real, on-the-ground practical experience of
24 companies that had imposed these kinds of
25 mandates and found that there was substantial

1 compliance levels and that the concern that
2 workers would leave in droves was -- was
3 misplaced.

4 And then the agency further emphasized
5 they had provided flexibility to employers to
6 adopt a mask-and-test policy instead of a
7 vaccination requirement specifically because
8 the employers are best positioned to understand
9 --

10 JUSTICE BREYER: Yeah. Okay. Okay.

11 GENERAL PRELOGAR: -- their workforce
12 and to know which of these options is going to
13 ensure maximum compliance.

14 JUSTICE ALITO: On this --

15 JUSTICE BREYER: What about on the
16 merits? I just have one other, which is on the
17 merits. You've heard and you've read the
18 argument on the other side that, look, what
19 OSHA could easily have done or should have done
20 is go through industry by industry or groups of
21 industries by groups of industries and -- and
22 say there's this here and there's that there.
23 Instead, what they did is everybody over a
24 hundred employees, except for, and then they
25 had a few exceptions, working alone, working at

1 home, a religious exemption, you can prove to
2 us that you have some other thing that's just
3 as good. You know, they went that way, across
4 industries instead of one by the other. That's
5 one of their arguments.

6 What would you say to that?

7 GENERAL PRELOGAR: My response to that
8 is that the Secretary here cited overwhelming
9 scientific and medical evidence that the grave
10 danger exists based on how this virus is
11 transmitted anywhere people gather indoors
12 together.

13 And that applies to a lot of
14 workplaces, but that just turns on the nature
15 of how this virus is communicable between
16 people. As -- as Justice Kagan noted, often
17 employees have little control over their work
18 environments. They can't control whether they
19 can socially distance, who they come into
20 contact with, what precautions those people are
21 taking, what ventilation systems exist. And,
22 ultimately, OSHA determined that anywhere there
23 is a risk of indoor transmission, there is a
24 grave danger to unvaccinated employees.

25 Now I take the point, as the Chief

1 Justice's hypothetical focused on -- I think
2 Justice Barrett focused on this as well -- that
3 there are certain workplaces -- factories,
4 assembly lines -- where the risk is even
5 graver, where the danger and the -- the chance
6 of transmission is heightened. But I don't
7 think that that in any sense calls into
8 question the Secretary's determination that
9 there is a baseline grave danger in any
10 worksite where that inside risk of transmission
11 can occur.

12 JUSTICE ALITO: Can I ask you a
13 question --

14 JUSTICE SOTOMAYOR: General, can we --
15 I'm sorry.

16 CHIEF JUSTICE ROBERTS: Justice Alito.

17 JUSTICE ALITO: I just wanted to ask
18 you a question on this issue of the
19 commencement of enforcement and the issuance of
20 a stay.

21 This ETS was issued a couple of months
22 ago, isn't that right?

23 GENERAL PRELOGAR: On November 5.
24 That's correct.

25 JUSTICE ALITO: Yeah, on November 5.

1 All right. And it hasn't been enforced during
2 that period. These cases arrived at this Court
3 just a short time ago. They present lots of
4 difficult, complicated issues. We have
5 hundreds of pages of briefing. We're receiving
6 very helpful arguments this morning.

7 Does the federal government object to
8 our taking a couple of days maybe to think
9 about this, to digest the arguments before
10 people start losing jobs?

11 GENERAL PRELOGAR: Well, Justice
12 Alito, if you're asking whether it would be
13 appropriate for the Court to issue a brief
14 administrative stay, certainly, we think that
15 that would be within the Court's prerogative if
16 it -- if it thinks that it's necessary to do
17 that.

18 Ultimately, for the injunction that
19 they're actually asking for here, the
20 Applicants would have to show an indisputably
21 clear right to relief, which we think they
22 can't satisfy.

23 JUSTICE ALITO: Well, I -- no, I'm
24 asking about an administrative stay. I won't
25 get into an argument about indisputably clear.

1 But your argument -- your point is you think it
2 would be appropriate or would not be
3 appropriate if we issued a short administrative
4 stay? Or if we do that, are you going to say,
5 well, they're causing people to die every day?

6 GENERAL PRELOGAR: We do think that
7 the agency found that there is grave harm every
8 day, and the numbers are stark, thousands of
9 lives --

10 JUSTICE ALITO: But there was that
11 grave harm during every single day --

12 GENERAL PRELOGAR: -- hundreds of
13 thousands of hospitalizations over six months.

14 JUSTICE ALITO: -- but was there not
15 that same grave harm during every single day
16 between the time when this was issued and --
17 and today?

18 GENERAL PRELOGAR: Well, certainly, we
19 think that the harm has existed and been
20 present throughout, and the agency specifically
21 set aggressive compliance deadlines to --

22 JUSTICE ALITO: Well, my answer -- I
23 asked a really simple question. And you have
24 the prerogative to say, no, we think, you know,
25 horrible consequences are going to -- are going

1 to ensue if you issue even an administrative
2 stay of a short period of time, and we don't
3 think that you need to have that time to digest
4 this case and decide it.

5 GENERAL PRELOGAR: I'm not going to
6 say that, Justice Alito. If the Court believes
7 that it needs a brief administrative stay,
8 then, of course, it can enter it.

9 JUSTICE KAGAN: But you mean "brief,"
10 don't you?

11 GENERAL PRELOGAR: Yes. We think that
12 there are lives being lost every day.

13 CHIEF JUSTICE ROBERTS: Well, brief
14 compared --

15 JUSTICE BREYER: I thought 750 --

16 CHIEF JUSTICE ROBERTS: I'm sorry.
17 Brief compared to what? The months that it --
18 excuse me -- the months that it hasn't been in
19 effect since November, whatever it is, when the
20 courts have been active in this area, or
21 brief -- brief compared to what?

22 GENERAL PRELOGAR: Well, Mr. Chief
23 Justice, I think that the agency well explained
24 that the employers who are covered by this
25 needed time to come into compliance. The

1 agency announced that it was exercising
2 enforcement discretion because of the confusion
3 that had been created by the Fifth Circuit
4 stay.

5 Maybe it would be helpful for me to
6 explain exactly what the January 10 deadline
7 means with respect to compliance. The agency
8 has announced that for employers who are acting
9 in good faith, it is not going to enforce any
10 of the provisions of this ETS until January 10.
11 And what that means as a practical matter is
12 that employers need to be adopting their
13 policies, they need to be ascertaining the
14 vaccination status of their employees, and as
15 of January 10, they need to be requiring
16 masking for any employees who remain
17 unvaccinated.

