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OSHA and Public Health in an Emergency and a Culture War

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ABSTRACT

The approval of COVID-19 vaccinations for working age Americans in early 2021 offered a welcome release from oppressive non-vaccination safety measures. Group activities including normal employment operations became possible with a greatly reduced risk of serious illness and death. However, escape from the virus and non-vaccination measures was limited by widespread resistance to vaccination. OSHA became one of a handful of federal government offices that adopted rules to motivate more people to accept vaccination as the best way to protect themselves, protect their families, and escape the oppression of non-vaccination measures. OSHA, which regulates private sector "occupational" health, issued an "emergency" rule that applied only to private sector employers with at least 100 employees. The rule did not "mandate" vaccinations. However, it strongly motivated employers to adopt their own vaccination requirements in order to avoid the alternative: burdensome non-vaccination requirements.

OSHA's emergency rule did not last long. Within two months, the U.S. Supreme Court issued an emergency stay against the rule in National Federation of Independent Businesses v. Department of Labor *("NFIB"). The practical effect of the Court's emergency stay was the end of the emergency OSHA rule.*

The OSHA rule is dead, but NFIB *lingers as a problem for future health crises. COVID-19 is not necessarily the last or most serious health crisis we will face as a nation. OSHA will probably be needed to contribute to a national response in the future.* NFIB *is a poorly reasoned but still significant obstacle for OSHA's participation in a public health crisis. This article examines the ways OSHA can act on an emergency basis in a crisis, the expanse and limits of its authority to regulate "occupational" health, the meaning and flaws of the Court's decision in* NFIB *to block enforcement of OSHA's COVID-19*

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rule, and the possible strategies for OSHA in the next public-occupational health crisis.

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I. INTRODUCTION

In *National Federation of Independent Business v. Department of Labor ("NFIB")*,[1] the U.S. Supreme Court heard emergency applications to stay an Occupational Safety and Health Administration ("OSHA") emergency temporary standard ("ETS") that included a COVID-19 vaccination rule.[2] The vaccination rule was part of an option: an employer could adopt a rigorous masking and testing regime for unvaccinated employees, *or* the employer could require all employees to obtain vaccinations. For many employers, employees and other members of the public, vaccinations were a relief from months of perpetual risk and crushing non-vaccination safety measures. Not all Americans shared this enthusiasm for vaccinations. Rules requiring vaccination or burdening unvaccinated persons offended a small but formidable minority. The conflict over vaccinations became part of a larger culture war which included other public health issues, including abortion and gun control.

The Court granted the applications and stayed OSHA's enforcement of its ETS.[3] The stay was based on a prediction, not a decision on the merits.[4] The Court decided only that OSHA could not enforce the ETS until the completion of judicial review, a process likely to take many months.[5] The Court's *per curiam* opinion explained one single reason for the stay: a Court majority believed the rule was not an "occupational health" rule.[6] Rather, it was a "public health" rule beyond OSHA's statutory authority. The practical effect of the stay was the end of the ETS. A stay for the duration of a judicial review process renders an emergency rule useless as a response to an emergency. OSHA withdrew the ETS a few days later.[7] And thus, the Court will never hear a final appeal on the merits of OSHA's COVID-19 vaccination rule.

The result disappointed OSHA and many vaccination advocates but was not a total defeat for the agency. The Court's dicta suggests that an OSHA vaccination rule targeting a few specific employment settings could survive judicial review.[8] On the same day as *NFIB*, the Court

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[1] 142 S. Ct. 661 (2022).

[2] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) [hereinafter Nov. 2021 ETS].

[3] *Nat'l Fed'n of Indep. Bus*., 142 S. Ct. at 663.

[4] The majority found that "Applicants are *likely* to succeed on the merits. . . ." 142 S. Ct. at 664 (emphasis added).

[5] *Id*. at 666–67.

[6] *Id*. at 665.

[7] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 Fed. Reg. 3928 (Jan. 26, 2022).

[8] *Nat'l Fed'n of Indep. Bus*., 142 S. Ct. at 665–66.

decided *Biden v. Missouri*,[9] upholding another agency's vaccination rule for certain medical facilities. Clear congressional authorization for such an agency rule is important.[10]

OSHA also won a small practical victory in losing. It appears that OSHA anticipated a Court stay against enforcement, as the agency was already moving on to another pandemic strategy. In the meantime, however, its short-lived ETS accelerated the rate of vaccinations among Americans during the weeks before the Court's stay.[11] That practical effect made the public a little safer.

Nevertheless, the *NFIB* majority's unsigned *per curiam* opinion casts a shadow on OSHA's ability to protect employee safety or participate in a public emergency response. "The question," the majority stated, "is whether the Act plainly authorizes the [OSHA vaccination] mandate. It does not."[12] However, the majority's conclusion that OSHA lacked authority to issue the ETS did not follow naturally or logically from the majority's statement of the law. The resulting stay did conveniently mitigate a culture war conflict in the short term, but flawed reasoning behind the stay has serious implications for the long term. COVID-19 is not necessarily finished with us. It might not be the last or worst health emergency we will face. The next pandemic might have a higher rate of hospitalization or fatality. It might be more deadly to children and young adults.[13] *NFIB* suggests that OSHA's tools are limited in ways that make preventive health measures more difficult in an emergency. The result

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[9] *Id.;* 142 S. Ct. 647 (2022) (upholding an emergency vaccination rule issued by the Secretary of Health and Human Services for medical facilities participating in Medicaid and Medicare).

[10] *Id*. at 653, 652.

[11] There appears to have been a significant upward bump in the rate of vaccination immediately after the announcement of the OSHA vaccination rule. To see the date-specific number and rate of vaccinations, place a cursor over the desired point on the graph. *See US Coronavirus vaccine tracker*, USA FACTS, https://usafacts.org/visualizations/covid-vaccine-tracker-states/ [https://perma.cc/L8XF-CH9B] (last visited May 30, 2022). To see the date-specific number and rate of vaccinations, place a cursor over the desired point on the graph.

[12] *Nat'l Fed'n of Indep. Bus*., 142 S. Ct. at 665.

[13] The elderly and disabled suffered disproportionately from COVID-19, which might account for the tendency of some younger, healthy adults to oppose burdensome preventive measures as unnecessary to their own personal safety. Residents and staff of long-term care facilities constituted 23% of deaths due to COVID-19. *See* Priya Chidambaram, *Over 200,000 Residents and Staff of Long-Term Care Facilities Have Died of COVID-19*, KFF (Feb. 3, 2002), https://www.kff.org/policy-watch/over-200000-residents-and-staff-in-long-term-care-facilities-have-died-from-covid-19/ [https://perma.cc/45E5-6VSU]. COVID-19 hospitalization rates for the elderly were significantly higher than for the young. *See* David Leonhardt, *Covid and Age*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/2021/10/12/briefing/covid-age-risk-infection-vaccine.html [https://perma.cc/Z68W-5L2M].

will eventually be detrimental to employers and local public health officials. A future public emergency will be more dangerous for employees and the public, and more expensive and politically divisive for employers, states and local authorities. *NFIB* shifted the likely frontlines of culture war conflict from OSHA to private workplaces.

The history of OSHA's pandemic strategy and the nature of judicial response is important for understanding what OSHA can and cannot do in the next emergency. Part II begins by explaining why an airborne disease like COVID-19 is an "occupational" disease within the scope of OSHA's authority. Part II then describes OSHA's regulatory tools for dealing with COVID-19 and the agency's shift from burdensome non-vaccination measures to the combination of vaccination and non-vaccination measures presented by the ETS. Part III looks at the legal and culture war battle over the ETS in the courts of appeals and the Supreme Court's decision to stay enforcement in *NFIB*. Part III takes a particularly hard look at the *NFIB* majority's legal argument and rhetoric in justifying the stay. Finally, Part IV examines the tools OSHA still possesses after *NFIB* to respond to an emergency. These tools are not as forceful as an emergency temporary standard but can still have a significant effect in mitigating risk. Unfortunately, some of these tools shift the front lines of a culture war from federal agency politics to the private sector workplace.

II. OSHA'S PANDEMIC RESPONSE

A. OSHA's Early Treatment of COVID-19 as an "Occupational" Disease

The *NFIB* majority ultimately held that the ETS was a "public" health measure, not an "occupational" health measure.[14] This is a false dichotomy. Appreciating the real scope of the terms "occupational hazard" and "occupational disease," and the relationship between occupational health and public health, begins with an examination of OSHA's pre-ETS approach to COVID-19 and its history in dealing with disease in the workplace.

OSHA's COVID-19 emergency temporary standard for the general workforce was not the agency's first pandemic-related action; it was the culmination of a series of actions by OSHA and other parts of the federal government that began almost immediately after COVID-19 arrived in the United States in early 2020.[15] From the start, OSHA treated COVID-19

[14] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

[15] Medical professionals identified the COVID-19 virus in China at the end of 2019. The virus probably arrived in the U.S. no later than January 2020 and possibly earlier. *See CDC Museum COVID-19 Timeline*, CENTERS FOR DISEASE CONTROL AND

as an "occupational hazard" within the meaning of the Occupational Safety and Health Act ("OSH Act"), but OSHA relied substantially on the Centers for Disease Control and Prevention ("CDC") for research and expertise about the dangers of COVID-19 and methods to control the disease.[16] Vaccination was not part of the agency's early strategy because vaccinations were not available to the general workforce for more than a year after the beginning of the pandemic.[17] Social distancing, masking, testing and other measures recommended by the CDC were part of OSHA's early strategy. However, even these non-vaccination measures became part of a culture war dividing society and politics.[18]

Partisans may have disputed the merits of OSHA's early COVID-19 strategies, but the agency's authority to treat COVID-19 as an occupational hazard in some settings was never in serious doubt. The OSH Act's purpose is to achieve "safe and healthful working conditions" for "every working man and woman in the Nation."[19] The Act authorizes OSHA to adopt any standard "reasonably necessary or appropriate" to meet this goal,"[20] and it includes illness among the range of work hazards within OSHA's mandate. For example, the Act begins with Congress's finding that "personal injuries and *illnesses* arising out of work situations" are a burden on interstate commerce.[21] The Act's goals include making work more "healthful."[22] Long before COVID-19, OSHA promulgated safety standards for diseases such as cancer, hepatitis and HIV when it found that work significantly exacerbated the risk of a disease.[23] Some of

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PREVENTION, https://www.cdc.gov/museum/timeline/covid19.html [https://perma.cc/3P4E-JB7Q] (last visited May 30, 2022).

[16] *See Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., https://www.osha.gov/coronavirus/safework [https://perma.cc/F4PE-Y6TC] (last visited May 10, 2022) (referring regularly to CDC as basis for recommendations for COVID-19 safety measures).

[17] The FDA issued an Emergency Use Authorization (EUA) for the Pfizer-BioNTech COVID-19 Vaccine on December 11, 2020, for the Moderna COVID-19 Vaccine on December 18, 2020, and for the Janssen COVID-19 Vaccine on February 27, 2021. *See* Klaassen v. Tr. of Indiana Univ., 549 F. Supp. 3d 836, 852–53 (N.D. Ind. 2021).

[18] *See generally* Rob Kahn, *Masks, Culture Wars, and Public Health Expertise: Confessions of a Mask "Expert,"* 17 U. ST. THOMAS L.J. 900 (2022); Neil Fulton, *COVID, Constitutionalism, Individualism, and Death*, 27 WIDENER L. REV. 123 (2021).

[19] 29 U.S.C. § 651(b).

[20] *Id*. § 652(8).

[21] *Id*. § 651(a) (emphasis added).

[22] *Id*. § 651(b).

[23] *E.g*., 29 C.F.R. § 1928.110 (prohibiting the use of common drinking cups to prevent transmission of disease). *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum

these disease standards were more than forty years old when COVID-19 arrived in the United States.[24] Pre-COVID-19 viral and bacterial disease standards do not appear to have provoked any significant social or political opposition. In fact, several congressional actions endorsed OSHA's early disease standards.[25] OSHA lacked any standard regarding *airborne* viral diseases until COVID-19,[26] but COVID-19 appears to be the first significantly dangerous airborne disease affecting the workplace since the enactment of the OSH Act in 1970.[27]

Nevertheless, at the outset of the COVID-19 pandemic, some insurers, agencies and judges questioned whether COVID-19 was an "occupational" disease under various employment laws.[28] COVID-19 is not unique to the workplace. Some non-employment settings are even more dangerous for the spread of the disease than a typical employment setting, leading insurers and opponents of regulation to argue that COVID-19 is a "common" or "ordinary" disease.[29] However, "occupational" and "ordinary" are not mutually exclusive. A disease that is "ordinary" or "common" can also be "occupational." Any disease can be "occupational" if work significantly increases the risk and causes infection. COVID-19 transmission is most likely when two individuals are less than six feet apart.[30] Work, especially by employees, is a cooperative interaction between employees or between an employee and a customer or other third

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Institute, 448 U.S. 607 (1980) (providing an example of OSHA's efforts to protect employees from cancer). *See* 29 C.F.R. §§ 1904.8, 1910.1020, 1910.1030.

[24] 29 C.F.R. § 1904.8 (regulating the handling of materials that may be infected with HIV or hepatitis B viruses, promulgated in 2001); 29 C.F.R. § 1910.1020 (defining "toxic substance or harmful physical agent" to include "bacteria, virus, fungus, etc." for purposes of identifying records of exposure an employer must make available for inspection, promulgated in 1980); 29 C.F.R.§ 1910.1030 (implementing safety standards for prevention of transmission of bloodborne pathogens, promulgated in 1991).

[25] *In re* MCP NO. 165, 21 F.4th 357, 370–71 (6th Cir. 2021) (describing Congressional actions to regulate transmission of bloodborne pathogens such as hepatitis B).

[26] Nov. 2021 ETS, *supra* note 2, at 32426.

[27] Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (emphasis added).

[28] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 663.

[29] Rodriguez v. Blaine Larsen Farms, Inc., Case No. 2:21-CV-52-Z, 2022 WL 484924, *4 (N.D. Tex. Feb. 15, 2022) (describing insurer's denial of workers' compensation claim); *Common "Ordinary" Illnesses—Diseases of Life*, 3 Casualty Insurance Claims § 40:33 (4th ed, Nov. 2021 update) (available on Westlaw at CASINSCLMS § 40:33); Stephen D. Palmer, *The Compensability of COVID-19 in Workers' Compensation—A General Analytical Roadmap*, 44 AMERICAN J. TRIAL ADVOC. 367, 374–77 (Spring 2021).

[30] *COVID-19 Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION (October 21, 2021), https://www.cdc.gov/coronavirus/2019-ncov/faq.html [https://perma.cc/65MW-HD76].

party, frequently in meetings or activities that bring the parties in close proximity. Even employees who are away from a regular workplace and away from other employees might be engaged in work with a heightened risk of exposure to COVID-19 because they deal with third parties in the course of their work. Some "roaming" employees, such as first responders who interact with the public, have very high rates of infection.[31]

There is no shortage of evidence that employment *in general* significantly increases the risk of transmission of COVID-19 and that the scale of the risk is greatly affected by an employer's management of the workplace and work methods. One way to think about the comparative dangers of occupational versus non-occupational transmission is to look at sources of "clusters" of infection: original sources of very large numbers of infection.[32] Some of the most common origins of clusters include work settings. For example, food-processing plants have a particularly high rate of transmission,[33] but indoor and outdoor construction work has also produced notable clusters of infection. Other common clusters include mixed social-work interactions.[34] "Bars" have an especially high risk of transmission in settings that mix patrons with employees.[35] "Conferences" and meetings are important origins of clusters, and even office employees working separately for most of the day might be infected by a single employee meeting or gathering.[36] Some common types of cluster origins are settings in which employees provide services to third parties, especially where the service requires face-to-face and even physical contact with clients.[37]

The fact that COVID-19 presents an "occupational hazard" serious enough to justify "reasonable or appropriate" OSHA rules in *some* settings was never successfully challenged in the courts.[38] A small but combative

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[31] I Backhaus et al., *Underascertainment of COVID-19 Cases Among First Responders: A Seroepidemiological Study*, 72 OCCUPATIONAL MEDICINE 225–228 (Dec. 9, 2021), https://doi.org/10.1093/occmed/kqab164 [https://perma.cc/87UG-759Q]. COVID-19 was the leading cause of death among police officers in 2021. *2021 Preliminary End-of-Year Law Enforcement Officers Fatalities Report*, NATIONAL LAW ENFORCEMENT OFFICERS MEMORIAL FUND (2021), https://nleomf.org/wp-content/uploads/2022/01/2021-EOY-Fatality-Report-Final-web.pdf [https://perma.cc/BXM6-KBBL].

[32] Q. Leclerc et al., *What Settings Have Been Linked to SARS-CoV-2 Transmission Clusters?*, 5 WELLCOME OPEN RES 2020 (June 5, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7327724/ [https://perma.cc/3UF3-L2ML].

