

1. Mark your confusion.
2. Show evidence of a close reading.
3. Write a 1+ page reflection.

## Supreme Court Blocks Biden's Workplace Vaccine Rules, Allows Requirement for Health-care Workers

Source: Robert Barnes, WashingtonPost.com, January 13, 2021

The Supreme Court on Thursday stopped the Biden administration's vaccination-or-testing requirement for the nation's largest employers, a dramatic blow to the federal government's most far-reaching initiative to combat the coronavirus and boost the country's lagging vaccination rate.

But the court allowed a different and smaller policy to go forward, requiring vaccinations for most health-care workers at the facilities that receive Medicaid and Medicare funds.

The court has been supportive of state requirements targeting the pandemic but skeptical of broad federal responses. All six of the court's conservatives said Congress had not given the Occupational Safety and Health Administration power to impose such a sweeping requirement in workplaces across the nation.

But Chief Justice John G. Roberts Jr. and Justice Brett M. Kavanaugh joined the court's three liberals to say the secretary of health and human services did have the ability to require vaccination of health-care workers at facilities receiving federal funds.

The court's orders, issued after an emergency hearing Friday, might seem like a split decision. But the OSHA vaccine-or-test requirement would have applied to 84 million people. The requirement for health-care workers covers about 10 million.

Approximately 63 percent of the country is fully vaccinated, according to estimates. The Biden administration had hoped the OSHA requirements would compel upward of an additional 20 million to get the shots and estimated there were more than 2 million holdouts among the health-care workers, distributed unevenly across the country.

President Biden accentuated the news regarding health-care workers and said he was disappointed the court ruled against the administration on the workplace rules.

"The Court has ruled that my administration cannot use the authority granted to it by Congress to require this measure, but that does not stop me from using my voice as President to advocate for employers to do the right thing to protect Americans' health and economy," Biden said in a statement. "I call on business leaders to immediately join those who have already stepped up — including one third of Fortune 100 companies — and institute vaccination requirements to protect their workers, customers, and communities."

In its unsigned order blocking the OSHA workplace rules, the court wrote that although the risks associated with the coronavirus occur 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," the order says. "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."

The opinion said OSHA might have more limited authority. "Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible," it said, mentioning those who work in "particularly crowded or cramped environments."

Joining Roberts and Kavanaugh in stopping the OSHA requirements were Justices Clarence Thomas, Samuel A. Alito Jr., Neil M. Gorsuch and Amy Coney Barrett. Thomas, Alito and Gorsuch went further, questioning exactly how much power Congress could give an agency.

If federal law "really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority," Gorsuch wrote.

The court's three liberals — Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — issued a joint dissent withering in its criticism of the majority and defensive of OSHA's expertise and authority.

"Over the past two years, COVID-19 has affected — indeed, transformed — virtually every workforce and workplace in the Nation," they wrote, adding that employers and workers alike had responded to the special risks of transmission.

It is "perverse" to read federal law as "constraining OSHA from addressing one of the gravest workplace hazards in the agency's history," the dissent says.

The justices asked who should decide the protection American workers should receive: “An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?”

The justices’ own workplace has been closed to the public for nearly two years because of the pandemic. All of them are vaccinated and have received booster shots, and all except Gorsuch have been wearing masks on the bench because of the particularly contagious omicron variant responsible for the most recent spike in cases and hospitalizations.

The now-halted OSHA regulations would have required employers with at least 100 workers to require vaccinations of most workers, or implement a weekly testing regime along with masking.

Businesses and 27 Republican-led states asked the court to put the workplace requirements on hold. One federal appeals court said the rules could not go forward; another said OSHA had the authority.

There was a similar battle over the requirements for health-care workers, which the Biden administration’s initial forecast indicated would cover as many as 17 million workers. The requirement from the Centers for Medicare and Medicaid Services (CMS) mandated vaccination of critical health-care workers at facilities that receive funds from the agency, allowing for religious and medical exceptions.

Objecting states said that the federal government did not have such a power and that it would mean workers would quit rather than comply at a time when their service is most needed. Courts had put the requirement on hold in about half of the states.

Roberts and Kavanaugh joined the three liberals in saying federal law in this case expressly gives the secretary of health and human services responsibility for protecting the safety of patients and controlling infectious diseases.

“Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control,” the five-member majority wrote in that unsigned order. “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.”

Thomas dissented, saying Congress did not expressly authorize the power to require vaccinations. “These cases are not about the efficacy or importance of COVID-19 vaccines,” he wrote, joined by Alito, Gorsuch and Barrett. “They are only about whether CMS has the statutory authority to force healthcare workers, by coercing their employers, to undergo a medical procedure they do not want and cannot undo.”

Federal law grants OSHA authority to issue emergency rules for up to six months to protect employees “exposed to grave danger” from “substances or agents determined to be toxic or physically harmful or from new hazards.” Although Biden administration officials had once expressed doubt about their powers, they changed course in September, saying OSHA had not only the authority but also the responsibility to act.

The temporary rule would have given companies with 100 or more workers a choice: Mandate that all employees be vaccinated or require unvaccinated employees to provide weekly negative coronavirus test results and wear face coverings to work on-site. The rules were set to take effect Jan. 4, but OSHA pushed back the date in response to the litigation and said it would not immediately issue citations for those not in compliance.

Soon after the administration announced the rules for private companies in November, the U.S. Court of Appeals for the 5th Circuit blocked enforcement of the policy.

Lawsuits emerged around the nation and were consolidated for review by a different court. A panel of the U.S. Court of Appeals for the 6th Circuit dissolved the 5th Circuit’s stay, saying the rules could go into effect.

The states challenging the policy for health-care workers said the federal government did not have such coercive powers over the states. As a practical matter, they said, worker opposition to the vaccine would cost the facilities skilled employees.

A panel of the U.S. Court of Appeals for the 11th Circuit dismissed a request from Florida to stop the requirement. But a district judge in Missouri stopped the rules, and the 5th Circuit agreed with a challenge from Louisiana.

In response to concerns about a shortage of health-care workers, the administration said the secretary of health and human services has given facilities some flexibility to meet the new requirements, including an additional 60 days to get employees fully vaccinated. The agency also said it will hold off on any enforcement action, as long as 90 percent of the workforce is vaccinated and the facility has a plan to immunize its remaining workers.

### **Possible Response Questions**

- What are your thoughts about the Supreme Court’s ruling? Explain.
- Did something in the article surprise you? Discuss.
- Pick a word/line/passage from the article and respond to it.
- Discuss a “move” made by the writer in this piece that you think is good/interesting. Explain.