18 So it's not as though immediately
19 employee -- employees are going to be quitting
20 their jobs or leaving in response with the
21 worst predictions. On January 10, if this
22 standard remains in effect, then masking will
23 immediately be required, and the testing will
24 kick in on February 9.

25 JUSTICE BREYER: So if we delay that

1 one day, maybe I'm wrong, and please tell me if
2 I am, but the numbers I read is when they
3 issued this order, there were approximately
4 70-something thousand new cases every day. And
5 yesterday there were close to 750,000.

6 So if we delay it a day, and if it
7 were to have effect, then 750,000 more people
8 will have COVID who otherwise, if we didn't
9 delay it, wouldn't have? I mean, I -- I don't
10 doubt the power of the Court to issue a stay.
11 I'm just saying what are the consequences of
12 that?

13 And if I'm wrong, you better tell me
14 I'm wrong because I -- I thought that it really
15 did make a difference to people who might get
16 -- you have the numbers. I saw the numbers.

17 Well, all right, what -- so what --
18 what do you say? Now you say does not --
19 that's really not a problem?

20 GENERAL PRELOGAR: Justice Breyer, we
21 -- we absolutely agree that this pandemic has
22 been dynamic, that it is constantly evolving
23 and that the current conditions are -- are
24 posing a truly grave danger.

25 JUSTICE SOTOMAYOR: General, am I to

1 understand from your previous answer that
2 enforcement qua testing doesn't occur until
3 February 9th, correct?

4 GENERAL PRELOGAR: That's correct,
5 Justice Sotomayor.

6 JUSTICE SOTOMAYOR: The only thing
7 that would happen in the next few days or -- up
8 to now, everybody should have a plan in place,
9 correct?

10 GENERAL PRELOGAR: Correct.

11 JUSTICE SOTOMAYOR: There's no -- been
12 no stay. So starting tomorrow, the only thing
13 that are required are masks, correct?

14 GENERAL PRELOGAR: Masking for
15 unvaccinated workers, that's correct.

16 JUSTICE SOTOMAYOR: That's the only
17 thing that occurs. And so until February 9th
18 when the testing comes into effect, that's when
19 the threat of -- of resignations or expense
20 comes into effect, correct?

21 GENERAL PRELOGAR: Yes, as I
22 understand the -- what the applicants are
23 arguing here especially --

24 JUSTICE SOTOMAYOR: So --

25 GENERAL PRELOGAR: -- on the testing

1 aspect.

2 JUSTICE SOTOMAYOR: So the need for an
3 administrative stay, if we're talking about a
4 few days, is really small, if -- very small,
5 correct?

6 GENERAL PRELOGAR: I certainly myself
7 do not think an administrative stay would be
8 warranted here, but I of course defer to the
9 Court on that.

10 JUSTICE SOTOMAYOR: All right, one
11 other question if I might --

12 CHIEF JUSTICE ROBERTS: Just --

13 JUSTICE SOTOMAYOR: -- counsel.

14 I want to go back to the chief's
15 question and to Justice Thomas's question
16 and -- and in part, to Neil -- to Justice
17 Gorsuch's questions earlier, the issue of who
18 should act and who can act.

19 An agency takes a while to act and
20 this is -- and it's acting under an emergency
21 order or an emergency statutory delegation by
22 Congress. And the chief says Congress should
23 act; we shouldn't let every agency act.

24 Could you speak about the relative,
25 both expertise and speed with which Congress

1 can act in -- to survey the countless work
2 sites in our economy to identify the health and
3 safety hazards in each one and to legislate
4 with the granular specificity necessary,
5 necessary to address the hazards in all of
6 these different workplaces?

7 I understood the fact that in an
8 emergency we should not violate the
9 Constitution, but I'm not quite sure what
10 regulation of safe and healthy, what provision
11 of the Constitution it violates.

12 But I want you to get to the -- to --
13 to the general question that some of thigh
14 colleagues have raised. Who's in a better
15 position to act and why and why is it in a
16 better position to act constitutionally?

17 GENERAL PRELOGAR: Yes, of course,
18 Justice Sotomayor.

19 To be clear, we think that Congress
20 has already acted here in passing
21 Section 655(c) to authorize OSHA to take this
22 kind of specific action in response to an
23 emergency situation.

24 If you look at the plain text of the
25 statute, we think that OSHA's standard clearly

1 falls within the terms that Congress enacted.
2 COVID 19 is a great danger, it's a physically
3 harmful agent, and the agency found that these
4 measures are essential to protect workers.

5 So we think the statutory language
6 already exists. And to the extent that the
7 applicants are suggesting that there's some
8 kind of specific authorization requirement here
9 that Congress had to do more, I think that gets
10 to the heart of your question, which is that
11 when this Court has interpreted statutes
12 before, it hasn't departed from plain meaning
13 and imposed that kind of burden on Congress to
14 legislate with that specificity and that
15 granularity, particularly in an emergency
16 situation like this one.

17 And the applicants have pointed to no
18 aspect of the statute that would warrant that
19 kind of result here. It's their interpretation
20 that runs counter to express statutory
21 provisions, Section 669(a)(5), that
22 specifically contemplates that immunization
23 requirements can be imposed, the American
24 Recovery Plan Act, that, where Congress
25 specifically appropriated \$100 million to OSHA

1 and directed it in -- in the words of the
2 legislation to carry out COVID-19 related
3 worker protection activities.

4 CHIEF JUSTICE ROBERTS: Well,
5 you're -- you're saying that Congress acted.
6 Don't -- don't complain that Congress hasn't
7 done anything and that -- you know, that was 50
8 years ago that you're saying Congress acted.

9 I don't think you had COVID in mind.
10 That was almost closer to the Spanish Flu than
11 it is to today's problem.

12 Now, I understand the idea that
13 agencies are more expert than Congress. And I
14 understand the idea that they can move more
15 quickly than Congress.

16 But this is something that the federal
17 government has never done before, right,
18 mandated vaccine coverage?

19 GENERAL PRELOGAR: It's true that
20 there has been no standard that looks exactly
21 like this one. The federal government has
22 encouraged vaccination as this standard does
23 and other provisions like the blood borne
24 pathogen standard. And masking and medical
25 testing of employees are common features of

1 OSHA standards.

2 CHIEF JUSTICE ROBERTS: Well, is --
3 is -- is it that important consideration that
4 we should take into effect, for example, along
5 with the fact that the police power to take
6 such action is more commonly exercised by the
7 states, and we've had many cases coming out of
8 the states and municipalities that -- that --
9 that -- that evidence that.

