OSHA's Authority to Regulate Workplace Heat

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Introduction

The Occupational Safety and Health Administration (OSHA) recently announced its intention to begin a standard-setting process on workplace heat exposure.[1] Since OSHA began public deliberations about regulating occupational heat hazards, the Supreme Court issued two decisions that, according to some, could pose challenges to the agency's authority to regulate in this area.[2] This article considers two questions:

- First, does the Supreme Court's decision in *NFIB v. OSHA*, striking down the OSHA COVID-19 emergency temporary standard (ETS), restrict the agency's authority to issue an occupational safety and health standard protecting workers from occupational heat exposure?
- Second, does the Supreme Court's decision in *West Virginia v. EPA*, concretizing the major questions doctrine (MQD), impact OSHA's authority to issue an occupational safety and health standard protecting workers from occupational heat exposure?

This article argues that neither *NFIB v. OSHA* nor *West Virginia v. EPA* should pose a barrier to OSHA's ability to regulate and protect workers from occupational heat exposure. The nature of heat as a hazard, OSHA's regulatory history, and the likely design of an OSHA heat standard make a potential regulation readily distinguishable from the OSHA COVID-19 ETS that the Supreme Court invalidated. For similar reasons, the MQD, formally announced in *West Virginia*, should not pose a threat to an OSHA heat standard, as such a regulation would be in line with previous OSHA regulatory action, not economically and politically significant, and well within the agency's congressional authorization.

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1. News Release, U.S. Dep't of Lab., US Department of Labor Announces Enhanced, Expanded Measures to Protect Workers from Hazards of Extreme Heat, Indoors and Out (Sept. 20, 2021), https://www.dol.gov/newsroom/releases/osha/osha20210920 [https://perma.cc/6E7B-6DNW].

2. *See* West Virginia v. EPA, 597 U.S. 697 (2022); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109 (2022).

I. Workplace Heat at OSHA

A. Heat as a Hazard

Heat-related illnesses are a significant risk to workers in indoor and outdoor workplaces. OSHA defines "heat-related illness" to include a variety of conditions, including heat stroke, heat rash, and acute kidney injury, among others.[3] According to the Bureau of Labor Statistics, reported heat cases in workplaces caused an average of thirty-five fatalities annually between 2015 and 2019 and 2,700 cases that resulted in days away from work.[4] In addition to being a worker safety issue, occupational exposure to heat is a racial equity issue: the impact of heat-related illness falls disproportionately on workers of color. For example, since 2010, Latino workers have made up one third of heat fatalities despite constituting only seventeen percent of the United States workforce.[5]

Climate change has contributed to increased temperatures and, along with them, an increased risk for heat-related illness.[6] July 2023 was Earth's hottest month on record, and 2023 was one of the hottest years ever.[7] Increased temperatures have contributed to greater risks for workers, with the three-year average of worker heat deaths doubling since the early 1990s.[8]

B. Sub-Regulatory Action

OSHA has paid significant attention to heat-related illnesses in recent decades, despite not yet issuing binding regulations on the subject.[9]

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3. OSHA, U.S. Dep't of Lab., National Emphasis Program—Outdoor and Indoor Heat-Related Hazards App. F-1 (2022), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf.

4. *Id.* at 4.

5. Julia Shipley, Brian Edwards, David Nickerson, Robert Benincasa, Stella M. Chávez & Cheryl W. Thompson, *Heat Is Killing Workers in the U.S.—And There Are No Federal Rules to Protect Them*, NPR (Aug. 17, 2021), https://www.npr.org/2021/08/17/1026154042/hundreds-of-workers-have-died-from-heat-in-the-last-decade-and-its-getting-worse [https://perma.cc/R6TC-EV8U].

6. News Release, White House, Fact Sheet: Biden Administration Mobilizes to Protect Workers and Communities from Extreme Heat (Sept. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/20/fact-sheet-biden-administration-mobilizes-to-protect-workers-and-communities-from-extreme-heat [https://perma.cc/7DAZ-8ZQB].

7. AJLabs, *July Set to Become World's Hottest Month on Record: What Happened?*, Al Jazeera (July 31, 2023), https://www.aljazeera.com/news/2023/7/31/july-set-to-become-worlds-hottest-month-on-record-what-happened [https://perma.cc/7DAZ-8ZQB]; Zahra Hirji, *This Year Is Already on Track to Be the Hottest Ever Recorded*, Bloomberg (July 17, 2023), https://www.bloomberg.com/news/articles/2023-07-17/2023-is-already-on-track-to-be-the-hottest-year-ever-recorded [https://perma.cc/AKK6-EH5V].

8. Erin McDaniel, *Outdoor Workers Could Face Far More Dangerous Heat by 2065 Because of Climate Change*, NPR (Aug. 17, 2021), https://www.npr.org/2021/08/17/1028552251/outdoor-workers-could-face-far-more-dangerous-heat-by-2065-because-of-climate-ch [https://perma.cc/VK65-CA46].

