Public Interest Law Reporter

Volume 27 | Issue 2 Article 3

Spring 2022

NFIB v. OSHA: Weighing Public Safety against Non-Delegation

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INTRODUCTION

In January 2022, the United States Supreme Court blocked a temporary emergency rule promulgated by the Occupational Safety and Health Administration ("OSHA") that would impose COVID-19 vaccination and test requirements for businesses employing over one hundred people.[1] This decision came in the midst of a surge of COVID-19 cases from the Omicron variant, and eliminated one of the major components of the White House's plan to address the pandemic—that is, the mitigation of transmission in the workplace.[2] Absent a unified rule from the federal government, the country has been left with a ". . . patchwork of state laws and policies . . .", and businesses have been left to choose whether or not to implement vaccination or testing standards.[3] Ultimately, this article explores the nuances of the Court's decision in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, and investigates not just the legal importance of the holding, but the cultural significance as well. What were the motivations of the Supreme Court Justices? Should the Supreme Court more broadly interpret the boundaries of an agency's congressionally delegated authority to better arm them in the fight against a global pandemic? Or, should the Court respect the sanctity of our system of government by not permitting agencies to go beyond their explicitly granted authority—even if a more generous interpretation could potentially save lives? This article seeks to provide an overview of what OSHA is and was created to do, unpack why the Supreme Court held that OSHA lacked the authority to enforce vaccination or testing standards in the workplace, and explore the impact of the Court's decision on the country as the pandemic lingers on.

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[1] Adam Liptak, Supreme Court Blocks Biden's Virus Mandate for Large Employers, THE NEW YORK TIMES, Jan. 13, 2022, https://www.nytimes.com/2022/01/13/us/politics/supreme-court-biden-vaccine-mandate.html.

[2] *Id.*

[3] *Id.*

WHAT IS OSHA, AND WHAT IS THEIR MISSION?

In 1970, Congress passed the Occupational Safety and Health Act ("the OSH Act" or "the Act"), which in turn created the Occupational Safety and Health Administration.[4] OSHA's main role as an agency is to "ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance."[5] OSHA is housed under the United States Department of Labor.[6] OSHA's administrator is the Assistant Secretary of Labor for Occupational Safety and Health, who answers to the United States Secretary of Labor, a member of the cabinet of the President of the United States.[7] The President holds the power to nominate the head of OSHA, who is then subject to Senate confirmation before officially being appointed. Doug Parker became the first confirmed OSHA head in over four years after being nominated by President Biden.[8] OSHA oversees the vast majority of private sector employers and their employees in the United States.[9]

Congress directly stated the impetus of OSHA's creation at the outset of the Act: that ". . .personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments."[10] The Act articulates a list of purposes and goals, including: encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at work (b)(1), promoting research into methods for dealing with occupational safety and health problems (b)(3), exploring the connections between various diseases and work environments (b)(6), providing medial criteria to ensure that employees do not suffer diminished health or functional capacity (b)(7), and promulgating occupational safety and health standards for the nation (b)(9).[11] OSHA's rules must be developed through a careful process of notice, comment, and public hearing.[12] However, the Act allows for exceptions to the traditional notice and

4 U. S. Dep't of Labor, *About OSHA,* https://www.osha.gov/aboutosha (Mar. 4, 2022).

5 *Id.*

6 *Id.*

7 *Id.*

8 Erik Dullea, *Doug Parker Receives Senate Confirmation as the New Head of OSHA*, SAFETY LAW MATTERS, Oct. 27, 2021, https://www.safetylawmatters.com/2021/10/doug-parker-receives-senate-confirmation-as-the-new-head-of-osha/.

9 U. S. Dep't of Labor, *supra* note 4.

10 29 U.S.C. § 651(a) (1970).

11 29 U.S.C. § 651(b) (1970).