10 And also that it's -- yes, 50 years
11 ago Congress passed a general provision, but I
12 think it's certainly hard to argue, and you're
13 doing a good job of it, that that gives free
14 reign to the agencies to take -- I guess this
15 is invoking the major cases doctrine, that it
16 gives free reign to the agencies to enact such
17 broad regulation that is -- was certainly
18 unfamiliar to Congress in 1970.

19 GENERAL PRELOGAR: There are a lot of
20 elements to that question. I'd like to try to
21 take them in turn.

22 I -- I -- I think that Congress did
23 specifically contemplate that there would be
24 emergency situations that posed grave dangers
25 to workers throughout America, and it

1 specifically empowered OSHA to take action in
2 response to that.

3 I understand the -- the suggestion
4 here that the standard is unprecedented but I
5 don't think it would withstand scrutiny. If
6 you look at the various claims that the
7 applicants are making, they -- they first
8 object to the scope of the standard, the number
9 of employers who are covered but OSHA commonly
10 issues nationwide standards that govern all
11 employers throughout the nation with respect to
12 risks that exist throughout the nation. And
13 that describes COVID-19.

14 There is substantial evidence here to
15 justify the scope of the standard.

16 CHIEF JUSTICE ROBERTS: Thank -- go
17 ahead.

18 GENERAL PRELOGAR: And just to -- to
19 close the loop with one final response, which
20 is to focus on the particular mitigation
21 measures. There, too, we think that there is
22 no indication that Congress couldn't have
23 anticipated or intended OSHA to use these types
24 of measures to combat a deadly virus at work.

25 Immunization is specifically

1 referenced in Section 669(a)(5). It is the
2 single most effective way to target the spread
3 of a deadly virus and to think that Congress
4 would have meant to preclude OSHA from
5 encouraging vaccination, I think, is
6 inconsistent, both with the text of the statute
7 and with the broader history of immunization
8 requirements in this country, which have
9 commonly been imposed.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas, anything further?

13 JUSTICE THOMAS: Just, I'm -- I'm
14 curious. This probably doesn't go to the
15 dispositions matter, but is a vaccine the only
16 way to treat COVID?

17 GENERAL PRELOGAR: It is certainly the
18 single most effective way to target all of the
19 hazards OSHA identified, both the -- the
20 chances of contracting the virus in the first
21 place, the risk of infecting other workers on
22 the work cite, and with respect to the negative
23 health consequences, that vaccination provides
24 protection on all of those fronts.

25 JUSTICE THOMAS: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Breyer, anything further?

3 Justice Alito?

4 JUSTICE ALITO: On the issue of
5 whether you're trying to squeeze an elephant
6 into a mouse hole and the question of whether
7 this is fundamentally different than from
8 anything that OSHA has ever done before, I want
9 to see if it might be fundamentally different
10 in at least two respects and get your answer to
11 -- to the question.

12 Most OSHA regulations, all of the ones
13 with which I'm familiar, affect employees when
14 they are on the job but not when they are not
15 on the job. And this affects employees all the
16 time. If you're vaccinated while you're on the
17 job, you're vaccinated when you're not on the
18 job.

19 Isn't this different from anything
20 OSHA has done before in that respect?

21 GENERAL PRELOGAR: So two responses to
22 that. First, of course there's also a
23 mask-and-test option here, so I think even --

24 JUSTICE ALITO: Okay --

25 GENERAL PRELOGAR: -- on that --

1 JUSTICE ALITO: -- well, right now --

2 GENERAL PRELOGAR: -- analysis --

3 JUSTICE ALITO: -- I'm talking just
4 about the vaccine.

5 GENERAL PRELOGAR: So focusing just on
6 vaccination, I think that that's a way to
7 describe it, that it provides protection when
8 you're not at work.

9 But OSHA was directly targeting and --
10 and trying to provide the protection at work
11 and I don't think there's any basis in the text
12 of the statute to think this kind of --

13 JUSTICE ALITO: All right. Suppose
14 that --

15 GENERAL PRELOGAR: -- protection is
16 off limits.

17 JUSTICE ALITO: I mean, suppose, this
18 is a little science fiction, but maybe it will
19 illustrate a point.

20 Suppose that this protection were
21 provided not by the administration of a vaccine
22 but by waving a wand over employees when they
23 arrive at work and suppose that wand also had
24 the capability of taking away this protection
25 when the employee leaves work.

1 Would OSHA have the authority to tell
2 employees you must -- we will -- we are going
3 to wave -- you must have this wand waved over
4 you when you arrive, but you can't have it
5 taken off when you leave?

6 GENERAL PRELOGAR: No, I don't think
7 that OSHA would have that authority.

8 JUSTICE ALITO: All right. So it's
9 different in that respect. And here's another
10 respect in which it may be different. And I
11 don't want to be misunderstood in making this
12 point because I'm not saying the vaccines are
13 unsafe. The FDA has approved them. It's found
14 that they're safe. It says that the benefits
15 greatly outweigh the risks. I'm not contesting
16 that in any way. I don't want to be
17 misunderstood. I'm sure I will be
18 misunderstood. I just want to emphasize I'm
19 not making that point.

20 But is it not the case that this --
21 these vaccines and every other vaccine of which
22 I'm aware and many other medications have
23 benefits and they also have risks and that some
24 people who are vaccinated and some people who
25 take medication that is highly beneficial will

1 suffer adverse consequences? Is that not true
2 of these vaccines? And if that is -- is that
3 true?

4 GENERAL PRELOGAR: That can be true,
5 but, of course, there is far, far greater risk
6 from being --

7 JUSTICE ALITO: But there are --

8 GENERAL PRELOGAR: -- unvaccinated --

9 JUSTICE ALITO: -- there is -- there
10 --

11 GENERAL PRELOGAR: -- by orders of
12 magnitude.

13 JUSTICE ALITO: Right. There is some
14 risk, do you dispute that?

15 GENERAL PRELOGAR: There can be a
16 minimal risk with respect to some individuals,
17 but -- but again I would emphasize that I think
18 that there -- there would be no basis to think
19 that these FDA-approved and authorized vaccines
20 are not safe and effective.