9. A few state-level OSHAs that are approved by and operate independently from federal OSHA have issued regulations to protect workers from heat-related illness. These

As early as 1992, OSHA began issuing informal guidance about the risk of heat-related illness and injury.[10] In 2014, for example, OSHA issued a fact sheet providing "information to employers on measures they should take to prevent worker illnesses and death caused by heat stress."[11] In various "standard interpretations,"[12] OSHA has discussed how high temperatures should alter workplace implementation of the OSHA Personal Protective Equipment (PPE) Standard.[13] OSHA also maintains a website that contains resources about heat illness to help educate employers and workers about risks and mitigation ideas.[14]

Advocacy group Public Citizen, along with co-signing organizations and unions, has petitioned three times since 2011 for OSHA to issue a workplace heat standard.[15] OSHA denied a 2011 petition for an ETS, explaining that the mortality rate of workers exposed to extreme heat was not high enough to meet the Occupational Safety and Health Act's (OSH Act's) requirement for "grave danger" and that OSHA had not yet established that its education and enforcement mechanisms were insufficient to mitigate the hazard.[16] OSHA has yet to respond to a 2018 petition for a permanent standard and a 2021 petition for an ETS.[17]

In 2021, President Biden's inauguration and extreme heat across the country brought renewed energy to the effort to decrease workplace heat hazards. In January 2021, President Biden issued Executive

states include California, Minnesota, Oregon, and Washington. However, only Minnesota and Oregon's standards regulate indoor places of employment. *See* Cal. Code Regs. tit. 8, § 3395 (2022); Minn. R. § 5205.0110; Or. Admin. R. § 437-002-0156 (2022); Wash. Admin. Code § 296-62-095 (2022).

10. *See* Landscaping Employees Working in Extreme Temperatures, OSHA Standard Interpretive Letter (July 14, 1992), https://www.osha.gov/laws-regs/standardinterpretations/1992-07-14-0 [https://perma.cc/QVA7-QP56].

11. OSHA, U.S. Dep't of Lab., Fact Sheet: Protecting Workers from the Effects of Heat 1 (Aug. 2014), https://labor.hawaii.gov/hiosh/files/2022/06/OSHA-FY2022-Outreach-Initiatives-11-23-21.pdf [https://perma.cc/V2JV-K579]. This fact sheet was replaced in 2023. OSHA, U.S. Dep't of Lab., Heat Illness Prevention: Protecting Workers from the Effects of Heat (2023), https://www.osha.gov/sites/default/files/publications/OSHA3743.pdf.

12. These are informal guidance documents that discuss how an OSHA standard applies to a particular set of facts. *See Heat*, OSHA, https://www.osha.gov/heat-exposure/standards (last visited Mar. 8, 2024).

13. *Id.*

14. *Heat Illness Prevention*, OSHA, https://www.osha.gov/heat (last visited Mar. 8, 2024).

15. Letter from Pub. Citizen and more than 115 organizations and individuals to James Frederick, Acting Assistant Sec'y of Lab. for Occupational Safety & Health, U.S. Dep't of Lab., Petition to OSHA for Heat ETS 1 (Aug. 4, 2012), https://www.citizen.org/wp-content/uploads/Public-Citizen-Petition-to-OSHA-for-Heat-ETS-8.4.2021.pdf [https://perma.cc/P7ED-73AL].

16. Letter from David Michaels, U.S. Dep't of Lab., to Sidney Wolfe, Pub. Citizen's Health Rsch. Grp, 1–2 (June 7, 2012), https://www.citizen.org/wp-content/uploads/migration/denial-of-heat-stress-petition.pdf [https://perma.cc/6WUT-LGSA].

17. Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59,309, 59,315 (Oct. 27, 2021).

Order 14008, "Tackling the Climate Crisis at Home and Abroad."[18] In response, the Labor Department issued its Climate Action Plan, which explicitly stated its goal of reducing heat-related illness.[19] The Biden administration announced in September 2021 that it would mobilize across agencies to combat heat-related workplace hazards.[20] This effort included stepped-up enforcement activity at OSHA under the OSH Act's general duty clause.[21] OSHA detailed this increased enforcement in a "heat initiative memorandum," highlighting the increased prevalence of heat-related illnesses in the workplace. The memorandum instructed OSHA inspectors to prioritize onsite inspections of heat-related complaints and to emphasize heat-related hazards during other investigation activities.[22] The administration's September 2021 release also announced that OSHA would launch a rulemaking process to develop a workplace heat standard.[23]

In response to the heatwave of July 2023, President Biden laid out several steps that his administration would take to address health risks caused by heat. In addition to ramping up enforcement of heat-safety violations, increasing inspections, and continuing the rulemaking process initiated in 2021, the President ordered OSHA to issue a Hazard Alert for heat.[24] The alert highlights employers' responsibility under the OSH Act's general duty clause to take preemptive steps to protect workers from heat risks.[25]

C. Regulatory Action and Public Comments

On October 27, 2021, OSHA issued an advance notice of proposed rulemaking (ANPRM) requesting public input on its decision to initiate a rulemaking process to protect indoor and outdoor workers from hazardous heat.[26] In its request for comment, the ANPRM noted that eighty percent of heat-related fatalities occurred in outdoor workplaces, but also that sixty-one percent of non-fatal heat-related

18. Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021).

19. U.S. DEP'T OF LAB., CLIMATE ACTION PLAN 6 (2021), https://www.sustainability.gov/pdfs/dol-2021-cap.pdf [https://perma.cc/8VT3-GKDW].

20. News Release, *supra* note 6.

21. The General Duty Clause is the general enforcement mechanism that OSHA uses to investigate and penalize serious workplace hazards for which OSHA has not issued a specific workplace standard. 29 U.S.C. § 654.

22. Memorandum from Kimberly Stille, Occupational Safety & Health Admin. on Inspection Guidance for Heat-Related Hazards to Reg'l Adm'rs (Sept. 1, 2021), https://www.osha.gov/laws-regs/standardinterpretations/2021-09-01.

23. News Release, *supra* note 6.

24. *Id.*

25. OSHA, U.S. DEP'T OF LAB., HAZARD ALERT: EXTREME HEAT CAN BE DEADLY TO WORKERS (2023), https://www.osha.gov/sites/default/files/publications/OSHA_HA-4279.pdf.

26. Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59309 (2021).

illnesses resulted from indoor work.[27] Explaining that heat-related illness affects workers in over 230 unique industries, OSHA requested input from commenters on the varied risks confronted by different groups of workers.[28] In all, OSHA's ANPRM posed 114 questions to the public on topics ranging from climate change, state heat standards, and monitoring requirements.[29]

Individuals, employers, and advocacy groups submitted approximately one thousand comments on the ANPRM.[30] Most comments made policy arguments in favor or against an OSHA heat standard. For example, parties in favor of OSHA issuing a standard cited increased heat-related deaths and injuries,[31] while opposing parties argued that a heat standard would be unnecessary because of OSHA's existing guidance, actions that employers have already taken, and OSHA's enforcement activities under the general duty clause of the OSH Act.[32] Some, however, made legal arguments in their comments, suggesting that an OSHA heat standard would reach beyond OSHA's authority to regulate. At least one commenter claimed that, because heat is a "universal" rather than "occupational" risk, OSHA does not have authority to regulate it.[33]

II. Discussion

A pair of Supreme Court cases decided in 2022 create the legal context in which OSHA regulators must act. One case, *NFIB v. OSHA*,[34] considered OSHA's authority to issue an economy-wide vaccine-or-test mandate to protect workers from workplace transmission of COVID-19. The other, *West Virginia v. EPA*,[35] explicitly defined the Court's new MQD, which limits the amount of deference afforded to agencies when they issue significant regulation.

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27. *Id.* at 59310.

28. *Id.* at 59311.

29. *See generally id.*

30. Rulemaking Docket for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, OSHA-2021-0009 (Oct. 27, 2021), https://www.regulations.gov/docket/OSHA-2021-0009.

31. *See, e.g.*, Kristina Dahl, Union of Concerned Scientists, Comment Letter on Proposed Rule on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, OSHA-2021-0009-0655 (Jan. 30, 2022), https://www.regulations.gov/comment/OSHA-2021-0009-0655.

32. *See, e.g.*, David Addington, Nat'l Fed'n of Indep. Bus., Comment Letter for Proposed Rule on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, OSHA-2021-0009-0173 (Nov. 25, 2021), https://www.regulations.gov/comment/OSHA-2021-0009-0173.

33. Jason Ortega, Nat'l Wooden Pallet & Container Ass'n, Comment Letter for Proposed Rule on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, OSHA-2021-0009-0697 (Jan. 31, 2022), https://www.regulations.gov/comment/OSHA-2021-0009-0697; Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2020).

34. NFIB v. OSHA, 595 U.S. 109 (2022) (per curiam).

35. West Virginia v. EPA, 597 U.S. 697 (2022).

A. NFIB v. OSHA

In January 2022, the Supreme Court struck down an ETS for COVID-19 that subjected employers with 100 or more employees to a vaccinate-or-test regime.[36] Specifically, the regulation, promulgated in November 2021, required employers to mandate that employees either receive COVID-19 vaccinations or test on a weekly basis.[37] Although the per curiam opinion did not explicitly mention the MQD, the analysis foreshadowed the doctrine that the Court would formalize months later in *West Virginia v. EPA* (discussed in Section II(B)). The Court noted the "vast economic and political significance" of the regulation because it "ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense."[38] Due to this significance, the Court searched for a clear source of congressional authorization for the regulation.[39]

Central to the Court's decision was whether the COVID-19 virus was an "occupational" safety hazard within the terms of the OSH Act, or whether it was a "universal" hazard to public health. The Court found that the Act did not "plainly authorize[] the Secretary's mandate" primarily because, on the Court's reading, "the Act empowers the Secretary to set *workplace* safety standards, not broad public health measures."[40] The Court concluded:

> Although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.[41]

The Court also highlighted the fact that a vaccine requirement was "strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, 'cannot be undone at the end of the workday.'"[42]

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

37. *Id*.

38. *NFIB*, 595 U.S. at 117. Although it did so rather conclusorily, simply stating that "there can be little doubt that OSHA's mandate qualifies as an exercise of such authority." *Id*.

39. *See infra* Section III.B for a more fulsome explanation of the Supreme Court's new Major Questions Doctrine.

40. *NFIB*, 595 U.S. at 117.

41. *Id*. at 118.

42. *Id.* (quoting *In re* MCP No. 165, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C.J., dissenting).

In another discussion of the regulation's scope relative to OSHA's statutory authority, the Court described the ETS as a "blunt instrument" because the exceptions to its enforcement were very narrow and the regulation made no distinctions between industries or workplaces where COVID-19 was more or less of an occupational hazard because of particular features of the job.[43] The Court deemed the ETS's exceptions for completely outdoor workplaces to be "illusory,"[44] and lamented that the ETS's one-size-fits-all approach addressed a hazard that was "untethered, in any causal sense, from the workplace."[45]

Finally, the *NFIB* Court actually suggested ways that OSHA could have narrowed the COVID-19 ETS and survived judicial scrutiny:

> That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face.[46]

As the following analysis explains, the Court's decision in *NFIB* helps reveal why a heat standard would be different from the vaccine-or-test mandate, and why such a regulation should survive judicial review.

1. An OSHA Workplace Heat Standard Would Be in Line with Previous Agency Action

a. Heat Is a Long and Widely Recognized Occupational Hazard

As the Court in *NFIB* explained, the OSH Act empowers OSHA to regulate only "occupational hazards."[47] Courts, regulatory bodies, and conventional wisdom have widely considered heat to be an occupational hazard throughout OSHA's history, across the country and around the globe, and within various substantive areas of law.

