



## Will the Supreme Court Strike Down Biden's Vaccine Mandates?

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**[00:00:00] Jeffrey Rosen:** Hello, friends and happy new year. In honor of the 234th anniversary of the ratification of the US constitution, the National Constitution Center is launching an exciting crowdfunding campaign. Thanks to our friends of the John Templeton Foundation, every dollar you give to support We The People will be doubled with a generous one-to-one match up to a total of \$234,000. I'm thrilled to share that right now we have 381 donations from 44 states, plus Washington, D.C. and the Northern Mariana Islands, for a total of \$48,588 and 7 cents.

**[00:00:37]** So let's keep it going. We still don't have any donations from Alaska, Kansas, North and South Dakota, Oklahoma or Wyoming. So if you're a listener in one of those states, I'd be so grateful, as will all of my colleagues at the NCC for a donation of any amount, five, \$10 or more. We wanna see all 50 states unite to support all of the light and learning that We The People spreads. It's a great opportunity to show your support of constitutional education, and all of us are so grateful for your passion, your engagement, and your support for lifelong learning. Please go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople), that's all one word, all lower case. Now, onto the show.

**[00:01:28]** Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit, chartered by Congress to increase awareness and understanding of the constitution among the American people.

**[00:01:47]** On January 7th, the Supreme Court hears a set of cases challenging the Biden Administration's COVID vaccine mandates. Under one mandate, employers with more than 100 employees has to require them to be vaccinated or test for COVID every week. Under the other mandate, any healthcare facility that participates in Medicare or Medicaid has to ensure that all their workers are fully vaccinated.

**[00:02:09]** Joining me to explore these cases and unpack the important legal issues are two of America's leading experts on these questions who have filed brief in the case. John Masslon is senior litigation counsel at the Washington Legal Foundation. He filed an amicus brief on behalf of WLF, arguing against the legality of the mandates. John, thank you so much for joining.

**[00:02:33] John Masslon:** Thank you very much for having me, Jeff.

**[00:02:35] Jeffrey Rosen:** And Deepak Gupta is founding principal of Gupta Wessler and an instructor at Harvard's Supreme Court Litigation Clinic. He filed the briefs supporting the legality of the mandates for the American Public Health Association. Deepak, it's great to have you on the show.

**[00:02:52] Deepak Gupta:** Thanks so much for having me, Jeff. It's great to be here.

**[00:02:54] Jeffrey Rosen:** John let's begin with the case, um, NFIB versus the Department of Labor, which involves a mandate issued by OSHA, that's the Occupational Safety and Health Administration, which issued an emergency order to protect the health of employees, which requires that employees in businesses with, uh, more than 100 of them be vaccinated or wear masks and take weekly tests. Tell us about what's going on in that case and why you believe that that mandate violates the constitution.

**[00:03:31] John Masslon:** There's a lot going on in that case. And there are several constitutional and statutory problems with OSHA's actions. The first is something called the major questions doctrine. And that asks that when a regulation has major economic and social impact, that Congress would not have delegated that authority to an agency without a clear statement in the statutory grant of authority, giving the agency the power to do that.

**[00:04:08]** Here in the Occupational Safety and Health Act, there's no clear statement that gives OSHA the authority to issue a vaccine mandate. There's also federalism problems. The job of requiring vaccinations for citizens has historically fallen to the states. The federal government has never required vaccinations for a broad swath of the population. And because this is normally reserved to the states, that also requires a clear statement by Congress that it wants OSHA to require vaccines. Otherwise, the state regulations are preempted.

**[00:04:54]** Many states have passed either laws or regulations that bar these types of vaccine mandates. Those laws are preempted by the OSHA mandate. The third constitutional problem is the First Amendment. A group of applicants are arguing that requiring religious organizations to have their ministers and other employees vaccinated violates their free exercise rights because it bars them from selecting their ministers and other employees without governmental interference.

