

Complete Win in Vaccine Mandate Cases Short Just One Vote

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It was High Noon on Jan 7 in the U.S. Supreme Court, when it held an extraordinary special session for oral argument on the consolidated vaccine mandate cases before it. One pair of the cases concerned the Biden Administration's new regulation, through the Occupational Safety and Health Administration (OSHA), to impose a vaccinate-or-test mandate on every employee of employers having at least 100 employees. The other pair of cases concerned the new vaccine mandate by the Centers for Medicare & Medicaid Services (CMS), with medical and religious exemptions, against workers at Medicare- or Medicaid-funded facilities.

All the Justices donned masks for the argument except Justice Neil Gorsuch, while Justice Sonia Sotomayor did not attend in person but called in remotely. All the Justices have announced they are fully vaccinated against COVID-19, including the booster shot, and on top of that all are tested regularly. Two of the advocates at oral argument had contracted COVID-19 anyway, and they argued remotely by phone.

Subsequent to the argument the mainly taxpayer-funded National Public Radio (NPR) ran an unusual report asserting that Justice Gorsuch had rebuffed a request made by Justice Sotomayor, who ordinarily sits next to him during oral argument, to wear a mask. Within only one day the Supreme Court issued a nearly unprecedented statement declaring the NPR story to be untrue, and thus fake news.¹ The Court's quick response demonstrated how sensitive it is to media reports. Should it really feel compelled to rebut fake news? Chief Justice John Roberts subsequently even issued his own statement disavowing that he had asked Justice Gorsuch to wear a mask. It is disconcerting that the Court takes the media so seriously, rather than viewing it with disdain as a mere sideshow, which is all that the media should be.

During questioning at the high-profile oral arguments, Justice Samuel Alito unhappily implied, in a very serious tone, that he even expected his questions to be misconstrued by the media. The good news is that the Court's decisions in these cases, though not entirely on the side of freedom, tend to weaken the grip by the public health authorities and media over the mandatory vaccination issue.

Background

On Sept 9, 2021, President Biden announced "a new plan to require more Americans to be vaccinated."² Biden declared that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week."² His stated, but perhaps pretextual, goal was to enforce "vaccine requirements" against "about 100 million Americans, two-thirds of all workers."²

Roughly two months later, Secretary of Labor Martin J. Walsh imposed the department's burdensome new requirement as an emergency standard, applying it to all employers having

at least 100 employees.³ Exceptions were narrow: employees who work remotely "100 percent of the time" or who "work exclusively outdoors."³ But as the 6-3 Court majority explained, the exemptions were illusory:

The Secretary has estimated, for example, that only nine percent of landscapers and groundskeepers qualify as working exclusively outside.... The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID-19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers. OSHA estimates that 84.2 million employees are subject to its mandate [internal citations omitted].⁴

The Supreme Court also emphasized the sweeping burdens and enormous penalties of this new rule:

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

Meanwhile, amid plummeting Biden poll numbers in late 2021, as one of the States' briefs pointed out, CMS, which is within the Department of Health and Human Services (HHS), promulgated an unprecedented new rule requiring that medical facilities nationwide order their employees, volunteers, contractors, and other workers to receive a COVID-19 vaccine. "Covered employers must fire noncompliant workers or risk fines and termination of their Medicare and Medicaid provider agreements. As a result, the Government has effectively mandated vaccination for 10 million healthcare workers," observed Justice Clarence Thomas in dissent.⁵

CMS had already imposed regulations, known as the Conditions of Participation, Conditions for Coverage, or Requirements for Participation, for 21 types of facilities and suppliers, including hospitals, hospices, rural health clinics, and long-term care facilities such as multiple types of nursing homes. CMS imposed a COVID-19 vaccine mandate, without an exception for those who test regularly, against all these entities:

- Ambulatory Surgical Centers (ASCs) (§ 416.51)
- Hospices (§ 418.60)
- Psychiatric residential treatment facilities (PRTFs) (§ 441.151)
- Programs of All-Inclusive Care for the Elderly (PACE) (§ 460.74)

- Hospitals (acute care hospitals, psychiatric hospitals, hospital swing beds, long-term care hospitals, children's hospitals, transplant centers, cancer hospitals, and rehabilitation hospitals/inpatient rehabilitation facilities) (§ 482.42)
- Long-Term Care (LTC) Facilities, including Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs), generally referred to as nursing homes (§ 483.80)
- Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID) (§ 483.430)
- Home Health Agencies (HHAs) (§ 484.70)
- Comprehensive Outpatient Rehabilitation Facilities (CORFs) (§§ 485.58 and 485.70)
- Critical Access Hospitals (CAHs) (§ 485.640)
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services (§ 485.725)
- Community Mental Health Centers (CMHCs) (§ 485.904)
- Home Infusion Therapy (HIT) suppliers (§ 486.525)
- Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs) (§ 491.8)
- End-Stage Renal Disease (ESRD) Facilities (§ 494.30)

The CMS vaccine mandate applies only to the Medicare- and Medicaid-certified entities and suppliers listed above. This vaccine mandate does **not** directly apply to other health care entities, such as physician offices, which are not regulated by CMS.⁶