OSHA's regulatory and enforcement history demonstrates that heat is an occupational hazard. As discussed above, OSHA has a long-running regulatory and education campaign to prevent workplace heat-related illness. The agency began issuing guidance on workplace heat as early as 1992.[48] OSHA's recordkeeping regulations require employers to record and report heat-related workplace illness that

43. *Id.* at 115.
44. *Id.*
45. *Id.* at 119.
46. *Id.*
47. *Id*. at 118.
48. *See supra* note 10.

necessitate medical treatment.[49] Under the OSH Act's general duty clause, employers are required to provide their employees with a place of employment that "is free from recognized hazards that are causing or likely to cause death or serious harm to employees."[50] Through enforcement programs and in resulting litigation, OSHA[51] and courts[52] have repeatedly affirmed that heat-related hazards can support a general duty clause violation under the OSH Act.

Multiple states and international jurisdictions recognize heat as an occupational hazard as well, and many have taken steps to regulate it as such. In the United States, states including California, Minnesota, Oregon, and Washington have state-level occupational health standards designed to protect workers from heat-related illness in the workplace.[53] Maryland's Department of Labor released a proposed heat standard in October 2022 after the state legislature passed a bill directing it to do so.[54] Regulators in countries around the world also regulate temperature as a workplace hazard; a recent report summarized workplace heat protections in Gabon, Mozambique, South Africa, Costa Rica, Germany, Spain, and Qatar, among others.[55]

Extreme temperature's significance as a workplace hazard is also recognized across American law. For example, in a seminal 1962 labor law case, the Supreme Court considered workers' rights to engage in concerted action to protest dangerously cold temperatures. The Court found those rights protected under the relevant statute because such workplace hazards are "too bad to have to be tolerated in a humane and

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49. *See generally* 29 C.F.R. § 1904 (2023). However, as OSHA explains:

> [I]f a worker needs "first aid," as defined in 29 CFR 1904.7(b)(iv), the employer is not required to record the case. For example, if a worker requires intravenous fluids to treat a work-related illness, the case meets the general recording criteria. On the other hand, if a worker is only instructed to drink fluids for relief of heat stress, the case is not recordable.

Heat, *supra* note 12.

50. 29 U.S.C. § 654(a)(1).

51. In 2019, OSHA conducted 289 heat-related inspections, issued 155 heat-related Hazard Alert Letters, and issued 31 heat-related General Duty Clause citations. Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59,315 (Oct. 27, 2021).

52. *See, e.g.*, Duriron Co. v. Sec'y of Lab., 750 F.2d 28, 29 (6th Cir. 1984) (holding that OSHA met its burden of proof to establish violation of the General Duty Clause, by showing recognized heat stress hazard in centrifugal casting department which had caused or was likely to cause death or serious bodily injury).

53. *See* Cal. Code Regs. tit. 8, § 3395 (2022); Minn. R. § 5205.0110; Or. Admin. R. § 437-002-0156 (2022); Wash. Admin. Code § 296-62-095 (2022).

54. Nene Narh-Mensah, *Facing Hotter Working Conditions, Activists Await New State Regulations on Employee Protections*, Md. Matters (Aug. 11, 2022), https://www.marylandmatters.org/2022/08/11/activists-accuse-md-labor-dept-of-slow-walking-heat-protection-regulations-for-workers [https://perma.cc/RF7N-NKAG].

55. Teniope Adewumi-Gunn, *Workplace Heat Protections Across the Globe*, NRDC: Expert Blog (Sept. 15, 2021), https://www.nrdc.org/experts/teniope-adewumi-gunn/workplace-heat-protections-across-globe [https://perma.cc/UH6U-XKNE].

civilized society like ours."[56] That sentiment was reaffirmed in court decisions related to heat in a variety of areas of law, including in litigation related to claims under theories of employer negligence torts,[57] the Federal Employers' Liability Act (FELA),[58] and the Employee Retirement Income Security Act (ERISA).[59]

b. OSHA Has Regulated "Universal" Hazards Before, as the NFIB Court Recognized

The fact that heat is a hazard both in and out of the workplace does not disqualify OSHA from issuing a standard to protect workers from it, as long as the standard's controls on the hazard are tailored based on the level of risk of a hazard present in particular workplaces or limited to the workplace. As the dissenting justices in *NFIB* identified,[60] and as the majority agreed,[61] OSHA's fifty-year history has seen standards set to protect against all sorts of "universal" hazards. These standards include those regulating sanitation,[62] fire,[63] asbestos,[64] ladder placement,[65] power tools,[66] electrical circuits,[67] and bloodborne pathogens,[68] among others.[69] It is immediately apparent that each of these hazards is present outside of the workplace, including "at home, in schools," and other locales.[70] To limit OSHA's authority to regulate such hazards in the workplace simply because they also exist outside of the workplace would upend the entire regulatory scheme and purpose of the OSH Act.

Indeed, the Court in *NFIB* did not prohibit OSHA from regulating such "universal" hazards. Rather, the Court reasoned that OSHA's regulation of the hazard must be focused on the hazard as it presents itself in the workplace specifically, and the remedy to protect against the hazard must be limited to the workplace and workday. The Court explained that requiring a vaccine, which could not "be undone at the

56. NLRB v. Wash. Aluminum Co., 370 U.S. 9, 17 (1962).

57. *See, e.g.*, Halsey v. Townsend Corp. of Ind., 20 F.4th 1222, 1228 (8th Cir. 2021) (finding that "providing a way for employees to avoid heat strokes falls within the employer's nondelegable duty to provide a safe place to work").

58. *See, e.g.*, Whaley v. Norfolk S. Ry. Co., No. 4:14-CV-0108-HLM, 2015 WL 11726510, at *6 (N.D. Ga. June 2, 2015) (finding that an employer's duty to keep the workplace safe included mitigating heat hazards).