21 JUSTICE ALITO: No, I'm --

22 GENERAL PRELOGAR: They are most
23 certainly --

24 JUSTICE ALITO: -- not making that
25 point. I tried to make it as clear as I could.

1 I'm not making that point. I'm not making that
2 point. I'm not making that point.

3 There is a risk, right? Has any other
4 -- has OSHA ever imposed any other safety
5 regulation that imposes some extra risk, some
6 different risk, on the employee, so that if you
7 have to wear a hard hat on the job, wearing a
8 hard hat has some adverse health consequences?
9 Can you think of anything else that's like
10 this?

11 GENERAL PRELOGAR: I can't think of
12 anything else that's precisely like this, but I
13 think to suggest that OSHA is precluded from
14 using the most common, routine, safe,
15 effective, proven strategy to fight an
16 infectious disease at work would be a departure
17 from how this statute should be understood.

18 JUSTICE KAGAN: Can I just say,
19 General, that regulators think of risk/risk
20 tradeoffs constantly when they make
21 regulations, that there are constant situations
22 in which there are risk/risk tradeoffs, risks
23 on both sides, but one risk vastly outweighs
24 another risk, and that that comes up throughout
25 regulatory space.

1 GENERAL PRELOGAR: That's absolutely
2 true. And one of the risks that OSHA was
3 guarding against here was the risk that
4 unvaccinated workers posed to other workers
5 because they are so much more likely to
6 transmit --

7 JUSTICE ALITO: To other --

8 GENERAL PRELOGAR: -- this deadly
9 disease to them.

10 JUSTICE ALITO: To what type of
11 workers? To other -- to vaccinated workers?

12 GENERAL PRELOGAR: Yes, the grave
13 danger finding --

14 JUSTICE ALITO: I thought the --

15 GENERAL PRELOGAR: -- was based on
16 unvaccinated --

17 JUSTICE ALITO: -- Secretary --

18 GENERAL PRELOGAR: Workers.

19 JUSTICE ALITO: -- disclaimed that.

20 GENERAL PRELOGAR: Yes. The grave
21 danger finding is limited to unvaccinated
22 workers coworkers --

23 JUSTICE ALITO: Right, so not a lot --

24 GENERAL PRELOGAR: -- who are far more
25 likely to --

1 JUSTICE ALITO: -- of concern for us?

2 GENERAL PRELOGAR: -- contract that
3 from their workers as well.

4 JUSTICE ALITO: That's not a concern
5 for us, is it? You can't sustain this on that
6 ground, that this is helpful to the vaccinated
7 workers, because the unvaccinated workers
8 present a risk to them.

9 GENERAL PRELOGAR: Oh, to be clear,
10 they present a risk to other unvaccinated
11 workers --

12 JUSTICE ALITO: All of whom have --

13 GENERAL PRELOGAR: -- who might be
14 older --

15 JUSTICE ALITO: -- all of -- all --

16 GENERAL PRELOGAR: -- might have other
17 comorbidities --

18 JUSTICE ALITO: -- all of whom have
19 balanced the risk differently, maybe very
20 foolishly, but they want to balance the risks
21 presented to their health in a different way.
22 And OSHA says, no, you can't do that, and that
23 applies when you're on the job and also when
24 you're not on the job and for the rest of your
25 life because you have to take these vaccines,

1 unless the testing option is viable.

2 GENERAL PRELOGAR: Well, one small
3 factual correction, if I could, and then a
4 broader legal point, I think it's wrong to say
5 that everyone who's unvaccinated is just
6 assuming the risk. Some people can't get
7 vaccinations for medical reasons. Some people
8 have deeply held religious beliefs and are
9 entitled to religious exemptions. And OSHA is
10 entitled to try to protect those unvaccinated
11 workers, no matter the reason they're
12 unvaccinated.

13 Just on the broader legal point, the
14 idea that OSHA is powerless to act to protect
15 workers if they simply want to assume the risk
16 is inconsistent with how the OSH Act has been
17 understood throughout its history. OSHA
18 frequently requires employers to require that
19 the employees use protective gear --

20 JUSTICE ALITO: Isn't -- isn't it --

21 GENERAL PRELOGAR: -- or take
22 precautions if it's not --

23 JUSTICE ALITO: Isn't it the case
24 that, most of the time, there's this strong
25 reason for saying that it isn't a defense to an

1 OSH Act charge, that the employers assumed the
2 risk voluntarily, that under most
3 circumstances, employers have an incentive to
4 avoid compliance with, to avoid the cost and
5 inconvenience of the regulation, and so we
6 don't want to have -- put the employees under
7 pressure, overt or implied, to -- to waive
8 protection of a -- a regulation, a protective
9 regulation?

10 But there's no such incentive here.
11 They're free. The vaccines are free. And to
12 the extent they keep workers healthy and on the
13 job, it's in the interests of the employers to
14 have them vaccinated.

15 GENERAL PRELOGAR: Well, certainly,
16 the -- the fact that workers in the past have
17 not wanted to use certain protections has not
18 provided a defense to regulations that have
19 been issued under the OSH Act.

20 JUSTICE SOTOMAYOR: Counsel, if I
21 might just go back to Justice Alito's question,
22 there's no vaccine mandate here, correct?

23 GENERAL PRELOGAR: That's correct.
24 And that's what I started with, that, of
25 course, any employer can opt for the

1 mask-and-test option instead.

2 JUSTICE SOTOMAYOR: So, really, the
3 question is between masking and testing and/or
4 vaccine, but no employer is being put at risk
5 greater than they choose to undertake
6 themselves, correct?

7 GENERAL PRELOGAR: Yes, the -- the
8 employers have a choice to adopt either of
9 those policies. And OSHA estimated that
10 40 percent of the employers would adopt the
11 mask-and-test policy.

12 JUSTICE SOTOMAYOR: Number two, with
13 respect to the issue of whether a person has
14 chosen to run the risk by being unvaccinated,
15 you point out that some people can't for a
16 variety of different reasons. But the risk
17 here is not just to the person; it's to
18 everybody else they put at risk, correct?

19 GENERAL PRELOGAR: That's correct.
20 The grave danger finding was premised on
21 unvaccinated individuals, but OSHA emphasized
22 that ensuring that unvaccinated individuals are
23 not spreading the virus in the workplace will
24 protect everyone they come into contact with.