In its regulation, CMS acknowledged that “[m]ost states have separate licensing requirements for health care staff and health care providers that would be applicable to physician office staff and other staff in small health care entities that are not subject to vaccination requirements under this” vaccine mandate.⁶ But CMS added that “entities not covered by this rule may still be subject to other State or Federal COVID-19 vaccination requirements, such as those issued by Occupational Safety and Health Administration (OSHA) for certain employers.”⁶

The CMS vaccine mandate was promulgated as an “interim final rule” (IFR) that did not allow for consideration of comments from the public or from physicians prior to its adoption. Instead, CMS dogmatically made statements like this: “CDC recommends that all people be vaccinated, regardless of their history of symptomatic or asymptomatic SARS-CoV-2 infection.”^{6, p 61560}

CMS only occasionally mentioned in its regulation the Vaccine Adverse Event Reporting System (VAERS), and referred to it merely to describe how it captures and records information about adverse reactions to vaccines. No mention was made by CMS in its new regulation about what, if anything, the government is doing to investigate the astronomical, unprecedented numbers of adverse reactions that have been reported to VAERS after people have received a COVID-19 vaccine. CMS stated:

The safety of the approved and authorized COVID-19 vaccines is closely monitored. VAERS is a safety and monitoring system that can be used by anyone to report adverse events after vaccines. For COVID-19 vaccines, vaccination providers and licensed and authorized vaccine manufacturers must report select adverse events to VAERS following receipt of COVID-19 vaccines (including serious adverse events, cases of multisystem inflammatory syndrome (MIS), and COVID-19 cases that result in hospitalization or death). Providers also must adhere to any revised safety reporting requirements. FDA’s website includes letters of authorization and fact

sheets and these documents should be checked for any updates that may occur. Other adverse events following vaccination may also be reported to VAERS. Additionally, adverse events are also monitored through electronic health record- and claims-based systems (through CDC’s Vaccine Safety Datalink and FDA’s Biologics Effectiveness and Safety System (BEST)).

FDA is closely monitoring the safety of the COVID-19 vaccines both authorized for emergency use and licensed use. Vaccination providers are responsible for mandatory reporting to VAERS of certain adverse events as listed on the Health Care Provider Fact Sheets for the authorized COVID-19 vaccines and for Comirnaty.^{6, p 61564}

But none of the above reflects any genuine investigation of the data gathered by VAERS about adverse effects.

Merely one paragraph in the massive IFR document by CMS actually addresses adverse effects in any substantive way, and even then merely in a superficial manner:

Vaccine safety is critically important for all vaccination programs. Side effects following vaccinations often include swelling, redness, and pain at the injection site; flu-like symptoms; headache; and nausea; all typically of short duration. Serious adverse reactions also have been reported following COVID-19 vaccines; however, they are rare. For example, it is estimated that anaphylaxis following the mRNA COVID-19 vaccines occurs in 2–5 individuals per million vaccinated (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html>). For these individuals, another shot of an mRNA COVID-19 vaccine is not recommended, and they should discuss receiving a different type of COVID-19 vaccine with their health care practitioner. Other rare serious adverse reactions that have been reported to occur following COVID-19 vaccines include thrombosis with thrombocytopenia syndrome (TTS) following the Janssen COVID-19 vaccine and myocarditis and/or pericarditis following the mRNA COVID-19 vaccines (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html>). In the face of the COVID-19 pandemic, global researchers were able to build upon decades of vaccine development, research, and use to produce safe vaccines that have been highly effective in protecting individuals from COVID-19. From December 14, 2020, through October 12, 2021, over 403 million doses of COVID-19 vaccine have been administered in the U.S. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html>. “CDC recommends everyone 12 years and older get vaccinated as soon as possible to help protect against COVID-19 and the related, potentially severe complications that can occur.” They state that the “potential benefits of COVID-19 vaccination outweigh the known and potential risks, including the possible risk of myocarditis or pericarditis.”^{6, pp 61564-61565}

In its entire 64,000-word Interim Final Rule, CMS mentioned “VAERS” only seven (7) times. Each of those references merely indicated that it exists, without adequately addressing or even mentioning the more than 1 million adverse reactions that have already been reported to it, which is more than double the adverse reactions ever reported for all other vaccines combined. CMS made no mention of the more than 21,000 deaths that have occurred after receipt of the COVID-19 vaccine,

only a few of which have been publicized in the news. Nor does CMS mention the young athletes who have reportedly had unexpected heart problems after receipt of the vaccine.

Both the employer and the CMS mandates were immediately challenged in court, with numerous States forming coalitions to lead the way. Several lower courts promptly enjoined both rules, and they quickly made their way to the U.S. Supreme Court on an emergency basis. Two federal district courts blocked the CMS rule, as requested by 25 States, while the U.S. Court of Appeals for the Fifth Circuit enjoined the employer mandate. But then the U.S. Court of Appeals for the Sixth Circuit, in which the employer mandate cases were consolidated pursuant to a rarely used statute, reinstated the employer mandate, and it was scheduled to take effect the next business day after oral argument in the U.S. Supreme Court. So, the drama was heightened in Washington, D.C., on Jan 7.

Procedurally at issue before the Supreme Court was whether a stay should block enforcement of these rules pending full adjudication on the merits. But as a practical matter the blocking or allowing of the enforcement of these rules was the whole ballgame, because once a new regulation is enforced it becomes very difficult to turn back the clock to the freedom that existed beforehand. Once freedom is lost, some unfortunately do not find it compelling to restore it.