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] OSHA's ETS requiring vaccination of certain employees in the healthcare field, 29 C.F.R. § 1910.502, remains unchallenged. In *Nat'l Fed'n of Indep. Bus.*, the

minority of Americans opposing COVID-19 restrictions asserted that COVID-19 was no more serious than the common flu.[39] Several leading politicians, including the then-President of the United States, supported the doubt.[40] However, the pandemic was so "grave" that most courts, including the Supreme Court in *NFIB*, accepted that it qualified as an "emergency" under the Act for purposes of some regulatory actions.[41] COVID-19's record of devastation confirms it is serious enough to justify a regular or emergency OSHA standard, reasonably drawn. By the date of the ETS challenged in *NFIB*, COVID-19 had killed more than 900,000.[42] After *NFIB*, deaths continued to mount, especially among the unvaccinated, so that the number of dead exceeded one million as of March 2022.[43] The pandemic's peak passed after the winter of 2022, but COVID-19 still affects hundreds of thousands of Americans in any given week, and it kills more than 2,000 in any given week.[44] When COVID-19 does not kill, it can still cause grave harm leading to hospitalization,

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majority appeared to concede that OSHA could impose its vaccination rule in some setting with special risks of COVID-19. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665–66 ("Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible.").

[39] Nicole Caroll, *Backstory: Why Do People Deny the Seriousness of COVID-19? I Asked The. Here's What They Said*, USA TODAY (Dec. 4, 2020), https://www.usatoday.com/story/opinion/2020/12/04/covid-conspiracy-why-people-dont-believe-deadly-pandemic-misinformation/3803737001/ [https://perma.cc/Q5F5-EGU7]; Karlyn Bowman, *Unmasking Polls on Masks*, AMERICAN ENTER. INST. (Mar. 24, 2022), https://www.aei.org/politics-and-public-opinion/unmasking-polls-on-masks/ [https://perma.cc/PQ7P-LBBF] (reporting that about 13 percent of Americans believe COVID-19 was never a true threat).

[40] James Hamblin, *Trump's Pathology Is Now Clear*, THE ATLANTIC (Oct. 31, 2020), https://www.theatlantic.com/health/archive/2020/10/trump-covid-denial/616946/ [https://perma.cc/9869-WLRJ].

[41] If an occupational hazard is "new" and "grave," the Act authorizes OSHA to issue an "emergency" temporary standard (ETS) that takes effect immediately without awaiting the usual notice and public comment period. 29 U.S.C. § 655(c). In *Nat'l Fed'n of Indep. Bus*., the majority assumed that there was a COVID-19 emergency likely justified an emergency standard for some workplace settings. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665–66; *See also infra* pp. 1035, 1041–42.

[42] OSHA's notice of the new rule stated that the Centers for Disease Control had recorded more than 725,000 deaths as of October 18, 2021. The larger number in the text is for recorded death as of the date of the notice, November 21, 2021. *Estimated COVID-19 Burden*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last visited Mar. 7, 2022), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/burden.html#est-infections [https://perma.cc/42WD-FWLQ].

[43] John Hopkins Univ. of Med., Coronavirus Resource Center, *Cumulative Cases*, https://coronavirus.jhu.edu/region/united-states [https://perma.cc/52S6-RVYB] (last visited Mar. 6, 2022).

[44] *COVID Tracker Data Tracker*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_weeklycases_select_00 [https://perma.cc/M8R4-NCSC] (last visited Jan. 5, 2023).

disability and job interruption or loss. At the time of the ETS, nearly 50,000 Americans were hospitalized due to COVID-19, and the number of hospitalizations reached nearly 160,000 a month later.[45] The portion of these deaths and hospitalizations that were due to employment-related transmission of COVID-19 is indeterminable, but there is no reason to doubt that employment was a major contributor.[46] Employment is a major setting for face-to-face or close personal interaction and the setting about which an individual employee has the least personal control.

B. OSHA's Early Enforcement Strategy for COVID-19

1. Early Non-Vaccination Measures

OSHA's early strategies in dealing with COVID-19 demonstrate the agency's capacity to deal with an emergency without an emergency temporary standard. The tools the agency used before the ETS are still available to the agency after *NFIB* and will be important in a future emergency. These tools might appear to be less forceful than an emergency temporary standard, but the consequences for employers and local authorities can be even more difficult and expensive.

While the justification for treating COVID-19 as an *occupational* and *emergency* hazard was sufficiently clear by the time *NFIB* arrived at the Supreme Court, developing an OSHA strategy was difficult. OSHA was not at the front lines of the initial government response to the pandemic. In the early days of the pandemic, federal health agencies with the best infectious disease expertise, such as the CDC, issued informative guidance and recommendations appropriate for many settings, including work

[45] *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/covid-cases.html?pageType=Legacy Collection&collectionName=Maps%2Band%2BTrackers&label=Maps%2 Band%2BTrackers&module=hub_Band&region=inline&template=storyline_band_r ecirc [https://perma.cc/B7PZ-M6V2] (last visited May 11, 2022).

[46] Lee Anne Jillings, *Memorandum from Lee Anne Jillings, Acting Director Directorate of Technical Support and Emergency Management, OSHA, on Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*, U.S. DEP'T OF LABOR (May 19, 2020), https://www.osha.gov/laws-regs/standardinterpretations/2020-05-19 [https://perma.cc/ZU52-NJ55] (discussing the complications OSHA has faced because of the indeterminacy of causation).

settings.[47] Aside from federal transportation rules,[48] the most important *legally binding* COVID-19 regulations were by state and local governments. State and local governments suspended some businesses and interpersonal activities, required masking in many person-to-person encounters, encouraged or required testing under certain circumstances and mandated leave from work based on positive test results.[49] Vaccination was not part of the early regulations because vaccinations were not yet widely available.

The non-vaccination regulations were very burdensome to employers and employees. Business suspensions and leave from work caused significant loss of revenue to employers and loss of income for employees. At the same time, many employers and employees worried that reopening or returning to work without the adequate safeguards would be unacceptably dangerous. Employees faced the threat of personal infection, illness, death and the threat that personal work-related infection would lead to infection, illness and death of family members. Employers faced possible tort or workers' compensation liability for work-related infection or subsequent spread of the virus to employee family members. Thus, some employer and employee interest groups urged OSHA and other agencies to issue guidelines for business and employment measures, even very expensive measures, to enable the reopening of business and a return to income-earning work on a near-normal scale pending the expected arrival of effective vaccinations.[50]

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[47] *Preventing the Spread of COVID-19 in a Variety of Settings Throughout Your Community*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/php/infection-control.html [https://perma.cc/WHU5-CCVW]. The CDC drafted a more comprehensive guidance applicable to workplaces, *Guidance for Implementing the Opening Up America Again Framework*, with a plan to release the guidance on May 1, 2020. However, the Trump Administration blocked official release of the guidance. The guidance was still publicly accessible to persons interested in the CDC's recommendations. *See*, John Sciamanna, *The CDC Guidance on Reopening*, CHILD WELFARE LEAGUE OF AMERICA, https://www.cwla.org/the-cdc-guidance-on-reopening/ [https://perma.cc/R3V9-P8YE] (last visited Sept. 23, 2022).

[48] *See, e.g.*, *DHS Issues Supplemental Instructions for Inbound Flights with Individuals Who Have Been In China*, DEP'T HOMELAND SEC. (Feb. 2, 2020), https://www.dhs.gov/news/2020/02/02/dhs-issues-supplemental-instructions-inbound-flights-individuals-who-have-been-china [https://perma.cc/W7XC-SW99].

[49] Alaa Elassar, *This Is Where Each State Is During Its Phased Reopening*, CNN (May 27, 2020), https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/ [https://perma.cc/3GGT-YQNQ]. *See generally* Brief of National Association of Home Builders of the United States, et al., as Amicus Curiae in Opposition to Emergency Petition for a Writ of Mandamus and in Support of Respondent, AFL-CIO v. OSHA, 2020 WL 2793067, at *9–12 (D.C. Cir. May 29, 2020) (listing various state and local actions).

[50] *See* 86 Fed. Reg. 61429.

OSHA faced two challenging obstacles in developing a "standard" (a legally enforceable regulation for occupational safety and health) during the period before widespread availability of vaccinations.[51] First, COVID-19 was a new disease. The courts have required careful and often lengthy scientific research to support OSHA's identification of true occupational hazards and feasible preventive measures.[52] The scientific investigation of COVID-19 was rapid but still in progress throughout 2020 and 2021. Final decisions about the effectiveness and feasibility of prevention methods were subject to the ongoing collection of data that might point in new directions as quickly as OSHA could draft rules based on old data.

Second, even after data collection, an OSHA standard with the force of law normally takes years of drafting, public notice and comment and judicial review, especially if the standard is controversial with an expected trajectory to the U.S. Supreme Court.[53] Delay in the case of COVID-19 prevention might lead to thousands of additional deaths. If preventive methods would prevent additional deaths, OSHA needed to require those methods as quickly as possible. However, OSHA also needed to weigh the likely political opposition to workplace regulation. OSHA has long been a favorite and representative target for opponents of government regulation.[54] The COVID-19 culture war was sure to exacerbate OSHA's political situation.[55] The proceedings before the U.S. Court of Appeals for the Fifth Circuit and the U.S. Supreme Court in *NFIB* confirmed these problems.

2. OSHA's Search for a Fast Non-Vaccination Strategy

a. Emergency Temporary Standard

OSHA had three fast tracks outside the usual OSHA rulemaking process for addressing an emergency. The most aggressive fast track, proposed by the AFL-CIO in a March 6, 2020 petition to the Department of Labor,[56] was to issue an ETS for *non*-vaccination preventive measures.

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[51] 29 U.S.C. §§ 652(8), 655.

[52] *See* Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607 (1980).

[53] *See* 29 U.S.C. § 655(b).

[54] David Weil, *OSHA: Beyond the Politics*, PBS (Jan. 9, 2003), https://www.pbs.org/wgbh/pages/frontline/shows/workplace/osha/weil.html [https://perma.cc/3RVE-R398].

[55] *OSHA Exposed to Culture Wars Backlash Through Vaccine Mandate*, BLOOMBERG LAW (Sept. 21, 2021), https://news.bloomberglaw.com/daily-labor-report/osha-exposed-to-culture-wars-backlash-through-vaccine-mandate [https://perma.cc/MMS2-M28L].

[56] Richard L. Trumka, *A Petition to Secretary Scalia for an OSHA Emergency Temporary Standard for Infectious Disease*, AFL-CIO (Mar. 6, 2020),

The Trump Administration's OSHA leadership declined to proceed by ETS even when limited to non-vaccination measures.[57] The day after the January 2021 inauguration, President Biden ordered OSHA to reconsider its position.[58] Even then, OSHA deferred issuing an ETS of general employment coverage. Instead, the agency issued a narrowly targeted ETS for employers providing healthcare services or healthcare support because employment in that sector was at especially high risk for infection by COVID-19.[59] The health services ETS required a wide range of *non*-vaccination measures but noted the growing availability of vaccinations and granted relief from some non-vaccination measures if and when an employer's staff for a location became fully vaccinated.[60]

The healthcare services industry was an easy choice for OSHA to target for an early ETS because that industry's workers faced the greatest interaction with persons who were or might be infected with COVID-19, and that industry was especially supportive of aggressive action to control COVID-19.[61] The effect of that rule's requirements for costly *non*-vaccination preventive measures, with an exemption for fully vaccinated workforces, was to create a powerful incentive for healthcare employers to require employees to obtain vaccinations. Although a small minority of healthcare workers opposed vaccination rules and threatened to resign if compelled to obtain vaccinations, the number of resignations does not appear to have seriously affected the healthcare industry.[62] There is not a

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https://aflcio.org/statements/petition-secretary-scalia-osha-emergency-temporary-standard-infectious-disease [https://perma.cc/Z38V-HB5U].

[57] Loren Sweatt, *Letter of Principal Deputy Assistant Secretary of Labor Loren Sweatt to Richard Trumka, President of AFL-CIO*, U.S. DEP'T OF LABOR (May 29, 2021), https://www.passnational.org/images/PDFs/COVID-19/OSHAMay292020 ResponsetoAFL.pdf [https://perma.cc/A2X3-TDUJ] [hereinafter Letter of Lauren Sweatt]. *See also OSHA Denies AFL-CIO Petition Calling for an Emergency Temporary Standard on Infectious Diseases*, (June 4, 2020), https://www.safetyand healthmagazine.com/articles/19945-osha-denies-afl-cio-petition-calling-for-an-emergency-standard-on-infectious-diseases [https://perma.cc/R4T7-Q38X]; Healthcare ETS, 86 Fed. Reg. 32412 (June 21, 2021) (describing OSHA's response to Congressional inquiry about the need for an ETS). On the other hand, several states with Department of Labor approved-OSH plans adopted COVID-19 emergency standards under state law. *Id*. at 32412 (listing Virginia, Oregon, California, Michigan, and Washington as states with ETS's for COVID-19).

[58] Exec. Order No. 13999, 86 Fed. Reg. 7211 (Jan. 21, 2021).

[59] 29 C.F.R. § 1910.502(a).

[60] *Id*. § 1910.502.

[61] *See supra* note 56 and note 57.

[62] Dave Muoio, *How Many Employees Have Hospitals Lost to Vaccine Mandates? Here Are the Numbers So Far*, FIERCE HEALTHCARE (Feb. 22, 2022), https://www.fiercehealthcare.com/hospitals/how-many-employees-have-hospitals-lost-to-vaccine-mandates-numbers-so-far [https://perma.cc/W9EQ-9UME].

single reported judicial action challenging OSHA's vaccination-incentivizing healthcare ETS.[63]

An analogous ETS covering all or most employers before sufficient availability of vaccinations would have been impractical, especially on an emergency basis. Non-vaccination rules would have required enormously complex research and drafting of details about masking, methods and regularity of testing, periods of leave from work, physical modifications of the workplace, workplace cleaning and work practices for many different types of work and workplaces.[64] The healthcare ETS reveals the difficulty of the task. The healthcare ETS was not an effortless document. The preamble standing alone runs 252 pages. It summarizes medical data from more than seventy medical studies supporting the agency's determination that COVID poses a "grave" danger to health services personnel.[65] It includes a substantial analysis of each of the mandated safety measures as applied to the health services setting, a technological feasibility assessment and an economic feasibility assessment for the healthcare setting.[66] The actual rules of the ETS are nearly 10,000 words long.[67] Drafting an analogous rule with separate analyses for each employment sector on an emergency basis would have been impossible, especially because the agency was then struggling with a limited budget and declining resources after decades of political opposition.[68] A pre-vaccination ETS of general coverage was thus impracticable.

In contrast, a *vaccination* rule is simple, requiring only the specification of approved brands, time limits for return to work and a method of verification. However, a vaccination rule was impossible until vaccinations were easily available for all employees.

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[63] In contrast, a later DHHS rule directly requiring healthcare employee vaccination prompted judicial challenges by a number of Republican states including Texas, Louisiana, and Missouri, with mixed results in the lower courts and ending in the Supreme Court's approval of that rule in *Biden v. Missouri*, 142 S. Ct. 647 (2022).

[64] *See* Letter of Loren Sweatt, supra note 57, at pp. 4. The AFL-CIO subsequently filed a petition for writ of mandamus in the U.S. Court of Appeals for the District of Columbia, seeking to compel OSHA to issue a non-vaccination ETS. The court recharacterized the petition as a "petition for review," and denied the petition, finding that OSHA's decision not to pursue a non-vaccination ETS was reasonable in light of OSHA's other regulatory tools, such as guidance and enforcement of the general duty clause. *In re* AFL-CIO, 2020 WL 3125324 (D.C. Cir. June 11, 2020).

[65] 29 C.F.R. § 1910.

[66] *Id*.

[67] *Id*. §§ 1910.502–.504.

[68] Letter of Loren Sweatt, *supra* note 57. *See also OSHA Faces Big Challenge with Biden Vaccination Mandate*, THE HILL (Sept. 15, 2021), https://thehill.com/business-a-lobbying/572297-osha-faces-big-challenge-with-biden-vaccine-mandate/ [https://perma.cc/4GPM-W864].

b. Non-Binding OSHA Guidance

An alternative OSHA enforcement strategy for quick action is to issue a "guidance" *recommending* employer measures to reduce the risk of an occupational hazard. A guidance is a soft enforcement strategy. It lacks the legal effect of a standard promulgated by the rulemaking process but can still have a real effect on employers. On its face, a guidance merely advises employers. However, an employer ignores a guidance at its peril. An oppositional employer can reject OSHA's advice without breaking the law, but it might still suffer consequences because a guidance can be evidence proving the employer's negligent failure to protect injured employees or third parties.

OSHA adopted a strategy based on non-vaccination guidances from the very outset of the pandemic. Its first COVID-19 guidance was entitled "Guidance for Returning to Work" because other agencies' first wave of workplace COVID measures involved complete shutdowns of normal face-to-face activity, and employers were struggling to find ways to reopen without unnecessary risk.[69] Unfortunately, there is no "one-size-fits-all" set of *non*-vaccination measures for work and workplaces. OSHA's first guidance lacked details to account for the variety of work and workplaces. However, one of the advantages of a guidance is that OSHA can amend its advice as circumstances change without the rulemaking process required to amend a legally binding standard. Over time, OSHA issued more specialized guidances for particular industries and particular work.[70] OSHA has continued to amend its guidances as circumstances change and data accumulates.[71]

OSHA cannot take enforcement action against an employer who rejects the advice of a guidance. Still, by issuing a guidance, OSHA limits the political or cultural backlash it might suffer by seeming to legislate. An employer still has strong incentives to follow OSHA's non-legislative advice for two reasons. First, an employer might want to comply with a guidance because it genuinely cares about the health of its employees,

[69] *Guidance on Returning to Work*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (2020), https://www.osha.gov/sites/default/files/publications/OSHA4045.pdf [https://perma.cc/X3CV-4B39]. For a list of relevant guidance OSHA issued during the pandemic, *see* OSHA, *Pandemic*, U.S. DEP'T OF LABOR, https://www.osha.gov/publications/bytopic/pandemic [https://perma.cc/R4VB-BY84] (last visited Sept. 23, 2022).