59. *See, e.g.*, Slane v. Mariah Boats, Inc., 164 F.3d 1065, 1066 (7th Cir. 1999) (discussing a worker's injury due to "hot temperatures" in excess of eighty degrees "in the factory").

60. NFIB v. OSHA, 595 U.S. 109, 132 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

61. *See id.* at 118–19 (per curiam opinion).

62. 29 C.F.R. § 1910.141 (2023).

63. *Id*. §§ 1910.155–.165.

64. *Id*. § 1910.1001.

65. *Id*. § 1910.23.

66. *Id*. §§ 1910.241–.244.

67. *Id*. §§ 1910.301–.399.

68. *Id*. § 1910.1030.

69. *See generally id*. § 1910.

70. NFIB v. OSHA, 595 U.S. 109, 118–19 (2022) (per curiam).

end of the workday," across the economy, with little regard to the relative risk of contracting COVID-19 in those particular workplaces, was "simply not part of what the agency was built for."[71] As explained in more detail below, an OSHA heat standard would, yes, regulate the arguably universal hazard of heat. But it would do so with controls that are limited to the workplace (and thus capable of being "undone" at the end of the workday) and likely would only require employers to take action when temperatures reached defined thresholds.

2. An OSHA Workplace Heat Standard Would Be Easily Distinguishable from the Regulation Invalidated in NFIB.

An OSHA workplace heat standard would be easily distinguishable from the regulation invalidated in *NFIB*. For purposes of discussion, this document assumes that a future OSHA heat standard would take a form similar to those of the recommended standard authored by the National Institute for Occupational Safety and Health (NIOSH) and various state standards on workplace heat.

NIOSH's recommended standard suggests that workplace controls to prevent heat stress be implemented in the event that work station temperature measurements exceed particular thresholds.[72] The recommended standard primarily relies on engineering controls, administrative controls, personal protective equipment (PPE), medical monitoring, and training strategies to prevent heat-related illnesses among workers.[73] Recommended engineering controls[74] include fans, heat shields, dehumidifiers, and air conditioning.[75] The standard's administrative controls[76] include limiting heat exposure time and increasing recovery time, decreasing metabolic demands by mechanization or increasing the number of workers per task, and implementing acclimatization plans.[77]

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71. *Id.* at 119 (internal quotations omitted).

72. Brenda Jacklitsch, Jon Williams, Kristin Musolin, Aitor Coca, Jung-Hyun Kim & Nina Turner, Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention & Nat'l Inst. for Occupational Safety & Health, Criteria for a Recommended Standard: Occupational Exposure to Heat and Hot Environments 3 (2016), https://www.cdc.gov/niosh/docs/2016-106/pdfs/2016-106.pdf?id=10.26616/NIOSHPUB2016106 [https://perma.cc/8UT5-U9MC] [hereinafter NIOSH Standard].

73. *Id*. at 4–9.

74. OSHA considers engineering controls to be the "first and best strategy." Such measures are based on the premise that, "to the extent feasible, the work environment and the job itself should be designed to eliminate hazards or reduce exposure to hazards." OSHA, Hazard Prevention and Control 1, https://www.osha.gov/sites/default/files/2018-12/fy11_sh-22318-11_Mod_3_HazardPrevention.pdf [https://web.archive.org/web/20230414093736/https://www.osha.gov/sites/default/files/2018-12/fy11_sh-22318-11_Mod_3_HazardPrevention.pdf].

75. NIOSH Standard, *supra* note 72, at 9.

76. Administrative controls are measures that do not involve redesigning physical work stations, but rather the organization of labor around them. These "measures include additional relief workers, exercise breaks and rotation of workers." OSHA, *supra* note 74, at 1.

77. NIOSH Standard, *supra* note 72, at 74–81.

State occupational standards on heat hazards tend to contain controls similar to NIOSH's recommended standard. In California, for example, the workplace heat standard requires various engineering and administrative controls when work site temperatures reach 80 and 95 degrees.[78] Such controls include shade requirements, break time, and training, among others.[79]

b. Regulating Workplace Heat Hazards by Requiring Workplace Controls Is Within OSHA's "Sphere of Expertise"

In concluding that the OSH Act did not "plainly authorize" the ETS, the *NFIB* Court lamented that the vaccine-or-test ETS was a "broad public health measure[]" that fell "outside of OSHA's sphere of expertise."[80] In contrast, an OSHA heat standard would be well within OSHA's "sphere of expertise," as a regulation that mitigates workers' risk of a workplace hazard through implementation of workplace-based controls.

OSHA's regulatory history reveals the extent to which a heat standard would fall squarely in its wheelhouse. An OSHA heat standard would likely establish a scientifically determined threshold limit for workstation temperature, above which employers would be required to implement workplace-based controls to mitigate risk of heat illness. This is a model with which OSHA has deep familiarity because it is the regulatory model that OSHA has used since the agency's inception. For instance, the agency's lead standard, promulgated in 1978, specifies a threshold worker lead exposure level, above which the employer must begin to implement engineering controls, like ventilation, and administrative controls, like job rotation, to mitigate employee exposure risk.[81] Similarly, the agency's asbestos standard, first issued the same year as OSHA was established in 1971, set a threshold limit for airborne asbestos exposure above which employers were required to implement engineering and administrative controls.[82] For lead and asbestos, employers are required to use PPE controls to mitigate hazards if engineering and administrative controls are not sufficient.