**[00:05:38]** Then there are the statutory problems. OSHA can only pass an emergency temporary standard in limited circumstances. And none of the requirements are satisfied here. In fact, only once in OSHA's history has a challenge to a OSHA ETS survived judicial review. Here OSHA is not regulating a workplace hazard, rather it is regulating a general health hazard that is COVID-19. So it's not co- occupation danger.

**[00:06:18]** Second, COVID-19 does not present the type of grave danger that OSHA can regulate with an emergency temporary standard. Third, the delay in issuing the ETS over 17 months after COVID became a pandemic, shows that it wasn't an emergency that required immediate action without notice and comment rulemaking. So under the OSHA Act, OSHA should have issued a notice of proposed rulemaking and allowed for comments on that, and then

issued a final rule that responded to those comments. It's failure to do so violates the OSHA Act, and therefore there's a lack of statutory authority. And so for all those reasons, the court should strike down the mandate.

**[00:07:18] Jeffrey Rosen:** Thank you very much for laying out those four arguments against the mandates so clearly, uh, which well sets up our discussion. Uh, Deepak, you just heard John's four major arguments. First, the major questions doctrine. There's no clear statement giving OSHA the authority to issue the mandate. Uh, second questions of federalism. Uh, third questions of involving the first amendment and the free exercise of religion, and fourth, statutory questions about whether or not the emergency order was proper.

**[00:07:46]** Let's start with the, uh, major question and federalism objections, because both involve the argument that there was no clear statement by Congress. That was an objection raised by Chief Judge Jeffrey Sutton, who argued on the Sixth Circuit that the clear statement rule doomed the mandate. And he traced the lineage of the clear statement rule to two constitutional principles and Supreme Court precedents that Congress has to speak clearly if it wants an agency to decide things of vast economic and political significance.

**[00:08:22]** And Congress has to enact exceedingly clear language if it wants to significantly alter the balance between federal and state power. What's your response to those, uh, two objections involving the need for a clear statement, uh, in the exercise of emergency, power involving major questions, and also with regard to federalism.

**[00:08:41] Deepak Gupta:** So I have to say, I have great respect for Judge Jeff Sutton. I think he's one of the finest [inaudible 00:08:47] in the country, whenever he writes an opinion, I want to read that opinion because he states his opinions very forcefully and, and clearly. I was disappointed and, and surprised to see that he took the position that he did when all of these cases were consolidated before the Sixth Circuit. I became worried [laughs] because the balance, uh, uh, on that court suggested it would not be the ideal forum, um, for the courts to hear these.

**[00:09:12]** And, and for those who don't know what, what have happens when there's a challenge to OSHA, um, regulations is that the courts hold a kind of lottery and one circuit is chosen. And so what judge Sutton appealed to there is a, is a pretty controversial idea in administrative law, that as you said, um, when there are certain questions, and this has only happened a couple of times, um, that the Supreme Court, it has invoked a concept like this, um, where, um, the question involves, um, you know, significant economic or, or political questions.

**[00:09:45]** The idea is it's not enough to use, uh, the ordinary tools of statutory construction, that Congress has to have, um, spoken very specifically to that, uh, issue. And I think the first thing to note about this is the fact that the challengers are focusing on this doctrine, I think betrays that there isn't a terribly strong argument on the basis of ordinary statutory construction. Um, in other words, if we use the tools that we normally use to interpret a statute, I think in my view, it's fairly clear that OSHA is acting within the ambit of, uh, of its authority.

[00:10:23] Um, it has to just determine that there's a grave danger presented in the workplace and that an emergency standard is necessary to protect employees from that danger. That's basically the language of the statute. We filed a brief for public health community explaining why based on the science, it's abundantly clear that OSHA has satisfied that standard and, and OSHA, um, did, I think, a very good job in explaining why the, the overwhelming weight of authority, um, supports that determination and the scientific community is unanimous on this. There really isn't any disagreement.

