

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -

3 NATIONAL FEDERATION OF INDEPENDENT)

4 BUSINESS, ET AL.,)

5 Applicants,)

6 v.) No. 21A244

7 DEPARTMENT OF LABOR, OCCUPATIONAL)

8 SAFETY AND HEALTH ADMINISTRATION,)

9 ET AL.,)

10 Respondents.)

11 and)

12 OHIO, ET AL.,)

13 Applicants,)

14 v.) No. 21A247

15 DEPARTMENT OF LABOR, OCCUPATIONAL)

16 SAFETY AND HEALTH ADMINISTRATION,)

17 ET AL.,)

18 Respondents.)

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.

1 APPEARANCES:
2 SCOTT A. KELLER, ESQUIRE, Washington, D.C.; on behalf
3 of the Applicants in No. 21A244.
4 BENJAMIN M. FLOWERS, Solicitor General, Columbus,
5 Ohio; on behalf of the Applicants in No. 21A247.
6 GEN. ELIZABETH B. PRELOGAR, Solicitor General,
7 Department of Justice, Washington, D.C.; on behalf
8 of the Respondents.
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SCOTT A. KELLER, ESQ.	
4	On behalf of the Applicants in No. 21A244	4
5	ORAL ARGUMENT OF:	
6	BENJAMIN M. FLOWERS, ESQ.	
7	On behalf of the Applicants in No. 21A247	42
8	ORAL ARGUMENT OF:	
9	GEN. ELIZABETH B. PRELOGAR, ESQ.	
10	On behalf of the Respondents	72
11	REBUTTAL ARGUMENT OF:	
12	SCOTT A. KELLER, ESQ.	
13	On behalf of the Applicants in No. 21A244	137
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 bloodborne
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 this an indispensable or essential
17 measure that necessarily would require looking
18 at what are the alternatives available. You
19 would have to also look at, necessary to what
20 end? And it's to abate a grave danger. And
21 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: -- and the major
2 questions 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 problem.

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 that's an assumption, right, but make that
7 assumption with me. Are you still asking us to
8 issue a stay and stop this from taking effect,
9 like issue a stay today or tomorrow or Sunday
10 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 the balance of harms. It's also public
6 interest. Can you ask us -- is that what
7 you're doing now, to say it's in the public
8 interest in this situation to stop this
9 vaccination rule with nearly a million people
10 -- let me not exaggerate -- nearly
11 three-quarters of a million people, new cases
12 every day? I mean, to me, I would find that
13 unbelievable.

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

18 JUSTICE BREYER: Yeah, yeah --

19 MR. KELLER: We do not --

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

23 Okay. I'm asking you a different
24 question, and the question is: How can it
25 conceivably be in the public interest with

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

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

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

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

25 Among those employers who have

1 attempted to do so, only 28 percent are able to
2 find adequate providers to ensure that weekly
3 testing is available for the employees.

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

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

12 JUSTICE KAGAN: Well, who does get --

13 JUSTICE ALITO: And, Mr. Keller --

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

16 Justice Thomas, anything further?

17 JUSTICE THOMAS: Not for me.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

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

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

1 the statute before us is first found to be
2 ambiguous.

3 What's your understanding?

4 MR. KELLER: Well, two points.

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

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

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

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

1 ambiguity. Do you disagree?

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

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

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

25 So we can talk about the billions in

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

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

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

22 JUSTICE ALITO: No, no, fine.

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

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

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

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

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

25 But, Mr. Fletcher, are you -- you seem

1 to be importing into "necessary" a concept of
2 strict scrutiny. Am I correct?

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

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

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

25 I always thought that all we had to

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

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

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

1 at Appendix 308, 316, 320 --

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

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

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

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

24 MR. KELLER: Justice Sotomayor, I
25 think that exactly proves our point, that

1 Congress knows how to enact a statute when it
2 wants to give OSHA power --

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

7 MR. KELLER: And --

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

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

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

25 Respectfully, I -- I think it has a

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

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

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

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

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

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

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

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

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

24 It's those types of internally
25 inconsistent positions that aren't taking

1 account of the full problem that could have
2 been explained and should have been explained.