25 JUSTICE SOTOMAYOR: So they may not be

1 a grave danger to other -- other people, but I
2 don't see why OSHA has to close its eyes to the
3 fact that they place grave risks to
4 unvaccinated and substantial risk to other
5 people, correct?

6 GENERAL PRELOGAR: That's right, and
7 OSHA specifically emphasized that vaccinated
8 individuals may still be at significant risk.
9 It wasn't ruling out that possibility. Its
10 grave danger finding was focused on all of the
11 ways that -- that the unvaccinated contributes
12 to the spread of this disease.

13 JUSTICE SOTOMAYOR: Thank you,
14 counsel.

15 JUSTICE ALITO: Is the testing
16 alternative viable at the present time in light
17 of the stories that we see about the long lines
18 that are required to be tested?

19 GENERAL PRELOGAR: The agency gave
20 sustained attention to testing capacity in the
21 preamble to the rule. It looked at existing
22 testing capacity and projected out of what
23 additional capacity would be necessary for
24 employers that choose to adopt the
25 mask-and-test policy and concluded there would

1 be ample testing in order to comply with the
2 rule.

3 I'm obviously familiar with the -- the
4 news stories you're referencing, and I think
5 that the agency could adjust if that proves to
6 be a problem, but with respect to reviewing
7 this rule, there was certainly a substantial
8 basis for the Secretary to conclude that this
9 is a viable option.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: I'd like to ask the --
12 the -- the government's views of the
13 major-questions doctrine that a number of my
14 colleagues have asked about.

15 And as I -- I see it, there are sort
16 of two ways that such a doctrine could operate.
17 One is with respect to ambiguous statutes,
18 ambiguous either because they're vague or
19 because they're statutes that seem to have
20 conflicting provisions, you know, where they
21 point both ways, and then the major questions
22 doctrine is an aid to interpretation of that
23 statute, essentially a kind of clue about how
24 you should interpret a very
25 difficult-to-understand statute.

1 And the second way is there's really
2 nothing difficult to understand about this.
3 The agency action falls within the scope of the
4 statutory authority. There's just no question
5 that it does. And yet, because the agency
6 action is a kind of a big deal, we're just
7 going to ignore the fact that it falls clearly
8 within the scope of the delegated authority and
9 say that, notwithstanding that that's true,
10 Congress has to re-up it.

11 So I think I'd like you to talk about
12 those two versions of the major questions
13 doctrine with respect to this rule. You know,
14 does -- what do you think of those two
15 versions, and which of the versions potentially
16 applies here?

17 GENERAL PRELOGAR: I think that
18 perfectly encapsulates the two versions. And
19 we think that this Court's precedents clearly
20 demonstrate that it's the first version that
21 you articulated is the way that the Court has
22 previously considered economic and political
23 consequences.

24 So it's never been the case that the
25 Court has started at the outset by saying does

1 this seem like a big deal, does this agency
2 action have a lot of consequences, and then
3 used that as a basis to depart from the plain
4 language of the statute or to say Congress has
5 to specifically authorize it; we're not going
6 to give the statutory text its -- its ordinary
7 meaning.

8 Instead, in the cases where the Court
9 has looked at those kinds of consequences, it
10 has always identified a conflict with other
11 express statutory language, a conflict with
12 other statutes that Congress has enacted that
13 directly addressed the issue at question, or a
14 conflict with the entire structure of the
15 statute such that it would be unrecognizable to
16 the Congress that enacted it.

17 And it's only been in those situations
18 where the Court has identified a textual and
19 structural problem with the agency's
20 interpretation in the beginning, using those
21 traditional tools of statutory construction,
22 that the Court has then gone on to say that its
23 interpretation of the statute is confirmed by
24 the economic and political consequences that
25 would ensue.

1 So I think it would be a sea change
2 for this Court to reverse the order of
3 operations as the applicants are asking for
4 here, and to start off by asking does this seem
5 like it has economic and political
6 consequences, and it would ultimately, would
7 disservice the principles of the separation of
8 powers and to -- to Congress's ability to have
9 a clear statutory enactments, even if they're
10 broad, given the effect that they have.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

13 JUSTICE GORSUCH: Yes. So my -- my
14 question with respect to the major questions
15 doctrine is this: We accept that it's not our
16 role to decide public health questions, but it
17 is our important job to decide who should
18 decide those questions.

19 I think we all agree on that. And
20 here our choice on the one hand is a federal
21 agency and on the other hand the Congress of
22 the United States and state governments.

23 Now, you argue we should not consider
24 the major questions doctrine unless and until
25 we find a statutory ambiguity. I understand

1 that. But let's -- let's say the Court does
2 find such ambiguity. I know you will contest
3 the premise, but let's just work on it.

4 If -- if there is an ambiguity, why
5 isn't this a major question that, therefore,
6 belongs to the people's representatives of the
7 states and in the halls of Congress, given that
8 the statute at issue here is, as the Chief
9 Justice pointed out, 50 years old, doesn't
10 address this question.

11 The rule affects, I believe, we're
12 told, 80 million people, and the government
13 reserves the right to extend it to every
14 private business in the country.

15 Additionally, states have had the
16 responsibility for overseeing vaccination
17 mandates. I rejected a challenge to one just
18 the other day from New Mexico.

19 Congress had a year to act on the
20 question of vaccine mandates already. As the
21 Chief Justice points out, it appears that the
22 federal government is going agency-by-agency as
23 a work-around to its inability to get Congress
24 to act.

25 The risks imposed here are not

1 unilateral. There are risks to those who
2 choose not to be vaccinated that they're trying
3 to avoid sometimes, as you discussed with
4 Justice Alito and conceded to him.

5 Traditionally OSHA has had rules that
6 affect workplace hazards that are unique to the
7 workplace and don't involve hazards that affect
8 individuals 24 hours a day.

9 So that's kind of the general tick
10 list we have before us. And I would just like
11 you to address, again, the question, assuming
12 the statute's ambiguous, why isn't this a major
13 question that normally under our Constitution
14 would reserve -- be reserved for the people's
15 representatives in the states, in the first
16 instance, and the halls of Congress, in the
17 second?

18 GENERAL PRELOGAR: So accepting the
19 assumption that there is an ambiguity, which of
20 course we disagree with, as you know, I think
21 that many of the factors you identified are
22 just simply inconsistent with the whole premise
23 of the OSH Act.

24 So it's true that states have a police
25 power over health and safety. But as this

1 Court recognized in the Gade case, Congress in
2 enacting the OSH Act specifically brought the
3 federal government into the role of protecting
4 the health and safety of America's workers and
5 displacing and preempting state law in that
6 field.