Accordingly, all eyes were on the Supreme Court on an expedited schedule that called for oral argument within less than a month of the petition for review, a brief period that spanned the end-of-year holidays. Indeed, observers pointed out that the Supreme Court had scheduled oral argument in this odd procedural posture only once before, and that was a half-century ago. So, historical precedent was being set not only on the substance, but also procedurally in how the Supreme Court turned away from all the other issues before it in order to address the illegality of Biden's vaccine mandates.

Amicus Briefs

Amicus curiae briefs poured into the docket on the employer-mandate cases, despite the Christmas and New Year's holiday. Only a few amicus briefs were filed on the CMS mandate. One of those briefs was filed by the American Medical Association and affiliated groups, while various self-described public health authorities filed another. Their theme was similar: both insisted that "the science is clear," and thus vaccine mandates must be supported. Independent data on worldometers.info show that the vaccine approach in the U.S. has not resulted in any better handling of COVID-19 than in other countries that have not pursued a vaccine-mandate approach. Indeed, with the vaccine approach the U.S. ranks among the 10 worst large countries in COVID-19 mortality, despite being the wealthiest and supposedly having by far the finest hospital system.

Our Amicus Brief

Though time was short and it was over the holidays, this author filed an amicus brief, beginning with the following:

The Covid vaccine strategy is a colossal failure. Despite a year of vaccination in the United States, more than in many other nations, the United States has incurred by far the highest number of Covid cases in the world. Second-place India, which has four times our population, has had only about 60% as many cases

of Covid as the United States. In terms of deaths from Covid, the United States has the most in the world, seven times the mortality rate in India.⁷

Yet there has been no political accountability for the public health authorities who caused this disaster. The brief continues:

But rather than be held accountable for their failed approach, agency officials insist on more of what has failed. Mandating more of a failure hardly makes "common sense," as argued by the Biden Administration.⁸ The federal government's approach to Covid has always assumed, without evidence, that a vaccine approach would end or dramatically reduce the pandemic. Yet its vaccine strategy has never made any sense and is the result of circular reasoning by a few agency officials who insisted on imposing vaccines no matter what the evidence shows. The amicus brief submitted by the American Medical Association, et al., illustrates the fallacious logic, by repeatedly assuming what the evidence does not support: "[t]he only way to truly end this pandemic is to ensure widespread vaccination."⁹

Both the Public Health and AMA briefs prominently use the same phrase: "the science is clear."^{9, p 10, 15} The Public Health brief repeats its assertion of "clear" five times in its brief in reference to science, evidence, or a pandemic, even resorting once to the phrase "abundantly clear."^{10, pp 1, 2, 18} While promoting mandatory vaccination, the government official Dr. Anthony Fauci declared that "I represent science," and then insisted that his critics are somehow opposed to science.¹¹ But science does not fail as the Covid vaccines have, and it is not "settled science" to forcibly impose a controversial vaccine on knowledgeable health care workers who rationally decline.

The argument section continued with the following:

Vaccines are not a successful approach to every pandemic, as the AIDS crisis demonstrated 35 years ago. Likewise, the so-called Spanish flu of 1918 was not overcome by a vaccine. Yet a handful of unaccountable federal agency workers adopted a pro-vaccine strategy back in early 2020 amid their own conflicts of interest, before any evidence was available, and have doubled-down on their approach ever since despite numerous indications that it is a failure.¹²

Notably missing from the many filings to this Court in support of the vaccine mandate is any discussion of the Vaccine Adverse Event Reporting System (VAERS), which is federally posted government data showing that "the total number of deaths associated with the COVID-19 vaccines **is more than double the number of deaths associated with all other vaccines combined** since the year 1990."¹³ This is official data, and an admission by the same entity that seeks to force millions of Americans to receive these same Covid vaccines. These data show to date that the number of reported adverse reactions from these Covid vaccines is 983,758; the number of hospitalizations is 108,572; and the number of deaths is 20,622.¹³ British researchers analyzed the VAERS data and published a report in June 2021 confirming the reliability of this data, "[c]ontrary to claims" of unreliability.¹⁴

Although the FDA itself has expressly relied on VAERS data [as in its analysis of Guillain-Barré syndrome

following COVID-19 vaccination]¹⁵ and 475 reported federal court decisions have expressly cited to VAERS, the federal government's briefs to this Court fail to address it. Ignoring this harm by the vaccine does not make it go away. There is no meaningful analysis of the harms compared with purported benefits of the Covid vaccine, in the briefs filed in support of the mandate. VAERS reports are merely a fraction of overall injuries because many do not bother to file a report. The more than 20,000 deaths reported to VAERS after the Covid vaccine may be only a small fraction of the actual number.

The AMA's brief details at length harm caused by Covid, but then concludes in a non sequitur that "[r]equiring healthcare facility staff to be vaccinated is therefore a crucial step toward protecting healthcare staff and patients from COVID-19."⁹ P¹⁰ While footnotes are throughout the AMA's brief supporting statements that demonstrate how completely the governmental strategy has failed so far, there is insufficient support for the AMA's assertions that mandatory vaccination will help. Indeed, already most health care providers are vaccinated, and yet Covid cases surge. Causing the unvaccinated workers to quit or be vaccinated can hardly be expected to make a dent in the worst-in-the-world Covid rates in the United States.