[70] *See supra* note 69.

[71] The latest version of OSHA's general guidance for COVID-19 notes the availability of vaccinations and makes different recommendations based on the vaccination status of employees. OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. DEP'T OF LABOR (June 10, 2021), https://www.osha.gov/coronavirus/safework [https://perma.cc/8K7V-RMXY].

especially if decision-making managers are exposed to the same risk as other employees. If the employer cares more about its profits, it might still see compliance as a good way to control medical and disability plan costs, reduce absenteeism due to illness and prevent the loss of employees due to death, disability or safety-based resignation. If some employees resist wearing masks, testing or vaccination, the backlash is against the employer, not OSHA. However, the social influence of employees who prefer safety measures might help to moderate opposition.

Second, an employer's failure to follow a guidance can affect an employer's liability to claimants injured by the hazard the guidance addresses. Employees are one major class of potential claimants. Employees suffering medical expenses, disability, lost income or death because of work-related illness have a right to workers' compensation benefits at a cost borne by the employer.[72] At first glance, it might seem that an employer's failure to comply with a nonbinding OSHA guidance is irrelevant to its workers' compensation costs. Workers' compensation is no-fault insurance. An employee or survivor need not prove employer negligence to establish a right to benefits, and an employer's proof of reasonable care is no defense.[73] However, if following a guidance reduces illness, it might reduce total workers' compensation claims.

A guidance is also important to workers' compensation costs for less obvious reasons. An employee's claim for benefits depends on proof that work *caused* the illness. A work-related cause is less than certain whenever the illness is due to a disease having significant non-work-related causes. Absolute certainty of causation is not required for the right to benefits. A typical standard of causation in workers' compensation law is a "reasonable probability" that work caused the injury.[74] One way a claimant can prove a reasonable probability of a work-related cause is to show that the employer failed to take recommended measures to prevent the disease.[75] A guidance is a useful tool for showing lapses that increased the chances of infection. Moreover, if the employer's neglect is extreme, as it might be if the employer rejects any masking or other recommended precautions, some states allow an injured employee or surviving

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[72] *See* CARLSON & MOSS, EMPLOYMENT LAW 384–87, 399 (4th ed. 2018).

[73] *Id*.

[74] *E.g.*, Schaefer v. Tex. Emp. Ins. Ass'n, 612 S.W.2d 199 (Tex. 1980).

[75] *See* Richard Lynch & Mary Henifin, *Causation in Occupational Disease: Balancing Epidemiology, Law and Manufacturer Conduct*, RISK: HEALTH, SAFETY & ENVIRONMENT (1990–2002), vol. 9, no. 3, p. 269, https://scholars.unh.edu/cgi/viewcontent.cgi?article=1366&context=risk [https://perma.cc/BS7R-P6DY].

> When injuries occur that are possibly the result of a particular exposure, but causation cannot be proved with certainty due to lack of data, limitations of study designs, or legitimate disputes among experts, the manufacturer's conduct should be considered of central importance in determining liability.

Id. p. 269.

dependents to sue in tort.[76] Thus, an employer anxious to reduce the costs of employee claims will strive to follow a reasonable OSHA guidance.

Nonemployees are another group of claimants who might impose consequences on an employer who fails to follow a guidance. Nonemployees include dependents of employees, independent contractors, employees of contractors, customers and visitors to the employer's workplace. Negligence-based tort law governs employer liability to non-employees, and an OSHA guidance might go to the heart of the negligence issue.[77] Tort liability is a reason for an employer to follow a guidance and a useful rationale for explaining safety measures to resistant employees.

There are other aspects of employment law that empower safety-conscious employees to "enforce" a nonbinding safety guidance against an employer. An OSHA rule allows an employee to refuse to work or obey an employer if working or obeying would expose the employee to an imminent risk of "serious injury or death arising from a hazardous condition at the workplace."[78] Safety-conscious employees might invoke this right against an employer who refuses to adopt or enforce masking rules or otherwise declines to adopt reasonable measures despite a

[76] CARLSON & MOSS, *supra* note 72, at pp. 419–423.

[77] *See, e.g.*, Plaintiff–Appellants' Opening Brief at 5, 37, Kuciemba v. Victory Woodworks, Inc., (no. 21-159632021) 2021 WL 4301339 (pending in the U.S. Court of Appeals for the Ninth Circuit and addressing the tort liability of an employer for negligence in causing employee-to-family transmission of COVID-19); *See generally* Walsh v. SSC Westchester Operating Company LLC, 2022 WL 846901 (N.D. Ill. 2022) (denying motion to dismiss claim of wrongful death for nursing home's neglect in failing to prevent spread of COVID); Requena v. Pilgrim's Pride Corp., No. 9:20-CV-00147-ZJH, 2021 WL 2099312 (E.D. Tex. April 1, 2021) (wrongful death action by employee's family members; noncompliance with guidance as evidence of negligence); Sprewell v. Federal Express Corporation, No. 2:20-cv-11612-SVW-AGR, 2021 WL 4706703 (C.D. Cal. May 19, 2021) (driver's nuisance and other claims based in part on OSHA guidance); Benjamin v. JBS S.A., 516 F. Supp. 3d 463 (E.D. Pa. 2021) (on motion to remand to state court after removal to federal court, court citing plaintiff's reliance on OSHA guidance to prove employer's negligence); Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 370 (E.D.N.Y. 2020) (OSHA guidance cited in support of plaintiffs' nuisance action); Benvenuto v. Tappan Zee Constructors, LLC, 129 N.Y.S.3d 742 (N.Y. App. Div. 2020) (subcontractor-employee's tort claim against general contractor supported by OSHA guidance). Even employees retain the right to sue in tort in some special cases involving actual or threatened work-related injury or disease. *See, e.g.*, Davis v. Vanderbilt University Medical Center, 2020 WL 4516094 (Tenn. Ct. App. 2020) (OSHA guidance supported employee's claim that employer retaliated against her for reporting conditions that were unsafe); CARLSON & MOSS, *supra* note 72, at pp. 417–24. In Texas, employees of "non-subscriber" employers who "opt out" of workers compensation retain their right to sue in tort for all work-related injuries. *Id.* at 387–88.

[78] 29 C.F.R. § 1910.12(b). *See generally* CARLSON & MOSS, *supra* note 72, at pp. 451–63.

community surge in infections. While jurors or local judges might disagree whether the risk was imminent, OSHA decides an employee's wrongful discharge or discipline claim under the work-refusal rule, not a local judge or jury.

The National Labor Relations Act ("NLRA") provides another avenue for safety-conscious employees to enforce a guidance against an employer. Under Section 7 of the NLRA, employees can lawfully act in concert, such as by picketing or striking or otherwise voicing complaints, for the purpose of dealing with an employer about the terms and conditions of employment.[79] Employees do not need a formal union to exercise such rights.[80] A subset of any group of employees can engage in picketing, striking or other organized activity even if they are a minority of the workforce.

Employees exercised these rights on several occasions to compel employers to adopt safety measures against COVID.[81] To the extent an employer is willing to meet or bargain with employee proponents for safety, negotiating a plan that is effective, sufficient and acceptable to all parties is likely to be difficult. A spontaneously organized group of some of a workforce is unlikely to have the tools for developing a plan or recognizing what is reasonable. An OSHA guidance can provide the parties with a model for what the employer should do. Of course, not all employees are on the same side of the masking, social distancing or vaccination issues. Workers protesting an employer's COVID-19 control policies can and have engaged in their own concerted actions.[82] However, workplace clashes over an employer's COVID-19 policies leave OSHA on the sidelines when OSHA has only issued a guidance.

In sum, OSHA's strategy of issuing non-binding guidances can have a real effect by supplying employers with a needed model and by empowering employees and other third parties to hold an employer accountable for failing to adopt safe practices. Some employers will still act negligently as they often do under a tort and workers' compensation system of liability because of ignorance, inertia in the absence of a legally

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[79] 29 U.S.C. § 157.

[80] *Id*. *See generally* CARLSON & MOSS, *supra* note 72, at pp. 451–63.

[81] *See* Luis Feliz Leon, *The Essential Worker Strike Wave*, THE NEW REPUBLIC (Jan. 22, 2021), https://newrepublic.com/article/161019/covid-essential-workers-strike [https://perma.cc/3D5Z-KYHA]; Kenya Evely, Amazon Workers Walk Out Over Lack of Protective Gear, THE GUARDIAN (March 30, 2020), https://www.theguardian.com/technology/2020/mar/30/amazon-workers-strike-coronavirus [https://perma.cc/QCN2-8AWC].

[82] Ginia Bellafante, *What the Anti-Vaccine Mandate Protesters Actually Want*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/10/29/nyregion/anti-vaccine-protests.html [https://perma.cc/V8DZ-6FZQ].

mandatory rule, "unpreventable employee misconduct,"[83] a gamble in favor of saving the cost of prevention or a belief system that rejects the scientific establishment or government regulation. If an employer fails to follow a guidance and employees lack the unity, motivation or bargaining power to demand safe practices, individual potential victims of employer carelessness lack any means to *prevent* future injury.[84] Individual potential victims cannot sue until they become actual victims with knowledge of facts sufficient to link their injuries to employer neglect. Thus, tort and workers' compensation systems are compensatory, not preventive.

c. Enforcement Under "General Duty" Clause

OSHA can compound the effect of a guidance by combining it with a third fast-track enforcement strategy: enforcement under the "general duty clause" of the OSH Act. The general duty clause is analogous to the reasonable care standard in tort law and operates without a specific OSHA standard.[85] An employer's "general duty" is to provide employees with work and a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm. . . ."[86] OSHA can use the general duty clause to bring an enforcement action seeking civil penalties against an employer when there is no OSHA standard addressing the hazard the employer created or allowed. OSHA issued COVID-19-related general duty clause citations against many employers in 2020 and 2021.[87] The citations alleged failure to adopt reasonable *non*-vaccination preventive measures to protect employees.

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[83] *See* Wicker v. Walmart, Inc., 533 F. Supp. 3d 944 (C.D. Cal. 2021) (employees' "public nuisance" claim against employer dismissed on the basis of OSHA's "primary jurisdiction" to regulate occupational safety).

[84] *See* Wicker v. Walmart, Inc., 533 F. Supp. 3d 94 (C.D. Cal. 2021) (employees' "public nuisance" claim against employer dismissed on the basis of OSHA's "primary jurisdiction" to regulate occupational safety).

[85] U.S. v. Sturm, Ruger & Co., Inc., 84 F.3d 1, 5 (1st Cir. 1996) (describing the general duty clause as a gap filling rule to require an employer to maintain a minimum level of safety in all circumstances even in the absence of a specific OSHA standard for the situation).

[86] 29 U.S.C. § 654(a)(1).

[87] The possibility of "general duty" enforcement actions OSHA was one reason why the Trump Administration's OSHA found a non-vaccination ETS to be unnecessary. *Supra* note 57. By October 2020, OSHA had issued general duty clause citations against 37 employers for failure to take steps to mitigate COVID-19 hazards. U.S. Dep't of Labor, News Release No. 20-1891, U.S. Department of Labor's OSHA Announces $484,069 in Coronavirus Violations, 2020 WL 5870212 (Oct. 2, 2020). By January 8, 2021, the total number of COVID-19 citations based on the general duty clause since the beginning of the pandemic had grown to 300. Dep't of Labor, News

Whether enforcement under the general duty clause is as effective or efficient as traditional rulemaking depends on the nature of the hazard and the urgency of prevention. Like the issuance of a guidance, enforcement under the general duty clause avoids the usual rulemaking process because the "rule" the employer is alleged to have violated already exists in the OSH Act. However, it does not avoid the need to identify and prove a significant risk, develop a risk prevention measure and prove the effectiveness and feasibility of the measure. The proof occurs in a hearing on a citation against an individual employer rather than in a rulemaking process for all employers. The agency's need to prove a standard of care in every case in which an employer challenges a citation can make "general duty" enforcement seem less efficient than rulemaking. Moreover, the enforcement proceeding can continue in contested cases for many years before a final, precedent-setting judgment.[88] Precedent established by successful enforcement actions can be porous compared with a rule created by the usual rulemaking process because slight differences between work, workers and work settings can be arguable points for distinguishing one case from another. Non-vaccination preventive measures about masking, cleaning, testing and leave from work might be so complex that case law, standing alone, lacks clarity and certainty. The clarity of general duty case law also depends on the uniformity of the judiciary in judicial review of OSHA's enforcement actions.

Nevertheless, enforcement under the general duty clause can be nearly as effective as traditional rulemaking, and it has certain advantages. OSHA can *begin* enforcement under the general duty clause *immediately*, without the delay of rulemaking. The Act even authorizes OSHA to seek an immediate temporary injunction against an individual employer's continued violation pending a final determination on the merits in an enforcement action, although the injunction is effective only against that individual employer.[89] If the agency engages in repeated enforcement actions based on the same hazard, the agency can standardize or package its proof of the hazard and the solution to reduce the difficulty of enforcement. The agency will usually not need to prove a violation at all. There are many reasons an employer will *not* challenge a citation. In most cases, OSHA's penalties are mild.[90] An employer's resistance is more

Release No. 21-0020, *U.S. Department of Labor's OSHA Announces $3,930,381 in Coronavirus Violations*, 2020 WL 5870212 (Jan. 8, 2021).

[88] *E.g.*, Whirlpool Corp. v. Occupational Safety and Health Rev. Comm'n, 645 F.2d 1096 (D.C. Cir. 1981) (final judgment seven years after issuance of citation in general duty case).

[89] The Department of Labor may seek an injunction against a particular cited employer with respect to an "imminent" harm that might cause death or serious injury during the pendency of an enforcement action. 29 U.S.C. § 662.

[90] CARLSON & MOSS, *supra* note 72, at 434.

likely if the cost of "abatement" (the measures required by the citation) is expensive. Non-vaccination preventive measures that interrupt business or reduce efficiency can be costly, but vaccination rules that require only monitoring of vaccination records are not likely to be expensive enough to provoke many challenges in enforcement proceedings. Challenging a citation is expensive to the employer and exposes the employer to greater liability for future claims by employees and third parties educated by the agency's enforcement proceeding.

A guidance can make OSHA's "general duty" enforcement even more efficient and effective. In a general duty enforcement action, two important issues are whether the cited hazard was "recognized" and whether there are specific, feasible means to mitigate the hazard.[91] A guidance can establish that the hazard was "recognized," and the guidance's suggested safety measures would likely be some evidence of feasibility. On the other hand, employers who comply with a guidance enjoy greater security against future OSHA enforcement actions. An employer's compliance with a guidance supports the employer's defense that it fulfilled its "general duty" with respect to the hazard.[92]

C. OSHA's Shift to a Vaccination-Inclusive Strategy

The approval of vaccinations at the end of 2020 and early 2021,[93] and nationwide availability for all working-age Americans by April 2021,[94] presented the welcome possibility that burdensome non-vaccination prevention measures might become unnecessary. Many employers, employees and other members of the public were desperate to end non-vaccination preventive measures. Non-vaccination rules can be devastatingly expensive for employers, employees, the economy and society. Reconstruction of the workplace, limits on face-to-face work, testing requirements, mandatory work leave and in some cases suspension

[91] *See* 29 U.S.C. § 654(a)(1).

[92] *Cf.* MetWest Inc. v. Secretary of Labor, 560 F.3d 506 (D.C. Cir. 2009) (guidance supported OSHA's interpretation of safety standard); Johnson v. Tyson Foods, Inc., No. 21-cv-01161-STA-jay (W.D. Tenn. 2021) (OSHA's public communications favoring vaccinations were evidence against employee's petition to enjoin employer's vaccination mandate); Equal Employment Opportunity Commission v. Huntington Ingalls, Inc., No. 4:17cv113, 2018 WL 6272891 (D. Va. Nov. 2018) (employer's need to comply with OSHA guidance showed that employee's proposed disability accommodation was not "reasonable").

[93] *See supra* note 17.

[94] Jacqueline Howard, *All 50 States Now Have Expanded or Will Expand Covid Vaccination Eligibility to Everyone 16 and Up*, CNN (April 5, 2021), https://www.cnn.com/2021/03/30/health/states-covid-19-vaccine-eligibility-bn/index.html [https://perma.cc/H2W7-MDBJ].

of business are more than some businesses can bear.[95] Further, the costs of some non-vaccination measures extend far beyond the workplace or an employer's profitability. Employees laid off or furloughed by closed or suspended businesses lose income to support themselves and their dependents.[96] Work is a major social occasion, but work at a distance exacerbates social isolation and contributes to society-wide emotional health problems.[97] The combined national cumulative costs and harms of COVID-19 illness and prevention measures had already reached about $16 *trillion* by late 2020, which was less than midway through the pandemic and still a year away from OSHA's general COVID-19 ETS.[98]

If a substantial majority of a population attains immunity from a contagious disease, the spread of the disease can be suppressed without expensive and harmful non-vaccination prevention measures. It remains uncertain what percentage of the population must attain immunity by recent prior infection or vaccination in the case of COVID-19 to achieve such "herd immunity," but estimated figures range from seventy to eighty-five percent of the population.[99]

Voluntary vaccination would be ideal, but apathy, individual doubt and organized resistance to vaccination slowed progress toward the goal of herd immunity. By late summer 2021, only fifty percent of the

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[95] Ruth Simon, *Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (April 16, 2021), https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619 [https://perma.cc/P94B-P8C2].