3 JUSTICE KAGAN: Thank you, Mr. Keller.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

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

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

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

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

1 What -- what should we look at?

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

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

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

23 Also, is this a profound and earnest
24 debate over a question of vast politically --
25 vast political and economic significance? I

1 don't at this point believe that the federal
2 government is contesting that this absolutely
3 satisfies that.

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

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

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

23 When you have the distinction between
24 the emergency power and the regular power --
25 this was the dialogue earlier with Justice

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

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

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

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: Mr. Keller, I want
25 to return to the discussion you were having

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

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

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

1 primarily outdoors, those, and workers who work
2 in an inside environment all day long.

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

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

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

22 JUSTICE BARRETT: Well, I understand
23 that. And you're saying that that's the
24 problem. You're not contesting that if we were
25 talking about healthcare workers or a

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

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

8 JUSTICE BARRETT: Sure.

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

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

24 MR. KELLER: Yes.

25 JUSTICE BARRETT: Okay. And a

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

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

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

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

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Flowers, I don't quite know where

1 to look, but are you still on the line?

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

3 CHIEF JUSTICE ROBERTS: Thank you.

4 You may proceed.

5 ORAL ARGUMENT OF BENJAMIN M. FLOWERS

6 ON BEHALF OF THE APPLICANTS IN NO. 21A247

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

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

23 So sweeping a rule is not necessary to
24 protect employees from a grave danger as the
25 emergency provision requires. And I want to be

1 clear that states share OSHA's desire to bring
2 this pandemic to a close, but the agency cannot
3 pursue that laudable goal unlawfully.

4 I welcome your questions.

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

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

18 JUSTICE THOMAS: Well, but --

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

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

1 presence there and by the fact that it is so
2 acute?

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

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

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

1 a sporting event or a concert.

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

10 JUSTICE KAGAN: Mr. Flowers --

11 MR. FLOWERS: But this cannot.

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

16 MR. FLOWERS: I --

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

25 I'm trying to figure out, like, why

1 this is a blunderbuss approach when everybody
2 knows from living their normal lives that every
3 workplace has been affected by this, save for,
4 you know, a few here and there.

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

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

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

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

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

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

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

1 risk they're talking about. They're not
2 talking about jobs where people do congregate
3 in settings like that that changes the nature
4 of the risk.

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

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

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

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

1 settings, you know, that's where the greatest
2 risk is. Not just that's where the risk of
3 ordinary life is. That is, in fact, where the
4 greatest risk is.

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

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

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

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

1 workplaces as safe and healthful as the ETA --
2 as the ETS can obtain a variance, okay?

3 So they did make some distinctions.

4 MR. FLOWERS: Well --

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

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

16 Well, OSHA considered that. My
17 wonderful law clerk has 61475, 63422, 61466, 61
18 474 and 475, those are pages. I don't think
19 you should read all 61,000, but, nonetheless,
20 there are at least five or 10 pages where they
21 went into this, and they said, in our view,
22 hmm, yeah, that's right, some people may quit,
23 maybe 3 percent. But more may quit when they
24 discover they have to work together with
25 unvaccinated others because that means they may

1 get the disease. Okay?

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

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

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

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

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

1 Alabama Realtors got to.

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

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

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

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

23 And as my presence here as a triple
24 vaccinated individual by phone suggests and as
25 Justice Sotomayor suggests and as the amicus

1 brief from the American Commitment Foundation
2 shows, vaccines do not appear to be very
3 effective in stopping the spread or
4 transmission.

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

11 JUSTICE SOTOMAYOR: Counsel --

12 MR. FLOWERS: -- where things are
13 entirely different --

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

21 We have hospitals that are almost at
22 full capacity with people severely ill on
23 ventilators. We have over 100,000 children,
24 which we've never had before, in -- in serious
25 condition and many on ventilators.

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

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

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

24 JUSTICE SOTOMAYOR: So, if it's within
25 the police power to protect the health and

1 welfare of workers, you seem to be saying the
2 states can do it, but you're saying the federal
3 government can't even though it's facing the
4 same crisis in interstate commerce that states
5 are facing within their own borders.

