United States Court of Appeals
for the District of Columbia Circuit

No. 21-1074

JONATHAN CORBETT,
Petitioner

v.

TRANSPORTATION SECURITY ADMINISTRATION
AND
DAVID P. PEKOSKE,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION,
Respondents

Petition for Review of Agency Orders Under 49 U.S.C § 46110

PETITION FOR REHEARING OR REHEARING *EN BANC*

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CERTIFICATE OF PARTIES

Pursuant to D.C. Cir. R. 35(c)(1), Petitioner makes the following certification:

Parties & Amici. There were no prior proceedings before the panel's opinion in this matter. Petitioner is Jonathan Corbett, an individual, and Respondents are the U.S. Transportation Security Administration, a federal component agency of the U.S. Department of Homeland Security, and its highest-ranking official, Administrator David P. Pekoske, in his official capacity. No amici have yet appeared.

INTRODUCTION[1]

Petitioner challenged Respondent TSA's mask mandate, which requires, *inter alia*, all persons within an airport, airplane, or other portion of the aviation system to wear a mask at virtually all times. Petitioner argued that this mandate was *ultra vires* because TSA's statutory authority is limited to transportation *security*, as opposed to general safety and public health matters. This argument was rejected by the panel on December 10th, 2021. *See* Addendum 1, Panel Opinion.

The majority opinion found that Congress used sufficiently "broad language" to empower TSA address to address threats to "security and safety" within the transportation system, rejecting Petitioner's contention that TSA was limited to the former to the exclusion of the latter. *Id*. at *18 (*citation and quotations omitted*). The dissenting opinion found that Petitioner lacked standing

[1] Pursuant to Fed. R. App. P. 35(b)(2), the panel decision conflicts with a new decision of the United States Supreme Court and reconsideration by the panel, or consideration by the full court, is necessary to secure and maintain uniformity of the court's decisions. The conflicting case is *NFIB v. OSHA*, 595 U.S. ____ (2022) (Case No. 21A244).

and that Petitioner's challenge amounted to mere "trifles" that were unworthy of the Court's time[2]. *Id*. at *24, 25.

However, on January 13th, 2022, the United States Supreme Court decided a challenge to coronavirus-related mandates of another federal agency and held that the agency's "mandate extends beyond the agency's legitimate reach." *NFIB v. OSHA*, 595 U.S. ____ (2022) (Case No. 21A244) at *8 (reproduced as Addendum 2). In particular, the Occupational Safety and Health Administration (OSHA) had promulgated a rule that forced all employers with over 100 employees to require their employees either to vaccinate or to wear a mask at work and test for the virus, among other requirements and various exceptions. The Supreme Court held that OSHA lacked the statutory authority to make the rule.

In *NFIB* the Supreme Court analyzed the question with a far less deferential view to the agency than this Court did in its December opinion, apparently reviving and possibly even expanding the "major questions doctrine." *Id*. (*see*, *generally*, concurring opinion of Gorsuch, J, explaining). Simply put, the panel opinion more closely aligns with the dissenting opinion in *NFIB*. The Court, therefore, should rehear this matter in light of the clarity – or arguably even new

[2] With the utmost respect for the esteemed dissenting judge, challenges to novel assertions of a federal agency's power are a service to our system of federalism and checks-and-balances. The personal attacks levied in the dissenting opinion for making such a challenge should be retracted.

law – set forth by the majority opinion of the Supreme Court. Petitioner requests that the panel rehear this case or that the case be reheard *en banc*.

ARGUMENT

I. *The Statutory Language at Issue Cannot Be Interpreted Using "Chevron Step 1"*

The *Chevron* test used to review agency interpretation of a statute is best described as a three-step process:

> "The threshold inquiry — sometimes called *Chevron* 'step zero' — is determining whether Congress has delegated interpretive authority to the agency in question. … If so, the court turns to *Chevron* "step 1." The *Chevron* framework requires "that both the agency and the courts give effect to Congress's unambiguously expressed intent if the underlying statute speaks directly to the precise question at issue." If the statute is clear, then the unambiguous intent of Congress must control and the *Chevron* inquiry is over. However, if the statute is ``silent or ambiguous with respect to the specific issue` the court must defer to the agency's interpretation if it is reasonable.' In *Chevron* step 2, the court must determine whether the agency's interpretation of ambiguous statutory language is reasonable, and the reviewing court's inquiry is limited thusly."

Prime Time Int'l Co. v. Vilsack, 930 F. Supp. 2d 240, 248 (D.D.C. 2013), *aff'd Prime Time Int'l Co. v. Vilsack*, 753 F.3d 1339 (D.C. Cir. 2014) (*internal citations omitted*).

Although the panel did not explicitly specify which step it used to resolve the question raised in this case, it appears that the Court was operating at Step 1 because it applied *Chevron* and found that Congress has spoken with clarity:

> "TSA has a clear mandate to secure the transportation system against threats that endanger that system's very ability to function. Therefore, TSA is authorized to 'develop policies, strategies, and plans for dealing with' COVID-19 to the extent it threatens to disrupt the transportation system. 49 U.S.C. § 114(f)(3). Because the Mask Directives seek to contain this threat, they are in line with the agency's core mission."

Panel Opinion at *17, *see also* *14 ("it cannot seriously be doubted that Congress' delegations of authority to TSA authorize the Mask Directives"). In particular, it found clear that Congress intended TSA's authority to extend to all matters affecting "operational viability of the transportation system" and thus both "safety and security" issues are fair game for it to regulate[3]. *Id*. at *2, *16.

The Supreme Court in *NFIB* also did not explicitly specify which step it ended on, and it is unclear if it applied any steps or simply avoided *Chevron* by applying the "major questions doctrine" as the concurring opinion suggested. *NFIB* at *12 ("The Court rightly applies the major questions doctrine…") (Gorsuch, J., *concurring*). Regardless of whether the Supreme Court applied or side-stepped the *Chevron* test, however, it certainly did not conclude its analysis at Step 1 because, despite the broad language of the OSH Act, it found that Congress had not "plainly authorize[d] the Secretary's mandate." *NFIB* at *6.

[3] The Court also cited *Olivares v. Transp. Sec. Admin*., 819 F.3d 454, 462 (D.C. Cir. 2016), for the notion that "safety and security" are both within bounds for TSA. Panel Opinion at *12. But *Olivares* involved a security issue and clearly did not contemplate whether there may be a distinction between the two. Reliance on this *dicta* is misplaced.

The Supreme Court reached its conclusion by looking to the purpose of the agency and powers assigned to it. The opinion starts at the highest of levels: the name Congress gave to the agency. "As its name suggests, OSHA is tasked with ensuring *occupational* safety." *NFIB* at *2 (*emphasis in original*). Petitioner used the same starting point in the first paragraph of his opening brief. Petitioner's Brief, p. 6 ("Choosing the U.S. Transportation Security Administration ('TSA') to enforce a mask mandate within the transportation system was an understandable mistake … but it was a mistake nevertheless because TSA's role is confined to transportation security," *emphasis in original*).

As the name is just a starting point and Congress could assign an agency powers not implied by their name if they wished, the *NFIB* court continued their look at the purpose of the agency as shown by its enabling act. "The Act empowers the Secretary to set workplace safety standards, not broad public health measures. See 29 U. S. C. §655(b) (directing the Secretary to set '*occupational* safety and health standards' (emphasis added)); §655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect 'employees' from grave danger in the workplace)." *NFIB* at *6.

So, too, is the TSA's highest officer similarly constrained. "The Administrator shall be responsible for *security* in all modes of transportation, including — (1) carrying out chapter 449, relating to civil aviation *security*, and

related research and development activities; and (2) *security* responsibilities over other modes of transportation that are exercised by the Department of Transportation." 49 U.S.C. § 114(d) (*emphasis added*). Safety is not mentioned here. Public health is certainly not.

The panel noted, however, that some parts of the enabling act use the word *safety* "in concert" with TSA's security duties, putting safety matters within TSA's scope. Panel Opinion at *14. In light of *NFIB,* these references are far too slender a reed to support the TSA's far-reaching requirement. *All* the uses of the word "safety" in parts of TSA's enabling act are either: 1) special, narrow exceptions for times when TSA authority includes safety, or 2) clearly referring *exclusively* to security matters and unrelated to "safety" outside of the context of terrorists and criminals. They are as follows (all from Title 49, U.S.C.):

Special Exceptions for Times When TSA Authority Includes Safety:

1. **§ 44903(b)(3)(A)** – TSA required to protect passenger safety *while searching them*
2. **§ 44903(e)** – TSA responsible for law enforcement safety measures *during act of piracy*
3. **§ 44903(h)(3)** – TSA parent agency and U.S. Attorney General may jointly order deployment of TSA law enforcement officers to address safety concern

4. **§ 44903(h)(4)(C)** – TSA responsible for safety of airplane catering[4]
5. **§ 46111** – TSA may request FAA modify an FAA certificate (*e.g.*, a pilot's license) when certificate holders present a passenger safety issue (but TSA has no power to do it without FAA)

Instances Where "Safety" Clearly Meant "Security:"

1. **§ 44901(h)** – TSA law enforcement officers allowed to carry *guns at security checkpoints* "to ensure passenger safety and national security;" the reference to carrying guns making clear that *security* is the concern as *guns* are not generally useful to protect against natural or accidental causes of injury
2. **§ 44902(b)** – Allowing air carriers, not TSA, to remove unsafe passengers, within a statute dedicated to *weapons and searches*
3. **§ 44905(b)** – TSA has authority to cancel flights if a "threat" cannot be addressed, where context is that of a security threat, not a public health or other safety threat, as the statute speaks of restricting reporting with regards to "intelligence information *related to aviation security*"

[4] This is presumably also "security" related, *e.g.*, to prevent terrorists from poisoning food on airplanes or from using catering as an opportunity to smuggle weapons aboard; it is highly unlikely Congress intended TSA to protect catering workers from workplace injury or ensure passengers have a healthy diet at 30,000 feet.

None of these examples provide a general grant of authority for TSA to address any safety issue at will. None indicate that Congress intended that the word "safety" be read into each and every security power it delegated. Congress' use of the word in only a few places is far better understood to mean that Congress did *not* intend the word for all the other places.