[96] During the first year of the pandemic, nonfarm employment declined by 9.4 million. This job loss was because of the pandemic, with the greatest concentration of job losses in industries most affected by the pandemic. *COVID-19 Ends Longest Employment Recovery and Expansion in CES History, Causing Unprecedented Job Losses in 2020*, MONTHLY LAB. R. (June 2021), https://www.bls.gov/opub/mlr/2021/article/covid-19-ends-longest-employment-expansion-in-ces-history.htm#:~:text=In%20March%20and%20April%202020,the%20efforts%20to%20contain%20it [https://perma.cc/6S6P-ZCBQ].

[97] Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KFF (Feb. 10, 2021), https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use [https://perma.cc/J85N-WM5L]; Emma Dorn et al., *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & CO. (July 27, 2021), https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning [https://perma.cc/JZ75-WUBR].

[98] David M. Cutler & Lawrence H. Summers, *The COVID-19 Pandemic and the $16 Trillion Virus*, 324 JAMA 1495, 1496 (Oct. 12, 2020), https://jamanetwork.com/journals/jama/fullarticle/2771764 [https://perma.cc/D85K-BP7A].

[99] Carrie MacMillan, *Herd Immunity: Will We Ever Get There*?, YALE MED. (May 21, 2021), https://www.yalemedicine.org/news/herd-immunity [https://perma.cc/R76K-SSUJ].

population was fully vaccinated.[100] Moreover, the rate of vaccination was very uneven across different sections of the population. Some large regions and communities of the United States were much less likely than others to reach a safe level of immunity. For example, even as late as March 30, 2022, only fifty-four percent of Georgia residents were fully vaccinated.[101] A further complication for the goal of herd immunity is that immunity by vaccination or recent infection diminishes over time, and past immunities might be ineffective against new variations of the COVID-19 virus.[102] It is now clear that protection will require regular follow-up vaccinations for the indefinite future.[103]

Within weeks of the approval of vaccinations for all working-age persons, some employers adopted vaccine requirements for their employees.[104] These employers often faced backlash from at least some unvaccinated employees and non-employee anti-vaccination activists.[105]

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[100] *US Coronavirus Vaccine Tracker: What's the Nation's Progress on Vaccinations*?, USA FACTS (2022), https://usafacts.org/visualizations/covid-vaccine-tracker-states [https://perma.cc/Y2B2-48VB]. OSHA calculated that as of October 2021, 26 million of the workers employed by employers subject to the ETA remained unvaccinated. Nov. 2021 ETS, *supra* note 2 at 61424.

[101] *See How Vaccinations Are Going in Your County and State*, N.Y. TIMES (updated March 28, 2022), https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html [https://perma.cc/5H7C-S4MC]. To see the date specific rate, place a cursor over the desired point on the graph.

[102] Prakash Nagarkatti & Mitzi Nagarkatti, *How Long Does Protective Immunity Against COVID-19 Last After Infection or Vaccination? Two ImmunologistsExplain*, THE CONVERSATION (Feb. 25, 2022), https://theconversation.com/how-long-does-protective-immunity-against-covid-19-last-after-infection-or-vaccination-two-immunologists-explain-177309 [https://perma.cc/J5FA-B273].

[103] Mayo Clinic Staff, *Are COVID-19 Vaccine Boosters or Extra Shoots Recommended?*, MAYO CLINIC (Dec. 17, 2022), https://www.mayoclinic.org/coronavirus-covid-19/vaccine-boosters#:~:text=Key%20takeaways,immune%20response%20weakened%20over%20time [https://perma.cc/NV74-Q8FC]; Sarah Cobey et al., *We Study Virus Evolution. Here's Where We Think the Coronavirus Is Going*, N.Y. TIMES (March 28, 2022), https://www.nytimes.com/interactive/2022/03/28/opinion/coronavirus-mutation-future.html [https://perma.cc/B8RS-JZXJ].

[104] Beth Umland, *Survey Looks at Vaccine Mandates and Employee Turnover*, MERCER (Oct. 13, 2021), https://www.mercer.us/our-thinking/healthcare/survey-looks-at-vaccine-mandates-and-employee-turnover.html [https://perma.cc/D68R-4RUS] (one third of respondents had adopted vaccination mandates); Dave Muoio, *As CMS' Requirement Looms, at Least 174 Health Systems Currently Mandate Vaccination for Their Workforces*, FIERCE HEALTHCARE (Sept. 14, 2022), https://www.fiercehealthcare.com/hospitals/40-health-systems-requiring-mandatory-covid-19-vaccines-for-their-workforces [https://perma.cc/2VKP-2JYZ]; Suzanne R. Kelleher, *All But 2 Major U.S. Airlines Have Announced Vaccine Mandates*, FORBES (Oct. 3, 2021), https://www.forbes.com/sites/suzannerowankelleher/2021/10/03/major-us-airlines-vaccine-mandates/ [https://perma.cc/52VQ-HY8W].

[105] Dave Muoio, *How Many Employees Have Hospitals Lost to Vaccine Mandates? Here Are the Numbers So Far*, FIERCE HEALTHCARE (Feb. 22, 2022),

One survey reported that as of May 2021, employers of only about five percent of all employees had adopted vaccination requirements.[106]

The Biden Administration's first significant move toward requiring vaccinations for any group of Americans was by exercising the Department of Defense's military command power over the uniformed services in August 2021.[107] Then in September 2021, the Biden Administration announced its intention to issue additional rules to "require" vaccinations for many civilian Americans by a number of measures, including OSHA's power to regulate occupational safety.[108] Reactions were highly politicized. Opponents assailed the plan as an unconstitutional assault against personal liberty.[109] However, *popular* arguments against vaccination were not aligned with conservative *legal* opposition. To recognize a vaccination rule as an assault against constitutional liberties would have required expansion of the concept of "liberty" protected by the Constitution at a time when a conservative U.S. Supreme Court was more inclined to reduce liberties protected by the Constitution.[110] Thus, while opponents often seemed to argue for a "right" to avoid government-mandated vaccination, the "right" was a cultural expression, not a legal argument. The ultimate legal strategy of legal opponents was to challenge the process for and merits of the executive branch's adoption of vaccination rules.

The Biden Administration's presentation of its vaccination goal and the ensuing debate obscured an important nuance in the different ways of seeming to "require" vaccination. One method for increasing the rate of vaccination is to adopt a rule demanding vaccination and *penalizing* the failure to obtain a vaccination. Another method is to *reward* covered entities whose personnel are fully vaccinated with an exemption from non-vaccination measures. This second method can lead to nearly the same

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https://www.fiercehealthcare.com/hospitals/how-many-employees-have-hospitals-lost-to-vaccine-mandates-numbers-so-far [https://perma.cc/5KE8-HEUH].

[106] Roy Maurer, *Number of Workers Under Vaccine Orders Levels Off*, SHRM (Jan. 12, 2022), https://www.shrm.org/hr-today/news/hr-news/pages/number-workers-under-vaccine-mandate-levels-off-scotus-osha-ets.aspx [https://perma.cc/ATG2-9EMM].

[107] *Memorandum from Secretary of Defense Lloyd J. Austin for Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DOD Field Activity Directors* (Aug. 24, 2021), https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/MEMORANDUM-FOR-MANDATORY-CORONAVIRUS-DISEASE-2019-VACCINATION-OF-DEPARTMENT-OF-DEFENSE-SERVICE-MEMBERS.PDF [https://perma.cc/K2GQ-DMF2].

[108] Sheryl Gay Stolberg & Katie Rogers, *Biden's Vaccine Requirements Draw Praise, Condemnation and Caution*, N.Y. Times (Sept. 9, 2021), https://www.nytimes.com/live/2021/09/09/world/covid-delta-variant-vaccine [https://perma.cc/H9D7-D6HM].

[109] *Id.*

[110] *See infra* p. 1038.

result as the first if the burden of non-vaccination measures motivates a covered entity to adopt its own rules leading to a high rate of vaccination among its personnel. Differences between these two approaches were mainly lost in the rhetoric over vaccination "mandates."

During the two months after the Biden administration's vaccination announcement, federal agencies issued a batch of new rules *requiring* or *rewarding* vaccination. To the existing military and healthcare industry rules,[111] the Administration added five new rules: (1) a rule for federal employees, based on the executive branch's management of the federal workforce;[112] (2) a rule for facilities providing service to Medicare patients, based on laws granting DHHS authority to regulate facilities receiving Medicare funds;[113] (3) a rule for federally funded "head start" programs, based on laws granting DHHS authority to regulate safety practices at such programs;[114] (4) a rule for federal contractors, based on the executive branch's constitutional and statutory authority to set the terms of contracts for parties doing business with the federal government;[115] and (5) the OSHA ETS applying to all employers with at least 100 employees.[116]

The November 2021 OSHA ETS had the broadest coverage of all the federal vaccination rules because it was not limited to any particular industry, occupation or type of work. It did include some exemptions or limits, two of which were of particular significance. First, it applied only to the private sector because the OSH Act applies only to the private sector.[117] Second, it exempted employers of fewer than 100 employees.[118] Even with these limits, the ETS applied to employers employing an

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[111] *See supra* p. 1014.

[112] *See* Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021) (requiring vaccination by all federal employees, subject only to such exceptions as are required by law).

[113] *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61555, 61616–61627 (2021) (requiring vaccinations for all staff at medical facilities receiving Medicare funds, except for teleworkers or staff with religious objections).

[114] *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68052 (2021).

[115] Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021) (providing that certain federal contractors would be subject to contract terms requiring compliance with a COVID-19 guidance, subsequently issued by the Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Sept. 24, 2021), https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf [https://perma.cc/26ZN-LJCV].

[116] *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

[117] 29 U.S.C. § 652(5).

[118] Nov. 2021 ETS, *supra* note 2, at 61403.

estimated eighty-four million employees.[119] By issuing the rule as an ETS, OSHA could declare the rule immediately effective *during*, not after, the usual and comment proceedings.[120]

The ETS was the most robust vaccination action in the agency's history. OSHA had never before included vaccination in a safety rule, except in its earlier COVID-19 healthcare rule rewarding fully vaccinated workforces and in much older rules requiring some employers to make certain vaccinations *available* to employees.[121] However, Congress had long ago contemplated that OSHA might eventually *require* vaccinations. In an authorization for OSHA research programs, Congress stated that "nothing in this or any other provision of [the OSH Act] shall be deemed to authorize or require . . . immunization . . . for those who object thereto on religious grounds, *except* where such is necessary for the protection of the health or safety of others."[122] This guarantee of a qualified religious exemption would not have been necessary if Congress had not anticipated the possibility of an OSHA vaccination rule.

However, the ETS was not an absolute vaccination requirement. Instead, OSHA adopted a non-compulsory but highly motivating reward approach: employers could adopt a rigorous masking-testing rule (exempting vaccinated employees) *or* a workforce-wide vaccination rule (subject to medical necessity and religious practice exemptions).[123] The masking-testing option required an employer to enforce and monitor a masking rule and a regular testing schedule for every unvaccinated employee, which might be a burden to an employer. The monitoring rule somewhat added to an employer's managerial and administrative workload. However, the rule applied only to large firms that would likely have human resources management able to handle this task without significant new costs. OSHA projected that about forty percent of employers would choose the masking-testing option rather than requiring all employees to obtain vaccinations.[124]

Of course, the masking-testing requirement was also a burden for an *unvaccinated employee*. In a workplace without a vaccination

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[119] *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 662 (2022). The actual number of employees affected by the ETS was probably significantly lower because many private sector employees were already covered by one or more of the other vaccination rules.

[120] *Supra* note 41.

[121] *See* 29 C.F.R. § 1919.1030(f) (requiring employers to make hepatitis B vaccinations available to certain employees).

[122] 29 U.S.C. § 669(a)(5).

[123] Nov. 2021 ETS, *supra* note 2, at 61552.

[124] OSHA projected that about 40 percent of employers would still choose the non-vaccination option. Oral Argument of Solic. Gen. Elizabeth Prelogar before U.S. Sup. Ct. in *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 2022 WL 193585 (Jan. 2, 2022).

requirement, an unvaccinated employee might feel compelled to obtain a vaccination to gain an exemption from masking and testing, or the unvaccinated employee might feel punished for remaining unvaccinated. Surveys of unvaccinated persons suggested that many clung to belief systems so strong that they would not accept COVID-19 vaccinations under any circumstances.[125] For some unvaccinated persons, identity with certain political or cultural subgroups made their opposition resilient against government rules, employer rules or recommendations of the medical establishment.[126]

The ETS was less compulsory than some other government and private entity vaccination rules. However, OSHA's presentation of the ETS as a vaccination "requirement" aided the opposition's rhetoric and undermined OSHA's defense of the ETS in rapid-fire judicial emergency hearings. There were two different ways to describe the ETS. First, the ETS was a *masking-testing* requirement exempting fully vaccinated employees. Alternatively, the ETS was a *vaccination* requirement exempting employees who submitted to testing-masking procedures with an employer's permission. OSHA generally emphasized the "vaccination requirement" prospective, making the ETS seem compulsory.

OSHA's presentation of the ETS aided the opposition in another way as well. The agency described the ETS as creating a "mandate" or a "mandatory" rule. In fact, the words "mandate" or "mandatory" appeared in the notice *290* times.[127] It would have sufficed to say that the ETS was a "rule" requiring employers to choose between two possible employer policies. Of course, *all* OSHA rules are mandates to the extent they require an employer to take prescribed actions or choose between prescribed actions. However, describing the ETS as a "mandate" and not just a "rule" allowed the opposition to argue to its own audience and sympathetic judges that the ETS was more imperative and oppressive than a normal rule.[128]

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[125] Serena Marshall & Lara Salah, *Psychological Barriers May Lead to COVID Vaccine Refusal* (Interview of Gretchen Chapman), MEDPAGE TODAY (Dec. 8, 2021), https://www.medpagetoday.com/podcasts/trackthevax/96053 [https://perma.cc/2LGJ-EUTH]; Linsday M. Monte, *Household Pulse Survey Shows Many Don't Trust COVID Vaccine, Worry About Side Effects*, U.S. CENSUS BUREAU (Dec. 28, 2021), https://www.census.gov/library/stories/2021/12/who-are-the-adults-not-vaccinated-against-covid.html [https://perma.cc/UE3J-4XAA].

[126] *See supra* note 125.

[127] The first use of either of those words is at the beginning of the notice, 86 Fed. Reg. at 61402. A word count of "mandate" or "mandatory" yields the number 290. Nov. 2021 ETS, *supra* note 2, at 61402.

[128] Ben Penn & John Lauinger, *OSHA Exposed to Culture Wars Backlash Through Vaccine Mandate*, BLOOMBERG L.: DAILY LAB. REP. (Sept. 21, 2021), https://news.bloomberglaw.com/daily-labor-report/osha-exposed-to-culture-wars-backlash-through-vaccine-mandate [https://perma.cc/D9NW-D6AE]; *See infra* text pp. 1035–41.

III. THE JUDICIAL CHALLENGES TO THE NOVEMBER 2021 ETS

A. The ETS in the U.S. Courts of Appeals

The courts of appeals' opinions in the judicial review of the ETS remain important even though the Supreme Court might seem to have had the final word in *NFIB*. *NFIB* did not answer all the issues that animated the appeals. The Supreme Court instead focused on a narrow range of issues. Even if *NFIB* had covered the full range of issues, *NFIB* was an unsigned *per curiam* opinion in a rapid, emergency hearing. It is of limited precedential value.[129] The lower courts' opinions on some matters might still be significant for the future. The Fifth Circuit's opinion, in particular, is damaging to the development of coherent public and occupational law.

When OSHA uses its emergency rulemaking power, opponents seeking immediate judicial review can proceed directly to a circuit court of appeals even while the agency receives and reviews public comment.[130] Opponents challenged the ETS in several federal circuit courts of appeals on the very day OSHA published the ETS, and they moved for an immediate stay of enforcement of the ETS.[131] The Fifth Circuit acted first, granting an emergency stay pending further consideration of preliminary relief.[132] Five days later, the Fifth Circuit confirmed and extended the stay pending final review of the merits.[133] The court found that a stay was warranted because the challengers were "likely" to prevail on the merits, they would suffer "irreparable harm" unless the court stayed enforcement and the public interest favored a stay.[134]

As a ruling on a motion for an emergency stay, the Fifth Circuit's opinion was a quick, first-look *prediction* of the outcome on the merits. The court issued its decision in an expedited fashion with no opportunity for careful argument, presentation of evidence or review of the law. In such a preliminary hearing, a court's errors, omissions and contradictions are ordinarily forgivable because the court is dependent on superficial and

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[129] *See Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 708 (1956).

[130] 29 U.S.C. § 655(f).

[131] *See* BST Holdings, L.L.C. v. OSHA., 17 F.4th 604, 610 (5th Cir. 2021).

[132] BST Holdings, L.L.C. v. OSHA, No. 21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021).

[133] *BST Holdings, L.L.C*, 17 F.4th at 619.