12 29 U.S.C. § 655(b) (1979).

comment procedure. OSHA is permitted to enact "emergency temporary standards" which can take immediate effect once published to the Federal Register.[13] In order for these temporary rules to be enforceable, the agency must demonstrate to Congress and the courts that: (1) "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and (2) "the emergency standard is necessary to protect employees from such danger."[14]

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

In September 2021, President Biden announced that the federal government would begin requiring more people to receive COVID-19 vaccinations.[15] Accordingly, in November 2021, the Secretary of Labor issued the "COVID-19 Vaccination and Testing; Emergency Temporary Standard."[16] The rule was published to the Federal Register and was set to become effective immediately.[17] The emergency temporary standard applied to large employers (workplaces with 100 or more employees).[18] Employers covered by the emergency standard were required to ". . . develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination."[19] There were two narrow exceptions within the standard, which included employees who worked remotely "100 percent of the time" or entirely outdoors.[20] The timing of Biden's announcement and the agency's emergency rule was in anticipation of a crushing winter surge in COVID-19 cases, which became reality when the Omicron variant rapidly spread in December.[21] The emergency temporary standard also provided OSHA with the ability to ". . .

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13 29 U.S.C. § 655(c)(1) (1979).

14 *Id.*

15 President Joe Biden, COVID-?19 Pandemic Address at the White House Briefing Room (Sep. 9, 2021).

16 COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61402 (Nov. 5, 2021).

17 *Id.*

18 *Id.* at 61403.

19 *Id.*

20 *Id.*

21 Biden, *supra* note 15.

issue more meaningful penalties for willful and egregious violations . . . creating effective deterrence against employers who intentionally disregard their obligations under the Act or demonstrate plain indifference to their employee safety."[22]

After OSHA published their standard in November, many parties (*e.g.* states, businesses, non-profit groups) immediately filed legal challenges in every regional Court of Appeals.[23] The Fifth Circuit stayed OSHA's rule while further judicial review was pending, holding that the rule exceeded OSHA's statutory authority, was not tailored to the risks facing different types of workplaces, and presented separation-of-powers concerns.[24] After this decision, the remaining cases were consolidated in the Sixth Circuit.[25] The Sixth Circuit held that the mandate was likely consistent with OSHA's statutory authority, and accordingly, that the stay of the rule was unjustified.[26] However, the Supreme Court disagreed with the Six Circuit, and reversed its decision in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration* (the "*NFIB* decision").[27]

In the *per curium* opinion, the majority begins by describing OSHA's order requiring " . . . 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense . . ." as no ordinary exercise of federal power.[28] The Court examined the text of the Act to answer the question of whether OSHA has the requisite authority to issue a mandate of this scale.[29] Under the Court's reading, ". . . [t]he Act empowers the Secretary to set workplace safety standards, not broad public health measures . . . [N]o provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise."[30] In the majority's view, while COVID-19 is a risk that occurs in many workplaces, it is a *universal* risk, not an *occupational* risk.[31] The Court warns that ". . . [p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs

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22 COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. at 61442.

23 *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.,* 142 S. Ct. 661, 664 (2022).

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 665.

29 *Id.*

30 *Id.*

31 *Id.*

and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."[32]

The Court held that OSHA would have the authority to promulgate targeted regulations for particular features of an employee's job if they are places at special or heightened risk of contracting COVID-19. For instance, OSHA could regulate researchers who are working with different strains of the COVID-19 virus. However, OSHA's authority does not permit it to regulate "everyday risks."[33] The Court wrote that ". . . the mandate takes on the character of a general public health measure, rather than an 'occupational safety or health standard' . . . OSHA's indiscriminate approach fails to account for this crucial distinction."[34] The majority opinion concludes with an admission that, while OSHA has provided a calculus that the mandate could save over 6,500 lives and prevent thousands of hospitalizations, it is not the role of the Court to weigh such public-benefit tradeoffs.[35] While Congress has granted OSHA the power to regulate occupational hazards, the Court does not believe that OSHA can permissibly regulate public health more broadly— and accordingly, the applications for stays were ultimately granted.[36]

The concurrence from Justice Gorsuch, Justice Thomas, and Justice Alito primarily raises concerns arising out of the "major questions doctrine" of constitutional law.[37] If Congress wishes to assign authority to an executive agency, they must clearly and precisely announce this intention.[38] The concurrence held that ". . . [OSHA] claims the power to force 84 million Americans to receive a vaccine or undergo regular testing . . . [, but] Congress has nowhere clearly assigned so much power to OSHA."[39] The text of 29 U.S.C. § 655(c)(1), which delegates to OSHA the ability to issue emergency regulations upon determination that employees are exposed to grave danger, does not, in the concurrence's opinion, permit the agency to ". . . issue sweeping health standards that affect workers' lives outside the workplace."[40] The concurrence concludes that ". . . [i]f administrative agencies seek to regulate the

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32 *Id.* at 666.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 667.