Other countries that have fared far better against Covid than the United States are doing so by making medications available over-the-counter for early treatment, such as hydroxychloroquine and ivermectin. Anyone can readily purchase ivermectin at local retail stores in the formerly communist Vietnam without a prescription or being retaliated against by the pro-vaccine public health authorities. Natural immunity and early treatment, rather than a misplaced hope in vaccination, are how countries less wealthy than the United States have overcome the Covid pandemic. Vietnam has only 333 Covid deaths per million in population, while the United States has eight times as many deaths per million: 2,538, as reported by the independent worldometers site.⁷

In *Jacobson v. Massachusetts*, the divided Court upheld a law by a state, not the federal government, which merely imposed a small fine on those who declined to be vaccinated. 197 U.S. 11 (1905). Since then, this Court has vastly expanded individual liberties, while *Jacobson* became the basis for the inhumane utilitarian mandatory sterilization decision by the Supreme Court in *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.") (citing *Jacobson*).

The entire American public cannot be compelled to be vaccinated, and many tens of millions of Americans will never submit voluntarily to a Covid vaccine. A partial vaccination approach that harshly penalizes a few million people by firing them for not being vaccinated is punitive and doomed to failure, as the past year has shown. The CDC admits that only about 62% of Americans have been fully vaccinated for Covid,¹⁶ and adding a few million here or there will do nothing to curb the virus. It will, however, cause irreparable harm in other ways, such as reducing access to medical care

in rural communities as thoroughly shown by Missouri's and Louisiana's briefs.

The brief concludes by urging the Supreme Court to rule in favor of the States and against the CMS vaccine mandate, by allowing the stay granted by the district courts against the CMS vaccine mandate to remain in place.

Oral Argument

The oral argument lasted nearly twice as long as scheduled. The audio, but not the video, was broadcast live. The media then predictably pounced on some of the questions asked.

The opening argument made by Scott Keller as the counsel for the Petitioner National Federation of Independent Business (NFIB) was follows:

OSHA's economy-wide one-size-fits-all mandate covering 84 million Americans is not a necessary, indispensable use of OSHA's extraordinary emergency power which this Court has recognized is narrowly circumscribed.

Just three days ago, the U.S. Postal Service told OSHA that this ETS's requirements are so burdensome for employers that the federal government is now seeking an exemption from its own mandate for the Postal Service. That's because OSHA's economy-wide mandate would cause permanent worker displacement rippling through our national economy, which is already experiencing labor shortages and fragile supply lines.

OSHA has never before mandated vaccines or widespread testing, much less across all industries. In fact, the June healthcare COVID ETS and the 1991 bloodborne pathogen rule both rejected vaccine mandates and widespread testing, and those were even just for targeting healthcare workers.

And, here, OSHA's vaccine-and-testing mandate treats virtually all industries' workplaces and workers the same. But even Congress's rescue plan identified high-risk workplaces, and OSHA itself here recited state data confirming that certain industries, like healthcare and correction facilities, are higher risk.

Our nation's businesses have distributed and administered hundreds of millions of COVID vaccines to Americans. Businesses have encouraged and incentivized their employees to get vaccines. But a single federal agency tasked with occupational standards cannot commandeer businesses economy-wide into becoming de facto public health agencies.

So, this Court should immediately stay OSHA's unprecedented ETS before Monday, when OSHA begins enforcement.¹⁷

Justice Elena Kagan weighed in early during the question-and-answer period, showing that the Left side of the Court was going to strongly favor Biden's employer mandate:

This is a pandemic in which nearly a million people have died. It is by far the greatest public health danger that this country has faced in the last century. More and more people are dying every day. More and more people are getting sick every day. I don't mean to be dramatic here. I'm just sort of stating facts.

And this is the policy that is most geared to stopping all this. There's nothing else that will perform that function better than incentivizing people strongly to

vaccinate themselves...

We all know what the best policy is. I mean, by this point, two years later, we know that the best way to prevent spread is for people to get vaccinated and to prevent dangerous illness and death is for people to get vaccinated. That is by far the best.¹⁷

Unfortunately, there was no rebuttal by anyone at oral argument of the assertion by the vaccine-mandate supporters that a vaccine is “by far the best” approach to the COVID-19 issue. The advocates against the mandate said less in rebuttal of this point than the conservative Justices Thomas and Alito said about it! Advocacy is not strong when it is weaker than what several justices themselves say from the bench.

What was said by those justices in casting doubt on the vaccine approach was immediately criticized by liberals in the media. Justice Thomas said: “I’m curious. This probably doesn’t go to the disposition of this matter, but is a vaccine the only way to treat COVID?”¹⁷ Justice Thomas’s question appeared to be rhetorical, with the correct answer obviously being an emphatic NO. It is further noteworthy that Justice Thomas referred to the vaccine as a “treatment.” Liberal trolls on the internet went to work with misplaced criticism of Justice Thomas for merely questioning the sacred cow of vaccination.