[134] *Id*. at 611, 618. The usual test for a temporary injunction against agency action pending judicial review includes a balancing of the "equities" for or against an injunction. Winter v. Natural Resources Defense Council, Inc. 555 U.S. 7, 20 (2008). The Fifth Circuit did not discuss the balance of the equities in *BST Holdings*, perhaps because the parties offered nothing relevant to equity beyond what they argued about their likely success on the merits, the irreparable harms they faced, and the public's interests.

adversarial presentations of the case without time for much independent research and deliberation. However, the Fifth Circuit's opinion was an incautious, full-throated charge into the culture war. The court's fulmination against the ETS gave its prediction the appearance of a final, confident condemnation. The court adopted nearly all the challengers' arguments and ridiculed or ignored nearly all of OSHA's arguments. The court, as a culture warrior, respected neither its virtual opponent (OSHA), the motives of the other culture or the complexity of the issue. As the Sixth Circuit later observed, the Fifth Circuit's opinion injudiciously failed to acknowledge "*any* of OSHA's factual explanations or its supporting scientific evidence concerning harm," costs of COVID-19 or the costs of non-vaccination preventive measures.[135]

From the outset, the Fifth Circuit labeled the ETS the "vaccine mandate"[136] or simply "the Mandate," a term for which OSHA was partly to blame.[137] The court found that the ETS likely exceeded federal power under the Commerce Clause, violated the nondelegation doctrine, extended beyond OSHA's statutory mandate and lacked sufficient supporting evidence.[138] The court prefaced these arguments by declaring that the OSH Act did not and probably *could not* "authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways."[139]

This preface was a compound exaggeration. OSHA is no more in the "recesses" of the federal bureaucracy than any other prominent agency. Indeed, only a few paragraphs later, the court noted that OSHA issued the ETS at the direction of the *White House*.[140] The ETS did not affect "every member of society." It indirectly affected *unvaccinated* workers qualifying as "employees" of employers employing at least 100 employees.[141] It is a matter of opinion whether vaccinations, if "mandated," affect individuals in "the *profoundest* of ways." Vaccinations for various diseases are widely required for entry into many

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[135] *In re* MCP No. 165, 21 F.4th 357, 368 (6th Cir. 2021) (emphasis added).

[136] *BST Holdings, L.L.C.*, 17 F.4th at 609.

[137] *Supra* text p. 1028.

[138] *BST Holdings, L.L.C.*, 17 F.4th at 611.

[139] *Id.* at 611, 616–18.

[140] *Id.* at 612. The ETS followed President Biden's push for greater federal regulatory effort to promote vaccinations. *Supra* note 109.

[141] Nov. 2021 ETS, *supra* note 2, at 61403, 61513.

schools.[142] Other long-validated government rules have an equal or better claim for being the "profoundest" of impositions.[143]

The court then turned its attention to whether COVID-19 presented an "emergency" of the sort for which the OSH Act authorized an ETS. The court doubted that the Act's authorization applied to a hazard posed by a virus.[144] If the authorization applied to a virus, the court opined without legal authority that OSHA could not require *preventive* measures without proof of the *current* presence of at least one infected employee in *every* covered workplace. In the Fifth Circuit's view, the *risk* that an employee or third party might bring the virus to any workplace involving group activity was not enough.[145] The court thus confused "risk" or "hazard" with actual occurrence, and it implied a devastatingly restrictive health policy that *preventive* rules based on the *hazard* of occurrence are invalid. If the court were correct, nearly any preventive rule OSHA might adopt, such as a fire extinguisher requirement in a building not yet on fire, would be invalid. Rules for masking, distancing or health monitoring for healthcare facilities and crowded workplaces would similarly be void.

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[142] *State Vaccination Requirements*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html [https://perma.cc/6QKY-XR5U] (last visited Apr. 25, 2022). The U.S. Supreme Court upheld the power of local school districts to compel vaccination of students in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *But see* Josh Blackman, *The Irrepressible Myth of* Jacobson v. Massachusetts, 70 BUFF. L. REV 131 (2022) (criticizing interpretations of this case as upholding the state's power to compel vaccination).

[143] *E.g.*, BNSF Ry. Co. v. Dep't of Lab., 566 F.3d 200 (D.C. Cir. 2009) (approving Department of Transportation rule requiring employees to disrobe and urinate with aural and visual observation by an official conducting a drug test).

[144] *BST Holdings, L.L.C,* 17 F.4th at 612–13. The OSH Act's emergency rulemaking provision requires a "grave danger" caused by "exposure *to substances or agents* determined to be toxic or physically harmful *or from new hazards*." 29 U.S.C. § 655(c)(1) (emphasis added). The court questioned whether a virus is a "substance" or "agent." However, OSHA has treated viruses as "toxic substances" for decades, with Congress's apparent agreement and without controversy until the pandemic. *Supra* text p. 1027. The court also doubted that COVID-19 could be a "new hazard" because OSHA had described COVID-19 as a "recognized" hazard for other purposes. *BST Holdings, L.L.*C., 17 F.4th at 613. However, there is no reason why a hazard that is "recognized" immediately cannot remain "new" for the time needed to issue an emergency regulation. A fire, immediately recognized, can still be an emergency. If a hazard ceased to be "new" immediately upon recognition, no emergency standard would ever be possible.

[145] *BST Holdings, L.L.C.*, 17 F.4th at 613. The court cited *In re Int'l Chemical Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987), which actually held that OSHA must prove a standard is necessary to protect against a "danger" in the workplace. In the case of a virus that circulates in general society—the environment in which the workplace exists—the virus is an omnipresent danger.

Then the court concluded that the virus that had already killed nearly a million persons presented no real workplace "emergency" because the vast majority of employees were vaccinated and safe from infection.[146] However, the rule's impact was limited to *unvaccinated* employees—the very employees who remained at greatest risk of COVID-19. Moreover, the court completely ignored the risk to unvaccinated *family* members of employees, including children not yet eligible for vaccination and elderly or health-compromised relatives for whom vaccination might not be sufficiently protective. Including risks to family members is essential for a complete evaluation of an OSHA standard addressing transmissible risks. Indeed, the Act expressly directs OSHA to develop standards that account for the problem of employee-to-family transmission of hazardous chemicals and substances.[147]

The lack of a true emergency, the court reasoned, was further revealed by the rule's temporary exemption for small firms that are equally exposed to the risk as large firms,[148] which was an odd criticism for the court to pair with its other complaint that OSHA inexcusably failed to account for administrative burdens of compliance.[149] The purpose of the small firm exemption was to account for that burden, pending the development of a more complete record during the emergency period.[150] The court further doubted OSHA's sincerity in treating COVID-19 as an emergency because the agency had seemed to delay an ETS until two years after the beginning of the pandemic and two months after the Biden Administration's vaccination policy directive.[151] This accusation ignored that the rule's solution—vaccination—was *impossible* until a few months before the ETS. The court's criticism that the agency had spent two months researching and drafting the ETS was equally unfair. The demanding rules of administrative and judicial review, and the possibility of hostile judges, had necessitated a document of nearly 150,000 words. It is hard to imagine any such document being prepared in under two

[146] *BST Holdings, L.L.C.*, 17 F.4th at 613–14.

[147] 29 U.S.C. §§ 671a(b)(2) ("It is the purpose of this section to. . . prevent or mitigate future incidents of home contamination that could adversely affect the health and safety of workers and their families"); *Id*. § 671a(d)(2) (authorizing appropriate regulations for the purpose of family protection).

[148] *BST Holdings, L.L.C.*, 17 F.4th at 616.

[149] *Id*. at 616, 618.

[150] Nov. 2021 ETS, *supra* note 2, at 61494. The function of the small firm exemption was to relieve small employers of the disproportionate compliance burden they would suffer because of their limited human resources expertise and management. *Id.* at 61403. *See also In re* MCP NO. 162, 21 F.4th 357, 381–82 (6th Cir. 2021); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHNS L. REV. 1197 (2006).

[151] *BST Holdings, L.L.C.*, 17 F.4th at 611–12.

months. As the court's own hasty opinion illustrated, a hasty decision by a judge or agency risks serious and potentially consequential mistakes.

Finally, the Fifth Circuit pronounced that "the Mandate flunks a cost-benefit analysis" because vaccine monitoring would impose a financial burden on employers and cause the departure of a large number of employees.[152] This argument seemed to contradict the court's earlier assertion that the vast majority of workers had already obtained vaccinations. In any event, OSHA rulemaking *cannot* flunk a "cost-benefit" analysis because OSHA rules are not subject to a "cost-benefit" test.[153] Even if a "cost-benefit" analysis did apply, that analysis would require consideration of *benefits* as well as costs, but the court cited only costs and ignored all the benefits of preventing illness and death and of substituting vaccination rules for much more burdensome *non*-vaccination safety measures.[154]

The Fifth Circuit's decision had other errors too, mainly the product of exuberant rhetoric but still potentially significant for future health crises.[155] Had the Sixth Circuit not quickly lifted the stay imposed by the

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[152] *Id.*

[153] *See In re* MCP NO. 165, 21 F.4th 357, 383 (6th Cir. 2021), for a discussion of cases including *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981), rejecting "cost-benefit analysis in reviewing OSHA safety standards. OSHA's standards are, however, subject to tests of reasonable effectiveness and "economic feasibility." *In re* MCP NO. 165, 21 F.4th at 383. OSHA did summarize its research in its announcement of the ETS. 86 Fed. Reg. at 61493-94 The Fifth Circuit's opinion shows no indication that the court considered any of that research in its own "cost-benefit" analysis. *See BST Holdings*, 17 F.4th at 604.

[154] *BST Holdings*, 17 F.4th at 616.

[155] The court described the ETS as a badly drafter "one-size-fits-all sledgehammer." *BST Holdings*, 17 F.4th at 612. This criticism revealed the court's fundamental misconception of work-related risks. A risk can be associated with a particular type of work, a particular type of workplace, or a particular condition that is not limited to a particular type of work or workplace. COVID-19 fits in the last category. *See infra* text p. 1043.

The court mischaracterized the history of the federal response in addressing the pandemic, claiming that the President's and OSHA's early resistance to emergency action undermined the present claim of emergency. *BST Holdings*, 17 F.4th at 614. Aside from the fact that "the President himself" was a different president from the president who adopted the vaccination goal, the court confused the agency's early non-vaccination rules strategy with its later vaccination strategy. *Id.* The Trump Administration's resistance to issuing non-vaccination standards—temporary or otherwise—was due to the impracticality of non-vaccination standards. *See supra* text pp. 1013–15. The court repeated this mistake when it referred to OSHA's early position that a valid ETS would require impractical complexity. *BST Holdings*, 17 F.4th at 615. That early position by OSHA was in reference to a non-vaccination rule, not a vaccination rule. *See supra* text pp. 1013–15. A vaccination rule can be uniform because variations in work and workplaces do not alter the basic means and effect of a vaccination. *See infra* text pp. 1042–43.

Fifth Circuit's questionable reasoning, the immediate effect of the Fifth Circuit's stay would have been a pause in the rise of the vaccination rate. Just days after the Fifth Circuit's order, OSHA invoked the special rule for multi-district litigation involving federal agency action.[156] A lottery gave jurisdiction over the matter to the Sixth Circuit Court of Appeals.[157] There, OSHA enjoyed the advantage of a more sympathetic panel. The Sixth Circuit granted OSHA's motion to dissolve the Fifth Circuit's stay.[158]

The Sixth Circuit's opinion was a near complete opposite of the Fifth Circuit's opinion on every major point, beginning with the Sixth Circuit's characterization of the ETS. As the Sixth Circuit described the rule: "[t]he ETS does not require anyone to be vaccinated. Rather, the ETS allows covered employers . . . to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces."[159] Unlike the Fifth Circuit, the Sixth Circuit reviewed OSHA's scientific evidence and found substantial evidence that COVID-19 is capable of airborne transmission, the disease poses significant risks in any setting in which employees are involved in group work, and the most cost-effective preventive measure for most workplaces will be an employer's adoption of a vaccination policy.[160]

The court complained that the ETS defied "common sense" because it "fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to some employees than to other employees." *BST Holdings*, 17 F.4th at 615. The court explained that some types of work involve more risk than others. *Id.* However, the variability of a risk across different groups is not a flaw in a preventive method that applies uniformly to all individuals, if all individuals are still subject to the risk. Thus, an employee exposed to close contact with other employees or third parties only a few times in a day might still be subject to significant risk during a pandemic, even though that risk is less than the extraordinary risk faced by a healthcare worker in a crowed clinic. Infection is not limited to crowd conditions. Infection can occur from a single meeting with a single person.

[156] *In re* MCP NO. 165, 21 F.4th 357, 366 (6th Cir. 2021). When a federal agency receives petitions for review filed in two or more different federal courts of appeals during the first 10 days after the agency issued its order, the agency must refer the matter to the judicial panel on multidistrict litigation. 28 U.S.C. § 2112(a)(1). That panel must use "a means of random selection" to select one the courts of appeals in which to consolidate all the petitions for review. *Id*. § 2112(a)(3). Because of this rule, a party's race to file in a court of appeals most favorable to that party will result in a random selection of the forum whenever a competing party has raced to some other court of appeals.

[157] *Id.* at 368.

[158] *Id.* at 366.

[159] *Id*. at 367.

[160] *Id*. at 376–81.

B. The ETS Before the U.S. Supreme Court

1. The "Vast Significance" of the ETS

Opponents of the ETS immediately applied to the U.S. Supreme Court for a stay of the ETS pending judicial review of the ETS.[161] On January 13, 2022, the divided Court issued its unsigned, *per curiam* decision in *NFIB*, restoring a stay against OSHA enforcement of the ETS.[162] In the interim, between OSHA's announcement of the ETS and the Supreme Court's stay, the vaccination rate had moved significantly upward.[163]

Like the Fifth Circuit, the Supreme Court majority labeled the ETS a "*mandate,*"[164] requiring vaccinations except where employers adopted masking-testing policies, rather than a masking-testing rule exempting fully vaccinated employees.[165] However, the Court avoided most of the issues in the Fifth Circuit's fusillade. The Court needed only one ground to predict that the "mandate" was invalid: statutory interpretation of the scope of OSHA's regulatory mandate.

It might have seemed that the OSH Act's authorization was broad enough to encompass the ETS. Congress's purpose in the OSH Act was to prevent "personal injuries and *illnesses* arising out of *work situations*. . . ."[166] The Act authorizes the Department of Labor to adopt "*any* occupational safety and *health* standard,"[167] a "standard which requires . . . practices, means, method, operations or processes, reasonably necessary or appropriate to provide safe or *healthful* employment and places of employment."[168] However, the majority invoked an argument that Congress must "speak clearly when authorizing an agency to exercise powers of *vast economic and political significance*."[169] To put the rule another way, Congress must have "plainly" authorized the administrative agency's action.[170] However, the Court's opinion leaves much uncertainty as to how Congress can be clearer than the OSH Act already is about future, unprecedented work-related risks that might demand emergency action. A standard of clarity that requires a prediction of the precise nature

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[161] Brief for Petitioner, Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 142 S. Ct. 661 (2022) (No. 21A244).

[162] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

[163] *Id.* at 663.

[164] *Id.* at 662.

[165] *Id*.

[166] 29 U.S.C. § 651(a) (emphasis added).

[167] *Id*. § 655(b) (emphasis added).

[168] *Id*. § 652(8) (emphasis added).

[169] 142 S. Ct. at 665 (emphasis added), quoting Ala. Assn. of Realtors v. Dep't. of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

[170] *Id.*

of a future risk and the measures needed to contain the risk might be impossible to achieve.

In what way was the ETS of vast economic and political significance? In answering this question, the majority emphasized that the ETS was a "vaccine mandate,"[171] diminishing the masking-testing side of the ETS. Approaching the ETS from the vaccine side was important to the majority's strategy because it allowed a focus on the "vast" significance of forced vaccination and a distraction from the fact that the ETS had a masking-testing option.

The majority's subsequent comments could be grouped into two reasons why the ETS was of vast significance. First, the ETS applied to a "*vast* number of employees," approximately eighty-four million.[172] However, the mere fact that an OSHA rule covered a large number of employees could not make the rule extraordinary. OSHA's mandate is to protect "employees,"[173] and not just some of them.[174] While eighty-four million is a large number, it is still only twenty-five percent of the general population, the part of the population employed by private employers covered by the OSH Act. Most OSHA regulations do not apply to all the work of all eighty-four million at once. Some OSHA regulations apply to *particular industries* when a hazard is associated with those industries.[175] Some regulations apply to *particular conditions* not unique to a particular industry but associated with particular types of work, equipment or settings that might occur in many different industries.[176] However, some regulations apply to *all employment at all times*, protecting all eighty-four million employees of covered employers.[177] For an employment safety rule to apply to *all* employment is thus not extraordinary.

A second reason the majority believed the ETS was of vast significance was that it constituted a "significant *encroachment* into the

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[171] *Id.* at 662.

[172] *Id.* at 662, 665 (emphasis added).

[173] 29 U.S.C. § 652(6).

[174] The OSH Act does not apply to public employees, 29 U.S.C. § 652(5), but neither did the ETS.

[175] *E.g.*, 29 C.F.R. §§ 1910.261 (pulp, paper, and paperboard mills), 1910.262 (textiles), 1910.265 (sawmills).