7 And so I think the idea that simply
8 because the states have that residual police
9 power provides a basis to assume that the OSH
10 Act can't have any application or that there
11 has to be a specific authorization here of each
12 and every type of mitigation measure is just
13 fundamentally inconsistent with Congress's
14 policy as embodied in that Act.

15 JUSTICE GORSUCH: What do we make of
16 the fact that Congress -- that OSHA has not
17 traditionally mandated other vaccines for other
18 hazards that could pose a grave -- grave risk,
19 some might say. The flu kills people every
20 year. Other grave diseases do, too.

21 And there are vaccines against many.
22 And -- and we don't need to list them all. But
23 traditionally OSHA has not regulated in this
24 area.

25 GENERAL PRELOGAR: I think that that's

1 explained by the fact that COVID-19 is an
2 unprecedented pandemic that has a magnitude and
3 proportion that --

4 JUSTICE GORSUCH: Well, polio --

5 GENERAL PRELOGAR: -- no one has seen
6 before.

7 JUSTICE GORSUCH: I mean, people
8 forget polio. That was a pretty bad, you can
9 call it a pandemic, you can call it an endemic,
10 I don't know what you would call it, but it was
11 a terrible scourge on this country for many
12 years.

13 We have vaccines against that -- that,
14 but the federal government through OSHA, so far
15 as I know, you can correct me, does not mandate
16 every worker in the country to receive such a
17 vaccine. We have flu vaccines. Flu kills, I
18 believe, hundreds of thousands of people every
19 year. OSHA has never purported to regulate on
20 that basis.

21 What do we make of that when we're
22 thinking about what qualifies as a major
23 question and what doesn't?

24 GENERAL PRELOGAR: Well, with respect
25 to other diseases where there are effective

1 vaccinations, I think that the simple
2 explanation for why OSHA hasn't had to regulate
3 workplace exposure to that is because virtually
4 all workers are already vaccinated.

5 With respect to many of those
6 diseases, all of us have -- at one time or
7 another have been subject to compulsory
8 vaccination.

9 JUSTICE GORSUCH: Is that true with
10 the flu? Do we know that to be true with the
11 flu?

12 GENERAL PRELOGAR: The flu is an
13 exception because it's a seasonal illness. And
14 there I think that the explanation for the
15 failure to regulate is that it doesn't present
16 anything approximating the kind of hazard or
17 danger to workers as COVID-19. I -- I don't
18 want to suggest that with the --

19 JUSTICE GORSUCH: Are you suggesting
20 that it doesn't pose a grave risk?

21 GENERAL PRELOGAR: I think that the
22 agency would have to build the record to
23 demonstrate that it would clear that statutory
24 hurdle.

25 JUSTICE GORSUCH: But it might?

1 GENERAL PRELOGAR: It would depend on
2 the evidence. Certainly if there were another
3 1918 influenza outbreak like the country
4 experienced before, yes, absolutely, I think
5 OSHA could regulate exposure to influenza in
6 the workplace. That's similar to what's
7 happening -- happening with COVID-19 right now.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

10 JUSTICE KAVANAUGH: I want to follow
11 up on Justice Gorsuch's and Justice Kagan's
12 questions with how the major questions doctrine
13 applies and really first zero in on this
14 question of ambiguity.

15 We've used words like vague, subtle,
16 oblique, cryptic, and ambiguous to describe the
17 kind of language that would trigger the major
18 questions doctrine, if it is a major question.

19 We haven't only used the word
20 ambiguous. And it seems to me that a question
21 that I would like your help on is applying
22 language that is subtle, cryptic, oblique to a
23 new context hasn't been done before in the last
24 50 years. How do we think about a question
25 like that? And in answering that, think about

1 the benzene case, the Brown & Williamson case
2 with tobacco, benzene with cancer, and the UARG
3 case with greenhouse gas emissions. All three
4 were the agency was applying this broad but
5 arguably cryptic language to a new context. I
6 think that's one way to characterize them.

7 How do we think about that?

8 GENERAL PRELOGAR: Well, I think,
9 Justice Kavanaugh, looking at those three cases
10 in particular, that the reason the Court
11 concluded that the language was -- was cryptic
12 or oblique was because it identified other
13 textual or structural reasons that ran counter
14 to the agency's interpretation.

15 So in the utility air case that you
16 referenced, the Court observed that the
17 asserted regulation would overthrow the entire
18 statutory scheme. The agency conceded that it
19 was never what Congress could have possibly
20 intended. So that was a structural indication
21 that the agency's regulation was impermissible.

22 With respect to the benzene case,
23 there, too, there was a question about whether
24 there was an entitlement to regulate without
25 any finding of risk, and that was in tension

1 with other statutory provisions, so there was a
2 conflict.

3 And with the Brown & Williamson case
4 that you mentioned, the Court chronicled a long
5 line of statutes that had directly addressed
6 the issue of regulation of tobacco products and
7 would have been flatly inconsistent with the
8 agency's asserted jurisdiction.

9 So there's never been a case where the
10 Court has just confronted broad language and
11 said, oh, it seems cryptic or oblique and so
12 it's a major question, and we're not going to
13 give it its plain meaning. In all of those
14 cases there was a -- a -- a textual and
15 structural reason for the Court to conclude
16 that there was something wrong with the
17 agency's claimed authority.

18 JUSTICE KAVANAUGH: In all three cases
19 there were strong dissents that said the
20 opposite of that, though, that said actually
21 this statutory language is clear and that the
22 Court, you know, Justice Marshall's dissent in
23 the benzene case was very powerful that the
24 Court was simply scaling back from the plain
25 language because of its concern about the

1 significance of regulating every workplace in
2 America to take out any risk of cancer.

3 So there were dissents that made that
4 point but the majority seemed nonetheless, to
5 apply the major questions doctrine.

6 GENERAL PRELOGAR: There were
7 certainly dissents in those cases that thought
8 that the statutory terms could get the agency
9 there. But here I think the critical
10 difference is that the applicants haven't
11 pointed to anything in this statute that
12 approximates the kind of textual or structural
13 problem that has prompted the Court to look at
14 those kinds of consequences before.

15 And it would be their interpretation
16 that creates those problems. They would render
17 superfluous Section 669(a)(5)'s specific
18 recognition that immunization requirements can
19 be imposed under the OSH Act itself. By saying
20 that OSHA can't regulate COVID-19 in the
21 workplace, they would give no effect to
22 Congress's appropriation just last year
23 directing OSHA to do just that, and to target
24 that grave danger.