38 *Id.*

39 *Id.*

40 *Id.* at 668.

daily lives of millions of Americans . . . they must at least be able to trace that power to a clear grant of authority from Congress."[41]

In the dissent, Justice Breyer, Justice Sotomayor, and Justice Kagan describe the ways in which COVID-19 has transformed American workplaces, and forced employees into environments where they have "little control" and "little capacity" to mitigate risk posed by a disease that rampantly transmits indoors.[42] In their view, OSHA performed just as Congress intended it should— to ensure the health and safety of workplaces faced by an unprecedented threat.[43] OSHA issued an emergency standard that ". . . falls within the core of the agency's mission: to 'protect employees' from 'grave danger' that comes from 'new hazards' or exposure to harmful agents . . ." as provided in 29 U.S.C. § 655(c)(1).[44] The dissent also stressed that OSHA's emergency temporary standard ". . . require[ed] *either* vaccination *or* masking and testing to protect American workers" (emphasis added) and criticized the majority for "obscuring" this freedom of choice by referring to the policy as a "vaccine mandate."[45] The dissenting opinion also rejected the majority's argument that OSHA did not have the power to promulgate this standard because OSHA is only authorized to ". . . set workplace safety standards [, but] COVID–19 exists both inside and outside the workplace."[46] In the dissent's view, "nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority . . ." because OSHA is not attempting to transform itself into a "public health regulator."[47] Further, it is irrelevant that COVID-19 exists within and outside of workplace walls.[48]

OSHA has historically regulated risks present both inside and outside of workplace settings—and the dissent references prior OSHA rules regarding fire, faulty electrical installations, emergency exit standards, drinking water, excessive noise, and so on.[49] In fact, the dissent brings up 29 C.F.R. § 1910.1030, an OSHA regulation aimed at the spread of "bloodborne pathogens" in the workplace, which permissibly required employers to coordinate medical screenings and laboratory tests, and even offer hepatitis B vaccinations

41 *Id.*
42 *Id.* at 670.
43 *Id.*
44 *Id.*
45 *Id.* at 670–71.
46 *Id.* at 673.
47 *Id.*
48 *Id.*
49 *Id.*

to workers.[50] The dissent concludes by reiterating that the standard could save thousands of workers' lives, prevent over 250,000 needless hospitalizations, and that OSHA is an agency responsible to the president and thus wholly accountable to the American public.[51] In the dissent's view, COVID-19 is a "new hazard" which poses a "grave danger" to millions of employees that OSHA tried to address with a vaccination or testing standard it deemed "necessary" to protect employees forced into close-contact with one another.[52]

In subsequent cases, the Supreme Court has held that COVID-19 vaccine mandates are enforceable in other contexts when promulgated by federal agencies different than OSHA.[53] For instance, in *Biden v. Missouri*, the Court affirmed that the Centers for Medicare and Medicaid Services (CMS) *had* the requisite authority to issue vaccine mandates for healthcare facilities that are subject to Medicare and Medicaid reimbursement.[54] This means that hospitals and nursing homes covered by the "CMS Rule" must ensure that their entire staff are vaccinated (and have received at least one dose) or have received a valid exemption from vaccination.[55] In clear reference to the *NFIB* decision, the majority writes that ". . . [t]he challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it . . . ," but ". . . at the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."[56] The Court reasons that CMS' core mission is to protect the health and safety of patients who are receiving medical services in healthcare facilities under their regulation.[57] This reasoning squares with the Court's *NFIB* ruling, in that OSHA's mission is to mitigate risk from occupational hazards in the workplace, not medical hazards.

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50 *Id.* at 674; *see, e.g.*, 29 C.F.R. §1910.1030(f).

51 *Id.* at 676.

52 *Id.* at 672.