[176] *E.g.*, 29 C.F.R. §§ 1910.215 (when work includes use or exposure to abrasive wheel machinery), 1910.252 (when work includes use or exposure to welding, cutting, or brazing).

[177] *E.g.*, 29 C.F.R. §§ 1910.22 ("The employer must ensure . . . *All* places of employment, . . . and walking-working surfaces are kept in a clean, orderly, and sanitary condition."), 1910.34(a) (with respect to "exit route" and emergency planning regulations, "*Every* employer is covered" at every workplace except with respect to vessels and vehicles), 1910.1200(b)(1) (OSHA "hazard communication" standard applies to "all employers.").

lives" of affected employees.[178] By this objection, the majority reached the true heart of the matter: COVID-19 vaccine opposition had become deeply politicized and cultural. The majority might have said a great deal about this problem, but it instead presented the "encroachment" objection with almost no explanation at all, as if the force of the objection was obvious enough on its face. "Encroachment into the lives" of employees implies an intrusion against individual autonomy and privacy. There is real substance to an argument that coerced vaccination is intrusive in ways that sometimes trigger protection under the Constitution. Even if the actual encroachment was by private sector employers not ordinarily subject to substantive due process limits, the ETS seemed to force employers to act on the government's behalf in committing the encroachment.[179] If the ETS was a true vaccination mandate, the "encroachment" was important.

Vaccination is a physical invasion, compounded if the invasion is simultaneously perceived as a submission to political or cultural conformity. If vaccination were *only* for the benefit of the vaccinated individual's personal health, forced vaccination would clearly be unconstitutional.[180] Sometimes COVID-19 vaccinations have temporarily disabling side effects, which are intrusive even if they are not severe.[181] A person might fear that a vaccination widely used for less than two years will have more serious side effects yet to be discovered.[182] Such risk calculations, even if foolish, are ordinarily left to the individual *if* no one else's life or health is at stake.[183] The effects of vaccination are also enduring. A vaccine is injected into the body. Whether the vaccine remains in the body for a significant length of time, the *effect* of the vaccine endures. The purpose of a vaccine is to create a lasting change in the body's defenses against a virus. A vaccination is not like a hard hat or protective clothing an employee can doff when clocking out. As the

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[178] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 663 (2022) (emphasis added).

[179] *See* CARLSON & MOSS, *supra* note 72, at pp. 185–86.

[180] In *Cruzan v. Mo. Dep't. of Health*, 497 U.S. 261 (1990), the Supreme Court recognized that a competent person has a Constitutional right to refuse medical treatment to preserve her own life or health. Vaccination is a medical treatment. However, the public's need for protection against the spread of disease by unvaccinated persons can outweigh the right to refuse vaccination. Jacobson v. Massachusetts, 197 U.S. 11 (1905). *But see* J. Blackman, *The Irrepressible Myth of* Jacobson v. Massachusetts, 70 BUFF. L. REV. 131 (2022) (criticizing interpretations of this case as upholding the state's power to compel vaccination.).

[181] *Vaccines, Possible Side Effects After Getting a COVID-19 Vaccine*, CDC (updated Jan. 22, 2022), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html?s_cid=10509:side%20effects%20of%20covid%2019%20vaccine:sem.ga:p:RG:GM:gen:PTN:FY21 [https://perma.cc/T6XR-FQZR].

[182] *See supra* note 126.

[183] *See supra* note 181.

majority observed elsewhere in its opinion, vaccination "cannot be undone at the end of the workday."[184]

If vaccination raises such easily identifiable problems of intrusion against individual autonomy and privacy, why did the majority hesitate to make these points? One likely reason is that majority preferred to avoid any implication that the right to refuse vaccination was a liberty interest under the Fifth Amendment. The majority had no need to bring the idea of a liberty interest into the debate. The majority's description of the ETS as an "encroachment" was the foundation for its argument that a federal agency's vaccination rules have "vast significance," requiring heightened scrutiny of statutory authorization.[185] An "encroachment" evidently need not rise to the level of an intrusion against a constitutionally protected personal liberty to trigger the majority's rule of interpretation.

Still, comparing the encroachment with other intrusions against individual autonomy and privacy would have strengthened the argument that the ETS was of vast political significance. If vaccination is not an intrusion against an important liberty interest, why is it *significant*, and how are future agencies to know what "encroachments" go too far, even for the sake of third-party safety? In an opinion destined to be controversial, why would justices who have previously resisted recognition of vague, "freewheeling"[186] liberty interests pause at being more specific about *this* "encroachment"?

The U.S. Supreme Court long ago rejected an argument that individual liberty interests could override the public's interests in state-mandated vaccination for deadly and highly contagious diseases,[187] and the majority showed no interest in overruling that precedent. On the very same day as the Court issued *NFIB*, it also issued *Biden v. Missouri*,[188] upholding the Department of Health and Human Services' vaccination requirement based on an allegedly clearer statutory authorization. The dissenting justices in that case objected only on the grounds of statutory interpretation and administrative procedure. Moreover, with the same justices possibly on the verge of abrogating constitutional protection against other serious encroachments, such as the denial of a right to abortion,[189] an argument that resistance to vaccination deserves constitutional protection as a liberty interest would have been ill-timed.

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[184] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (quoting *In re* MCP No. 165, 20 F.4th at 274 (Sutton, C.J., dissenting)).

[185] *Id*.

[186] *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 703 (2015) (Roberts, J., dissenting); NASA v. Nelson, 562 U.S. 134, 154–56 (2011) (doubting "informational privacy").

[187] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[188] Biden v. Missouri, 142 S. Ct. 647, 654–55 (2022).

[189] Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM),

Assuming that a vaccination mandate could be a personal encroachment of vast significance, what about a masking-testing rule? After all, the ETS could just as easily be described as a masking-testing mandate with an exemption for fully vaccinated employees. A masking requirement would have added little to the rules by which some employees worked, shopped, traveled or congregated at the time OSHA issued the ETS. Local health authority masking orders were common, and so were employer masking policies. Again, the majority was vague about whether the masking requirement would be of "vast significance" or was simply a contributing factor. As between masking and testing, the majority seemed most concerned about testing, but not because a medical test is invasive. The majority observed only that testing would be at the employee's expense and on the employee's time.

The objection that employees would bear the cost was an assumption that was not necessarily true. Time lost to testing is minimal if an employee can perform a self-conducted test at home and wait at home for online verification of results, although this process would require an employee to be diligent in following the testing schedule. If circumstances required or permitted on-site testing, the few minutes to conduct the test and receive results might be compensable working time as a matter of law for some hourly-rated employees.[190] If the time was not compensable as a matter of law, the question would be open for negotiation between employers and employees. Employers allowing unvaccinated employees to continue employment might prefer to provide test kits and manage testing to assure compliance.

The majority also objected that employees would bear significant costs in purchasing tests. Again, this objection required an assumption that might not be true. The cost for self-conducted tests purchased in bulk might be around $10 per test, but federal and state laws might require employers to bear this cost for some employees.[191] Employers would be motivated to bear the costs for all unvaccinated employees because of the advantages of bulk pricing and assuring a supply of verified, standardized tests. The employer would not be burdened with administering tests for the entire workforce, only for unvaccinated employees, if the employer chose not to adopt a cheaper, more easily administered vaccination policy.

Even if employees and employers would have borne these burdens under a masking-testing rule, the majority was unclear whether this was the part of the ETS that had "vast significance" requiring clear congressional authorization. Perhaps the majority believed the testing burden made the non-vaccination option impractical, distasteful and not a

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https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/AHQ6-9V26].

[190] *See* CARLSON & MOSS, *supra* note 72, at 277–89.

[191] *See* CARLSON & MOSS, *supra* note 72, at 289–301.

genuine option at all. Unvaccinated employees would feel compelled to accept unwanted COVID-19 vaccinations, resign under the threat of punitive burdens or employers would feel compelled to require vaccinations to avoid the burden of test monitoring and enforcement of the masking rule. The majority appeared to credit the petitioners' allegation that the "mandate" (vaccination mandate or masking-testing mandate?) would "cause hundreds of thousands of employees to leave their jobs."[192] There does not appear to be any empirical evidence of significant resignations at large firms that had imposed such requirements,[193] although this was one issue as to which the majority required *no* empirical evidence at all. The majority ignored the other side of the resignation problem: employees reluctant to return to the office because of personal or family medical conditions that place them at risk of contagion by unvaccinated individuals.[194] Employers who fail to require vaccinations might lose some of these employees or find it difficult to recruit from this group of applicants. The culture war is not a single side against the establishment. It is two sides to a set of cultural and political issues, often between employees, with employers in the middle with or without an ETS.

The majority's most clearly stated reasons that the ETS was of "vast significance"—the number of persons affected and the personal encroachment—were not necessarily all that the majority had in mind. The majority might have had an eye on the politically divisive effects of enforcement of the ETS, which was certainly related to the problem of personal encroachment. Perhaps political *consequences* were what the majority had in mind in describing the ETS as having "vast political" significance.[195] Even if opposition to vaccination, masking and testing rules is unreasonable in the face of scientific facts, forcible action against a significant minority's religious-like opposition can have serious political and social consequences. While mandatory vaccinations for school attendance have not often inflamed political divisions, some particular types of vaccinations have been controversial even before COVID-19.[196] The present culture war is not necessarily, or not yet, about *all*

[192] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022).

[193] In fact, OSHA produced some empirical evidence to the contrary. 86 Fed. Reg. at 61465, 61471–72.

[194] Kim Parker, Juliana M. Horowitz & Rachel Minkin, *COVID-19 Pandemic Continues To Reshape Work in America*, PEW RESEARCH CENTER (Feb. 16, 2022), https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/ [https://perma.cc/9D73-QXV9].

[195] Nat'l Fed'n of Indep. Bus.,142 S. Ct. at 665 (emphasis added) (quoting Ala. Assn. of Realtors v. Dep't. of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

[196] Lawrence O. Gostin, *Mandatory HPV Vaccination and Political Debate*, 306 JAMA 1699–1700 (2011) (Geo. Pub. Law Research Paper No. 11-128), https://ssrn.com/abstract=1945958 [https://perma.cc/H27N-UD93].

vaccinations. Overreaching can harden and incite opposition even for a worthy and rational cause. Sincerely religious practitioners were exempt even from employer-mandated vaccination rules under the ETS,[197] but "religion" is not the only type of immovable devotion to a belief system.

Political consequences are not routinely an express part of the Court's judicial review of administrative agency action. However, sometimes the Court's opinions make it reasonable to guess that the Court was inclined toward a certain outcome because it was concerned with consequences, including political divisiveness.[198] A consequentialist view of *NFIB* includes considering that the ETS had already fulfilled an important part of its goal: It had motivated more employees to obtain vaccinations in anticipation of imminent employer-adopted vaccination rules. Some members of the majority—especially those who joined in approving a more specialized vaccination rule on the very same day—[199] might have found that the balance had tipped against giving the ETS any further polarizing effect.

2. Statutory Interpretation: Did the OSH Act *Clearly* Authorize the ETS?

What did it mean that the ETS was of "vast significance" in the majority's view? That conclusion, standing alone, did not mean that OSHA had exceeded its authority. Finding that an administrative rule has vast significance triggers a closer inspection of the congressional authorization for an administrative agency's action. In this case, OSHA's emergency action requiring employers to choose between requiring vaccinations or imposing other burdens on unvaccinated employees triggered the Court's close inspection.

The majority assumed that the congressional authorization for OSHA to adopt an emergency standard was broad enough to include a properly drafted emergency vaccination rule. Thus, for example, if OSHA's narrow

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[197] The ETS exempted persons with sincere religious objections to the vaccination. Nov. 2021 ETS, *supra* note 2, at 61519. This exemption was more lenient than required by federal employment law or the Constitution. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), for example, requires an employer to accommodate an employee's religious practice only if doing so would impose no more than a *de minimis* burden on the employer and other employees. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977). The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to 2000bb-4, allows the government to burden the exercise of religion if the government proves a compelling interest in its action and has chosen the least restrictive method of furthering that interest. 42 U.S.C. § 2000bb-1.

[198] Aaron Tang, *Consequences and the Supreme Court*, NW. UNIV. L. REV., (forthcoming Apr. 2022), https://ssrn.com/abstract=4081462 [https://perma.cc/2DB2-L3J3].

[199] Biden v. Missouri, 142 S. Ct. 647 (2022).

emergency vaccination rule for *healthcare* employers ever arrives before the Court, it appears that a Court majority might uphold that emergency standard. The *NFIB* majority implicitly rejected the Fifth Circuit's dangerous view that a deadly *virus* is not a "substance or agent" OSHA can address by *emergency* action.[200] In fact, the majority clearly signaled that it might have upheld the ETS if it were limited to special workplace situations with a uniquely heightened risk of COVID-19.[201]

a. Workplace Safety Standard vs. Broad Public Health Measure

In the majority's view, the problem is that Congress authorized OSHA to adopt only certain types of standards: "workplace safety standards," not "broad public health measures." The ETS, in the Court's opinion, was the latter.[202] Actually, the ETS affected only private sector employers with 100 employees or more, indirectly affecting a large number of employees but *not* all employers or employees and *not* the public generally. The majority's belief that a rule applying only to employers was a "broad public health measure" appears to have involved several vaguely articulated ideas. One idea was that the ETS was part of the Biden Administration's broader public health campaign to improve the vaccination rate, using several different agencies, including OSHA. The majority did not give any reason to believe this coordination of agencies by the President was illegal or improper except from the perspective of one side of the culture war. OSHA clearly acted within its authorized realm: regulating employers. The Secretary of Labor, who acts through OSHA, is appointed by the President, and the President's role in coordinating actions by the Secretary of Labor with other federal officials did not violate any rules of law, ethics or propriety—at least none that the petitioners or majority could cite.

Another reason that the majority might have believed the ETS was a public health measure, not just a "workplace safety standard," was that it required more safety than employees wanted. Employees who *want* protection can obtain vaccination if they want. Perhaps requiring an employee to accept protection an employee chooses to reject is not "reasonably necessary or appropriate" for that employee.[203] However, Congress expressly rejected the argument that employees have no duty for their own protection. Under the OSH Act, "employers *and employees* have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions."[204] OSH Act history

[200] *Supra* note 145.
[201] *Biden*,142 S. Ct. at 665–66.
[202] *Id*.
[203] 29 U.S.C. § 652(8).
[204] *Id.* § 651(b)(2).

stretching back nearly half a century supports OSHA's authorization to adopt workplace safety standards some employees would reject if they had a choice. Wearing a hard hat or respirator can be annoying, and some employees would prefer to work without this protection. Nevertheless, OSHA requires an employer to enforce rules for personal safety gear even to the point of discharge.[205] A standard that overrides an employee's personal decision about self-protection is still a "workplace safety standard."

Still another reason the *NFIB* majority might have believed the ETS was a public health measure and not a "workplace safety standard" was that it had the effect of protecting nonemployees as much or more than it protected employees. Many employees are already vaccinated by choice, and many unvaccinated employees are healthy enough to work without particularly significant personal risk of the worst symptoms of COVID-19. The greatest beneficiaries of compulsory vaccination are third parties, including family members of employees. However, spillover benefits are a virtue, not a flaw in a safety standard. In fact, the OSH Act explicitly directs OSHA to protect family members from dangers employees might bring home. When an OSHA standard protects employees *and* their families from risks that can travel and spread in public transportation or other group encounters, the standard benefits other third parties too. Spillover benefits have never disqualified an OSHA rule from being a valid workplace safety standard, at least not until the majority's *per curiam* decision in *NFIB*.

The single most likely reason the *NFIB* majority believed the ETS was a public health measure, not a "workplace safety standard." was that it lacked differentiating rules based on features of employment.

> The regulation . . . 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.[206]

The majority's "blunt instrument" argument was rhetorical, not a meaningful legal argument. That the ETS was the same for nearly all employment settings was no reason to regard it as other than a "workplace safety standard." There is no law or legal theory that an OSHA standard or any other employment rule must have subparts treating different employment settings differently. Some problems are the same in any setting that involves managed, organized work by multiple persons engaged in business with third parties. Like sexual harassment, COVID-

[205] Atlantic & Gulf Stevedores v. OSHRA, 534 F.2d 541, 555 (5th Cir. 1976); CARLSON & MOSS, *supra* note 72, at pp. 436–37.

[206] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 664.

19 is not limited to particular industries or occupations. Uniformity of some problems is exemplified in many work safety, workers' compensation, nondiscrimination and employee benefit laws that are essentially the same for all employment settings.[207]

The ETS applied across employment settings covering most employees because the risk, airborne transmission of a virus, is common to all employment involving a gathering of employees and third parties. It is unusual that the *solution* is also the same in every work setting, which is why OSHA could not rapidly develop a standard for *non*-vaccination preventive measures. Once vaccinations were practical, however, there was one uniform solution that would not vary across employment settings: vaccination. Like a fire extinguisher, vaccination is the same solution for the same risk that exists in every building.