25 And so in this case we think that all

1 of the textual clues line up on our side, in
2 addition to the plain language of the statute.

3 JUSTICE KAVANAUGH: And one other
4 question related to this -- sorry to prolong
5 this -- but Congress has specifically referred
6 to vaccines in a variety of contexts.
7 Immigration contexts, those statutes authorize
8 specifically via language vaccines. Military
9 contexts, which you would expect, at least the
10 Anthrax vaccine is referenced in the military.
11 The National Childhood Vaccine Act passed in
12 '86 refers, and it's a different context, but
13 dealing with vaccines. And so that's one
14 point.

15 And the other is since -- not forever,
16 but 2005, President Bush gave a very detailed
17 speech kind of predicting what has happened.
18 And it's eerie to read it, and yet in the -- in
19 the years since, there has not been at least a
20 vaccine statute passed by Congress to deal with
21 this kind of thing, even though he, in -- in
22 the wake of 9/11, but still was putting the
23 country on notice of this problem that was
24 going to hit us at some point.

25 GENERAL PRELOGAR: Well, I certainly

1 recognize that there are other statutes where
2 Congress has specifically referred to
3 vaccination, and I think that maybe that would
4 get the Applicants some traction here if, for
5 example, this Act specifically referred to
6 other mitigation measures and -- and
7 illuminated what kinds of things OSHA can do
8 and left vaccination off the list. But it
9 doesn't do that.

10 So I think to suggest that there is
11 some negative inference to be drawn is
12 inconsistent with how Congress drafted this
13 statute in recognition that OSHA would be
14 positioned to understand the kinds of control
15 measures that are necessary against the variety
16 of workplace hazards.

17 And if I could make just make one
18 additional point on that. Of course, as I've
19 emphasized, there is an express reference to
20 immunization requirements in the OSH Act
21 itself, and we think that that actually
22 provides additional confirmation that Congress
23 was thinking about that and could have
24 anticipated it and that religious exemption
25 would have no application if, in fact,

1 immunization is just off limits.

2 But I think as well it's important to
3 look at this against the backdrop of
4 immunization requirements in our country. This
5 is not some kind of newfangled thing. As I've
6 mentioned before, most of us have been subject
7 to compulsory vaccination requirements at
8 various points throughout our lifetime. And so
9 the idea that Congress couldn't have
10 anticipated that in dealing with the -- the
11 deadliest virus that OSHA has experienced in
12 its history, it might think that vaccination --
13 encouragement of vaccination would be an
14 appropriate way to protect workers, I think is
15 just inconsistent with the idea that
16 vaccination is often the single most effective
17 way to target a virus.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett.

21 JUSTICE BARRETT: General Prelogar, I
22 have two questions, both of which address the
23 status of this rule as an emergency temporary
24 standard. So my first question has to do with
25 the question with which Justice Thomas opened,

1 which is the meaning of "necessary." So, of
2 course, when OSHA passes a rule through its
3 regular regulatory process, it has to go
4 through notice and comment, and that's a way of
5 holding an agency accountable. All affected
6 people have an opportunity to comment, and the
7 agency develops a robust record.

8 With an ETS, of course, the agency can
9 circumvent that process so that it can act more
10 quickly. So, for an ETS, we would want that
11 power to be the exception, not the rule. And
12 one contrast that the Applicants point out
13 between OSHA's authority to issue an ETS versus
14 a regular regulation is that for its exercise
15 of power in the normal course, it need only
16 find that a regulation to be reasonably
17 necessary, but for an ETS, it has to satisfy a
18 necessary standard.

19 Now, you've argued, and I think
20 there's a lot of intuitive appeal to this, that
21 when you're facing an emergency of the
22 magnitude of this pandemic, that this power
23 effectively -- can be used most effectively as
24 a blunt instrument. You know, we don't have
25 time to make industry-by-industry specific kind

1 of calculations because we want to move with
2 speed.

3 But how do you reconcile that
4 understanding of "necessary" with the broader
5 "reasonably necessary" standard in OSHA's
6 normal regulatory authority?

7 GENERAL PRELOGAR: So we certainly
8 agree that the Emergency Temporary Standards'
9 reference to "necessary" as contrasted with
10 "reasonably necessary and appropriate" is a --
11 is a heightened burden and includes a measure
12 of tailoring that's necessary with respect to
13 the particular mitigation measures.

14 But I don't think that that helps the
15 Applicants here because they haven't come
16 forward with any alternative mitigation
17 measures that they think would equally protect
18 the workers that OSHA found were in grave --

19 JUSTICE BARRETT: But do they have --

20 GENERAL PRELOGAR: -- danger.

21 JUSTICE BARRETT: -- to come forward
22 with that evidence or did OSHA have to consider
23 it and reject it? Because another part of
24 their contention is that OSHA did not
25 adequately explain why this measure, this

1 particular rule and its scope was necessary
2 vis-à-vis or as compared to other
3 possibilities.

4 GENERAL PRELOGAR: Well, OSHA
5 explained that at length over dozens of pages
6 in the 150-page preamble to the rule. OSHA
7 specifically explained why vaccination as the
8 single most effective way to target all of the
9 ways that the virus threatens workers in the
10 workplace was a necessary measure here.

11 And it further explained why masking
12 and testing would be essential if workers
13 remain unvaccinated, in order to ensure that,
14 despite their higher risk level of contracting
15 the virus, they couldn't carry it into the
16 workplace and spread it to their coworkers.

17 So I think the suggestion that this
18 wasn't adequately explained is inconsistent
19 with the -- the arguments they're making.

20 And as I understand their tailoring
21 arguments -- and this actually touches on the
22 question you asked earlier in the argument --
23 they're really focused on two things, the
24 categories of workers and the -- the particular
25 workplaces. And they haven't suggested that

1 there are other mitigation measures there that
2 OSHA neglected to consider. They're saying
3 those things should have just been carved out
4 altogether.

5 But that is inconsistent with the
6 Secretary's judgment that all unvaccinated
7 workers face a grave danger and that the risk
8 exists anywhere that employees are gathered
9 indoors together.

10 And, again, there might be
11 subcategories within those groups that are in
12 graver danger, but I don't think there is any
13 basis on this record to conclude that the
14 agency lacked substantial evidence to draw the
15 lines that it did.