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

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

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

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

19 JUSTICE SOTOMAYOR: No, they have a
20 police power to protect workers.

21 MR. FLOWERS: I would not call it a
22 police power. I think the Commerce Clause
23 power allows them to address health -- sorry,
24 is there a question?

25 CHIEF JUSTICE ROBERTS: No. But it's

1 --

2 MR. FLOWERS: It allows them to
3 address health in the context of the workplace.

4 JUSTICE SOTOMAYOR: Exactly.

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

7 Justice Thomas?

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

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

20 Would you just talk about how
21 efficacious the vaccine is in the workplace?

22 MR. FLOWERS: So I want -- first, I
23 want to be very clear. We're -- we are strong
24 promoters of vaccination because they do stop
25 serious illness.

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

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

19 If you look at the Griffin study that
20 they cite at 61418 of the Federal -- of the
21 Federal Register, unvaccinated and vaccinated
22 both had low risks of death and ICU.

23 As a societal matter, we are not
24 debating that COVID is serious, and it has
25 incredibly grave risk for some people, not for

1 everybody. And, finally, I'd point you to the
2 Scovy Study. Again, they cite that at 61418 of
3 the Federal Register. It showed that
4 vaccinated individuals who are 65 or older are
5 twice as likely to die as unvaccinated
6 individuals 18 to 49. And keep in mind that's
7 18 to 49, not 18 to 29. So that's -- it would
8 probably be even more skewed if you looked at
9 the -- the younger demographic.

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

17 Could the State of Ohio do what you
18 say OSHA cannot do?

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

23 Now I think that's an important point
24 to stress is we're talking here as though OSHA
25 is the only entity that can regulate this, an

1 agency that no one thought had anything to do
2 with the pandemic until months, if not years,
3 into it.

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer?

20 JUSTICE BREYER: A quick question, I'm
21 just curious. I was searching for an example.
22 Universal risk inside and outside the
23 workplace, including the workplace, can OSHA
24 regulate it? Can OSHA regulate fire risks?

25 MR. FLOWERS: Yes. We don't draw the

1 distinction between in -- in the workplace and
2 out of work.

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

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

11 JUSTICE BREYER: Well, people throw
12 matches.

13 MR. FLOWERS: They smoke.

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

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

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

24 MR. FLOWERS: I do.

25 JUSTICE BREYER: Say it again so I

1 catch it.

2 MR. FLOWERS: Sure. I want to be -- I
3 want to be very clear about this. We accept
4 the line that's been drawn forever in Forging
5 Industry that simply the fact that a risk
6 exists outside the workplace doesn't mean you
7 can't address it when it's inside the
8 workplace.

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

13 And so you can regulate -- to be
14 clear, OSHA could regulate COVID-19 in the
15 workplace when the employer does something like
16 packing individuals very closely together in a
17 poorly ventilated area that -- that -- that
18 enhances or changes the nature of the risk, I
19 should say. But that's not the risk they say
20 they're regulating. Again, 61411 of the
21 Federal Register, they say the risk is you'll
22 come into contact with individuals.

23 And the risk of encountering an
24 individual is an ever-present risk we face at
25 home, at work, and everywhere else.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

21 That's my understanding of the issue,
22 but maybe I haven't understood it correctly.
23 Is that your understanding? And I'll ask the
24 Solicitor General the same question, or at
25 least I hope she will address it.

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

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

13 MR. FLOWERS: Correct. And I would go
14 further and say they cannot rely at all on the
15 risk to vaccinated workers because they
16 conclude -- this is 61419 of the Federal
17 Register -- that no one who's vaccinated is --
18 is in grave danger.

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor.

22 JUSTICE SOTOMAYOR: Counsel,
23 unvaccinated people you showed or you -- you
24 pointed to young people who had a different --
25 or had the same death rate as vaccinated older

1 people.

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

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

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

1 to calculating --

2 JUSTICE SOTOMAYOR: But lower risk
3 doesn't --

4 MR. FLOWERS: -- the overall grave
5 danger.

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

14 MR. FLOWERS: Right.

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

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

25 In terms of spread, their own ETS says

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

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

23 MR. FLOWERS: That's right, but the
24 problem for -- for --

25 JUSTICE KAGAN: Okay. So just -- I --

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

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

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

1 key point there.