Still, the majority believed that COVID-19 is *not* a uniform problem across employment settings because the risk's *significance* varies from place to place. This argument confused significant risk with greater risk. The fact that risk is greatest in one setting does not negate the possibility that there is significant risk in any other setting. The risk of sexual harassment is exceptionally high in factories staffed mainly by undocumented women under the supervision of documented men. This does not mean that banks, where sexual harassment is a lesser but still significant risk, should be free of regulations imposed on factories. The fact that a problem is greatest in one place does not mean that the same problem must be unworthy of regulation in any other place.

b. Occupational Hazards vs. Daily Life Hazards

The majority had one more plausible argument why the ETS was a public health measure and not an authorized work safety standard. In the majority's view, the OSH Act authorizes workplace standards for "occupational" or "work-related" hazards but not for "hazards of daily life."[208] COVID-19, the majority believed, is a general "hazard of daily life" for most employees. A premise of this argument is that employees are at risk of COVID-19, whether they are at work or not. Some work does expose employees to risks above the risks of daily life. The majority agreed that COVID-19 is an "occupational" hazard and not just an ordinary life risk in certain settings. For example, the majority believed a vaccination rule might be appropriate for a particularly "cramped or crowded" workplace.[209] This was not much of a concession to OSHA's rulemaking authority. It would probably be very difficult for OSHA to specify concentrations of employees or employees combined with third

[207] *See supra* note 178.

[208] *Nat'l Fed'n of Indep. Bus.*,142 S. Ct. at 664.

[209] *Id.* at 665–66.

parties that would trigger vaccine coverage. If drafting such a rule were possible, it would be a very complicated rule for employers to follow. How would the concentration be measured? Triggering concentrations of people could also be unpredictable. A crowd can occur in most workplaces for many different reasons, planned and unplanned. Would a holiday party move a previously exempt employer into the nonexempt zone?

Still, the argument that the ETS improperly sought to regulate a hazard of daily life might have some substance. The majority's argument seemed to follow, knowingly or unknowingly, a debate about *occupational disease* that has continued for the past century. At the very least, the history of occupational disease in employment law is useful for understanding the merits and flaws of the majority's "hazard of daily life" argument.

The concept of occupational disease became an important legal problem a century ago when occupational safety and health law was mainly compensatory, not preventive. In the early twentieth century, there was little or no government regulation to *prevent* work hazards,[210] but all states eventually enacted workers' compensation systems for workers injured by work-related "accidents."[211] An accident is an event at a specific time and place, easily determinable in most cases.[212] A disease is not an "accident" because a tribunal cannot identify a specific moment or place of the occurrence of exposure.[213] Early lawmakers probably also doubted the legal system's ability to deal with issues of causation in the case of disease, especially common diseases not limited to particular types of work. Thus, many early workers' compensation systems awarded no benefits for "occupational disease," even when there was little doubt that work was the only possible cause of a disease. In fact, some legislatures amended their statutes to expressly exclude coverage of "occupational disease" to prevent benefits tribunals from treating exposure to disease-causing working conditions as an "accident."[214]

Public sympathy for sickened and deceased workers and their dependents, and better health science, caused legislatures to reverse course in the middle of the twentieth century. Amendments to workers' compensation laws provided for compensation under new "occupational

[210] Judson MacLaury, *Workplace Safety and Health Law at the Beginning of the Modern Regulatory Era*, reproduced in CARLSON & MOSS, *supra* note 72, at pp. 379–81.

[211] CARLSON & MOSS, *supra* note 72, at pp. 381–88.

[212] *Id.* at 388–99.

[213] Tintic Milling Co. v. Indus. Comm'n of Utah, 206 P. 278, 281 (Utah 1922).

[214] Brown v. Indus. Comm'n of Ohio, 25 Ohio Dec. 578, 581 (1914), *rev'd*, 92 Ohio St. 309.

disease" provisions for diseases caused by work.[215] From that point forward, it was often important to decide whether "occupational disease" included a "common" or "ordinary" disease widely suffered by the public outside the employment setting.

Consider, for example, a serious disease caused by an insect bite. Any member of the public might suffer this disease because of some personal outdoor activity, but an employee might allege he suffered the disease *because of work* that required him to be outdoors. The problem is difficult, first, because "occupational disease" is a vague term. Does "occupational disease" mean a disease caused exclusively, or nearly so, by a certain type of work (e.g., "black lung" caused by coal mining), or does it include any sickness *caused by work* (e.g., flu contracted because of a brief meeting with a single co-employee)? Second, if "occupational disease" can be any sickness *caused* by work, is the issue of causation too complex for the legal system in the case of common diseases?

Any statement about occupational disease in workers' compensation law is a generalization because workers' compensation is mainly state law, which can vary significantly from state to state. One view is that a sickness is an occupational disease if a *condition* of the employee's work probably *caused* the disease. One variant of this view is that any disease is occupational if the claimant proves it "arose out of and in the course of employment."[216] Another variant is that a disease is occupational if it probably originated in a particular risk-aggravating condition of the employment.[217] Some states require that the disease must be "characteristic of and peculiar" to the workplace, but in applying this rule, courts still often look for a disease-causing *condition* that was "characteristic or peculiar" to the workplace.[218] Still, other states, fearing runaway liability for all sorts of diseases, explicitly exclude "ordinary

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[215] Jannusch v. Weber Bros. Metal Works, 249 Ill. App. 1, 4 (Ill. App. 1928) (describing and applying Illinois Occupational Diseases Act).

[216] *See* Treadway v. Indus. Comm'n, 213 P.2d 373, 376–78 (Ariz. 1950); Hirst v. Chevrolet Muncie Div. of Gen. Motors Corp., 33 N.E.2d 773, 774 (Ind. App. 1941) (bronchiectasis was covered occupational disease where substantial evidence showed that it "arose out of and in the course of. . . employment").

[217] Am. Bridge Div., U.S. Steel Corp. v. McClung, 333 S.W.2d 557, 558, 560 (Tenn. 1960); Ferguson & Lange Foundries v. Indus. Comm'n, 43 N.E.2d 684, 687 (Ill. 1942).

[218] As the court stated in *Rutledge v. Tultex Corp./Kings Yarn*, 301 S.E.2d 359 (N.C. 1983), to prove that a disease is characteristic of and peculiar to the employment,

> it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.

Id. at 365.

diseases,"[219] seeming to deny benefits for any disease that affects the public generally, like the flu. However, even under these "ordinary disease" statutes, courts sometimes still focus on the causative *condition*: if a risk-enhancing condition of employment probably caused the disease, the disease is "occupational," not "ordinary."[220]

Whether a common disease can be "occupational" for workers' compensation law under the aggravating condition approach depends on which version of that approach a tribunal follows. Suppose an employee's "flu" (influenza) is so serious it causes hospitalization, leads to prolonged loss of pay or even kills the employee. The flu could be an "occupational disease" under workers' compensation law if the employee or his survivors could identify a particular *condition* of employment that made infection at work more probable than infection outside work.[221] This part of a claimant's case is easiest if the employee can identify a work setting, such as driving a crowded bus, that is especially conducive to spreading the disease.

The *NFIB* majority believed that exposure to airborne viruses is not a work-related condition that can make a common disease "occupational" because it is like the "everyday risk of contracting COVID–19 that all face."[222] However, the employment risk of COVID-19 is clearly *not* like the "everyday risk" all people face outside of employment.

As the majority observed, the risk of infection occurs wherever people "gather,"[223] but employment-related gathering is distinctly different from non-employment gathering. A person who chooses to minimize risk has some control over *non*-employment gatherings such as shopping, travel, entertainment and social activity. A person can choose whether to go to some non-employment gatherings. Shopping might seem necessary, but a person can avoid gatherings at stores by arranging for delivery, curbside pickup or at least managing time spent in stores.

The gatherings employment requires are different because an employee lacks predominant control over the setting, the duration and the activity. Most employees cannot avoid employment. For most, employment is not a choice; it is a necessity. By the time of the ETS, COVID-19-related federal payroll protection and mandatory paid leave

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[219] *E.g.*, Fuller v. Delco Remy Div. of Gen. Motors Corp., 63 N.E.2d 542, 543 (Ind. App. 1945).

[220] Marcus v. Arlington Cnty. Bd. of Sup'rs, 425 S.E.2d 525, 530 (Va. Ct. App. 1993) (causality is the guiding factor in determining whether an ordinary disease is compensable); Schaefer v. Texas Emp. Ins. Ass'n, 612 S.W.2d 199, 201–02 (Tex. 1980).

[221] *In re* Compensation of Rogers, 505 P.3d 1073 (Or. Ct. App. 2022) (remanding case for determination whether a condition of work caused claimant's disabling influenza).

[222] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022).

[223] *Id*. at 665.

laws had expired, and some employees were always required to work even when these programs were in force. When employees work, they are under an employer's management with respect to all work tasks. The employer can require attendance at a large meeting, decide where and with whom the employee must work and choose and manage the physical facilities for the employee's work. The employee is largely at the mercy of the employer.

The fact that employment in general might be a condition making disease "occupational" is probably why workers' compensation systems have struggled lately with so many COVID-19 workers' compensation claims. COVID-19 can be the basis for workers' compensation if it disables an employee for a lengthy period of time or causes hospitalization, other expensive medical treatment or death. Texas alone reported about 50,000 COVID-19-related workers' compensation claims by August 1, 2021.[224] The private insurance companies that manage workers' compensation claims accepted and processed slightly more than half of those claims.[225]

The general run of employment settings—employer-directed gathering of employees—is a condition that aggravates the risk of COVID-19 exposure. The *NFIB* majority's opinion lacked a direct response to this fact. However, other parts of the majority's opinion imply what the majority might have said about the "employment is the condition" argument.[226] The majority appears to have followed the "*particularized* condition" theory that some workers' compensation tribunals have adopted in addressing "ordinary" diseases like the flu.

The particularized condition theory rejects that employment, in general, can ever be the condition that makes an ordinary disease "occupational."[227] However, a particular work condition can make an ordinary disease "occupational." There are few reported cases in workers' compensation law explaining this distinction. Until COVID-19, it was extremely rare for employment in general to be the alleged condition causing illnesses resulting in sustained loss of pay, significant medical costs, disability or death. However, passages of the *NFIB* majority's opinion do track the particularized condition theory:

> 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

[224] WORKERS' COMPENSATION RESEARCH & EVALUATION GROUP, *Covid-19 in the Texas Workers' Compensation System*, (Aug. 2021), https://www.tdi.texas.gov/wc/information/documents/covid19txwc0821.pdf [https://perma.cc/7FJ8-L82M].

[225] *Id.*

[226] Nat'l Fed. of Indep. Bus., 142 S. Ct. at 665–66.

[227] *E.g.*, Schaefer v. Texas Emp. Ins. Ass'n, 612 S.W.2d 199, 202–04 (Tex. 1980).

> 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.[228]

This argument would be recognizable and persuasive in a workers' compensation proceeding. However, what makes sense in workers' compensation makes much less sense in a preventive legal system like the OSH Act. In workers' compensation law, the particularized condition approach limits overbroad employer *liability* for "common" diseases like insect-borne Lyme disease or airborne viruses like influenza. That approach is a poor fit for *preventive* regulation under the OSH Act. Limiting OSHA's power to prevent illness in the workplace will not protect employers from burdensome liabilities. Rather, a lack of prevention can *increase* an employer's costs and liabilities. The *NFIB* majority asserted that employers would "face hefty fines" of "up to $13,653" for standard violations of the ETS,[229] but the figures the majority cited are the maximums the Act authorizes for violations of standards in general.[230] In practice, OSHA penalties are very small, often no more than clarifying what OSHA requires and a warning to comply.[231] OSHA enforcement often acts as an educational process, not a punitive process. *Compliance* with a rule can be a real cost, possibly significant for some employers, but preventing disease also reduces an employer's workers' compensation costs, medical benefit plan costs, tort liabilities and workforce losses. Perhaps most importantly, the ETS presented the benefit of relief from non-vaccination preventive measures. The cost of compliance and enforcement would not likely match the costs of prolonged business suspensions and other non-vaccination measures.

c. Historical Precedent Reflecting the Scope of Congressional Authorization

Legislative history and settled practice under a law can be important in interpreting the scope of a legislative authorization. Thus, the majority concluded its prediction of the outcome on the merits with an interpretation of history:

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[228] *Nat'l Fed. of Indep. Bus.*,142 S. Ct. at 665–66 (emphasis added).

[229] *Id*. at 664.

[230] 29 C.F.R. § 1903.15(d) (2021).

[231] CARLSON & MOSS, *supra* note 72, at p. 848. OSHA penalties are typically very low. From an employer's point of view, the biggest cost of OSHA enforcement is the cost of "abatement:" curing the violation, which can be as simple as adoption a workplace rule or as difficult as installing expensive new equipment.

> 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.[232]

It is equally telling that the majority failed to cite a single example of a similar *threat* for which a similar preventive measure could have been possible. History was devoid of precedential crises as well as precedential standards. The fact that the majority refused to concede that *COVID-19* was an unprecedented crisis was one of the greatest disappointments of its opinion. In this way, the majority finally slipped into a culture war.

d. Balancing Equities for Preliminary Relief

NFIB was a preliminary stay proceeding requiring the Court to *predict* the outcome, not *decide* the outcome. The majority predicted the ETS would fail for lack of congressional authorization. It still needed to decide whether the balance of equities favored preliminary relief after a quick, superficial review of the matter.[233] Anticipating an abortion decision again appears to have affected the majority's approach to the balance of equities. The result might be an important precedent for future emergencies and administrative actions even without issues of vaccination or abortion.

There was one obvious and compelling argument for the petitioners seeking a stay: vaccinations, once administered, cannot be undone, and the harm of compelled vaccination cannot be compensated. If the Court had not granted a stay, OSHA would have prevailed as a practical matter. The "encroachment" would have happened before the Court reached a final decision on the merits. The best resistance employees could have achieved would have been the avoidance of follow-up and booster vaccinations.

The irreversibility and non-compensability of compulsory medical treatment favored the petitioners in the balance of equities. However, the majority said nothing about the encroachment suffered by individual employees in this section of their opinion. Instead, the majority recited economic costs alleged by the petitioning *employers* and *states* represented by Republican attorneys general:

> 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

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[232] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.

[233] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

> cause hundreds of thousands of employees to leave their jobs. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations.
>
> *It is not our role to weigh such tradeoffs*. In our system of government, that is the responsibility of those chosen by the people through democratic processes.[234]

The majority's avoidance of the "encroachment" in addressing the balance of equities is one more clue that the majority anticipated an abortion decision and sought to avoid a contradiction. Had the majority treated compelled medical care as important enough to justify a stay, *NFIB* and a decision yet to be announced would have created a paradox: compelled medical treatment by vaccination is *important*, but compelled denial of medical treatment or compelled childbirth is not. The paradox is not necessarily inescapable, especially if the majority's main appeal was to a culture war audience, but the paradox might still be awkward and embarrassing.

If the majority was considering a change in the law of abortion, striking down the ETS presented an additional problem in the balance of equities part of its opinion. Both vaccination and abortion are arguably "right to life" decisions. The majority noted, "the Federal Government says that the mandate will save over 6,500 lives."[235] The majority chose not to dispute this science-based estimate. As far as can be gleaned from any of the opinions or proceedings in *NFIB*, there was no reputable alternative scientific estimate or rebuttal evidence. If the majority rejected the value of thousands of lives saved by compelled medical treatment in *NFIB*, how would the same justices be able to proclaim the value of thousands of lives saved by compelled denial of medical treatment? The majority avoided its dilemma by *refusing* to weigh the equities at all:

> It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes.[236]

To the contrary, Supreme Court precedent compelled the Court to consider public interests and tradeoffs before granting a potentially prejudicial preliminary order without a complete and final hearing of the merits.[237] The majority's assertion that it was "not our role" to examine the equities at the preliminary injunction stage was an abdication of its role. In an opinion that demanded precedents of OSHA, the majority offered no

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[234] *Nat'l Fed'n of Indep. Bus.*,142 S. Ct. at 666 (emphasis added).

[235] *Id.*

[236] *Id.*

[237] *Winter*, 555 U.S. at 24; *Weinberger*, 456 U.S. at 213.

precedent at all for eliminating a basic requirement for preliminary injunctive relief.

Perhaps the majority meant that it had already decided the merits and that there could be no conclusion other than that the ETS was illegal because it exceeded OSHA's statutory authority. However, even this interpretation of the majority's "not our role" comment would be a radical departure from the rule that a court cannot conclusively decide the merits in a preliminary emergency proceeding. More likely, the majority was grasping for any reason to avoid an embarrassing question: Do lives matter?

IV. LESSONS FOR OSHA'S ROLE IN A FUTURE "PUBLIC" HEALTH EMERGENCY

NFIB left impediments to OSHA's role in future health emergencies. However, *NFIB* did not completely sideline OSHA as a participant in federal management of COVID-19 or future health crises. *NFIB* left OSHA with a significant achievement: a welcome increase in the vaccination rate. It also left intact OSHA's alternatives to an emergency temporary standard for the next emergency. If public and employee safety require quick OSHA action again, the history of OSHA's actions against COVID-19 and the majority's reasoning in *NFIB* have important lessons for enforcement strategy and drafting emergency orders.

A. The Practical Benefits of a "Stayed" ETS

It is possible to view *NFIB* as a partial victory for OSHA. OSHA's ETS was part of the Biden Administration's plan to encourage wider vaccination against COVID-19. That plan never contemplated 100 percent vaccination. In fact, the collective jurisdiction of all the federal agencies that issued orders would not have reached 100 percent of the population.