16 JUSTICE BARRETT: That's helpful.
17 Thank you.

18 My -- my second question is, again,
19 about the status of this rule as an ETS. So
20 Chief Judge Sutton pointed out in his dissent
21 from the denial of initial en banc that OSHA
22 did not adopt this rule in response to the
23 emergency qua emergency because that had been
24 ongoing since early 2020, but, instead, it
25 responded to new facts on the ground which

1 included the widespread availability of a
2 vaccine, that maybe it was a surprise many
3 people chose to forgo, and the emergence of the
4 Delta variant.

5 And Chief Judge Sutton pointed out
6 that in an extended pandemic, or I don't know
7 if we've moved to an endemic, such as this one,
8 facts will continually change. New variants
9 will emerge. There might be new treatments,
10 new vaccinations. We have boosters now, right?
11 So now full vaccination might not just be the
12 two jabs; it might include a booster as well.

13 So when does the emergency end? I
14 mean, a lot of this argument has been about
15 Congress's failure to act. Two years from now,
16 do we have any reason to think that COVID will
17 be gone or that new variants might not be
18 emerging? And when -- when must OSHA actually
19 resort to its regular authority and go through
20 notice and comment and not simply be kind of
21 doing it in this quick way, which doesn't
22 afford people the voice in the process that
23 they are otherwise entitled to?

24 GENERAL PRELOGAR: So I think, if I
25 could respond to that in a few different ways,

1 Congress defined when the emergency exists. It
2 labeled this an Emergency Temporary Standard,
3 but it's dictated by the statutory
4 requirements. So there has to be a grave
5 danger from a physically harmful agent or a new
6 hazard, and the measures have to be necessary
7 to protect against that danger. And we don't
8 think that there is an additional free-floating
9 requirement about emergency status that has to
10 be taken into account.

11 JUSTICE BARRETT: So it could be an
12 emergency two more years from now?

13 GENERAL PRELOGAR: Well, I certainly
14 take the point that the emergency can be of
15 substantial duration. Of course, this is not a
16 way to -- to bypass notice and comment
17 permanently. Congress further specified that
18 the agency is expected to conduct a rulemaking
19 process over six months, and that's why the
20 agency estimated the lives saved, the
21 hospitalizations prevented over the six-month
22 life of the rule.

23 JUSTICE BARRETT: Sure, but I was
24 envisioning a new rule, right? Like, you know,
25 OSHA might, two years from now, adopt something

1 that's different from this vaccine or
2 mask-and-test mandate. I'm just talking about
3 the limits more generally on OSHA's power under
4 the ETS provision.

5 GENERAL PRELOGAR: The limits, I
6 think, are the ones written into the statute.
7 And so, if you want to project out two years
8 from now, I think it's entirely possible, of
9 course, that the trajectory of the pandemic
10 will change. I certainly hope so. And in that
11 case, OSHA, I think, would have to, if it
12 wanted to regulate again, cross the high burden
13 of showing a grave danger.

14 You know, this is a -- an authority it
15 has used sparingly in cases of -- of what we
16 think are true emergencies, and I think to
17 suggest based on concern about what might
18 happen in the future that its authority should
19 be constrained or clipped now, when we are in
20 the middle of an unprecedented pandemic that is
21 claiming more lives than we've seen in a
22 shorter amount of time, would do a disservice
23 to Congress's anticipation that OSHA might need
24 to act quickly in response to dangers like
25 this.

1 JUSTICE BARRETT: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Keller,
3 rebuttal?

4 REBUTTAL ARGUMENT OF SCOTT A. KELLER
5 ON BEHALF OF THE APPLICANTS IN NO. 21A244

6 MR. KELLER: Two points, Mr. Chief
7 Justice.

8 First, we need a stay now before
9 enforcement starts. Our members have to submit
10 publicly their plans to how to comply with this
11 regulatory behemoth on Monday. Vaccines would
12 need to occur by February 9. You would need
13 two vaccines to comply. Those vaccines would
14 have to start immediately. Tracking and
15 recordkeeping cannot happen overnight.

16 And on tests, you heard my friend, the
17 Solicitor General, mention the media reports
18 that we've all seen about shortages of tests
19 and costs increasing. Our declarations,
20 Appendix page 345 and 374, confirm that as
21 well.

22 And that's exactly why workers will
23 quit right away. You don't even have to take
24 our word for it. The federal government, the
25 Postal Service and Amtrak, both say the same

1 things. What OSHA did is they cherry-picked
2 one study about healthcare workers, a very
3 specific industry, and what that worker
4 attrition rate would be. Again, two
5 declaration cites, we have plenty more, but
6 Appendix pages 351 and 374.

7 And my second point to close on is
8 about who decides in the public interest. And
9 I would submit that this Court's precedents
10 answer that.

11 We're not asking this Court to reverse
12 anything. Industrial union 40 years ago in
13 Justice Stevens's controlling opinion says that
14 there was an absence of a clear mandate in the
15 OSH Act, so it's unreasonable to assume that
16 Congress gave OSHA unprecedented power over
17 American industry and the emergency power is
18 also narrowly circumscribed, yet here OSHA has
19 never before done mandated vaccines or
20 widespread testing much less over all
21 industries or on an emergency basis.

22 So whether we're talking about the
23 agency's failure to explain, whether we're
24 talking about the statutory terms necessary,
25 whether we're talking about how this has to be

1 tethered to the workplace under the major
2 questions doctrine, under any one of those
3 theories we are likely to succeed on the
4 merits.

5 And finally, when it comes to the
6 public interest as this Court just recognized a
7 few months ago, it is undisputable that the
8 public has a strong interest in combatting the
9 spread of the COVID-19 delta variant but our
10 system does not permit agencies to act
11 unlawfully, even in pursuit of desirable ends.

12 We would respectfully request a stay
13 of this unprecedented sweeping S -- ETS before
14 Monday.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The applications are submitted.

17 (The applications were submitted at
18 12:09 p.m.)

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Official - Subject to Final Review

\$	6			
\$100 [1] 98:25	6,500 [1] 74:15	33:1	adopted [1] 38:19	Alito's [1] 111:21
1	60 [1] 17:25	accountable [4] 31:13,20, 24 130:5	adopting [1] 93:12	allow [1] 52:6
1 [2] 26:23 27:18	60-year-olds [1] 38:25	acknowledge [1] 32:6	advanced [1] 9:10	allows [2] 55:25 56:4
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