53 Jeffery S. Beck et. al, *Supreme Court Blocks OSHA Vaccination-or-Test Mandate and Upholds CMS Rule Mandating Vaccines – Now What?*, FAEGRE DRINKER, Jan 14, 2022, https://www.faegredrinker.com/en/insights/publications/2022/1/supreme-court-block-osha-vaccination-or-test-mandate-and-uphold-cms-rule-mandating-vaccines-now-what.

54 *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022).

55 *Id.*

56 *Id.* at 654.

57 *Id.* at 650.

IMPLICATIONS OF THE DECISION, AND THE PUBLIC'S RESPONSE

The Court's ruling generated animated responses from lawyers and the general public alike. For instance, the law firm Hogan Lovells (an international firm specializing in corporate and employment law) recently weighed in on the Court's ruling.[58] According to Sean Marotta, a partner with the firm,

> ". . . [a] vaccine mandate that targets problems specific to a federal regulatory program will likely be upheld . . . [However,] a mandate that is simply an attempt to get as many people vaccinated as possible, or is a workaround for the government not having a general power of vaccination, will probably be struck down."[59]

The *NFIB* decision helps to define the boundaries of the federal government's power to regulate during a public health crisis. It is worth noting that in light of the 6-3 Supreme Court decision blocking OSHA's emergency vaccination and testing requirements, many businesses have decided to implement their own vaccine mandates anyway. According to data from Mercer, an employee-benefits consulting agency, 44 percent of 500 employers polled in January 2022 had a vaccine mandate in place with another six percent planning to implement one in the coming weeks.[60] This implies some important considerations. One, a significant portion of businesses (nearly half of the businesses polled by Mercer) do not want to impose vaccine or testing requirements on their workers and would be against the government requiring them to do so. Two, large businesses are left with the freedom and discretion to choose how they would like to protect their workers from the pandemic. Three, this increased discretion will, naturally, leave employees across the nation more susceptible to contracting COVID-19 at work.

There are some who believe that the *NFIB* decision has done more harm than good. In a blog post by the Alliance for Justice ("AFJ"), the renowned judicial advocacy group argues that ". . . [b]y enjoining the OSHA standard, the Court worsened the public health crisis just as the pandemic hit a new

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58 Jacob Gershman, *Judges Weigh More Biden Vaccine-Mandate Cases After Supreme Court Rulings*, The Wall Street Journal, Feb. 2, 2022, https://www.wsj.com/articles/judges-weigh-more-biden-vaccine-mandate-cases-after-supreme-court-rulings-11644143401.

59 *Id.*

60 *Worksite Vaccine Requirements in the Wake of the OSHA ETS*, Mercer, Jan. 27, 2022, https://www.mercer.us/our-thinking/healthcare/worksite-vaccine-requirements-in-the-wake-of-the-osha-ets.html.

peak."[61] Siding with the dissent in *NFIB*, AFJ criticizes the majority for ". . . reinventing decades of administrative law on the fly . . . OSHA was doing exactly what Congress instructed it to do: protect workers from unsafe working conditions."[62] AFJ goes even further by arguing that this decision is a dramatic shrinking of the federal government's ability to take direct action against emergencies, potentially ". . . upend[ing] our ability to alleviate climate change . . . [or] to protect the nation's food supply from disease . . . ."[63]

Conversely, there are many people who believe that vaccine mandates should fall outside of the government's domain, and that we are better off without these requirements. Some go as far as to say that vaccine mandates are "human rights violations."[64] This sentiment is evidenced by international protests, such as the disruptive Ottawa truck driver's rally that occurred in January (which started as a "narrow demonstration" staged by truckers, and grew into mass demonstrations involving thousands of Canadians).[65] There are also those who hold less dramatic opinions. As stated by an anti-mandate group in Boston (comprised of members of the city's firefighter's union), ". . . [o]ur concerns regarding mandated vaccination should not in any way be misconstrued to belittle the deadly effects of this virus."[66] Rather, a vaccine mandate deprives people of "meaningful dialogue" and deliberation, and even ". . . represents a lack of respect."[67]

EXPERT INSIGHT

Stephanie Gournis provided crucial insight on the *NFIB* decision from the perspective of a practicing attorney. Gournis is a uniquely qualified person to speak to on this topic. She spent over 25 years providing advice and counsel to employers in private and publicly traded "Fortune 500" and mid-sized compa-

61 William Harrison, *The Supreme Court's Vaccine Mandate Decision is a Deadly Power Grab*, ALL. FOR JUST., Feb. 2, 2022, https://www.afj.org/article/the-supreme-courts-vaccine-mandate-decision-is-a-deadly-power-grab/.