While the vaccination rate is less than it would have been if the ETS had survived, even the failed ETS had an important effect. It probably increased the rate of vaccinations. When OSHA issued the ETS, and especially after the Sixth Circuit removed the Fifth Circuit's stay, some employers probably adopted or announced plans to adopt one of the ETS options: a masking-testing or vaccination rule.[238] For employers *wanting*

[238] Lisa Nagele-Piazza, *OSHA's Vaccine-or-Testing Rule Is Back, Unless Supreme Court Says Otherwise*, SHRM (Dec. 20, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/sixth-circuit-osha-ets.aspx [https://perma.cc/6B2Y-SUY7] (advising employers regarding the effect of the lifting of the stay and the prospective need to adopt masking-testing or vaccination policies).

to mandate vaccination to ease liabilities, reduce employee absences and encourage pro-vaccine employees and applicants, the ETS provided a convenient response to vaccine opponents: the law required the rule. Some previously unvaccinated employees became vaccinated during this interval to prepare for enforcement of the employer policy. In fact, the rate of vaccination rose significantly during this period.[239] The ETS did not achieve its loftiest goal, but it did achieve part of its goal.

The stay also relieved OSHA of problems it might have faced had enforcement proceeded. First, the stay avoided continuing political backlash aimed at OSHA, an agency that is already a favorite target of opponents of federal regulation. Second, the stay relieved OSHA of dealing with some challenges in applying and enforcing the stay. The ETS was imperfect—no surprise for an administrative action on an emergency basis. But its biggest imperfections were not the ones its opponents trumpeted. The ETS failed to account for the complications of a continuously changing pandemic landscape. What constitutes complete vaccination?[240] Is a booster required? Is a booster required for all or only some? At what point must employers require follow-up, seasonal or annual vaccinations? In the remote possibility that vaccination does produce a significant risk of side effects, or if it no longer works against a future variant,[241] how will employers or OSHA shift to the new reality? What if new medical treatments make COVID-19 much less dangerous, or the pandemic ends or declines to a point that the hazard no longer justifies the "encroachment"?

Presumably, the agency would have continued to work through these problems and supplied an answer by the end of the ETS's six-month emergency term. However, regulators often struggle to keep pace with science, technology, public health and political changes. The COVID-19 crisis spawned particularly fast-moving events. Events beginning during the proceedings in *NFIB* suggest that the ETS would not have lasted long after *NFIB*, with or without the stay. Even before the Court issued its stay, OSHA had already *withdrawn* its unchallenged, targeted healthcare ETS because of the difficulty the agency foresaw in meeting the six-month deadline to develop a record and complete final drafting to convert that

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[239] USA Facts, *supra* note 11.

[240] *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *Stay Up to Date with COVID-19 Vaccines Including Boosters*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html [https://perma.cc/34XN-2MN6] (updated Aug. 23, 2022) (recommendations concerning booster vaccinations).

[241] *See* Centers for Disease Control and Prevention, *Selected Adverse Events Reported after COVID-19 Vaccination*, (updated May 24, 2022), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html [https://perma.cc/8XC8-JXX6] (reporting concerning side effect of one type of vaccination).

ETS into a permanent standard.[242] If the work to support conversion of the targeted healthcare ETS into a permanent standard was overwhelming, the work to support conversion of the generally applicable ETS into a permanent standard would have been staggering, if not outright impractical.

However, in suspending enforcement of the healthcare ETS, OSHA also announced its intention "to consider its broader *infectious disease* rulemaking."[243] Politics, the progress of the pandemic and advances in treatment will likely determine whether OSHA ever issues an ETS of general applicability for the problem of infectious disease. The lessons of *NFIB* will be important whether OSHA moves forward with a new infectious disease standard with a *normal* rulemaking process or suspends its effort and relies on *other* enforcement tools discussed below. The lessons of *NFIB* are also important for the next public or occupational health emergency, especially of the airborne virus kind.

B. OSHA's Other "Emergency" Tools

Starting more than a year before the ETS, OSHA used other tools to require employer safety measures against COVID-19. The agency continues using those tools even after *NFIB*. It might use those tools more vigorously if conditions warrant it.

OSHA's fastest and most easily updated tool is a guidance, a nonbinding but still legally important recommendation for preventing workplace hazards.[244] An OSHA guidance cannot mandate vaccinations or any other preventive measure, but it can encourage employer policies that might include vaccination rules. From the beginning of the pandemic, OSHA used guidances to protect employees by pre-vaccination recommendations, and it updated its guidance to account for vaccinations when they became widely available.[245] OSHA's principal COVID-19 guidance was similar to but less demanding than the subsequent ETS: "OSHA *suggests* that employers *consider* adopting policies that *require* workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated."[246] Failing to require vaccinations does not constitute a violation of the OSH Act, but failing to strengthen non-vaccination measures to account for unvaccinated employees exposes an employer to

[242] OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, *Statement on the Status of the OSHA COVID-19 Healthcare ETS*, (Dec. 27, 2021), https://www.osha.gov/coronavirus/ETS [https://perma.cc/X4PL-WG4P].

[243] *Id*. (emphasis added).

[244] *See supra* note 77.

[245] *See supra* notes 69–71.

[246] OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, *supra* note 69 (emphasis added).

workers' compensation claims and other civil liability.[247] If not for backlash from vaccination resisters, an employer's easiest and least expensive preventive measure would be to require vaccination.

OSHA's guidances are indirectly enforceable by "general duty clause" citations. Failing to follow a guidance puts an employer at greater risk of such a citation. The guidance is not the legal basis for the citation, but it can support OSHA's proof that the hazard and the solution were "recognized."[248] Employers who adopt stronger vaccination rules are likely to be better positioned to defend against general duty citations than employers who fail to adopt any vaccination policy at all.

Is continued enforcement by these tools legally viable after *NFIB*? Almost certainly so. A guidance is not a final order and not subject to judicial review. The occasion for judicial review arises when OSHA relies on the guidance as evidence in an appealable enforcement action. However, *NFIB* offers several reasons why the Court would uphold enforcement under the general duty clause if enforcement prioritized the most dangerous workplaces. A general duty clause citation is highly particularized and nothing close to the "blunt instrument" the *NFIB* majority alleged the ETS to be. The *NFIB* majority granted that some work settings might require a hard vaccination rule.[249] General duty enforcement proceedings would allow OSHA to test the supportability of hard vaccination rules in widening classes of employment settings based on evidence particularized to those settings. Success in any category of cases would signal the developing law to other employers, especially large employers with easy access to occupational safety advisers.

These alternative emergency tools are second best. The law-making process by general duty clause enforcement is slow, painfully slow in an emergency, even if supported by guidances. An ETS would result in faster compliance at the greatest number of workplaces. The biggest benefit of general duty clause enforcement of COVID-19 cases in developing the law might be for the *next* emergency involving an airborne virus.

Action by these alternative emergency tools has another important consequence in a culture war. Enforcement by guidance moves the front lines of the culture war to the workplace rather than OSHA. When OSHA imposes a legally binding rule, it gives employers cover. The decision issues from the government. It is not the employer's decision, and employees feel less reason to choose sides. OSHA's alternative measures, on the other hand, put employers in the position of decision-makers, free to choose but also facing the conflict that arises from the choice.

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[247] *See supra* note 77.

[248] *Supra* notes 86, 92.

[249] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665–66 (2022).

C. Future Emergency Orders

1. Presentation

Presentation matters in a culture war. The history of OSHA's pandemic ETS demonstrates that judges at every level can be part of the culture war and resort to rhetoric and hyperbole at the expense of legal reasoning. The words and structure of an agency rule can be turned against the agency, as happened to OSHA and its ETS. OSHA's message communicated well with the part of the public and judiciary that already favored vaccination and vaccination rules. The agency lacked a message for the part of the public and judiciary that remained open-minded but were vulnerable to arguments that authorities had understated the risk or overstated the effectiveness of inconvenient and intrusive preventive measures. OSHA's message emphasized compulsion for the sake of health. The agency should have emphasized choice and freedom from oppressive non-vaccination measures.

a. Incidental Personal, Business and Economic Benefits of Vaccination

Prevention by vaccination yielded two important benefits: First, safety from a significant hazard, and second, relief from burdensome non-vaccination preventive measures. Non-vaccination measures took a severe toll on business, the economy and personal health.[250] OSHA emphasized protection of employees against COVID-19. Unfortunately, OSHA was not in a good position to emphasize the secondary benefits of relief from non-vaccination measures. OSHA's mission is employee and family health and safety. Drafting safety rules with an eye toward the general public welfare invites the *NFIB* majority's rebuff: OSHA steps outside its legislative mandate by adopting general public welfare, even public health, as a goal. However, the operation of OSHA's non-vaccination rules can lead employers, employees and the courts to consider the secondary benefits of vaccination.

Diverting employers and employees from non-vaccination measures to vaccination can begin by granting employers exemptions or defenses for achieving a fully or substantially vaccinated workforce. An emergency or regular standard could follow that approach by combining specific non-vaccination measures with vaccination-based exemptions. Unfortunately, the Court frustrated the vaccination-based exemption strategy in *NFIB*, perhaps because the ETS was tainted by the "vaccination mandate" label or perhaps because the *NFIB* majority did not view the non-vaccination prong as a credible employer alternative. Better presentation, and the development of non-vaccination measures no more oppressive than

[250] *Supra* note 98.

reasonably necessary, might result in a better outcome before the courts. Without a standard, OSHA might offer vaccination-based defenses and exemptions from general duty clause enforcement. However, enforcement by general duty clause citations makes developing agency-articulated defenses more difficult. OSHA would need to signal defenses to employers in guidances or other notices.

b. Choice vs. Compulsion

Overemphasis on compulsion is counterproductive in a culture war when the rule in question compels physical submission to a belief system like modern science or trust in government. OSHA used the word "mandate" or variations of that word as one of its principal descriptors. It repeated the "mandate" term throughout the text of the ETS.[251] "Mandate" appealed to the side that trusted science and government, valued *public* safety, and was anxious to move past the restrictions of pre-vaccination measures. The same words alienated those who suspected government and the scientific establishment and valued *personal* safety. Opponents of vaccines or vaccine rules, including judges and advocates, used the word "mandate" to highlight themes of compulsion, scientific and bureaucratic arrogance and federal agency overreach.

OSHA also exposed the ETS to the appearance of compulsion by the order of the general rule and its exception. Perhaps OSHA designed the ETS to have the appearance of a rule requiring vaccination to fulfill President Biden's publicly stated vaccination goal. However, presenting the vaccination rule as the starting point of the ETS bolstered the opposition's argument that the ETS was, first and foremost, a "vaccination mandate." OSHA should have presented the mirror image of the rule: the general rule was that covered employers must adopt appropriate masking-testing rules and procedures. The ETS granted an exception for workplaces where all employees were vaccinated.

Standing alone, a change in words and structure of the ETS would have accomplished little if the masking-testing rule was so oppressive as to punish employees for remaining unvaccinated. The masking part of the rule was not unreasonable compared with masking rules already imposed by many local authorities and employers.[252] The *NFIB* majority was mainly concerned with the seven-day testing requirement, not because the test was physically intrusive but because of the cost, which the majority assumed would be borne by employees. The rule would have seemed less coercive *to employees* if OSHA had required *employers* to finance the cost of testing. Whether these costs would have been burdensome to employers would depend partly on their existing labor costs. For a workforce of very

[251] *Supra* note 128.

[252] Nov. 2021 ETS, *supra*, note 2, at 61505–06, 61456.

low-paid, minimum wage workers, employer financing and administration of testing would cost the equivalent of one to two hours of work per week. The cost for a modestly paid workforce would be a fraction of an hour of work per week. For a highly paid workforce, the cost would be an increasingly small fraction of an hour of work per week. These costs would be limited to unvaccinated employees, so the total cost to the employer would be substantially lower.

Such costs are not necessarily *de minimis* for a cost-conscious employer. Moreover, imposing the costs on the employer makes the employer conscious of the higher cost of vaccine resisters. Shifting the cost to the employer might therefore induce the employer to use a range of management measures and inducements to encourage employees to obtain vaccinations.

2. Variances

One of the *NFIB* majority's arguments against the ETS was that it lacked separate rules for separate employment settings.[253] The majority rejected OSHA's finding that the risk, person-to-person transmission, could be significant in every work setting involving group activity, and it denied that OSHA had the authority to require the same preventive method for every work setting.[254] Perhaps the denial of any possibility of a single solution for an omnipresent risk argued in an unsigned *per curiam* preliminary order should not be taken seriously.[255] The Court's real concern might have been the political consequences of the moment.[256] However, the majority's characterization of the ETS as a "blunt instrument" for its lack of differentiation might haunt judicial review of OSHA's safety standards in the future.

For safety purposes, it was not likely possible or necessary for OSHA to have drafted a COVID-19 ETS differentiated by work setting. COVID-19 is the same virus regardless of an employee's work, and a vaccine does not discriminate by occupation. A future airborne viral pandemic will likely present these same facts. However, future emergencies might also involve truly differentiated risks, or preventive methods might involve diverse techniques. The challenge for the agency in emergency conditions will be to account for all variables quickly enough for emergency action.

The OSH Act offers two ways in which an OSHA standard might begin with a general principle but evolve and gain detail in subsequent administrative proceedings. First, the Act allows an employer's defense that compliance with a standard is technologically or economically

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[253] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 664.

[254] *Id.* at 665–66.

[255] *See supra* note 130.

[256] *Supra* note 181.

infeasible.[257] The feasibility defenses are available in both general duty and standard-based enforcement actions.[258] These defenses were certainly available against the ETS. However, an employer would need to await a citation to assert a feasibility defense. More importantly, feasibility relates only to the effectiveness or cost of a preventive measure, not the need for the preventive measure. An employer could not use a feasibility defense to challenge the significance of the risk or to assert the adequacy of alternative means of prevention. Failing to comply with a standard and gambling on a feasibility defense could end badly for the employer and expose the employer to the very things it sought to avoid: OSHA enforcement proceedings, penalties and administrative findings of fact useful for employees and third parties in workers' compensation and tort actions against the employer.

An employer petitioning for a variance from a standard is a second, safer path under the OSH Act to achieve differentiation.[259] The agency's approval of an employer's variance petition creates a defense in advance for any enforcement action. In an administrative hearing, an employer must prove that an alternative strategy will result in employment conditions "*as safe and healthful* as those which would prevail if he complied with the standard."[260] Employers have not used the variance procedure much, probably because the time and expense necessary for a hearing makes a variance impractical and because an employer must prove its proposal will achieve *at least* the same level of safety. Adequate or reasonable safety is not enough.

The mere availability of the feasibility defenses and the variance process are unlikely to assuage a federal court that takes *NFIB*'s "blunt instrument" criticism seriously. The statutory variance process might be too demanding. To make the variance process credible, OSHA might need to include a softer variance scheme within the body of an emergency temporary standard to allow employers to argue the need for appropriate differentiation. Allowing such a process carries the danger that employers will seek variances only to delay compliance, perpetuating a hazard. Thus, whether this method of fast evolution by variance is practical is likely to depend on agency resources for providing at least rapid preliminary determinations. However, employers may use the process to bring important facts forward, allowing the agency to accelerate the standard's

[257] 29 U.S.C. § 655(b)(5); *See Donovan v. Castle & Cooke Foods*, 692 F.2d 641 (9th Cir. 1982).

[258] The OSH Act refers to feasibility as a limit for "standards dealing with toxic materials or harmful physical agents." 29 U.S.C. § 655(b)(5). However, the courts have inferred technological and economic feasibility as a defense for all types of enforcement actions under the Act. CARLSON & MOSS, *supra* note 72, at pp. 444–49.

[259] 29 U.S.C. § 655(d).

[260] *Id*. (emphasis added).

evolution. At the very least, the availability of a built-in variance process might overcome a "blunt instrument" objection.

V. CONCLUSION

Is OSHA an appropriate participant in a public health crisis? Necessarily so. For better or worse, compelled by the Constitution or not, the nation lacks a single authority to command the preventive measures a pandemic requires. The nation's ability to respond depends on many levels and agencies of government. OSHA is one of those agencies. OSHA has an important role to play in the realm Congress clearly assigned to it: health and safety in private sector employment settings.

Is an OSHA rule still a valid "occupational" rule if it applies to all employment settings without differentiation? Of course. Sometimes, a risk exists at a minimum threshold of significance in every group setting, and sometimes the same solution works for every setting. Moreover, an undifferentiated, uniform employment rule can still be "occupational" even though it addresses a risk that also exists outside an employment setting. Compelled, employer-directed group activity, inherent in nearly all employment, makes employment different from all other settings. If a rule regulates only the employment setting and not other settings, the rule is "occupational." If the *NFIB* majority intended to make new law denying these meanings of "occupational," *NFIB* is a deeply flawed decision dangerous to the nation's health.

Is vaccination an intrusion that requires special caution by regulators? Yes, but not to the point of abandoning a strong vaccination policy. Lost in the proceedings before the Supreme Court were some intrusions by *non*-vaccination: not just death and illness, but also critical rates of hospitalization that overwhelmed healthcare providers and oppressive non-vaccination measures that destroyed businesses and jobs, exacerbated mental health problems and robbed nearly all of us of some of the basic joys of life.

In a culture war, government actors must step delicately in designing measures that move as many people as possible as fast as possible from the enormous intrusions of sickness and non-vaccination preventive measures to the lesser "encroachment" of vaccination. *NFIB*, for all the faults in its reasoning, leaves reason to hope that OSHA can still be a strong promoter of vaccinations for employees.