Courts, too, have long held that OSHA's "sphere of expertise" includes such a regulatory model. Upholding OSHA's workplace arsenic standard, the Ninth Circuit deferred to OSHA's "expertise" about the feasibility of its threshold arsenic exposure level.[83] The D.C. Circuit agreed that OSHA met its burden to demonstrate that engineering and administrative controls were feasible to reach the specified lead exposure threshold in the lead standard.[84] The D.C. Circuit also

78. *See generally* Cal. Code Regs. tit. 8, § 3395 (2022).
79. *Id.*
80. NFIB v. OSHA, 595 U.S. 109, 118 (2022) (per curiam).
81. 29 C.F.R. § 1910.1025.
82. *Id.*; 29 C.F.R. § 1910.1001.
83. ASARCO, Inc. v. OSHA, 746 F.2d 483, 493 (9th Cir. 1984).
84. Am. Iron & Steel Inst. v. OSHA, 939 F.2d 975, 986 (D.C. Cir. 1991).

upheld administrative controls—including a medical removal program through which employees are entitled to time off with pay after workplace exposure—in the lead standard.[85] Thus, OSHA's existing standards and these court cases firmly establish that any conceivable OSHA heat standard would fall within OSHA's "sphere of expertise."

c. Controls Required by a Heat Standard Could Be "Undone at the End of the Workday"

Key to the Court's decision in *NFIB* was its understanding that the ETS's vaccine requirement was "strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, 'cannot be undone at the end of the workday.'"[86] This was particularly important to the Court's complaint that the ETS was more like a public health regulation than one about workplace safety and health.

As discussed above, an OSHA heat standard modeled on NIOSH's recommended standards or existing state-level OSHA standards would likely include engineering, administrative, PPE, medical monitoring, and training controls. In contrast to the ETS's vaccine requirement, such controls would not permanently affect workers outside of the workplace.

d. An OSHA Heat Standard Would Not Be a "Blunt Instrument" Because It Would Only Apply to Workplaces Where "Particular Features" Make Heat a "Special Danger"

The Court discussed at great length what it perceived to be a fatal flaw in the COVID-19 ETS: the ETS applied equally to all types of workplaces, seemingly without regard to the relative risk that the virus posed in each. Calling the ETS's limited exceptions for entirely outdoor workplaces "illusory,"[87] the Court explained that the ETS's one-size-fits-all approach addressed a hazard that was "untethered, in any causal sense, from the workplace."[88] If the ETS had only regulated exposure to COVID-19 where it "pose[d] a special danger because of the particular features of an employee's job or workplace," the Court suggested that it would have been on a stronger legal footing.[89] For instance, the ETS could have focused only on cramped workplaces.[90]

An OSHA heat standard, in contrast, would likely only place requirements on workplaces when the temperature in or outside of the workplace reached a certain threshold. This temperature threshold-based model is contained within NIOSH's recommendations and

85. United Steelworkers of Am., AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1228 (D.C. Cir. 1980).

86. *NFIB*, 597 U.S. at 116 (quoting *In re* MCP No. 165, 20 F.4th 264, 276 (6th Cir. 2021) (Sutton, C.J., dissenting)).

87. *Id.* at 115.

88. *Id.* at 119.

89. *Id.*

90. *Id.*

several state workplace heat standards.[91] This design should satisfy the Court's admonition that OSHA only regulate to lessen a hazard when a "particular feature[]"—the temperature—of the workplace makes that hazard a "special danger" in a particular workplace.

e. Exposure to Workplace Heat Has an Immediately Measurable Causal Link to Heat-Related Workplace Injury

In its discussion of COVID-19 as a workplace hazard, the *NFIB* Court focused on the idea that COVID-19 was a risk present outside of work in everyday life, implying that it would be difficult to demonstrate that a particular case of COVID-19 could be attributed to the workplace.[92] While it seems obvious that there must be cases of workplace COVID-19 transmissions that resulted in deaths, the line of causation is blurry because of workers' potential for exposure outside of work hours and the incubation period of the virus.[93] Accurately determining the point of transmission as on or off the job in many cases is nearly impossible.

In this regard, regulating occupational heat exposure is entirely different from regulating the hazards posed by COVID-19. For one thing, OSHA has ample data from actual workplace reports of heat-related illnesses and deaths caused by excess temperatures.[94] Further, even if individual workers experience pre-work heat exposure off-the-clock that makes them more susceptible to the workplace heat illness to which they fall victim, occupational heat exposure is still a but-for cause of the illness because the danger acts cumulatively on the body.

f. An OSHA Heat Standard Would Primarily Regulate Employers at Employers' Own Expense, Not Individual Employees' Health Decisions at Employees' Expense

Though the Court focused most of its ire toward the ETS's vaccine-related requirements, it did note that the ETS also gave employers the option to permit employees to don a mask at work and test weekly for COVID-19. The Court was particularly troubled both that OSHA was

91. *See supra* Section III(A)(2).

92. *See NFIB*, 597 U.S. at 118–19.

93. OSHA's informal guidance (no longer in effect) implementing the ETS reveals the difficulty with which an employer would identify the work-relatedness of a COVID-19 illness or death:

> If the COVID-19 exposure event likely occurred within the employee's work environment, and the subsequent illness led to either death or in-patient hospitalization, reporting of this incident would be required. An employer is not required to report a fatality or hospitalization if the employer determines that exposure to COVID-19 clearly did not occur in the workplace. For example, if an employee had been on vacation when the case of COVID-19 was contracted, this would be an indication that this was not a workplace exposure event.

OSHA, OSHA 4129-06 2021, Emergency Temporary Standard, Reporting COVID-19 Fatalities and In-Patient Hospitalizations to OSHA (2021), https://www.osha.gov/sites/default/files/publications/OSHA4129.pdf (last visited Mar. 8, 2024).