62 *Id.*

63 *Id.*

64 John Letzing, *Are COVID-19 vaccine mandates human rights violations?,* WORLD ECON. F., Jan. 31, 2022, https://www.weforum.org/agenda/2022/01/are-covid-19-vaccine-mandates-a-human-rights-violation/; Christopher Gavin, *Boston firefighters union president calls city's vaccine mandate a 'violation' of human rights*, BOS. GLOBE MEDIA, Aug. 13, 2021, https://www.boston.com/news/coronavirus/2021/08/13/boston-firefighters-union-president-calls-citys-vaccine-mandate-a-violation-of-human-rights/.

65 Letzing, *supra* note 64.

66 Gavin, *supra* note 64.

67 *Id.*

nies across the nation.[68] Gournis spent most of her career as a partner at an AM Law 100 firm representing clients in healthcare, financial services, insurance, retail, construction, and many other fields.[69] She recently opened her own firm, Gournis Law and HR Consulting, focusing her private practice on HR and employment counseling, traditional labor relations consultation, and labor and employment litigation.[70] She has litigated a wide-range of employment and labor-related matters in state and federal courts, counseled businesses through complex mergers and acquisitions, and has drafted HR policies and employee handbooks for large companies.[71] In the last two years, Gournis worked directly with employers to develop COVID-19 workplace safety and regulatory compliance programs—making her the ideal practitioner to speak with about the current state-of-affairs after *NFIB*.[72]

Gournis was not shocked by the Court's holding in *NFIB,* explaining that ". . . [t]his is a particularly conservative Supreme Court. This Supreme Court majority is more likely than some of its predecessors to interpret narrowly the administrative authority granted to a federal agency by statute . . . I'm not aware of OSHA having previously attempted such an extensive expansion of authority."[73] However, Gournis was ". . . a bit surprised at the scope of the Supreme Court's decision."[74] She highlighted the fact that ". . . the Supreme Court did not limit its *NFIB* decision to a finding that OSHA exceeded the limits of its *emergency* authority . . . [They] went further to determine that OSHA had exceeded the limits of its overall *statutory* authority."[75] The Court held that permitting OSHA to regulate the hazards of daily life would significantly expand OSHA's regulatory authority beyond their clear congressional authorization.[76] Gournis believes the holding means that ". . . neither a permanent or emergency standard of this type can likely be enforced in the future."[77]

When asked about her opinion on the outcome of the case, Gournis said that she ". . . overall agrees that the Supreme Court made the right decision . . . [because] an ETS standard that is not narrowed to the specifics of individual

68 Telephone Interview with Stephanie Gournis, Attorney, Gournis Law and HR Consulting (Mar. 9th, 2022) [*hereinafter* Gournis Interview].
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.
77 Gournis Interview.

workplace concerns could create a potential 'slippery slope' expansion of OSHA's administrative authority."[78] Gournis went on to characterize two conflicting perspectives surrounding the Court's decision. On one hand, ". . . [i]f OSHA has authority to enforce workplace standards aimed at addressing the general health of the American population, then OSHA arguably could establish workplace standards allowing employers to monitor employee caloric intake, force employees to quit smoking, force employees [to] increase their daily exercise, and so on."[79] On the other hand, ". . . one could argue that there is strong public heath merit to such standards and regulations."[80] It comes down to whether ". . . Congress intended such a broad extension of statutory authority from the wording of the current OSH Act."[81]