The Solicitor General, arguing in response on behalf of Biden, said about the vaccine approach:

It is certainly the single most effective way to target all of the hazards OSHA identified, both the—the chances of contracting the virus in the first place, the risk of infecting other workers on the worksite, and with respect to the negative health consequences, that vaccination provides protection on all of those fronts.¹⁷

Notice her use of “certainly,” as though there cannot be any doubt about this issue. “Certainly” better than hydroxychloroquine and ivermectin? Not certainly better, and possibly not better at all.

Justice Alito incurred the wrath of unjustified internet criticism when he said:

All right. So it’s different in that respect. And here’s another respect in which it may be different. And I don’t want to be misunderstood in making this point because I’m not saying the vaccines are unsafe. The FDA has approved them. It’s found that they’re safe. It’s said that the benefits greatly outweigh the risks. I’m not contesting that in any way. I don’t want to be misunderstood. I’m sure I will be misunderstood. I just want to emphasize I’m not making that point.

But is it not the case that this—these vaccines and every other vaccine of which I’m aware and many other medications have benefits and they also have risks and that some people who are vaccinated and some people who take medication that is highly beneficial will suffer adverse consequences? Is that not true of these vaccines? And if that is—is that true?

The dialogue continued, with Solicitor General Elizabeth Prelogar conceding “that can be true, but, of course, there is far, far greater risk from being...unvaccinated...by orders of magnitude.”

Justice Alito responded: “Right. There is some risk, do you dispute that?”

Solicitor General Prelogar admitted only that “there can be a very minimal risk with respect to some individuals,” emphasizing that “there would be no basis to think that these FDA-approved

and authorized vaccines are not safe and effective. They are the single-most effective.”

Justice Alito again forcibly stated: “I’m not making that point. I tried to make it as clear as I could. I’m not making that point. I’m not making that point. I’m not making that point.” But he pursued the issue: “There is a risk, right? Has...OSHA ever imposed any other safety regulation that imposes some extra risk, some different risk, on the employee, so that if you have to wear a hard hat on the job, wearing a hard hat has some adverse health consequences? Can you think of anything else that’s like this?”

The solicitor general could not think of a specific example but said: “I think that to suggest that OSHA is precluded from using the most common, routine, safe, effective, proven strategy to fight an infectious disease at work would be a departure from how this statute should be understood.”¹⁷

Shockingly, the solicitor general referred to the COVID-19 vaccine, which has more than 1 million adverse reaction events reported concerning it in the official government database VAERS, as “the most common, routine, safe, effective, proven strategy to fight an infectious disease at work.” And no one challenged that characterization of the vaccine. Indeed, VAERS was never mentioned in any way in more than three-and-a-half hours of oral argument in these cases, not even once.

Notably, neither the Court nor mandate opponents challenged the assertion that the vaccines were FDA approved. As of Jan 7, only the Comirnaty™-branded formulation, which is currently unavailable in the U.S., had approval. All COVID-19 vaccines were being administered under an Emergency Use Authorization (EUA), which requires informed consent.

Supreme Court Decisions

Six days after oral argument, the Supreme Court rendered its two decisions, one against the employer vaccine mandate, and the other in favor of the CMS vaccine mandate. The decision against the employer vaccinate-or-test mandate was by a 6–3 margin, while the decision upholding the CMS vaccine was by a narrower 5–4 vote. The two justices who switched sides between the cases were Chief Justice John Roberts and Justice Brett Kavanaugh.

Employer Mandate Cases

The Supreme Court blocked Biden’s employer mandate. In the form of a strong, though unsigned, per curiam decision by six Justices, the Court stayed enforcement of the employer vaccinate-or-test mandate for all employers having at least 100 employees. The Supreme Court held:

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. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.^{4, p*11}

Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett, and the Chief Justice Roberts all joined this decision, which effectively ends Biden’s approach of co-opting the workplace by forcing

Americans to vaccinate or frequently test.

"Who decides?" was the refrain that prevailed for three justices against the Biden mandate, emphasizing that while the Supreme Court was not going to make medical decisions, it should decide which part of government has the power to impose such a broad mandate. Justice Gorsuch wrote a concurrence, which was joined by Justices Thomas and Alito. Justice Gorsuch began with this:

The central question we face today is: Who decides? No one doubts that the COVID-19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.^{4, pp *12-13}

Justice Gorsuch then embarked on a discussion of "major questions doctrine," which means that issues of immense significance are not to be decided by federal agencies unless Congress so authorizes. "We expect Congress to speak clearly if it wishes to assign to an executive agency decisions 'of vast economic and political significance.'"^{4, pp *13-14} Congress has not spoken clearly to give the Biden Administration vast powers to order 84 million Americans to be vaccinated. In fact, the Senate has voted 52–48 to reject Biden's employer mandate, thereby confirming that Congress disapproves rather than approves the employer mandate. (There was no vote on this issue in the Democrat-controlled House of Representatives.)

As Justice Gorsuch explained further:

The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. E.g. *Kin v. Burwell*, 576 U. S. 473, 485–486, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015). Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority." *United States Telecom Assn v. FCC*, 855 F.3d 381, 417, 428 U.S. App. D.C. 439 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also N. Richardson, Keeping Big Cases From Making Bad Law: The Resurgent Major Questions Doctrine, 49 Conn. L. Rev. 355, 359 (2016).