94. OSHA, *supra* note 3.

regulating the behavior of eighty-four million Americans and by the fact that the mask-and-test option would permit employers to charge employees for weekly testing.[95]

In contrast to the ETS, an OSHA heat standard would likely regulate employers directly, rather than employees, and would do so at employers' expense rather than the employees'. Rather than imposing requirements on employees, the heat standard would likely focus on engineering and administrative controls that could only be implemented by regulated employers. Such regulation is, indeed, more common in OSHA's regulatory history. Further, employees would not bear the cost controls that would likely be required by a heat standard.

B. West Virginia v. EPA

In addition to its relevance as a Supreme Court case about OSHA's authority specifically, *NFIB* was an application of the Supreme Court's new major questions doctrine (MQD).[96] Months after *NFIB*'s implicit invocation of the MQD, the Supreme Court set out the doctrine in explicit terms in *West Virginia v. EPA*.[97] The MQD is a relatively new doctrine, incubated in the conservative legal academy, that limits[98] deference to an agency's interpretation of their statutory authority in cases where the agency seeks to regulate issues of great economic and political significance.[99] Although arguably the Court began applying it as early as 2000, the Supreme Court, for the first time in a majority opinion, explicitly invoked the MQD in *West Virginia v. EPA*.

In a change from the typical deference afforded to federal agencies, the *West Virginia* Court deployed the MQD to invalidate the EPA's Clean Power Plan, which was an Obama-era greenhouse gas regulation that relied on a rarely used section of the Clean Air Act. In reaching its conclusion, the majority sketched what is essentially a two-part MQD test.

The first question in a MQD analysis, according to the *West Virginia* Court, concerns whether the dispute at issue raises a "major question," which is assessed by examining (a) "the history and the breadth of the authority that [the agency] has asserted," and (b) the "economic and political significance of that assertion."[100] If a major question is at issue, the test requires a second inquiry: whether the agency has

95. *NFIB*, 597 U.S. at 113, 117.

96. Technically, the per curiam opinion did not use the words "major question"; however, Justice Gorsuch's concurrence did. *Id.* at 122 (Gorsuch, J., concurring). And the Court later acknowledged in *West Virginia v. EPA* that this was indeed a major questions case. *See* West Virginia v. EPA, 597 U.S. 697, 722–23 (2022).

97. *West Virginia*, 597 U.S. 697.

98. It arguably *eliminates* deference in such cases.

99. *See generally* Michael Sebring, *The Major Rules Doctrine*, GEO. J. L & PUB. POL'Y LEGAL BLOG (Sept. 17, 2018), https://www.law.georgetown.edu/public-policy-journal/blog/the-major-rules-doctrine [https://perma.cc/CD9S-TSXT].

100. *West Virginia*, 597 U.S. at 699 (internal citations omitted).

identified a "clear congressional authorization for the power it claims," which goes beyond "a merely plausible textual basis."[101]

1. MQD Step One: An OSHA Heat Standard Likely Would Not Trigger MQD Analysis

At step one of MQD analysis, a court would evaluate whether and how the agency previously used the claimed statutory authority and whether Congress had acted or refused to act to implement similar regulatory schemes. Additionally, it would consider the economic and political significance of the agency's assertion of regulatory authority.

a. An OSHA Heat Standard Would Be in Line with Prior Agency Action in Terms of its Breadth

In contrast to the *West Virginia* case, where the Court considered the EPA's regulatory scheme to be a novel use of a previously little-used statutory provision, an OSHA heat standard would be very much in line with existing workplace safety and health standards promulgated under the OSH Act.

As described above,[102] OSHA has issued workplace safety and health standards since its inception, most of which share commonalities with the modes of regulation present in NIOSH's recommended standards and state standards (which, again, will likely serve as the basis for a potential OSHA heat standard). A threshold exposure-level-based standard, prescribing engineering, administrative, PPE, and training controls, among others, is a familiar tool in OSHA's belt, as the description of OSHA's lead and asbestos standards above demonstrates.[103] This mode of regulation has firm footing in OSHA's history.

The statutory provision upon which an OSHA heat standard would rest is also not at all, in the words of the *West Virginia* Court, a "previously little-used backwater."[104] Rather, OSHA has issued workplace safety and health standards under 29 U.S.C. §§ 654 and 655 repeatedly. Indeed, standards issued under this section are OSHA's most common mode of regulation, and OSHA's enforcement program is heavily focused on violations of these standards.[105]

Congressional action on the subject also indicates that OSHA possesses this authority. In *West Virginia*, the Court noted that Congress had repeatedly voted down efforts to create by legislation regulatory schemes similar to the Clean Power Plan, which suggested

101. *Id*. at 723 (internal citations omitted).
102. *See supra* Section III(A)(2).
103. *Id.*
104. *West Virginia*, 597 U.S. at 730.
105. Matt Scherer, Ctr. For Democracy & Tech., Warning: Bossware May Be Hazardous to Your Health 16 (2021), https://cdt.org/wp-content/uploads/2021/07/2021-07-29-Warning-Bossware-May-Be-Hazardous-To-Your-Health-Final.pdf [https://perma.cc/N59Z-PLYM].

that Congress believed that EPA may not already have such authority.[106] In contrast, as described above, congressional action has, in fact, bolstered OSHA's authority to issue a heat standard. For example, in 2021, several members of Congress wrote a letter to the Secretary of Labor specifically requesting that OSHA issue a heat standard.[107] In 2023, Representatives and Senators introduced legislation to require OSHA to issue such a standard "on a much faster track than the normal OSHA regulatory process."[108] That Congress focused on compelling OSHA to issue a standard quickly, rather than purporting to bestow new authority on the agency to address the hazard or legislating one independently, shows that OSHA was presumed to have this authority.