Gournis does not believe that ". . . OSHA will try again to broadly enforce a single standard across all workforces. I especially don't expect OSHA to test a broad standard before the current (conservative) Supreme Court majority."[82] Summarizing the effect of the decision, Gournis said that ". . . the opinion reads more like a decision on the merits of OSHA's underlying statutory authority to enforce broad workplace standards on either an emergency or permanent basis."[83] As we know, ". . . [t]he Court distinguished OSHA's authority to address 'hazards that employees face at work,' from any authority to address 'broad public health measures.'"[84] Moving forward, Gournis believes ". . . OSHA could publish more targeted vaccination mandates. The Supreme Court's concern in the *NFIB* decision was that OSHA's standard applied across *all* workforces. We likely may see OSHA issue a similar standard more narrowly tailored to address employees in specific work environments or industries."[85]

As an attorney deeply rooted in employment and labor law, the Supreme Court's decision had a direct impact on Gournis' practice. In a way, "[t]he Supreme Court decision ended the chaos specifically arising from employers attempting to determine the applicable compliance date and standards of OSHA's specific regulation."[86] When asked how her approach to counseling

78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*

clients changed in the wake of the *NFIB* decision, Gournis provided optimistic insight. She stated that ". . . [m]ost of my employer clients already had announced and/or implemented workplace standards necessary to address the OSHA standards in anticipation of the vaccination mandate going into effect."[87] In fact, "[o]ne could argue that OSHA's [Emergency Temporary Standard ("ETS")] already has accomplished its stated goal of increasing nationwide vaccination rates. The mere promise (or threat) of an ETS was instrumental in increasing the percentage of Americans that received their initial vaccination doses."[88] Given that ". . . 1 [out] of 10 OSHA emergency standards have ever survived legal challenge . . . ," Gournis poses the question of whether OSHA was ever convinced in the first place that its mandate would pass legal muster.[89] Was this merely a move by the Court to make an impact on nationwide vaccination rates, regardless of the outcome of future legal challenges? While we will likely never know, the concept of a "doomed" emergency rule promulgated by an agency still producing some of its intended effect sets an interesting standard for the future. If this was in fact their tactic, we may see the strategy employed again by OSHA and even other administrative agencies in a future public crisis.

How does the *NFIB* decision impact the health and safety of workers as the pandemic lingers on? Gournis concluded the interview by reassuring that ". . . employers already have a 'general duty' obligation under the OSH Act to provide a safe work environment for employees."[90] While there still remains uncertainty as to how this duty specifically applies to COVID-19 safety standards, employers cannot escape their responsibility to ". . . consider what standards are appropriate for protecting their particular workforces from COVID-19 exposures."[91] Finally, many employers are still subject to "state, regional, and/or other federal mandates," especially those targeted at healthcare providers and federal contractors.[92]

CONCLUSION

The *NFIB* decision has in many ways been as divisive as the COVID-19 pandemic itself. According to the majority, OSHA lacks the delegated author-

87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*

ity to promulgate sweeping COVID-19 regulations that have ramifications outside of workplace walls. To the dissent, COVID-19's existence both within and outside of the workplace is irrelevant, and OSHA has historically been able to enforce workplace safety measures against new hazards and harmful diseases. The public's response has been no less divided. Many celebrate the decision as upholding the separation of powers within American government wherein an agency cannot stray outside of its delegated Congressional authority. Others believe that the decision dangerously limits the ability of the federal government in addressing the present pandemic or a future public health crisis. One thing is clear: preserving the structural limitations and authoritative divisions of our government often comes with a cost, especially during a national health emergency.

The balancing act unfortunately forces us to weigh: (1) the risk of establishing a precedent of overly expansive agency-authority against (2) the risk of decreased health and safety of our population. Were OSHA's motivations to protect the safety of workers in large companies? Was OSHA trying to seize more administrative power during a chaotic moment in our nations' history? Did the agency cast out a "doomed" emergency temporary standard in an attempt to stimulate the national vaccine rates, or something else entirely? It all remains unclear.

We are left with a decision that strongly defines the limitations of OSHA's statutory authority. At the very least, it appears that largescale employers have generally decided to address the pandemic on their own in varying ways by going forward with vaccine requirements independently, implementing flexible remote work options, or enforcing mask policies. The very notion of an impending rule was enough to spur action from those anticipating the new regulation. In this way, perhaps the failure of OSHA's ETS was a blessing in disguise—preventing the improper expansion of OSHA's authority while still indirectly increasing workplace safety. An overarching philosophical question remains: how and when should governmental boundaries be crossed in the name of national safety?