2 JUSTICE KAGAN: Okay. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

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

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

22 And so the question in my mind really
23 turns a lot on the major questions doctrine in
24 this case. Is this one that has been given to
25 the agencies to decide or one that Congress has

1 to make as a major question under our federal
2 system? And I haven't heard a lot of
3 discussion about that.

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

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

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

20 And with respect to these major
21 questions that are going to affect people from
22 coast to coast and cost, you know, millions and
23 millions of dollars and potentially many jobs
24 and potentially infect -- affect public health,
25 we would expect Congress -- we would demand

1 Congress to at least speak clearly before we
2 will say an agency can exercise that power and
3 therefore before we're into the non-delegation
4 issue.

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Yeah, I want to
21 follow up on Justice Gorsuch's questions, which
22 I think are important, and also Justice Kagan's
23 questions about the policy arguments that are
24 present here, especially in an emergency
25 situation.

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

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

12 JUSTICE KAVANAUGH: Okay. Yes, that's
13 what I meant by "this."

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

23 What's the value of insisting on that
24 here?

25 MR. FLOWERS: Well, one -- one value

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

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: No questions.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 General Prelogar.

17 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

18 ON BEHALF OF THE RESPONDENTS

19 GENERAL PRELOGAR: Mr. Chief Justice,
20 and may it please the Court:

21 COVID-19 is the deadliest pandemic in
22 American history, and it poses a particularly
23 acute workplace danger. Workers are getting
24 sick and dying every day because of their
25 exposure to the virus at work.

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

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

20 The Applicants try to portray this
21 standard as unprecedented. But this lies in
22 the heartland of OSHA's regulatory authority.
23 Congress charged the agency with setting
24 nationwide standards to protect the health and
25 safety of employees throughout the nation, and

1 Congress specifically appropriated money to
2 OSHA to address COVID-19 in the workplace.

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

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

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

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

19 The Court should reject the argument
20 that the agency is powerless to address that
21 grave danger.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: General, the --
24 what's the -- the -- the problem you're getting
25 at? Is it the employer not providing -- making

1 sure that employees are vaccinated or masked,
2 or is it the employees who decline to be
3 vaccinated or masked?

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

6 JUSTICE THOMAS: But who's --

7 GENERAL PRELOGAR: -- at work, Justice
8 Thomas, and --

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

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

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

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

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

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

25 GENERAL PRELOGAR: No. I think that

1 with respect to other infectious diseases it
2 would be necessary for OSHA to develop the
3 record to demonstrate that the requisite risk
4 level that the statute requires --

5 JUSTICE THOMAS: But you could --

6 GENERAL PRELOGAR: -- is satisfied.

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

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

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

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

19 JUSTICE THOMAS: Example?

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

1 So it's not --

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

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

13 JUSTICE THOMAS: Thank you.

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

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

25 Could you give me examples of some

1 federal agencies where you would be willing to
2 say COVID is not a grave danger in their -- in
3 that context?

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

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

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

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

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

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

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

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

23 But I don't know that we should try to
24 find, okay, what specific thing can we find to
25 say, oh, this is covered by OSHA? What

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

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

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

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

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

1 this constitutes a grave danger in the
2 workplace.

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

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

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

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

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

23 GENERAL PRELOGAR: I think it's
24 incorrect to say that that is what is happening
25 here. This policy clearly --

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

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

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

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

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

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

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

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

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

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

16 JUSTICE BREYER: Yeah.

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

1 workers would leave in droves was -- was
2 misplaced.

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

9 JUSTICE BREYER: Yeah. Okay. Okay.

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

13 JUSTICE ALITO: On this --

14 JUSTICE BREYER: What about on the
15 merits? I just have one other, which is on the
16 merits. You've heard and you've read the
17 argument on the other side that, look, what
18 OSHA could easily have done or should have done
19 is go through industry by industry or groups of
20 industries by groups of industries and -- and
21 say there's this here and there's that there.