Whichever the doctrine, the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." A. Scalia, A Note

on the Benzene Case, American Enterprise Institute, *J. on Govt. & Soc.*, July-Aug. 1980, p. 27. And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no "specific restrictions" that "meaningfully constrain[n]" the agency. *Touby v. United States*, 500 U. S. 160, 166–167, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991). OSHA would become little more than a "roving commission to inquire into evils and upon discovery correct them." *A. L. A. Schechter Poultry Corp v. United States*, 295 U. S. 495, 551, 55 S. Ct. 837, 79 L. Ed. 1570 (1935) (Cardozo, J., concurring). Either way, the point is the same one Chief Justice Marshall made in 1825: There are some "important subjects, which must be entirely regulated by the legislature itself," and others "of less interest, in which a general provision may be made, and power given to [others] to fill up the details." *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 43, 6 L. Ed. 253 (1825). And on no one's account does this mandate qualify as some "detail."^{4, pp *18-20}

"Major questions doctrine" thereby reinforced how unconstitutional the Biden employer mandate really is: Congress did not hide an "elephant" (vast power for an agency to impose a broad employer mandate) in a "mousehole" of an obscure old OSHA statute.

Three Justices were quite unhappy about this injunction against the Biden employer mandate. Predictably, their dissent went on for nearly 4,000 words expressing dismay, even outrage, that the Court would block the employer mandate in the middle of what these dissenters called "a still-raging pandemic."^{4, p *39} Co-signed by all three Democrat-appointed justices on the Court—Breyer, Sotomayor, and Kagan—the dissent ends with a flourish:

As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.^{4, p *39}

The dissenters' introductory passage was just as strong, relying on statistics that are higher than what the independent worldometers.info reports and without citing any of the VAERS data about many vaccine-caused injuries:

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

transformed.^{4, pp *20-21}

As of Jan 19, the worldometers.info website reports that about 880,000 Americans have died from COVID-19,⁷ but some of those were vaccinated, and the vaccine deaths reported in VAERS exceed 20,000. The Court made no mention of adverse reactions to the vaccine, even though no one can deny that some harm exists.

The gravamen of the dissent was that the Court should defer to the “experts,” a word the dissenters repeated along with “expertise” eight times. For example, the dissenters stated that “OSHA employs, in both its enforcement and health divisions, numerous scientists, doctors, and other experts in public health, especially as it relates to work environments.”^{4, p *27} Indeed, Justices Sotomayor and Kagan mentioned “expert” or “expertise” nine times during oral argument, in advancing their view that the Court should defer to the federal agency.

The deference here is to a few life-long bureaucrats, viewed by many as having too much power and as having not been forthright with the American public. The lack of any real effort by the vaccine promoters to address the VAERS issue is alarming, and hardly inspires confidence in their recommendations.

CMS Mandate Cases

Declaring that CMS is presumed to have general authority to “require hospital employees to wear gloves, sterilize instruments, wash their hands in a certain way and at certain intervals,” a 5–4 Court majority upheld the COVID-19 vaccine mandate as more of the same type of ordinary regulation, despite how different the vaccine requirement is from merely wearing gloves.^{5, p *8} “Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control. But he has never had to address an infection problem of this scale and scope before. In any event, there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what he does,” the Court majority added.^{5, p *8} This opinion was unsigned (“per curiam”), and joined by Chief Justice Roberts and Justices Breyer, Sotomayor, Kagan, and Kavanaugh.

The 5–4 majority reinforced its decision by ruling 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. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have.”^{5, p *12} Surprisingly little content was in the majority decision, totaling only about 2,500 words and shorter than the combined concise dissents. There is, in fact, very little statutory or other basis for CMS to impose its vaccine mandate on medical professionals as it has done.

The Court, by only a one-vote margin, upheld this interference with the practice of medicine by rejecting the claim that it violates a ban in the Medicare statute, which AAPS has long cited:

Lastly, the rule does not run afoul of the directive in §1395 that federal officials may not “exercise any supervision or control over the...manner in which medical services are provided, or over the selection [or] tenure...of any officer or employee of” any facility. That reading of section 1395 would mean that nearly every condition of participation the Secretary has long insisted upon is unlawful.^{5, p *12}

Fortunately, the dissents were strong against allowing the CMS vaccine mandates to be enforced. Justices Thomas and Alito wrote separate dissents which were fully joined by all the other dissenting justices. Separate compelling arguments were made by these dissents.

Notably, Justice Alito referred to the Covid vaccine as an “irreversible medical treatment,” which is exactly what it is, and complained about how the Biden Administration bypassed the typical procedure of notice-and-comment rulemaking to impose its mandate:

Today’s decision will ripple through administrative agencies’ future decisionmaking. The Executive Branch already touches nearly every aspect of Americans’ lives. In concluding that CMS had good cause to avoid notice-and-comment rulemaking, the Court shifts the presumption against compliance with procedural strictures from the unelected agency to the people they regulate. Neither CMS nor the Court articulates a limiting principle for why, after an unexplained and unjustified delay, an agency can regulate first and listen later, and then put more than 10 million healthcare workers to the choice of their jobs or an irreversible medical treatment.^{5, pp *28-29}

Refuting assertions that an emergency justifies the actions by CMS, Justice Alito wrote:

Although CMS argues that an emergency justifies swift action, both District Courts below held that CMS fatally undercut that justification with its own repeated delays. The vaccines that CMS now claims are vital had been widely available 10 months before CMS’s mandate, and millions of healthcare workers had already been vaccinated before the agency took action. President Biden announced the CMS mandate on September 9, 2021, nearly two months before the agency released the rule on November 5, and the mandate itself delayed the compliance deadline further by another month until December 6. 86 Fed. Reg. 61555; *id.*, at 61573 (making implementation of the vaccine mandate begin “30 days after publication” and completed “60 days after publication”). This is hardly swift.^{5, pp *26-27}

“Hardly swift” indeed by the Biden Administration, which was probably motivated more by Biden’s plummeting approval ratings than by any actual science. Political experts observe that if Biden’s approval rating is below 44 percent, then Republicans are likely to gain four Senate seats to attain a commanding 54-46 Senate majority. As of mid-January, the highly reliable Quinnipiac University poll put Biden’s approval rating at only 33 percent.

Meanwhile, Justice Thomas focused on the utter lack of any statutory authority for the CMS vaccine mandate. Also joined by the three other dissenting justices, who were Alito, Gorsuch, and Barrett, Justice Thomas wrote that:

The Government has not made a strong showing that this agglomeration of statutes authorizes any such rule. To start, 5 of the 15 facility-specific statutes do not authorize CMS to impose “health and safety” regulations at all. See 42 U. S. C. §§1396d(d)(1), (h)(1)(B)(i), 1395rr(b)(1)(A), 1395x(iii)(3)(D)(i)(IV), 1395i-4(e). These provisions cannot support an argument based on statutory text they lack. Perhaps that is why the Government only weakly defends them as a basis for its authority. See *Tr. of Oral Arg.* 25-28.^{5, pp *16-17}

Justice Thomas then pointed out that:

[T]he Government identifies eight definitional provisions describing, for example, what makes a hospital a “hospital.” These define covered facilities as those that comply with a variety of conditions, including “such other requirements as the Secretary finds necessary in the interest of...health and safety.” §1395x(e)(9); see also §§1395x(dd)(2)(G), (o)(6), (ff)(3)(B)(iv), (cc)(2)(J), (p)(4)(A)(v), (aa)(2)(K), 1395k(a)(2)(F)(i). The Government similarly invokes a saving clause for “health and safety” regulations applicable to “all-inclusive care” programs for the elderly, see §§1395eee(f)(4), 1396u-4(f)(4), and a requirement that long-term nursing facilities “establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment... to help prevent the development and transmission of disease,” §1395i-3(d)(3).^{5, P *17}

Justice Thomas logically concluded from the above, while coming up one vote short from becoming the prevailing majority:

The Government has not made a strong showing that this hodgepodge of provisions authorizes a nationwide vaccine mandate. We presume that Congress does not hide “fundamental details of a regulatory scheme in vague or ancillary provisions.” *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). Yet here, the Government proposes to find virtually unlimited vaccination power, over millions of healthcare workers, in definitional provisions, a saving clause, and a provision regarding long-term care facilities’ sanitation procedures. The Government has not explained why Congress would have used these ancillary provisions to house what can only be characterized as a “fundamental detail” of the statutory scheme. Had Congress wanted to grant CMS power to impose a vaccine mandate across all facility types, it would have done what it has done elsewhere—specifically authorize one. See 22 U. S. C. §2504(e) (authorizing mandate for “such immunization ... as necessary and appropriate” for Peace Corps volunteers).^{5, PP *17 18}

Justice Thomas further pointed out that Court majority did not even rely on statutory authority argued by the Biden Administration in its brief. Instead, the five-justice majority “asserts that CMS possesses broad vaccine-mandating authority by pointing to a handful of CMS regulations. To begin, the Court does not explain why the bare existence of these regulations is evidence of what Congress empowered the agency to do. Relying on them appears to put the cart before the horse. Regardless, these regulations provide scant support for the sweeping power the Government now claims.”^{5, P *21}

Justice Thomas analyzed the regulations and found them unresponsive of the sweeping COVID-19 mandate “to force healthcare workers, by coercing their employers, to undergo a medical procedure they do not want and cannot undo.”^{5, P *23}

The Road Ahead

The blocking of Biden’s employer mandate was an enormous win for freedom, and an historic defeat for both public health authorities and their facilitators in the media. Although the decision left employers free to impose the mandate if they so choose, the large employer Starbucks subsequently overturned its own mandate based on the Supreme Court decision to block Biden’s.

Starbucks, which employs hundreds of thousands in the U.S. and is ranked as the tenth largest American private employer, announced on Jan 21, 2022, that it would no longer impose its previously announced vaccine requirement.¹⁸ Starbucks serves many members of the public and is known for being left-leaning, so this was a significant development for freedom. Similarly, Boston-based General Electric, which employs 56,000, announced in the wake of the ruling that it was dropping its vaccination requirement.

But as to the CMS vaccine mandate, we came up one vote short in stopping it. The dissents were strong yet unfortunately did not question the efficacy or side effects of the vaccine itself, or the right to reject it. But it was called an irreversible treatment by four out of the nine justices, which is a silver lining. The pro-vaccine public health authorities narrowly avoided a complete loss by only one vote.