In light of *NFIB*'s strategy of first looking at the high-level intent of Congress regarding the agency's scope, it is very likely – at the least, likely enough to justify a rehearing on the issue – that the panel's strategy for evaluating TSA's scope does not comport with the Supreme Court's. The *NFIB* court found that "the Act's provisions typically speak to hazards that employees face at work. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise." The same squarely applies to TSA: 1) neither the word "health," nor any synonyms, ever appear within § 114 or any of the rest of TSA's mandate, 2) the enabling act typically speaks to security issues as opposed to general transportation safety issues, and 3) epidemiology is obviously far outside of the scope of the agency's expertise.

This simply does not harmonize with the panel's opinion. The phrase "operational viability" exists nowhere in TSA's enabling act and it existed in no court's opinion regarding TSA before December 10th, 2021. The phrase originated

in *Respondent's* Brief, p. 48[5], and was adopted by the panel as the standard by which to measure TSA's authority. But, at least post-*NFIB*, this broad latitude cannot be said to be the unambiguously expressed intent of Congress that *Chevron* Step 1 contemplates. TSA was created to prevent the next 9/11, not to single-handedly ensure the "operational viability" of the transportation system. Congress has chosen to divide up the powers required to accomplish that goal between TSA, FAA, CBP, DOT, and many others, and the courts must give effect to that choice.

II. TSA's Rule Has "Vast Economic and Political Significance" Unintended by Congress

Like OSHA's mask-or-vaccine mandate in *NFIB,* what TSA has done here is no "everyday exercise of federal power." *NFIB* at *5, *citing In re MCP No. 165*, 20 F. 4th, 264, 272 (6th Cir. 2021) (Sutton, C. J., *dissenting*). "[B]efore January 2021, TSA had never attempted to include general safety matters within its security duties." Petitioner's Brief, p. 13, *citing Util. Air Regulatory Group*[6]. TSA's

[5] All page numbers refer to ECF-stamped header page numbers, not litigant-provided footer page numbers.

[6] TSA's response was, to paraphrase: "this one time we coordinated with CDC to deny boarding to people with Ebola." Respondent's Brief, pp. 49, 50; *see also* 80 Fed. Reg. 16402 (explaining context). This "coordination" did not involve TSA creating its own regulations and penalties – it was CDC who did that. It is also not clear if *anyone* was ever denied boarding under the policy.

mandate affects about 2,000,000 air passengers daily[7], in addition to hundreds of thousands of transit workers. At this rate, math demonstrates that every two months, more people are affected by TSA's mask mandate than OSHA's mandate will ever affect.

It is the unusually personal imposition of the mandate – requiring the public to attach a cover onto their faces for many hours at a time, influencing breathing and communication, while confined in an environment where one cannot leave to take a break, without even an option to avoid the mask by providing proof of vaccination (as OSHA's rule did) – that makes this attempt at exerting power unusual and has resulted in frequent non-compliance leading to diverted flights, skyrocketing "unruly passenger" complaints, and TSA fines and revocations of PreCheck status. Airlines and airports have borne the massive costs of compliance with these new rules and lost revenues resulting from passengers who choose alternative modes of transportation to avoid the mask requirement – costs that have surely been passed on to the passenger.

Despite this being TSA's first attempt to enforce its own public health regulation, and to do so on a massive scale and long-term basis (next week marks the one-year anniversary of the regulations), the panel did not address how unprecedented this exercise of power was. This omission is inconsistent with

[7] TSA. "TSA checkpoint travel numbers." https://www.tsa.gov/coronavirus/passenger-throughput (Retrieved January 23rd, 2022).

NFIB, where the unprecedented nature of OSHA's order was held to be important. "It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind — addressing a threat that is untethered, in any causal sense, from the workplace." *NFIB* at *8. "This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." *Id*., *citing Free Enterprise Fund v. Public Company Accounting Oversight Bd*., 561 U. S. 477, 505 (2010).

It is not alleged that TSA's mandate has an economic impact on the same scale as OSHA's. But dollars are not the only, or even most important, factor in determining whether an agency is attempting an expansion of its power too great to be accomplished without a *clear* grant of authority. The question simply boils down to whether an agency is taking a leap from its traditional nexus of power, and this is so whether the court calls it the "major questions doctrine" or simply invokes the "vast economic and political significance" mantra while nominally considering *Chevron* steps 1 or 2. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (*EPA attempt to broaden definition of pollution source too "vast"*); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (FDA attempt to regulate tobacco analyzed as major question); *ClearCorrect Operating, LLC v. International Trade Commission*, 810 F.3d 1283 (Fed. Cir. 2015) (ITC's attempt to

include digital data within the ambit of "articles" violated doctrine); *Tiger Lily, LLC v. United States Dep't of Housing & Urban Dev.*, 5 F.4th 666 (6th Cir. 2021) (CDC rent moratorium, preliminarily enjoined applying doctrine); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (deferred action program for illegal immigrants; preliminarily enjoined applying doctrine); *Missouri v. Biden*, 4:21-cv-01329-MTS (E.D. Mo., Nov. 29th, 2021) (agency that administers Medicare requires healthcare workers to be vaccinated; preliminarily enjoined applying doctrine).

This changes – indeed simplifies – the analysis. Given the vast numbers of American citizens affected by this intrusive and broad imposition, "[t]he question … is whether the Act plainly authorizes the Secretary's mandate." *NFIB* at *6. Because there is no plain language in TSA's authorizing statute at all contemplating TSA legislating public health matters, the Court must come to the same conclusion as *NFIB*: "It does not." *Id*.

III. *Even if TSA Had Authority Over "Transportation Safety" Matters, the Supreme Court Has Foreclosed Arguments That This Includes Broad Public Health Mandates*

Petitioner and TSA have argued whether the agency has only "security" powers or if it can regulate "safety and security." However, in OSHA's case, they

have "safety" as the second initial in their name, and unambiguously have authority over "safety" matters. Their mandate was *still* held to be *ultra vires*.

"It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating 'occupational' hazards and the safety and health of 'employees.'" *NFIB* at *6. "Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most." *Id.* (*emphasis in original*).

Unlike the case involving OSHA, a most serious question is raised here as to whether TSA has any authority over non-security-related issues of "safety" at all. But to the extent that TSA has authority over any "safety" matters, it is certainly limited to "*transportation* safety" matters if we are to read any limits whatsoever into their authority. And, every single argument that TSA made about why coronavirus may have a specific effect on the transportation system or its "operational viability" applies just the same to workplaces: absent preventative measures, more people may catch it, there may not be enough workers, close quarters, important for national economy, operational viability may be in jeopardy, *etc*. *etc*. But according to the Supreme Court, none of that is sufficient to turn a general public health issue into an *occupational* safety issue, and it stands to reason that the same would apply when attempting to cast a general public health issue into a *transportation* safety issue.

Granted, *if* TSA has authority over "transportation safety" matters, they could possibly make coronavirus regulations that were specific and narrowly tailored to transportation safety. "That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible." *NFIB* at *7. Thus, *if*, for example, TSA's agency expertise led it to the conclusion that being on an airplane, in particular, puts one at a heightened risk for coronavirus, it is possible TSA may be able to create a specific rule about masks on airplanes[8]. Or perhaps it could mandate masks *at the security checkpoint* because of the close contact required to screen passengers. But that is not what happened here. There is no credible rationale for treating one who is sitting at the airport food court as if they are at a special risk of catching or spreading coronavirus, nor does TSA argue the same. They argue that they have the right to regulate the entire transportation system for coronavirus as they see fit and one-size-fits-all, and this simply does not comport with the rules laid down in *NFIB*.

[8] Although one's knee-jerk reaction may be, "of course a crowded airplane comes with increased risk of coronavirus transmission," that may not be the case: passenger airplanes have some of the most advanced and effective air filtration systems on the planet.

IV. TSA's Emergency Powers Are Still Subject to the Major Questions Doctrine

The panel found that even if TSA's everyday powers did not include the issuance of a public health mandate, 49 U.S.C. § 114(g) grants TSA that additional power. Panel Opinion, pp. 21, 22. There are several reasons why the grant of authority in § 114(g) is insufficient here.

First, the major questions doctrine applies "[e]ven in exigency." *Missouri v. Biden* at *3. Unless an agency was given specific emergency powers, and uses those emergency powers as directed, it does not get to take over a new area of regulation solely because it seems like the responsible or prudent thing to do. The canon that if Congress intended to delegate to TSA powers of vast economic and political importance, it would have done so clearly, does not get pushed aside just because there is an emergency or an invocation of emergency powers.

Second, § 114(g)(1) describes four "responsibilities" once an emergency is properly invoked. The first three allow for "coordination" with other agencies only. *See* § 114(g)(1), subsections A ("coordinate"), B ("coordinate and oversee"), and C ("coordinate and provide notice"). But TSA did not merely coordinate; it issued its own new regulations, with their own new penalties for non-compliance, burdening two million members of the general public daily. Issuing sweeping regulations is not contemplated by the word "coordinate." Only subsection D

offers any hope for TSA: "To carry out such other duties, and exercise such other powers, relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe." It is doubtful that "carrying out duties" encompasses sweeping regulations either, but even if it did, they would need to be regulations *relating to transportation*. The *NFIB* case forecloses any attempt to read that as authorizing measures to combat a pandemic if those measures are not aimed at risks specific to the transportation system. Just as "OSHA's indiscriminate approach fails to account for this crucial distinction — between occupational risk and risk more generally — and accordingly the mandate takes on the character of a general public health measure, rather than an 'occupational safety or health standard,'" *NFIB* at *7, TSA's approach fails to account for the distinction between transportation risk and risk more generally, and accordingly its mandate – whether issued under § 114(g) or not – is outside of its authority.

Finally, the panel found that "[t]he Mask Directives were properly promulgated pursuant to TSA's section 114(g)." Panel Opinion at *22. A review of the DHS Secretary's emergency declaration shows that TSA was directed to "support[] the CDC in the enforcement of any orders," not to issue its own orders. 86 Fed. Reg. 8217, 8218. Once again, creation of broad regulations is not contemplated by the actual words TSA claims authorized their mandate.

CONCLUSION

"The question before us is not how to respond to the pandemic, but who holds the power to do so." *NFIB* at *15 (Gorsuch, J., *concurring*). The Supreme Court has set forth new tools with which this issue must be analyzed. The Court should take a second look using those tools.

Dated: Washington, D.C.
January 24th, 2022

Respectfully submitted,

/s/Jonathan Corbett

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CERTIFICATE OF COMPLIANCE

This document complies with the type volume limit of Fed. R. App P. 35(b) because it contains approximately 3,800 words. This document complies with the type face and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it uses a 14-point proportionally spaced font.