22 Instead, what they did is everybody
23 over a hundred employees, except for, and then
24 they had a few exceptions, working alone,
25 working at home, a religious exemption, you can

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

5 What would you say to that?

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

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

24 Now I take the point, as the Chief
25 Justice's hypothetical focused on -- I think

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

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

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

15 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

24 JUSTICE ALITO: Yeah, on November 5.
25 All right. And it hasn't been enforced during

1 that period. These cases arrived at this Court
2 just a short time ago. They present lots of
3 difficult, complicated issues. We have
4 hundreds of pages of briefing. We're receiving
5 very helpful arguments this morning.

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

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

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

22 JUSTICE ALITO: Well, I -- no, I'm
23 asking about an administrative stay. I won't
24 get into an argument about indisputably clear.
25 But your argument -- your point is you think it

1 would be appropriate or would not be
2 appropriate if we issued a short administrative
3 stay? Or if we do that, are you going to say,
4 well, they're causing people to die every day?

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

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

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

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

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

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

1 stay of a short period of time, and we don't
2 think that you need to have that time to digest
3 this case and decide it.

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

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

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

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

14 JUSTICE BREYER: I thought 750 --

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

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

1 enforcement discretion because of the confusion
2 that had been created by the Fifth Circuit
3 stay.

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

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

24 JUSTICE BREYER: So, if we delay that
25 one day, maybe I'm wrong, and please tell me if

1 I am, but the numbers I read is, when they
2 issued this order, there were approximately
3 70-something thousand new cases every day. And
4 yesterday there were close to 750,000.

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

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

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

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

24 JUSTICE SOTOMAYOR: General, am I to
25 understand from your previous answer that

1 enforcement qua testing doesn't occur until
2 February 9, correct?

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

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

9 GENERAL PRELOGAR: Correct.

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

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

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

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

23 JUSTICE SOTOMAYOR: So --

24 GENERAL PRELOGAR: -- on the testing
25 aspect.

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

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

9 JUSTICE SOTOMAYOR: All right. One
10 other question if I might --

11 CHIEF JUSTICE ROBERTS: I'm sorry, I
12 don't believe I was --

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 worksites
2 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 some of my colleagues
14 have raised. Who's in a better position to act
15 and why and why is it in a better position to
16 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 swift 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 grave 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 that the statutory
6 language already exists. And to the extent
7 that the Applicants are suggesting that there's
8 some kind of specific authorization requirement
9 here that Congress had to do more, I think that
10 gets to the heart of your question, which is
11 that 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. I
9 don't think it had COVID in mind. That was
10 almost closer to the Spanish Flu than it is to
11 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. But this is something
16 that the federal government has never done
17 before, right, mandated vaccine coverage?

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

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

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

18 GENERAL PRELOGAR: Well, there are a
19 lot of elements to that question. I'd like to
20 try to take them in turn.

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

1 response to that.

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

15 With --

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 no
22 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 disposition of this matter, but is a vaccine
16 the only 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 worksite, 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 from anything
8 that OSHA has ever done before, I want to see
9 if it might be fundamentally different in at
10 least two respects and get your answer to -- to
11 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 also provides protection
8 when 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 that 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 --
18 this is a little science fiction, but maybe it
19 will 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's said 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 very
16 minimal risk with respect to some individuals,
17 but -- but, again, I would emphasize that I
18 think that -- there would be no basis to think
19 that these FDA-approved and authorized vaccines
20 are not safe and effective. They are the
21 single-most effective.

22 JUSTICE ALITO: No, I'm not making
23 that point. I tried to make it as clear as I
24 could. I'm not making that point. I'm not
25 making that point. I'm not making that point.

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

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

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

24 GENERAL PRELOGAR: That's absolutely
25 true. And one of the risks that OSHA was

1 guarding against here was the risk that
2 unvaccinated workers posed to other workers
3 because they are so much more likely to
4 transmit --