[00:10:56] And so instead when the challengers are resorting to is this doctrine, um, the, the major questions doctrine. One thing to say about that doctrine is the reason that it is controversial, the reason it has been so rarely invoked is that it basically hands unelected judges a license to say, "Well, you know, I think this issue is controversial. I think this issue is one that we should take out of the ordinary kind of way that we interpret statutes."

[00:11:24] And I'm not sure that there are any judicially manageable standards for determining when that is the case. Um, and I think the Solicitor General has done a very good job of explaining why, um, actually Congress didn't speak clearly. Uh, Congress authorized OSHA to issue an emergency temporary standard whenever it makes the requisite determinations, which it did. And the whole idea of granting authority for an emergency temporary standard is this Congress can't know in advance precisely what emergency might arise that will present itself in, in the workplace.

[00:12:00] Contrary to what John said, I do think this is a danger that presents itself uniquely in the, in the workplace. Of course, the pandemic is affecting everything in American life and has been for the past couple of years, but we saw early in the pandemic that the hotspots were often places like slaughterhouses, uh, places where people are packed in, uh, together for long periods of time and the virus transmits.

[00:12:27] And so one of the things we've explained in our brief is why, um, you know, there is a, there's a particular workplace danger. So i- in my view, Congress has spoken clearly to this issue. It, it, it gave the agency emergency authority to do just this, but, uh, I also just have concerns that if the court doesn't, uh, agree that there is a clear statement, that this is a license now for the Supreme Court and for unelected judges to simply decide that certain issues are controversial or that the judges disagree because of their own policy preferences.

[00:13:05] Um, and then take that out of the ordinary, um, rules. And I, I'm, I'm, I'm not sure where that, where that goes. And I'm, I'm quite concerned that this is not the way to, to, uh, for the Supreme Court to, to decide, um, such a significant question of administrative law on an unusual emergency stay application without, um, sort of a full process, uh, on a shortened timeline.

[00:13:31] **Jeffrey Rosen:** John, your response to some of those points, including the posture in which this case arises, uh, it is, uh, decided on an emergency basis. On the other hand, the court decided to hold oral arguments on short notice. Some suggested that that was a response to

recent criticisms of the so-called shadow docket, and a desire to hold oral arguments before reaching a decision.

**[00:13:51]** And tell us what you think the relevance of recent decisions involving, for example, the Biden Administration's eviction moratorium, which the court struck down at the end of August, and which some say suggests that this court will, uh, be suspicious of, uh, claims that, uh, Congress has delegated authority to administrative agencies in this case as well.

**[00:14:12] John Masslon:** I'll start with that last point. Deepak mentioned that the court has rarely invoked the major questions doctrine, but one of the times it did invoke the major questions doctrine was in Alabama realtors in which the court struck down the sentence for disease controls eviction moratorium. So the court clearly believes that any questions related to the pandemic and major questions about it is a major question. And the Biden Administration was on notice of that when it issued this ETS.

**[00:14:48]** As far as the posture of the case, I would be more concerned if there weren't another case currently on the court's docket, uh, it's called West Virginia versus Environmental Protection Agency, scheduled for oral argument the last day of February. In that case, the court has granted cert to consider the scope of the major questions doctrine and is receiving full merits briefing after a six-year battle in the District of Columbia Circuit over the Obama Administration's clean power plan and the Trump Administration's ACE Rule.

**[00:15:31]** So the court is not dealing with this just based on briefing that it is receiving from the applicants and the Solicitor General and the amicus in these cases, rather it is able to also look at that briefing, which is very fresh in the court's mind. But even if the West Virginia v. EPA case weren't there, I think that cases like this are critically important. And with the ETS standard, it can only last six months.

**[00:16:07]** If the court were not to address it on this emergency basis, it would never be able to address these types of questions because the cases would become moot by the time they worked their way through the Courts of Appeal and then made it to the Supreme Court. And we shouldn't have the Courts of Appeal being the last word on these important questions of constitutional law and statutory interpretation. Rather, we should have those kinds of questions be decided by our Supreme Court.