Dated: Washington, D.C.
January 24th, 2022

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CERTIFICATE OF SERVICE

I, Jonathan Corbett, certify that on January 24th, 2022, I effected service of this brief upon all respondents by using the CM/ECF system.

Dated: Washington, D.C.
January 24th, 2022

Respectfully submitted,

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ADDENDUM 1: PANEL OPINION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted October 13, 2021 Decided December 10, 2021

No. 21-1074

JONATHAN CORBETT,
PETITIONER

v.

TRANSPORTATION SECURITY ADMINISTRATION AND DAVID P. PEKOSKE, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION,
RESPONDENTS

On Petition for Review of Orders of the
Transportation Security Administration

Jonathan Corbett, pro se, was on the briefs for petitioner.

Brian M. Boynton, Acting Assistant Attorney General, U.S. Department of Justice, and *Jennifer L. Utrecht* and *Daniel Tenny*, Attorneys, were on the brief for respondents.

Before: HENDERSON and TATEL, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

Dissenting Opinion filed by *Circuit Judge* HENDERSON.

EDWARDS, *Senior Circuit Judge*: In January 2021, in response to the ongoing COVID-19 pandemic, the Transportation Security Administration ("TSA") issued several directives and an emergency amendment mandating that masks be worn in airports, on commercial aircraft, and on surface transportation such as buses and trains ("Mask Directives"). In February 2021, pro se petitioner Jonathan Corbett ("Petitioner" or "Corbett"), a frequent flyer, filed a petition for review pursuant to 49 U.S.C. § 46110(a) to challenge the Mask Directives. Corbett does not challenge the wisdom of a government agency requiring face masks in airports and on airplanes. Rather, he claims that TSA had no authority to issue the Mask Directives.

In support of his claim, Corbett's central argument is that TSA's statutory authority under the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in 49 U.S.C. § 114 and scattered sections of 49 U.S.C.) ("Act"), is limited to developing policies and promulgating directives to protect against violent threats to transportation and ensure the security of airports and other transportation facilities against criminal attack. According to Corbett, this authority does not empower TSA to require face masks to prevent the spread of COVID-19. Corbett contends that TSA's Mask Directives purport to regulate general health and safety, not transportation security. Therefore, in his view, TSA's Mask Directives are *ultra vires*.

Because we find no merit in Corbett's claim, we deny the petition for review. The COVID-19 global pandemic poses one of the greatest threats to the operational viability of the transportation system and the lives of those on it seen in decades. TSA, which is tasked with maintaining transportation

safety and security, plainly has the authority to address such threats under both sections 114(f) and (g) of the Aviation and Transportation Security Act. *See* 49 U.S.C. § 114(f), (g).

I. BACKGROUND

In the wake of the deadly September 11, 2001, terrorist attacks, Congress created TSA to safeguard this country's civil aviation security and safety. 49 U.S.C. § 114; *see Alaska Airlines, Inc. v. TSA*, 588 F.3d 1116, 1117-18 (D.C. Cir. 2009) (citing 49 U.S.C. § 114). The Act confers upon the agency broad authority to "assess threats to transportation" and "develop policies, strategies, and plans for dealing with" such threats. 49 U.S.C. § 114(f)(2), (3). This authority extends to "ensur[ing] the adequacy[] of security measures at airports and other transportation facilities," as well as "work[ing] in conjunction with the . . . Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations." *Id.* § 114(f)(11), (13). "[T]o carry out the functions of the [TSA]," the agency "is authorized to issue, rescind, and revise such regulations as are necessary." *Id.* § 114(*l*)(1).

The global COVID-19 pandemic has, to date, resulted in the deaths of more than 750,000 persons in the United States. Centers for Disease Control and Prevention, *COVID Data Tracker Weekly Review*, http://go.usa.gov/x6Zge (last visited Nov. 22, 2021). When President Biden assumed office, he issued an Executive Order directing agencies, including TSA, to "immediately take action . . . to require masks to be worn" in airports, on airplanes, and on buses and trains. Exec. Order No. 13,998, 86 Fed. Reg. 7205, 7205 (Jan. 21, 2021), *reprinted in* Supplemental Appendix ("S.A.") 1 ("Executive Order"). The President said that the action was critical "to save lives and allow all Americans, including the millions of people

employed in the transportation industry, to travel and work safely." *Id.*

On January 27, 2021, the Acting Secretary of the Department of Homeland Security determined that the COVID-19 pandemic constitutes a "national emergency." *See* Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System, 86 Fed. Reg. 8217, 8218, 8219 (Feb. 4, 2021), *reprinted in* S.A. 5-6. This determination reaffirmed determinations that had been made by the Executive Branch dating back to March 2020. *Id.* at 8218. The January 2021 determination found that the pandemic was "a threat to our health and security" and "a threat to transportation." *Id.* at 8218, 8219. The Secretary directed TSA "to take actions consistent with the authorities in [the Act] . . . to implement the Executive Order to promote safety in and secure the transportation system." *Id.* at 8218. This included any measures "necessary to protect the transportation system . . . from COVID-19 and to mitigate [its] spread . . . through the transportation system." *Id.* at 8218-19.

In response to the emergency determination, TSA issued several security directives and an emergency amendment mandating that masks be worn in airports, on commercial aircraft, and on surface transportation such as buses and trains. Security Directives Nos. 1582/84-21-01, 1542-21-01, 1544-21-02, *reprinted in* S.A. 13-26; Emergency Amendment 1546-21-01, *reprinted in* S.A. 27-31 (collectively, "Mask Directives"). The Mask Directives instruct airport operators, domestic aircraft operators, foreign air carriers, and surface transportation operators to require passengers and employees to wear a mask "covering the nose and mouth" "at all times" while in transportation hubs and on conveyances. *See, e.g.*, Security Directive No. 1542-21-01 at 2, *reprinted in* S.A. 19.

Children under two, people with disabilities who cannot wear a mask, or workers for whom a mask would create a risk to workplace health or safety are exempt from the mandate. *See, e.g.*, *id.* at 3, *reprinted in* S.A. 20. In addition, the Mask Directives provide exceptions to the mask requirement for "eating, drinking, or taking oral medications for brief periods," "for identity verification purposes," or "while communicating with a person who is deaf or hard of hearing." *See, e.g.*, *id.* at 2-3, *reprinted in* S.A. 19-20.

Airport and aircraft operators are required to notify passengers of the mask requirements and ask them to put on a mask if they are not wearing one. *See, e.g.*, *id.* at 2, *reprinted in* S.A. 19. Passengers who refuse to comply must be denied boarding, removed from the aircraft or airport, and reported to TSA. *See, e.g.*, *id.* at 2, 4, *reprinted in* S.A. 19, 21; Security Directive No. 1544-21-02 at 2, 4, *reprinted in* S.A. 23, 25. These passengers may face penalties of between $500 to $1,000 for first-time offenders and $1,000 to $3,000 for second-time offenders. *See* TSA, *Penalty for Refusal to Wear a Face Mask*, https://www.tsa.gov/coronavirus/penalty-mask (last visited Nov. 14, 2021).

In a separate action, the Centers for Disease Control and Prevention ("CDC") issued its own order that also requires passengers and employees to wear face masks in and on the transportation system. *See* Requirement for Persons To Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8029 (Feb. 3, 2021) ("CDC Order") *reprinted in* S.A. 11. The CDC Order and TSA Mask Directives overlap in some respects, but there are differences. For example, while they both permit removing masks for "brief periods" to eat or drink, TSA's directives additionally specify that masks must be worn "between bites and sips" of food and drink. *See, e.g.*, *id.* at 8027; Security Directive No. 1544-21-02 at 3, *reprinted in*

S.A. 24. The TSA Mask Directives also require operators to report incidents of noncompliance to TSA and carry the potential for civil penalties. *See, e.g.*, Security Directive No. 1544-21-02 at 2, 4, *reprinted in* S.A. 23, 25.

On February 26, 2021, Corbett filed a timely petition for review of the TSA Mask Directives pursuant to 49 U.S.C. § 46110(a). Section 46110(a) permits any person with "a substantial interest in an order" issued by TSA "with respect to security duties and powers . . . [to] apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C. § 46110(a). The reviewing court has "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." *Id.* § 46110(c).

Petitioner Jonathan Corbett is a frequent flyer who has "flown several hundred thousands of miles in the past decade, including at least a dozen flights during the 'pandemic period' of the last 12 months." Corbett Affirmation, Br. of Pet'r, Ex. A, at 1. Corbett "intend[s] to continue this rate of travel" and has "a currently-booked flight in the near future." *Id.*; Br. of Pet'r 7. As a result of his frequent travel, Corbett says that he is subject to the TSA Mask Directives "dozens of times annually." Br. of Pet'r 7. Corbett further alleges that, "[b]ut for" the TSA Mask Directives, "[he] would wear a mask at fewer times." Corbett Affirmation 1.

The essence of Corbett's petition for review is that TSA has no statutory authority to address the threat that the COVID-19 global pandemic poses to the nation's transportation systems. The petition for review challenges the three security directives and one emergency amendment issued by TSA on

January 31, 2021, with an effective date of February 1, 2021. Br. of Resp'ts 3; *see* Security Directive No. 1542-21-01, *reprinted in* S.A. 18-21; Security Directive No. 1544-21-02, *reprinted in* S.A. 22-26; Security Directive No. 1582/84-21-01, *reprinted in* S.A. 13-17; and Emergency Amendment No. 1546-21-01, *reprinted in* S.A. 27-31. The initial Mask Directives expired May 11, 2021, but they have since been extended multiple times. *See* Resp'ts' 28(j) Letter (Aug. 30, 2021). The current Mask Directives that are under review here are in effect through January 18, 2022. *See* Security Directive Nos. 1542-21-01B, 1544-21-02B, and 1582/84-21-01B; Emergency Amendment No. 1546-21-01B, *reprinted in* Attach. to Resp'ts' 28(j) Letter (Aug. 30, 2021). Corbett urges the court to hold that the Mask Directives are *ultra vires*, *i.e.*, beyond the scope of TSA's lawful authority, and enjoin TSA from enforcing them. Br. of Pet'r 18-19; *see Fla. Health Scis. Ctr., Inc. v. Sec'y of Health & Hum. Servs.*, 830 F.3d 515, 522 (D.C. Cir. 2016) (holding that "[t]o challenge agency action on the ground that it is *ultra vires*, [the complaining party] must show a 'patent violation of agency authority.'" (quoting *Indep. Cosmetic Mfrs. & Distribs. Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 574 F.2d 553, 555 (D.C. Cir. 1978))).