5 JUSTICE ALITO: To other --

6 GENERAL PRELOGAR: -- this deadly
7 disease to them.

8 JUSTICE ALITO: -- what type of
9 workers? To other -- to vaccinated workers?

10 GENERAL PRELOGAR: Yes, the grave
11 danger finding --

12 JUSTICE ALITO: I thought the --

13 GENERAL PRELOGAR: -- was based on
14 unvaccinated --

15 JUSTICE ALITO: -- Secretary --

16 GENERAL PRELOGAR: -- workers.

17 JUSTICE ALITO: -- disclaimed that.

18 GENERAL PRELOGAR: Yes. The grave
19 danger finding is limited to unvaccinated
20 workers --

21 JUSTICE ALITO: Right, so that's not
22 --

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

25 JUSTICE ALITO: -- a concern for us?

1 GENERAL PRELOGAR: -- contract it from
2 their coworkers as well.

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

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

11 JUSTICE ALITO: All of whom have --

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

14 JUSTICE ALITO: -- all of --

15 GENERAL PRELOGAR: -- who might have
16 other comorbidities --

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

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

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

19 JUSTICE ALITO: No, but isn't -- isn't
20 it --

21 GENERAL PRELOGAR: -- or take
22 precautions. 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 a regulation, and so we don't
6 want to have the -- put the employees under
7 pressure, overt or implied, to -- to waive the
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 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 being unvaccinated
12 contributes 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 that there

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

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

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: General, I'd like to
12 ask the -- 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 there are 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. It's essentially a kind of clue about
24 how 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 kind of a big deal, we're just going
7 to ignore the fact that it falls clearly within
8 the scope of the delegated authority and say
9 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 do a
7 disservice to principles of the separation of
8 powers and to -- to Congress's ability to have
9 its 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 an ambiguity. I know you'll 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 Traditionally, 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 has 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 workaround 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'd just like you
11 to address, again, the question, assuming the
12 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 in the halls of Congress in the
17 second?

18 GENERAL PRELOGAR: So accepting the
19 assumption that there's 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 states have that residual police power
9 provides a basis to assume that the OSH Act
10 can't have any application or that there has to
11 be a specific authorization here of each and
12 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 be -- pose a grave -- grave
19 risk, some might say? The flu kills people
20 every year. Other grave diseases do too. And
21 there are vaccines against many. And -- and we
22 don't need to list them all.

23 But, traditionally, OSHA has not
24 regulated in this 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: -- OSHA has never
6 seen 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'd call it, but it was a
11 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, and you can correct me, does not
16 mandate every worker in the country to receive
17 such a vaccine. We have flu vaccines. The flu
18 kills, I believe, hundreds, thousands of people
19 every year. OSHA has never purported to
20 regulate on 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 another
7 been subject to compulsory vaccination
8 requirements --

9 JUSTICE GORSUCH: Is that true with
10 the flu?

11 GENERAL PRELOGAR: -- mostly --

12 JUSTICE GORSUCH: Do we -- do we know
13 that to be true with the flu?

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

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

23 GENERAL PRELOGAR: I think that the
24 agency would have to build the record to
25 demonstrate that it would clear that statutory

1 hurdle for --

2 JUSTICE GORSUCH: But it might?

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

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

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

21 We haven't only used the word
22 ambiguous. And it seems to me that a question
23 that I'd like your help on is applying language
24 that is subtle, cryptic, oblique to a new
25 context hasn't been done before in the last 50

1 years. How do we think about a question like
2 that? And in answering that, think about the
3 benzene case, the Brown & Williamson case with
4 tobacco, benzene with cancer, and the UARG case
5 with greenhouse gas emissions. All three were
6 the agency was applying this broad but arguably
7 cryptic language to a new context. I think
8 that's one way to characterize them.

9 How do we think about that?

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

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

24 With respect to the benzene case,
25 there too, there was a question about whether

1 there was an entitlement to regulate without
2 any finding of risk, and that was in tension
3 with other statutory provisions, so there was a
4 conflict.

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

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

20 JUSTICE KAVANAUGH: In all three
21 cases, there were strong dissents that said the
22 opposite of that, though, that said actually
23 the statutory language is clear and that the
24 Court -- you know, Justice Marshall's dissent
25 in the benzene case is very powerful that the

1 Court was simply scaling back from the plain
2 language because of its concern about the
3 significance of regulating every workplace in
4 America to take out any risk of cancer.

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

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

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

1 And so, in this case, we think that
2 all of the textual clues line up on our side,
3 in addition to the plain language of the
4 statute.

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

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

1 going to hit us at some point.