This fight is far from over. Subsequent to the Supreme Court’s ruling, the U.S. District Court for the Southern District of Texas Galveston Division blocked Biden’s vaccine mandate against all federal workers. That good decision stands in tension with the ruling upholding the CMS mandate. The Supreme Court will have to address this issue a second, and perhaps a third, time as these additional issues come up through the courts. Meanwhile, the abject failure of the vaccine mandates to accomplish good becomes more difficult for its proponents to deny.

In that recent federal case, humorously captioned *Feds v. Biden*, District Court Judge Jeffrey Vincent Brown began by stating his view that everyone should be vaccinated, but then said it is a “bridge too far” for Biden on his own to mandate that every federal worker be vaccinated:

Executive Order 14043[] amounts to a presidential mandate that all federal employees consent to vaccination against COVID-19 or lose their jobs. Because the President’s authority is not that broad, the court will enjoin the second order’s enforcement. The court notes at the outset that this case is not about whether folks should get vaccinated against COVID-19—the court believes they should. It is not even about the federal government’s power, exercised properly, to mandate vaccination of its employees. It is instead about whether the President can, with the stroke of a pen and without the input of Congress, require millions of federal employees to undergo a medical procedure as a condition of their employment. That, under the current state of the law as just recently expressed by the Supreme Court, is a bridge too far.¹⁹

This federal district court thereby rejected the notion that “workplace conduct” justified forcing all federal employees to be vaccinated or else lose their job:

So, is submitting to a COVID-19 vaccine, particularly when required as a condition of one’s employment, workplace conduct? The answer to this question became a lot clearer after the Supreme Court’s ruling in *NFIB* earlier this month. There, the Court held that the Occupational Safety and Health Act of 1970, 29 U.S.C. § 15 et seq., allows OSHA “to set workplace safety standards,” but “not broad public health measures.” *NFIB*, 595 U.S. slip op. at 6. Similarly, as noted above, §7301 authorizes the President to regulate the workplace conduct of executive-branch employees, but not their conduct in general. See 5 U.S.C. §7301. And in *NFIB*, the Supreme Court specifically held that COVID-19

is not a workplace risk, but rather a “universal risk” that is “no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.” *NFIB*, 595 U.S. slip op. at 6. Accordingly, the Court held, requiring employees to get vaccinated against COVID-19 is outside OSHA’s ambit. *Id.* Applying that same logic to the President’s authority under §7301 means **he cannot require civilian federal employees to submit to the vaccine as a condition of employment.**^{19, p *16}

Judge Brown did not doubt that the President wields “broad statutory authority to regulate executive branch employment policies.”^{19, p *16} But he ruled that: “[T]he Supreme Court has expressly held that a COVID-19 vaccine mandate is not an employment regulation. And that means the President was without statutory authority to issue the federal-worker mandate.”^{19, pp *15-17}

Additional injunctions against Biden’s vaccine mandates have been issued by other federal courts. On Jan 22, Judge Terry Doughty of the Western District of Louisiana blocked a Biden vaccine mandate against teachers in the Head Start early education program, which will go on appeal to the same Fifth Circuit that previously ruled against Biden’s broad employer vaccinate-or-test mandate.

Louisiana Solicitor General Liz Murrill is handling several of these ongoing cases in Louisiana, and she shrugged off the setback on the CMS mandate case that she argued before the Supreme Court: it was “a political compromise on the court,” she reportedly stated.

In Georgia, a federal district court enjoined a vaccine mandate against federal contractors who provide services to the federal government. They had also been ordered by Biden to be vaccinated or else lose their contracts.

Meanwhile, vaccine mandates imposed by cities and other governmental entities are sometimes being delayed. On Jan 21, for example, the City of Philadelphia again delayed its order that employees be vaccinated or be fired. Unions oppose workers being fired for not receiving the vaccine, and the collective bargaining agreements with unions require a decision by an arbitrator as to whether workers can be fired merely for declining the COVID-19 vaccine. As Firefighters Union Local 22 President Michael Bresnan declared, “The unions have never been against the vaccine. We’re just against our members being terminated for not getting the vaccine.”²⁰ After firefighters and police officers risk their lives throughout their careers—as do physicians—being fired for merely not taking an experimental vaccine is hardly a just ending to an heroic career.

Conclusion

Attaining herd immunity from vaccination was never realistic in the U.S., and it was never plausible that a President could use merely his pen to compel 100 million more Americans to be vaccinated as Biden attempted to do. Even if a vaccine truly stopped the spread of COVID-19, which current vaccines seem ineffective in doing, polls have shown that 50–100 million Americans would not voluntarily receive it. As of the oral argument in the U.S. Supreme Court, barely 60 percent of Americans were fully vaccinated and that number is unlikely to budge much.

State governors such as Ron DeSantis in Florida, remain free to prohibit requirements of vaccination and vaccine passports,

as he has done. Walt Disney World rescinded its vaccination requirement of non-union workers in order to comply with Florida law. The Supreme Court’s recent rulings paved the way for States to establish further freedom from vaccine mandates, and more may imitate that approach. Natural immunity can then thrive, and perhaps finally there will be a proper emphasis on early treatment using inexpensive, long-proven-safe therapies.

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