On the same day when he filed his petition for review, Corbett filed an emergency motion for stay pending review of the directives. Emergency Mot. for Stay Pending Review 10-11. This court denied the motion for stay on March 26, 2021. Order (Mar. 26, 2021).

Corbett's petition challenges only the actions of TSA, not the CDC. In addition, one of the directives that is referenced in Corbett's petition for review applies only to masking on surface transportation services such as buses and trains. *See* Security Directive No. 1582/84-21-01, *reprinted in* S.A. 13-17. However, this directive is not challenged in Corbett's briefs.

Therefore, we will limit our review of Petitioner's claims to TSA's mask requirements in airports and on airplanes.

II. ANALYSIS

A. Standing

In order to challenge a disputed government regulation, a petitioner must satisfy "the irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Corbett clearly does. As we explained in *Bonacci v. TSA*, 909 F.3d 1155 (D.C. Cir. 2018):

> To establish standing to seek review of [a TSA] action, a petitioner bears the burden of proof "to show a 'substantial probability' that it has been injured, that the defendant caused its injury, and that the court could redress that injury." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000) (per curiam)).
>
> "The Supreme Court has stated," however, that "'there is ordinarily little question' that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated." *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)). A "petitioner's standing to seek review of administrative action is [usually] self-evident . . . if the complainant is 'an object of the action (or forgone action) at issue. . . .'" *Sierra Club*, 292 F.3d at 899–900 (quoting *Lujan*, 504 U.S. at 561); *see also Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 43 (D.C. Cir. 2015) (explaining "regulated entities' standing to challenge

> the rules that govern them is normally not an issue") (internal quotation marks omitted).

Bonacci, 909 F.3d at 1159-60.

As a directly regulated party, Corbett plainly has standing to pursue his claims in this case. The Government does not deny that, absent a permissible regulation compelling him to do so, Corbett has every right to choose whether and when to wear a face mask in an airport – just as he can choose what clothing to wear in an airport. Each time Corbett flies, he is forced to comply with the TSA directives to wear a mask almost continuously. Because he is the target of the TSA regulations, he faces the threat of enforcement and ensuing penalties should he fail to comply. Corbett has made clear that, were it not for the TSA regulations, he would not wear a mask in accordance with the TSA requirements. Reply Br. of Pet'r 6. (Petitioner "would engage in conduct prohibited by the order but for the order."). In addition, Corbett's injury is not "conjectural" or "hypothetical": he is a frequent flyer and he currently has future travel booked where he will again face compelled compliance with the Mask Directives under the credible threat of enforcement. *See* Br. of Pet'r 7; *Lujan*, 504 U.S. at 560, 563-64.

Like the pilot in *Bonacci*, who had standing to challenge TSA screening procedures that he was subject to, it is undisputed that Corbett is regularly subject to the challenged TSA Mask Directives. *See Bonacci*, 909 F.3d at 1160. Corbett does not allege "unlawful regulation or lack of regulation of *someone else*," in which case "much more [would be] needed" to establish standing. *Lujan*, 504 U.S. at 562 (emphasis in original). Rather, he is within the regulated class of persons covered by the disputed directives, and those directives are plainly ripe for review. The Mask Directives are "directed at

[Petitioner] in particular; [they] require[] [him] to make significant changes in [his] everyday [travel] practices; [and] if [he] fail[s] to observe the [TSA]'s rule [he is] quite clearly exposed to the imposition of . . . sanctions." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 154 (1967). His claims are ripe for review because "[e]ither [Corbett] must comply with [the Mask Directives] . . . or [he] must follow [his] present course and risk prosecution." *Id.* at 152 (citation omitted).

Moreover, because Corbett is directly regulated by the agency's Mask Directives, he is not pursuing a "generalized grievance" that would undercut his standing. The Supreme Court has made it clear that "it does not matter how many persons have been injured by [a] challenged action, [so long as] the party bringing suit . . . show[s] that the action injures him in a concrete and personal way." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). Corbett has himself been denied the ability to choose whether and when to wear a mask in transit.

TSA contends that the Mask Directives have not caused Petitioner's injury because "[t]he obligation to wear a mask in transportation hubs and on conveyances originates" not with TSA, but with the CDC Order or local law. Br. of Resp'ts 27. This argument borders on frivolous. TSA issued *its own* mandate that it claims it is authorized to do under *its own* statutory authority. However slight the differences may be, its Mask Directives are not a one-for-one fit with the CDC Order as far as scope, *see* Motion for Stay Pending Review 3, 4, n.3, and they indisputably carry new and distinct penalties. Merely because other agencies have similar regulations does not preclude Corbett from challenging the TSA Mask Directives. *See Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012) (A challenger is "not required to solve all roadblocks simultaneously and is entitled to tackle one roadblock at a time."). Setting aside the TSA Mask Mandates would provide

Petitioner clear relief and thus there is an injury that the court can redress.

In sum, as an "object of the action . . . at issue," there is "little question" that the TSA directives "ha[ve] caused [Corbett] injury, and that a judgment preventing . . . the action will redress it." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (quoting *Lujan*, 504 U.S. at 561-62).

B. Standard of Review

Our review of Petitioner's claim is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron* step one, we must first decide "whether Congress has directly spoken to the precise question at issue." *Id.* at 842; *see also Kingdomware Techs., Inc. v. United States*, 579 U.S. 162,171 (2016) ("[W]e begin with the language of the statute. If the . . . language is unambiguous and the statutory scheme is coherent and consistent . . . [t]he inquiry ceases." (second alteration in original) (internal quotation marks and citation omitted)). If the statutory provisions in question are "silent or ambiguous with respect to the specific issue," we then assess the matter pursuant to *Chevron* step two to determine whether the agency's interpretation "is based on a permissible construction of the statute." 467 U.S. at 843. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). However, *Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. And because a "new application of a broad statutory term" can always "be reframed" as an expansion of agency authority, "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington v.*

FCC, 569 U.S. 290, 300-01 (2013) (citing EDWARDS & ELLIOTT, FEDERAL STANDARDS OF REVIEW 146 (2007)).

Two very important considerations come into play in our review of TSA's actions in this case. First, it is clear from the terms of the Act that "Congress has entrusted TSA with broad authority over 'civil aviation security.'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citing 49 U.S.C. §§ 114(d)(1), (f)(10), (*l*)(1), 44901(f)); *Bonacci v. TSA*, 909 F.3d 1155, 1161 (D.C. Cir. 2018). The agency's authority to enforce its "safety and security obligations" is not rigidly cabined. *Olivares v. TSA*, 819 F.3d 454, 462 (D.C. Cir. 2016) (citing *Suburban Air Freight, Inc. v. TSA*, 716 F.3d 679, 683 (D.C. Cir. 2013)). Second, the directives at issue are the product of "expert agency judgments," *id.*, regarding TSA's assessments of possible "threats to transportation," 49 U.S.C. § 114(f)(2). Therefore, it is not the court's role to second-guess TSA's judgments in carrying out its statutory mandate. *See Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004).

C. The Limits of Petitioner's Challenge to TSA's Regulatory Authority

It is noteworthy that Petitioner does not contend that TSA's determinations regarding the seriousness of the threats posed by COVID-19 are unreasonable. Nor does he contend that TSA's enforcement of its directives somehow runs afoul of the arbitrary-and-capricious standard under the Administrative Procedure Act. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). "Normally, an agency rule would be arbitrary and capricious if the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an

explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. at 43. Petitioner has not advanced any such claims.

Therefore, any such challenges to the legality of the Mask Directives as they might be applied in any particular case are not before the court. Petitioner's only claim in this case is that TSA has no authority whatsoever to issue the Mask Directives. And any claims by Petitioner that TSA *might* act unreasonably in enforcing the Mask Directives are not ripe for review. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985))).

D. TSA's Regulatory Authority

Petitioner does not question TSA's authority to ensure transportation and civil aviation security. Br. of Pet'r 11. His principal contention is that the term "security," as used by Congress in the Aviation and Transportation Security Act, was meant only to reference preventing "an act of criminal violence, aircraft piracy, and the introduction of an unauthorized weapon, explosive, or incendiary [onto] an aircraft." *Id.* at 13 (quoting 49 C.F.R. § 1542.101(a)(1)). Petitioner argues that directives aimed at preventing or mitigating the effects of COVID-19 involve only matters of public health, *i.e.*, matters related to "safety," not "security." *Id.* at 12; Reply Br. of Pet'r 7-8. He maintains that TSA cannot regulate to contain COVID-19 because doing so falls outside the agency's limited mandate to secure the transportation system against violent attack.

This extraordinarily narrow view of the Act does not withstand scrutiny. Petitioner contends that "security" entails only protection against intentional attack, while "safety" is protection against natural or accidental causes. Reply Br. of Pet'r 7. This framing is belied by the text of the Act, which uses the terms in concert. *See, e.g.*, 49 U.S.C. §§ 44903(b)(3)(A), (e), (h)(3), (h)(4)(C), 44901(h), 44902(b), 44905(b), 46111(a). The Act certainly does not limit TSA's authority to "security" concerns. For example, in defining TSA's duties and powers, the Act states that TSA shall "work in conjunction with the . . . Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations." *Id.* § 114(f)(13). To the extent there is any difference in the words, TSA has established that COVID-19 qualifies as a threat to both safety and security.

Furthermore, in describing its general functions, Congress gave TSA "broad authority to assess potential risks to aviation and national security" and respond to those risks. *Olivares v. TSA*, 819 F.3d 454, 466 (D.C. Cir. 2016); 49 U.S.C. § 114(f)(2) (stating that TSA shall "assess threats to transportation"), (3) (stating that TSA shall "develop policies, strategies, and plans for dealing with threats to transportation security"). In addition, Congress conferred upon the agency an expansive power to act in relation to the transportation system during a national emergency. 49 U.S.C. § 114(g). In light of the language of the Act, it cannot seriously be doubted that Congress' delegations of authority to TSA authorize the Mask Directives issued to contain the spread of the COVID-19 virus.