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

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

19 And if I could make just make one
20 additional point on that. Of course, as I've
21 emphasized, there is an express reference to
22 immunization requirements in the OSH Act
23 itself, so we think that that actually provides
24 additional confirmation that Congress was
25 thinking about that and could have anticipated

1 it and that religious exemption would have no
2 application if, in fact, immunization is just
3 off limits.

4 But I think as well it's important to
5 look at this against the backdrop of
6 immunization requirements in our country. This
7 is not some kind of newfangled thing. As I've
8 mentioned before, most of us have been subject
9 to compulsory vaccination requirements at
10 various points throughout our lifetime.

11 And so the idea that Congress couldn't
12 have anticipated that in dealing with the --
13 the deadliest virus that OSHA has experienced
14 in its history, it might think that vaccination
15 -- encouragement of vaccination would be an
16 appropriate way to protect workers, I think, is
17 just inconsistent with the idea that
18 vaccination is often the single-most effective
19 way to target a virus.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: General Prelogar, I
24 have two questions, both of which address the
25 status of this rule as an emergency temporary

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

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

21 Now you've argued, and I think there's
22 a lot of intuitive appeal to this, that when
23 you're facing an emergency of the magnitude of
24 this pandemic, that this power effectively --
25 can be used most effectively as a blunt

1 instrument. You know, we don't have time to
2 make industry by industry specific kind of
3 calculations because we want to move with
4 speed.

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

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

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

21 JUSTICE BARRETT: But do they have --

22 GENERAL PRELOGAR: -- danger.

23 JUSTICE BARRETT: -- to come forward
24 with that evidence, or did OSHA have to
25 consider it and reject it? Because another

1 part of their contention is that OSHA did not
2 adequately explain why this measure, this
3 particular rule and its scope was necessary
4 vis-à-vis or as compared to other
5 possibilities.

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

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

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

22 And as I understand their tailoring
23 arguments -- and this actually touches on the
24 question you asked earlier in the argument --
25 they're really focused on two things, the

1 categories of workers and the -- the particular
2 workplaces. And they haven't suggested that
3 there are other mitigation measures there that
4 OSHA neglected to consider. They're saying
5 those things should have just been carved out
6 altogether.

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

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

18 JUSTICE BARRETT: That's helpful.
19 Thank you.

20 My -- my second question is, again,
21 about the status of this rule as an ETS. So
22 Chief Judge Sutton pointed out in his dissent
23 from the denial of initial en banc that OSHA
24 did not adopt this rule in response to the
25 emergency qua emergency because that had been

1 ongoing since early 2020, but, instead, it
2 responded to new facts on the ground, which
3 included the widespread availability of a
4 vaccine, that maybe it was a surprise many
5 people chose to forgo, and the emergence of the
6 Delta variant.

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

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

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

13 JUSTICE BARRETT: So it could be an
14 emergency two more years from now?

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

25 JUSTICE BARRETT: Sure, but I was

1 envisioning a new rule, right? Like, you know,
2 OSHA might, two years from now, adopt something
3 that's different from this vaccine or
4 mask-and-test mandate. I'm just talking about
5 the limits more generally on OSHA's power under
6 the ETS provision.

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

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

1 to act quickly in response to dangers like
2 this.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Keller,
5 rebuttal?

6 REBUTTAL ARGUMENT OF SCOTT A. KELLER
7 ON BEHALF OF THE APPLICANTS IN NO. 21A244

8 MR. KELLER: Two points, Mr. Chief
9 Justice.

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

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

24 And that's exactly why workers will
25 quit right away. You don't even have to take

1 our word for it. The federal government, the
2 Postal Service and Amtrak both say the same
3 things. What OSHA did is they cherry-picked
4 one study about healthcare workers, a very
5 specific industry, and what that worker
6 attrition rate would be. Again, two
7 declaration cites, we have plenty more, but
8 Appendix pages 351 and 374.

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

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

24 So whether we're talking about the
25 agency's failure to explain, whether we're

1 talking about the statutory term "necessary,"
2 whether we're talking about how this has to be
3 tethered to the workplace under the major
4 questions doctrine, under any one of those
5 theories, we are likely to succeed on the
6 merits.

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

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The applications are submitted.

19 (Whereupon, at 12:09 p.m., the
20 applications were submitted.)
21
22
23
24
25