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.