The simple point here is that "Congress created the [TSA] to assess and manage threats against air travel." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 241 (2014). Decisions from this court have consistently confirmed that TSA has

"*broad* statutory authority to protect civil aviation security." *Bonacci v. TSA*, 909 F.3d 1155, 1157 (D.C. Cir. 2018) (emphasis added). Fulfilling this mandate requires, at its core, that TSA identify "threats to transportation" and take the appropriate steps to respond to those threats. 49 U.S.C. § 114(f)(2), (3). Threats may include "security" issues, narrowly defined, and/or "safety and security," more broadly construed. *Olivares*, 819 F.3d at 462 (explaining that TSA is charged to address issues concerning "safety and security").

In crafting the Act, Congress knew how to circumscribe TSA's authority in plain terms if that was the intent of the legislature. *City of Arlington*, 569 U.S. at 296. However, as indicated above, Congress instead used capacious terms to define TSA's authority. Rather than restricting TSA to preventing violent attack, as Petitioner contends, Congress selected broad language in its mandate to the agency. The Act also emphasizes TSA's ongoing duty to perform "research and development activities" in relation to civil aviation security and safety and "order[s] air carriers to modify training programs . . . to reflect new or different security threats." 49 U.S.C. §§ 44918(a)(7), 114(d)(1), (f)(8).

If there is any ambiguity in this expansive grant of authority to TSA, there is "a presumption that Congress . . . desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). The questions regarding what constitutes "threats to transportation" and "threats to transportation security," 49 U.S.C. § 114(f)(2), (3), are subject to TSA's reasonable interpretation. TSA determined that COVID-19 poses a serious threat to the security and safety of the transportation system and that the Mask Directives would help to curtail the spread of the virus and mitigate its adverse effects. TSA's actions adhered to the

decisions of the President, the CDC, and the Acting Secretary of Homeland Security regarding appropriate national policies to address the COVID-19 threats. *See, e.g.*, Security Directive No. 1542-21-01, at 1, *reprinted in* S.A. 18. The only question for this court is whether TSA's action was "within the bounds of reasonable interpretation." *City of Arlington*, 569 U.S. at 296. There is no doubt that it was.

1. The Mask Directives Are a Reasonable and Permissible Response to the Threats Posed by COVID-19

In issuing the Mask Directives, TSA relied on CDC findings that the risk of transmission of COVID-19 is particularly high in transportation hubs and on conveyances. *See, e.g.*, Security Directive No. 1542-21-01, at 1*, reprinted in* S.A. 18. The CDC has established that the virus spreads "very easily" through inhalation of or contact with "respiratory droplets produced when an infected person coughs, sneezes, or talks." 86 Fed. Reg. 8025, 8028 (Feb. 3, 2021), *reprinted in* S.A. 10. "Travel[] on multi-person conveyances increases" the risk of spread "by bringing persons in close contact with others, often for prolonged periods, and exposing them to frequently touched surfaces." *Id.* at 8029. In these settings, "[s]ocial distancing may be difficult if not impossible." *Id.* The spread of COVID-19 in the transportation system, the CDC has concluded, can aggravate the outbreak in the general population, put passengers and workers at risk, and threaten the "essential" movement of medical providers, the workforce, and goods like food and medicine. *Id.*

As TSA asserts, COVID-19 poses a threat to the operational viability of the transportation system and thus transportation security and safety. Br. of Resp'ts 37-38. Transmission of COVID-19 to transportation workers – from TSA agents to airline crew and airport personnel – imperils

transportation services. The uncontrolled spread of COVID-19 among passengers and these workers can lead to cuts in service that threaten the essential movement of people and goods, and, consequently, our national supply chains, the economy, and national security. TSA has a clear mandate to secure the transportation system against threats that endanger that system's very ability to function. Therefore, TSA is authorized to "develop policies, strategies, and plans for dealing with" COVID-19 to the extent it threatens to disrupt the transportation system. 49 U.S.C. § 114(f)(3). Because the Mask Directives seek to contain this threat, they are in line with the agency's core mission.

In addition, TSA has reasonably determined that COVID-19 is a threat to transportation security and safety because it endangers the lives of large numbers of passengers, transportation workers, and the greater public. Br. of Resp'ts 2, 7-8, 22-23, 36-37. COVID-19 specifically spreads at high rates on transportation, posing a direct and serious risk to many passengers' and workers' lives. Moreover, uncontrolled spread of the highly contagious disease in the transportation system threatens the nation's ongoing efforts to contain the pandemic. For these reasons, we find it "self-evident that the [Mask Directives] are related to the TSA's . . . goals of improving the safety of air travel." *Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004). This is not to say that TSA can regulate anything that causes illness or death. However, the scale of death wrought by COVID-19, its established adverse effects on our nation's economy, its specific tendency to spread at high rates in transportation areas, and its threats to persons employed to operate transportation services (as well as to people who use those services), make it a clear threat to transportation security and safety.

Finally, in issuing the Mask Directives, TSA relied on the CDC's finding that appropriately worn masks reduce the transmission of COVID-19. 86 Fed. Reg. at 8028-29; *see, e.g.*, Security Directive No. 1542-21-01, at 1, *reprinted in* S.A. 18. In the crowded, tight quarters of airports and aircrafts, face masks "reduce the emission of virus-laden droplets" and "reduc[e] inhalation of these droplets." 86 Fed. Reg. at 8028. The cumulative effect of universal masking, the CDC has found, can "prevent the need for lockdowns" and "protect . . . workers who frequently come into close contact with other people (*e.g.,* at transportation hubs)." *Id.* at 8029. Again, Petitioner does not contest these facts.

Given the threat posed by COVID-19 to the security and safety of the transportation system, it is entirely within TSA's authority to require that masks be worn to contain that threat. To the extent such requirements are an imposition on passengers, as Petitioner suggests, we decline to second-guess TSA's judgment. Br. of Pet'r 6-7; Corbett Affirmation, Ex. A, at 1-2; *see Jifry*, 370 F.3d at 1180. "It is TSA's job—not . . . ours—to strike a balance between convenience and security." *Suburban Air Freight, Inc. v. TSA*, 716 F.3d 679, 683 (D.C. Cir. 2013).

Congress' choice of "broad language" in the Act "reflects an intentional effort to confer the flexibility necessary" for TSA to address yet unknown threats to transportation security and safety as they arise. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). Petitioner contends that the history of the Act, along with TSA's lack of prior regulation aimed at addressing a threat to public health, indicate that the Mask Directives are outside the scope of TSA's authority. Br. of Pet'r 12-15. We disagree.

The Supreme Court has been quite clear in saying that, in applying *Chevron*, "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington*, 569 U.S. at 301. Thus, "[w]hen Congress delegates broad authority to an agency to achieve a particular objective, agency action pursuant to that delegated authority may extend beyond the specific manifestations of the problem that prompted Congress to legislate in the first place." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 707 (D.C. Cir. 2011). When creating TSA, "although Congress may not have foreseen the [threat to transportation posed by COVID-19], [section 114(f)]'s expansive language suggests that it intended to give the [TSA] sufficient flexibility . . . [to] pursue the statute's objectives as [threats to transportation] evolve[d]." *Id.* (internal quotations omitted).

Petitioner's invocation of *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021) ("*Alabama Realtors*") (per curiam) in support of his position is unpersuasive. *See* Pet'r's 28(j) Letter (Sept. 14, 2021). There, the Supreme Court found that the CDC lacked the authority to "impose[] a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination." *Alabama Realtors*, 141 S. Ct. at 2486. It rejected the CDC's contention that the provision allowed it to act as "necessary" to stop the spread of disease. *Id.* at 2488-89. The first sentence of the statutory provision at issue in *Alabama Realtors* gives the CDC broad powers to stop the spread of disease, while "the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination and destruction of contaminated animals and articles." *Id.* at 2488 (discussing 42 U.S.C. § 264(a)). The eviction moratorium was "markedly different" from those

direct actions targeting disease Congress had listed in the provision. *Id.* And allowing the CDC to promulgate whatever measures it deemed "necessary," the Court opined, "would give the CDC a breathtaking amount of authority" such that "[i]t is hard to see what measures this interpretation would place outside the CDC's reach." *Id.*

Petitioner likens *Alabama Realtors* to this case, arguing that the broad grants of authority in 49 U.S.C. § 114(f) and (g) are constrained by the statute's discussion elsewhere of passenger screening, baggage inspections, access control to secure areas, and the like. Pet'r's 28(j) Letter, at 2 (Sept. 14, 2021). Petitioner contends that TSA's powers would be "essentially unlimited" if it were allowed to promulgate regulations on public health, "as virtually any regulation can be framed as 'for your safety.'" *Id.* This is a specious argument.

Petitioner's argument fails for at least two reasons. First, as discussed above, the Mask Directives are in service of both transportation "security" and "safety" and cannot be construed as solely public health regulations. Second, the grant of authority to the CDC in *Alabama Realtors* was found in a single provision, 42 U.S.C. § 264(a), that was controlled and defined by reference to the types of action Congress listed *in that very provision*. 141 S. Ct. at 2488. Petitioner turns the holding in *Alabama Realtors* on its head by asking this court to apply limiting constructions to provisions plainly granting TSA broad authority to act by drawing on entirely separate provisions that appear throughout 49 U.S.C. Chapter 449. *See* Br. of Pet'r 11-13. There is no viable canon of construction that endorses this interpretive approach. *See Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 435 (D.C. Cir. 2013) (holding that specific statutory provisions amplifying the FAA's regulatory authority merely indicated that Congress intended to address

the matters subject to regulation in several different ways, not to limit the statute's broad grant of authority).

Moreover, contrary to Petitioner's suggestion, TSA will not be at liberty to regulate in any way it deems "necessary" if this court rejects his facial challenge to the Mask Directives. Congress defined the outer bounds of what TSA can do through its careful selection of terms in the Act. The fact that TSA has the power to regulate to contain the threat COVID-19 does not, as Petitioner asserts, give it the power to regulate "warning label requirements for the purpose of preventing cancer" or set speed limits into and out of the airport. Br. of Pet'r 12-13, 18. The examples cited by Petitioner are frivolous because, unlike COVID-19, these matters do not plausibly pose a threat to the security and safety of transportation systems.

"[T]he Mask Directives at issue were designed as part of a government-wide collaborative effort to implement and support enforcement of the CDC's Order in order to counteract the spread of a contagious and life-threatening illness on the nation's planes, trains, buses, and transit systems." Br. of Resp'ts 22-23. The Mask Directives are well within TSA's delegated authority, limited, and reasonably designed to address the "threats to transportation" posed by COVID-19. *See* 49 U.S.C. § 114(f)(2). Therefore, we will not second-guess TSA's expert judgment in adopting the Mask Directives.