b. An OSHA Heat Standard Likely Would Not Be Politically and Economically Significant

In *West Virginia*, the Court invalidated what it considered to be central planning for the country's energy sector and criticized the EPA for assuming that Congress meant to assign to the agency the "decision of how much coal-based [power] generation there should be over the coming decades."[109] The EPA's action, the Court explained, purported to settle a national policy debate, the "basic and consequential tradeoffs" of which are ones that Congress would likely have intended to keep to itself.[110] In *NFIB*, the Court struck down OSHA's vaccine-or-test mandate, noting the fact that the vaccine-or-test ETS would have placed requirements on eighty-four million American workers.[111] In another pre-*West Virginia* MQD case, the Supreme Court struck down the Centers for Disease Control and Prevention's (CDC) eviction moratorium.[112] In its decision to apply the MQD, the Court noted the economic and political significance of the fact that the eviction moratorium applied to "all residential properties."[113]

An OSHA heat standard would probably not have the political and economic significance required to trigger MQD because its likely design would limit and tailor its application. If the standard is based on the NIOSH recommendations and the existing state-level standards, it will only apply to workplaces in which the temperature reaches

106. *West Virginia*, 597 U.S. at 731–32.

107. Press Release, H. Comm. on Educ. & Lab., Rep. Scott and Colleagues Urge OSHA to Adopt Federal Heat Standards (Aug. 6, 2021), https://bobbyscott.house.gov/media-center/press-releases/scott-and-colleagues-urge-osha-adopt-federal-heat-standards [https://perma.cc/6RS2-JB49].

108. Adiel Kaplan, *Congressional Democrats Move to Ramp up Heat Safety Protections for Workers*, NBCNews (July 27, 2023), https://www.nbcnews.com/politics/politics-news/democrats-move-ramp-heat-safety-protections-workers-rcna96075 [https://perma.cc/22F3-RRWR].

109. *West Virginia*, 597 U.S. at 701.

110. *Id.* at 730.

111. NFIB v. OSHA, 597 U.S. 109, 117 (2022) (per curiam).

112. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

113. *Id.* at 2486–87.

or exceeds a specific threshold. In the COVID-19 ETS, on the other hand, OSHA had declined to make distinctions between workplaces, the "particular features" of which, created greater or lesser risks of contracting COVID-19. Similarly, the CDC's eviction moratorium did not make distinctions among residential properties based on COVID-19 risk. The heat standard's likely design, then, would result in the number of workplaces affected likely being far smaller than that of those impacted by the vaccine-or-test mandate. With fewer workplaces affected, the impact would not be economically significant enough to trigger MQD analysis.

A heat standard would also not be politically significant enough to trigger MQD analysis. At the time of the COVID-19 ETS's and the CDC's eviction moratorium's promulgations, there was a fierce public debate about the efficacy and ethics of imposing COVID-19 protections on individuals. A debate around workplace heat safety certainly exists, but there is no question that this debate is orders-of-magnitude less significant in the "national policy debate" than was the debate about COVID-19. Critics may charge that heat is related to climate change—a significant national policy debate, to be sure. However, this potential regulation does not purport to address climate change as an overall phenomenon. Rather, it would address but one effect of climate change in a particular set of circumstances. Additionally, workplace heat has been a hazard to workers' safety and health since far before climate science confirmed the existence of climate change.

2. MQD Step Two: There Is "Clear Congressional Authorization" for an OSHA Heat Standard

If, for whatever reason, a court decided that an OSHA heat standard did pose a "major question," OSHA would have a sound argument defending the standard at step two of the MQD analysis. At step two of MQD analysis, the *West Virginia* Court demanded that any regulation it deemed a "major question" be supported by a "clear congressional authorization."[114] Such an authorization, the Court clarified, must be "more than a merely plausible textual basis for the agency action.[115] Clear congressional authorization for a workplace safety standard on heat exists.

a. An OSHA Heat Standard Would Be a Workplace Safety Standard, as Defined in the OSH Act, Not a Broad Public Health Measure

The OSH Act mandates that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated" under the Act.[116] The OSH Act was enacted, in part, to "authoriz[e] the Secretary

114. *West Virginia*, 597 U.S. at 723.
115. *Id.*
116. 29 U.S.C. § 654(a).

of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce."[117] In *NFIB*, the Court interpreted these statutory mandates to mean that the OSH Act empowers OSHA to set "*workplace* safety standards, not broad public health measures."[118]

As described above, an OSHA standard on heat-related hazards in the workplace would be precisely the type of occupational safety and health standard that is well within the definition laid out in statutory text and reiterated by the Supreme Court. Unlike the COVID-19 ETS, an OSHA heat standard would primarily consist of workplace controls that could be "undone at the end of the workday."[119] It would only apply to a workplace where "particular features" (i.e., high temperature) make heat a "special danger."[120] OSHA's regulatory history[121] also demonstrates how a heat standard would fall precisely within the meaning of an "occupational safety and health standard[]," as permitted by the OSH Act.

Conclusion

Heat exposure in the workplace is a threat to American workers. Recent Supreme Court decisions in *NFIB v. OSHA* and *West Virginia v. EPA* should not slow OSHA's regulatory process on occupational heat. This article explained why the analysis underlying the Court's invalidation of OSHA's vaccine-or-test ETS is inapplicable to workplace heat and why a heat standard should not trigger the Court's new MQD. Issuing a permanent workplace safety and health standard against excessive workplace heat is well within OSHA's regulatory authority.

117. *Id.* § 651(b).
118. *NFIB*, 597 U.S. at 117.
119. *See supra* Section III(A)(2)(b).
120. *See supra* Section III(A)(2)(c).
121. *See supra* Section III(A)(2)(a).