2. TSA Had Additional Delegated Authority to Adopt the Mask Directives Pursuant to its National Emergency Powers

TSA had additional delegated authority to adopt the Mask Directives once the Secretary of Homeland Security declared a national emergency. 49 U.S.C. § 114(g). Section 114(g) of the Act expressly grants TSA expansive powers and

responsibilities "during a national emergency." *Id.* This includes the authority to "coordinate and oversee the transportation-related responsibilities of other departments and agencies" and to "carry out such other duties, and exercise such other powers, relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe." 49 U.S.C. § 114(g)(1)(B), (D). The Mask Directives were properly promulgated pursuant to TSA's section 114(g) powers.

In the Department of Homeland Security's emergency determination, the Acting Secretary concluded that the COVID-19 pandemic constituted a national emergency, invoked section 114(g), and directed TSA "to take actions consistent with the authorities in . . . sections 106(m) and 114(f), (g), (l), and (m) to implement the Executive Order to promote safety in and secure the transportation system" against the emergency posed by COVID-19. 86 Fed. Reg. 8217, 8218 (Feb. 4, 2021). The Acting Secretary further specified that TSA should "support[] the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system . . . from COVID-19." *Id.* at 8218-19. These directions from the Acting Secretary expressly authorized TSA to issue the challenged Mask Directives, regardless of whether it already had the power to do so.

III. CONCLUSION

We hold that the Mask Directives are reasonable and permissible regulations adopted by TSA to promote safety and security in the transportation system against threats posed by COVID-19. We therefore reject Petitioner's claim that TSA's Mask Directives are *ultra vires*, defer to the agency's interpretation of the Act, and deny the petition for review.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting: On the merits, this petition for review is a slam dunk loser. Of course the Transportation Security Administration (TSA), charged with "develop[ing] policies, strategies, and plans for dealing with threats to transportation security," can require individuals in airports and on airplanes to wear the partial face masks we are all familiar with as a result of the coronavirus scourge. 49 U.S.C. § 114(f)(3). But I believe Corbett is so lacking in standing to sue that I would dispose of his petition without reaching the merits.

The three prongs of Article III standing are almost catechismal and Corbett most likely fails all three. He has (1) no cognizable injury that is (2) caused by the TSA's mask mandate and (3) redressable by this court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). I will stop at the first prong as his challenge should end there.

As my colleagues note, Maj. Op. 5, the CDC mandate and the TSA mandate provide that masks need not be worn for "brief periods" while eating and drinking. *See* 86 Fed. Reg. 8025, 8027 (Feb. 3, 2021); Security Directive No. 1542-21-01 at 3. The TSA mandate adds that "the mask must be worn between bites and sips." Security Directive No. 1542-21-01 at 3. Corbett hangs his injury hat on this added language, fearing that sometime in the future a TSA agent may "swoop in to make sure that he [does] not hesitate for too long in replacing his mask after each bite" and asserting that but for the TSA mask mandate, he "would wear a mask at fewer times." But unlike his mask, Corbett's precariously hung hat falls.[1] It is

[1] Because Corbett brings a facial challenge, Maj. Op. 13, he must show "that the [TSA mandate] injures him in a concrete and particular way," *see Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). Although Corbett alleges he is a "frequent flyer," Br. of Pet'r at 7, it is far from clear when or if he will travel again and thus make himself a specific "object of the [mandate]" any more than the

anyone's guess whether Corbett faces "injury" based on any difference between the CDC's mandated "brief periods"—which, significantly, Corbett does not challenge and would follow—and the TSA's mandated "between bites and sips." *See Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) ("[A]ny petitioner alleging only future injuries confronts a significantly more rigorous burden to establish standing.") (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989)). Corbett's allegation that he faces a bona fide threat of future enforcement in his pre-enforcement challenge, *see Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979) (allowing for pre-enforcement standing as long as "there exists a credible threat of prosecution"), is even more fatuous in view of his total failure to allege past enforcement against him or anyone else, *see Muthana v. Pompeo*, 985 F.3d 893, 911 (D.C. Cir. 2021) ("Preenforcement review is not a vehicle to settle questions of statutory interpretation unconnected with matters of constitutional right."), *petition for cert. filed*, No. 21-489 (June 16, 2021).

De minimis non curat lex, the "venerable maxim" that ensures the law does not concern itself with trifles, *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992), resolves Corbett's annoying waste of judicial

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millions of members of the general public who fly, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Just as a taxpayer cannot mount a challenge so general that his standing is only as a member of the public, *see Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007), Corbett's generalized injury is likewise insufficient to invoke our jurisdiction, *see Ex parte Levitt*, 302 U.S. 633, 633 (1937) ("[T]o invoke the judicial power . . . [an individual] must show that he . . . is immediately in danger of . . . a direct injury . . . and it is not sufficient that he has merely a general interest common to all members of the public.").

resources; as a lawyer and thus an officer of the court, he should know better.[2] I respectfully dissent.

[2] I note that his website is "https://professional-troublemaker.com/."

ADDENDUM 2:
***NFIB v. OSHA*, 595 U.S. ____ (2022) (Case No. 21A244).**

Per Curiam

SUPREME COURT OF THE UNITED STATES

Nos. 21A244 and 21A247

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL., APPLICANTS
21A244 *v.*
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.

OHIO, ET AL., APPLICANTS
21A247 *v.*
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.

ON APPLICATIONS FOR STAYS

[January 13, 2022]

PER CURIAM.

The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact

any measure similar to what OSHA has promulgated here.

Many States, businesses, and nonprofit organizations challenged OSHA's rule in Courts of Appeals across the country. The Fifth Circuit initially entered a stay. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

I

A

Congress enacted the Occupational Safety and Health Act in 1970. 84 Stat. 1590, 29 U. S. C. §651 *et seq.* The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. As its name suggests, OSHA is tasked with ensuring *occupational* safety—that is, "safe and healthful working conditions." §651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. §655(b). Such standards must be "reasonably necessary or appropriate to provide safe or healthful *employment*." §652(8) (emphasis added). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. §655(b).

The Act contains an exception to those ordinary notice-and-comment procedures for "emergency temporary standards." §655(c)(1). Such standards may "take immediate effect upon publication in the Federal Register." *Ibid.* They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from

new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger." *Ibid.* Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full. See *BST Holdings, L.L.C.* v. *Occupational Safety and Health Admin.*, 17 F. 4th 604, 609 (CA5 2021).

B

On September 9, 2021, President Biden announced "a new plan to require more Americans to be vaccinated." Remarks on the COVID–19 Response and National Vaccination Efforts, 2021 Daily Comp. of Pres. Doc. 775, p. 2. As part of that plan, the President said that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week." *Ibid.* The purpose of the rule was to increase vaccination rates at "businesses all across America." *Ibid.* In tandem with other planned regulations, the administration's goal was to impose "vaccine requirements" on "about 100 million Americans, two-thirds of all workers." *Id.,* at 3.

After a 2-month delay, the Secretary of Labor issued the promised emergency standard. 86 Fed. Reg. 61402 (2021). Consistent with President Biden's announcement, the rule applies to all who work for employers with 100 or more employees. There are narrow exemptions for employees who work remotely "100 percent of the time" or who "work exclusively outdoors," but those exemptions are largely illusory. *Id.,* at 61460. The Secretary has estimated, for example, that only nine percent of landscapers and groundskeepers qualify as working exclusively outside. *Id.,* at 61461. The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID–19. Thus, most lifeguards and

linemen face the same regulations as do medics and meatpackers. OSHA estimates that 84.2 million employees are subject to its mandate. *Id.,* at 61467.

Covered employers must "develop, implement, and enforce a mandatory COVID–19 vaccination policy." *Id.*, at 61402. The employer must verify the vaccination status of each employee and maintain proof of it. *Id.*, at 61552. The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo [weekly] COVID–19 testing and wear a face covering at work in lieu of vaccination." *Id.*, at 61402. But employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary. *Id.,* at 61437. Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." *Id.,* at 61532. And employers who commit violations face hefty fines: up to $13,653 for a standard violation, and up to $136,532 for a willful one. 29 CFR §1903.15(d) (2021).

C

OSHA published its vaccine mandate on November 5, 2021. Scores of parties—including States, businesses, trade groups, and nonprofit organizations—filed petitions for review, with at least one petition arriving in each regional Court of Appeals. The cases were consolidated in the Sixth Circuit, which was selected at random pursuant to 28 U. S. C. §2112(a).

Prior to consolidation, however, the Fifth Circuit stayed OSHA's rule pending further judicial review. *BST Holdings*, 17 F. 4th 604. It held that the mandate likely exceeded OSHA's statutory authority, raised separation-of-powers concerns in the absence of a clear delegation from Congress, and was not properly tailored to the risks facing different types of workers and workplaces.

When the consolidated cases arrived at the Sixth Circuit, two things happened. First, many of the petitioners—

nearly 60 in all—requested initial hearing en banc. Second, OSHA asked the Court of Appeals to vacate the Fifth Circuit's existing stay. The Sixth Circuit denied the request for initial hearing en banc by an evenly divided 8-to-8 vote. *In re MCP No. 165*, 20 F. 4th 264 (2021). Chief Judge Sutton dissented, joined by seven of his colleagues. He reasoned that the Secretary's "broad assertions of administrative power demand unmistakable legislative support," which he found lacking. *Id.,* at 268. A three-judge panel then dissolved the Fifth Circuit's stay, holding that OSHA's mandate was likely consistent with the agency's statutory and constitutional authority. See *In re MCP No. 165*, 2021 WL 5989357, ___ F. 4th ___ (CA6 2021). Judge Larsen dissented.

Various parties then filed applications in this Court requesting that we stay OSHA's emergency standard. We consolidated two of those applications—one from the National Federation of Independent Business, and one from a coalition of States—and heard expedited argument on January 7, 2022.

II

The Sixth Circuit concluded that a stay of the rule was not justified. We disagree.

A

Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." *In re MCP No. 165*, 20 F. 4th, at 272 (Sutton, C. J., dissenting). It is instead a significant encroachment into the lives—and health—of a

vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 6) (internal quotation marks omitted). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. See 29 U. S. C. §655(b) (directing the Secretary to set "*occupational* safety and health standards" (emphasis added)); §655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. See, *e.g.,* §§651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

The dissent protests that we are imposing "a limit found no place in the governing statute." *Post*, at 7 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). Not so. It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating "occupational" hazards and the safety and health of "employees." See, *e.g.,* 29 U. S. C. §§652(8), 654(a)(2), 655(b)–(c).

The Solicitor General does not dispute that OSHA is limited to regulating "work-related dangers." Response Brief for OSHA in No. 21A244 etc., p. 45 (OSHA Response). She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no

different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

The dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. See *post*, at 7–9. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, "cannot be undone at the end of the workday." *In re MCP No. 165*, 20 F. 4th, at 274 (Sutton, C. J., dissenting). Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for." *Post*, at 10.

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard." 29 U. S. C. §655(b) (emphasis added).

In looking for legislative support for the vaccine mandate, the dissent turns to the American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. See *post*, at 8. That legislation,

signed into law on March 11, 2021, of course said nothing about OSHA's vaccine mandate, which was not announced until six months later. In fact, the most noteworthy action concerning the vaccine mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation on December 8, 2021. S. J. Res. 29, 117th Cong., 1st Sess. (2021).

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010) (internal quotation marks omitted).*

B

The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. See Application in No. 21A244, pp. 25–32; Application in No. 21A247, pp. 32–33; see also 86 Fed. Reg. 61475. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations. OSHA Response 83; see also 86 Fed. Reg. 61408.

It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by

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* The dissent says that we do "not contest," *post*, at 6, that the mandate was otherwise proper under the requirements for an emergency temporary standard, see 29 U. S. C. §655(c)(1). To be clear, we express no view on issues not addressed in this opinion.

the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.

* * *

The applications for stays presented to JUSTICE KAVANAUGH and by him referred to the Court are granted.

OSHA's COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition of the applicants' petitions for writs of certiorari, if such writs are timely sought. Should the petitions for writs of certiorari be denied, this order shall terminate automatically. In the event the petitions for writs of certiorari are granted, the order shall terminate upon the sending down of the judgment of this Court.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

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ON APPLICATIONS FOR STAYS

[January 13, 2022]

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

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

*

I start with this Court's precedents. There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 536 (2012) (opinion of ROBERTS, C. J.); U. S. Const., Amdt. 10. And in fact, States have pursued a variety of measures in response to the current pandemic. *E.g.*, Cal. Dept. of Public Health, All Facilities Letter 21–28.1 (Dec. 27, 2021); see also N. Y. Pub. Health Law Ann. § 2164 (West 2021).

The federal government's powers, however, are not general but limited and divided. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 6) (internal quotation marks omitted). We sometimes call this the major questions doctrine. *Gundy* v. *United States*, 588 U. S. ___, ___ (2019) (GORSUCH, J., dissenting) (slip op., at 20).

OSHA's mandate fails that doctrine's test. The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA. Approximately two years have passed since this pandemic began; vaccines have been

available for more than a year. Over that span, Congress has adopted several major pieces of legislation aimed at combating COVID–19. *E.g.*, American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. But Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA's regulation. See S.J. Res. 29, 117th Cong., 1st Sess. (2021). It seems, too, that the agency pursued its regulatory initiative only as a legislative "'work-around.'" *BST Holdings, L.L.C.* v. *OSHA*, 17 F. 4th 604, 612 (CA5 2021). Far less consequential agency rules have run afoul of the major questions doctrine. *E.g.*, *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994) (eliminating rate-filing requirement). It is hard to see how this one does not.

What is OSHA's reply? It directs us to 29 U. S. C. § 655(c)(1). In that statutory subsection, Congress authorized OSHA to issue "emergency" regulations upon determining that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful" and "that such emergency standard[s] [are] necessary to protect employees from such danger[s]." According to the agency, this provision supplies it with "almost unlimited discretion" to mandate new nationwide rules in response to the pandemic so long as those rules are "reasonably related" to workplace safety. 86 Fed. Reg. 61402, 61405 (2021) (internal quotation marks omitted).

The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate. See *ante*, at 5–6. Section 655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. See *In re: MCP No. 165*, 20 F. 4th 264, 276 (CA6 2021) (Sutton, C. J.,

dissenting from denial of initial hearing en banc). As the agency itself explained to a federal court less than two years ago, the statute does "not authorize OSHA to issue sweeping health standards" that affect workers' lives outside the workplace. Brief for Department of Labor, *In re: AFL–CIO*, No. 20–1158, pp. 3, 33 (CADC 2020). Yet that is precisely what the agency seeks to do now—regulate not just what happens inside the workplace but induce individuals to undertake a medical procedure that affects their lives outside the workplace. Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. Meanwhile, at the federal level, OSHA arguably is not even the agency most associated with public health regulation. And in the rare instances when Congress has sought to mandate vaccinations, it has done so expressly. *E.g.*, 8 U. S. C. § 1182(a)(1)(A)(ii). We have nothing like that here.

*

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

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. *E.g.*, *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion). Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to "reduc[e] the degree to which they will be held accountable for unpopular actions." R. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. Pub. Pol'y 147, 154 (2017). But the Constitution imposes some boundaries here. *Gundy*, 588 U. S., at ___ (GORSUCH, J., dissenting) (slip op., at 1). If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives. *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 61 (2015) (ALITO, J., concurring); see also M. McConnell, The President Who Would Not Be King 326–335 (2020); I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 1502 (2021).

The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. *E.g.*, *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015). Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority." *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381,

417 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also N. Richardson, Keeping Big Cases From Making Bad Law: The Resurgent Major Questions Doctrine, 49 Conn. L. Rev. 355, 359 (2016).

Whichever the doctrine, the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." A. Scalia, A Note on the Benzene Case, American Enterprise Institute, J. on Govt. & Soc., July–Aug. 1980, p. 27. And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no "specific restrictions" that "meaningfully constrai[n]" the agency. *Touby* v. *United States*, 500 U. S. 160, 166–167 (1991). OSHA would become little more than a "roving commission to inquire into evils and upon discovery correct them." *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 551 (1935) (Cardozo, J., concurring). Either way, the point is the same one Chief Justice Marshall made in 1825: There are some "important subjects, which must be entirely regulated by the legislature itself," and others "of less interest, in which a general provision may be made, and power given to [others] to fill up the details." *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825). And on no one's account does this mandate qualify as some "detail."

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

with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.

SUPREME COURT OF THE UNITED STATES

Nos. 21A244 and 21A247

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL., APPLICANTS
21A244 *v.*
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.

OHIO, ET AL., APPLICANTS
21A247 *v.*
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.

ON APPLICATIONS FOR STAYS

[January 13, 2022]

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

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

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

Health Administration (OSHA) issued an emergency temporary standard (Standard), requiring *either* vaccination *or* masking and testing, to protect American workers. The Standard falls within the core of the agency's mission: to "protect employees" from "grave danger" that comes from "new hazards" or exposure to harmful agents. 29 U. S. C. §655(c)(1). OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time. 86 Fed. Reg. 61408 (2021).

Yet today the Court issues a stay that prevents the Standard from taking effect. In our view, the Court's order seriously misapplies the applicable legal standards. And in so doing, it stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. We respectfully dissent.

I

In 1970, Congress enacted the Occupational Safety and Health Act (Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," including "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U. S. C. §§651(b), (b)(5). To that end, the Act empowers OSHA to issue "mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." §651(b)(3). Still more, the Act requires OSHA to issue "an emergency temporary standard to take immediate effect upon publication in the Federal Register if [the agency] determines (A) that employees are exposed to grave danger from exposure to substances or agents de-

termined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." §655(c)(1).

Acting under that statutory command, OSHA promulgated the emergency temporary standard at issue here. The Standard obligates employers with at least 100 employees to require that an employee either (1) be vaccinated against COVID–19 or (2) take a weekly COVID–19 test and wear a mask at work. 86 Fed. Reg. 61551–61553. The Standard thus encourages vaccination, but permits employers to adopt a masking-or-testing policy instead. (The majority obscures this choice by insistently calling the policy a "vaccine mandate." *Ante,* at 1, 4, 7, 8.) Further, the Standard does not apply in a variety of settings. It exempts employees who are at a reduced risk of infection because they work from home, alone, or outdoors. See 86 Fed. Reg. 61551. It makes exceptions based on religious objections or medical necessity. See *id.*, at 61552. And the Standard does not constrain any employer able to show that its "conditions, practices, means, methods, operations, or processes" make its workplace equivalently "safe and healthful." 29 U. S. C. §655(d). Consistent with statutory requirements, the Standard lasts only six months. See §655(c)(3).

Multiple lawsuits challenging the Standard were filed in the Federal Courts of Appeals. The applicants asked the courts to stay the Standard's implementation while their legal challenges were pending. The lawsuits were consolidated in the Court of Appeals for the Sixth Circuit. See 28 U. S. C. §2112(a)(3). That court dissolved a stay previously entered, thus allowing the Standard to take effect. See *In re MCP No. 165*, 2021 WL 5989357, ___ F. 4th ___ (2021). The applicants now ask this Court to stay the Standard for the duration of the litigation. Today, the Court grants that request, contravening clear legal principles and itself causing grave danger to the Nation's workforce.

II

The legal standard governing a request for relief pending appellate review is settled. To obtain that relief, the applicants must show: (1) that their "claims are likely to prevail," (2) "that denying them relief would lead to irreparable injury," and (3) "that granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U. S. ___, ___ (2020) (*per curiam*) (slip op., at 2). Moreover, because the applicants seek judicial intervention that the Sixth Circuit withheld below, this Court should not issue relief unless the applicants can establish that their entitlement to relief is "indisputably clear." *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___, ___ (2020) (ROBERTS, C. J., concurring in denial of application for injunctive relief) (slip op., at 2) (internal quotation marks omitted). None of these requirements is met here.

III

A

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

The virus that causes COVID–19 is a "new hazard" as well as a "physically harmful" "agent." Merriam-Webster's Collegiate Dictionary 572 (11th ed. 2005) (defining "hazard"

as a "source of danger"); *id.*, at 24 (defining "agent" as a "chemically, physically, or biologically active principle"); *id.*, at 1397 (defining "virus" as "the causative agent of an infectious disease").

The virus also poses a "grave danger" to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID–19 and millions more had been hospitalized. See 86 Fed. Reg. 61408, 61424; see also CDC, COVID Data Tracker Weekly Review: Interpretive Summary for Nov. 5, 2021 (Jan. 12, 2022), https://cdc.gov/coronavirus/2019–ncov/covid-data/covidview/past-reports/11052021.html. Since then, the disease has continued to work its tragic toll. In the last week alone, it has caused, or helped to cause, more than 11,000 new deaths. See CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#cases_deathsinlast7days. And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces. See 86 Fed. Reg. 61411, 61424.

Finally, the Standard is "necessary" to address the danger of COVID–19. OSHA based its rule, requiring either testing and masking or vaccination, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that "[t]he science of transmission does not vary by industry or by type of workplace"; that testing, mask wearing, and vaccination are highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID–19 as compared to their vaccinated peers. *Id.*, at 61403, 61411–61412, 61417–61419, 61433–61435, 61438–61439. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the

Standard would.

OSHA's determinations are "conclusive if supported by substantial evidence." 29 U. S. C. §655(f). Judicial review under that test is deferential, as it should be. OSHA employs, in both its enforcement and health divisions, numerous scientists, doctors, and other experts in public health, especially as it relates to work environments. Their decisions, we have explained, should stand so long as they are supported by "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 522 (1981) (quoting *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 477 (1951)). Given the extensive evidence in the record supporting OSHA's determinations about the risk of COVID–19 and the efficacy of masking, testing, and vaccination, a court could not conclude that the Standard fails substantial-evidence review.

B

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID–19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or vaccination policy is "necessary" to prevent those harms. Instead, the majority claims that the Act does not "plainly authorize[]" the Standard because it gives OSHA the power to "set *workplace* safety standards" and COVID–19 exists both inside and outside the workplace. *Ante,* at 6. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting.

But nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority. Of course, the ma-

jority is correct that OSHA is not a roving public health regulator, see *ante,* at 6–7: It has power only to protect employees from workplace hazards. But as just explained, that is exactly what the Standard does. See *supra*, at 5–6. And the Act requires nothing more: Contra the majority, it is indifferent to whether a hazard in the workplace is also found elsewhere. The statute generally charges OSHA with "assur[ing] so far as possible . . . safe and healthful working conditions." 29 U. S. C. §651(b). That provision authorizes regulation to protect employees from all hazards present in the workplace—or, at least, all hazards in part created by conditions there. It does not matter whether those hazards also exist beyond the workplace walls. The same is true of the provision at issue here demanding the issuance of temporary emergency standards. Once again, that provision kicks in when employees are exposed in the workplace to "new hazards" or "substances or agents" determined to be "physically harmful." §655(c)(1). The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter. When Congress "enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can" do, the Court cannot "impos[e] limits on an agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ___, ___ (2020) (slip op., at 16) (alteration and internal quotation marks omitted). That is what the majority today does—impose a limit found no place in the governing statute.

Consistent with Congress's directives, OSHA has long regulated risks that arise both inside and outside of the workplace. For example, OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits—even though the dangers prevented by those rules arise not

only in workplaces but in many physical facilities (*e.g.,* stadiums, schools, hotels, even homes). See 29 CFR §1910.155 (2020) (fire); §§1910.302–1910.308 (electrical installations); §§1910.34–1910.39 (exit routes). Similarly, OSHA has regulated to reduce risks from excessive noise and unsafe drinking water—again, risks hardly confined to the workplace. See §1910.95 (noise); §1910.141 (water). A biological hazard—here, the virus causing COVID–19—is no different. Indeed, Congress just last year made this clear. It appropriated $100 million for OSHA "to carry out COVID–19 related worker protection activities" in work environments of all kinds. American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 30. That legislation refutes the majority's view that workplace exposure to COVID–19 is somehow not a workplace hazard. Congress knew—and Congress said—that OSHA's responsibility to mitigate the harms of COVID–19 in the typical workplace do not diminish just because the disease also endangers people in other settings.

That is especially so because—as OSHA amply established—COVID–19 poses special risks in most workplaces, across the country and across industries. See 86 Fed. Reg. 61424 ("The likelihood of transmission can be exacerbated by common characteristics of many workplaces"). The majority ignores these findings, but they provide more-than-ample support for the Standard. OSHA determined that the virus causing COVID–19 is "readily transmissible in workplaces because they are areas where multiple people come into contact with one another, often for extended periods of time." *Id.,* at 61411. In other words, COVID–19 spreads more widely in workplaces than in other venues because more people spend more time together there. And critically, employees usually have little or no control in those settings. "[D]uring the workday," OSHA explained, "workers may have little ability to limit contact with coworkers, clients, members of the public, patients, and

others, any one of whom could represent a source of exposure to" the virus. *Id.*, at 61408. The agency backed up its conclusions with hundreds of reports of workplace COVID–19 outbreaks—not just in cheek-by-jowl settings like factory assembly lines, but in retail stores, restaurants, medical facilities, construction areas, and standard offices. *Id.*, at 61412–61416. But still, OSHA took care to tailor the Standard. Where it could exempt work settings without exposing employees to grave danger, it did so. See *id.*, at 61419–61420; *supra*, at 3. In sum, the agency did just what the Act told it to: It protected employees from a grave danger posed by a new virus as and where needed, and went no further. The majority, in overturning that action, substitutes judicial diktat for reasoned policymaking.

The result of its ruling is squarely at odds with the statutory scheme. As shown earlier, the Act's explicit terms authorize the Standard. See *supra,* at 4–6. Once again, OSHA must issue an emergency standard in response to new hazards in the workplace that expose employees to "grave danger." §655(c)(1); see *supra,* at 2–4. The entire point of that provision is to enable OSHA to deal with emergencies—to put into effect the new measures needed to cope with new workplace conditions. The enacting Congress of course did not tell the agency to issue this Standard in response to this COVID–19 pandemic—because that Congress could not predict the future. But that Congress did indeed want OSHA to have the tools needed to confront emerging dangers (including contagious diseases) in the workplace. We know that, first and foremost, from the breadth of the authority Congress granted to OSHA. And we know that because of how OSHA has used that authority from the statute's beginnings—in ways not dissimilar to the action here. OSHA has often issued rules applying to all or nearly all workplaces in the Nation, affecting at once many tens of millions of employees. See, *e.g.*, 29 CFR §1910.141. It has previously regulated infectious disease, including by

facilitating vaccinations. See §1910.1030(f). And it has in other contexts required medical examinations and face coverings for employees. See §§1910.120(q)(9)(i), 1910.134. In line with those prior actions, the Standard here requires employers to ensure testing and masking if they do not demand vaccination. Nothing about that measure is so out-of-the-ordinary as to demand a judicially created exception from Congress's command that OSHA protect employees from grave workplace harms.

If OSHA's Standard is far-reaching—applying to many millions of American workers—it no more than reflects the scope of the crisis. The Standard responds to a workplace health emergency unprecedented in the agency's history: an infectious disease that has already killed hundreds of thousands and sickened millions; that is most easily transmitted in the shared indoor spaces that are the hallmark of American working life; and that spreads mostly without regard to differences in occupation or industry. Over the past two years, COVID–19 has affected—indeed, transformed—virtually every workforce and workplace in the Nation. Employers and employees alike have recognized and responded to the special risks of transmission in work environments. It is perverse, given these circumstances, to read the Act's grant of emergency powers in the way the majority does—as constraining OSHA from addressing one of the gravest workplace hazards in the agency's history. The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for.

IV

Even if the merits were a close question—which they are not—the Court would badly err by issuing this stay. That is because a court may not issue a stay unless the balance of harms and the public interest support the action. See

Trump v. *International Refugee Assistance Project*, 582 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 10) ("Before issuing a stay, it is ultimately necessary to balance the equities—to explore the relative harms" and "the interests of the public at large" (alterations and internal quotation marks omitted)); *supra,* at 4. Here, they do not. The lives and health of the Nation's workers are at stake. And the majority deprives the Government of a measure it needs to keep them safe.

Consider first the economic harms asserted in support of a stay. The employers principally argue that the Standard will disrupt their businesses by prompting hundreds of thousands of employees to leave their jobs. But OSHA expressly considered that claim, and found it exaggerated. According to OSHA, employers that have implemented vaccine mandates have found that far fewer employees actually quit their jobs than threaten to do so. See 86 Fed. Reg. 61474–61475. And of course, the Standard does not impose a vaccine mandate; it allows employers to require only masking and testing instead. See *supra*, at 3. In addition, OSHA noted that the Standard would provide employers with some countervailing economic benefits. Many employees, the agency showed, would be more likely to stay at or apply to an employer complying with the Standard's safety precautions. See 86 Fed. Reg. 61474. And employers would see far fewer work days lost from members of their workforces calling in sick. See *id.*, at 61473–61474. All those conclusions are reasonable, and entitled to deference.

More fundamentally, the public interest here—the interest in protecting workers from disease and death—overwhelms the employers' alleged costs. As we have said, OSHA estimated that in six months the emergency standard would save over 6,500 lives and prevent over 250,000 hospitalizations. See *id.,* at 61408. Tragically, those estimates may prove too conservative. Since OSHA issued the Standard, the number of daily new COVID–19 cases has

risen tenfold. See CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (reporting a 7-day average of 71,453 new daily cases on Nov. 5, 2021, and 751,125 on Jan. 10, 2022). And the number of hospitalizations has quadrupled, to a level not seen since the pandemic's previous peak. CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions (reporting a 7-day average of 5,050 new daily hospital admissions on Nov. 5, 2021, and 20,269 on Jan. 10, 2022). And as long as the pandemic continues, so too does the risk that mutations will produce yet more variants—just as OSHA predicted before the rise of Omicron. See 86 Fed. Reg. 61409 (warning that high transmission and insufficient vaccination rates could "foster the development of new variants that could be similarly, or even more, disruptive" than those then existing). Far from diminishing, the need for broadly applicable workplace protections remains strong, for all the many reasons OSHA gave. See *id.,* at 61407–61419, 61424, 61429–61439, 61445–61447.

These considerations weigh decisively against issuing a stay. This Court should decline to exercise its equitable discretion in a way that will—as this stay will—imperil the lives of thousands of American workers and the health of many more.

* * *

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

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action

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

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[] the background, competence, and expertise to assess" workplace health and safety issues. *South Bay United Pentecostal Church*, 590 U. S., at ___ (opinion of ROBERTS, C. J.) (slip op., at 2). When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible

federal officials, acting well within the scope of their authority, to protect American workers from grave danger.