**[00:16:41]** Responding to some of Deepak's arguments, I don't think that anyone is arguing that the vaccines don't work, but what the applicants are arguing is that there sh- are other alternatives that OSHA did not consider when deciding whether to issue this ETS. And if they would've considered those other issues, they would've seen that this broad vaccine mandate was not "necessary" which is a requirement.

**[00:17:17]** Furthermore, just last, well, now in 2020, the OSHA refused to issue an ETS regarding COVID. The AFL-CIO challenged that decision in the D.C. Circuit and said that, "OSHA, you have to issue this ETS because this poses a grave danger." The D.C. Circuit agreed

with OSHA that it was not required to issue this ETS. Then over a year later, with the deadliness of the virus decreasing, and the increase in the availability of vaccines and other treatment for COVID, then OSHA comes forward with this ETS. It's not necessary now if it wasn't necessary when the AFL-CIO requested that ETS.

**[00:18:14] Jeffrey Rosen:** Deepak, tell us more about that necessary standard, uh, that seems like a high standard to meet. Do you think it's met here? Uh, maybe respond to the claim that the federal government has never imposed a mandate of this scope before, and that it's questionable whether it could impose a nationwide vaccine mandate, of course, this isn't that, but, uh, raises similar questions.

**[00:18:36] Deepak Gupta:** Yeah.

**[00:18:37] Jeffrey Rosen:** And, and then maybe, uh, respond to some of the other constitutional challenges that are on the table, including the ones involving, uh, religious liberty.

**[00:18:44] Deepak Gupta:** Sure. And, and I should say, you know, I think it's important, the terminology, um, is important. A lot of people have referred to this as a, a vaccine mandate. I, I think that's really the wrong way to describe what OSHA has done here. OSHA could have, um, and I think it, they'd be justifiably be able to do this within their statutory authority, they could have required, um, vaccines across the board for lar- large employee and even for employees below that large employer threshold.

**[00:19:13]** Um, instead they did something that was, uh, narrower. They required, um, uh, vaccines or in the alternative, uh, masking and testing. And so that's, you know, not as strict, uh, a requirement as the CMS has imposed for ex- example for nursing homes and that has been imposed in other contexts. I just wanna, in response to what John said, say, I don't wanna be misunderstood, I do think the Supreme Court is, deserves some credit, uh, for, uh, deciding to, uh, hear oral argument on these stay applications.

**[00:19:45]** These are, um, whether or not it's a major, major question as a matter of administrative law, these are so certainly important questions. The nation is focused on them. It's important that the court not decide a question like this, uh, in the dark of the night without hearing argument. And so this way the public will be able to see what the arguments are and see the justices interacting with the advocates. I think that's always important, uh, for the process.

**[00:20:09]** And I think, uh, I, I, it is evidence that the Supreme Court has been listening to criticisms of how the shadow docket is working. If I can just, uh, respond a bit to what John said on the, the major, uh, questions doctrine. Uh, it's true that, uh, as, as both you, uh, Jeff and John said that the, the court invoked, um, this doctrine, um, recently in the, in the case involving the eviction moratorium and has, and has, um, invoked the doctrine in the past.

**[00:20:37]** But I think the court has been clear and it was clear in the, in the realtors case, um, the eviction case, that the doctrine only applies, um, if the text is ambiguous and then in,

considerations of economic and political significance can come in. Um, and, and so what the court has done in these cases is reasoned first based on the text that there's some ambiguity and I, and I just, I don't think there is ambiguity here.

[00:21:03] Um, Jeff, you asked about necessity and John you said, um, you know, it obviously wasn't necessary because they didn't do it earlier in the pandemic. I, I just think this is precisely why courts should be very, very careful on questions of, uh, public health in the midst of a national emergency. This is an unprecedented national emergency, perhaps the greatest public health emergency this country has ever faced, that we, we listen to the science, that we listen to what experts are saying.

[00:21:33] And, um, you know, the public health and medical experts, the, the entire community of public health and epidemiologists are unanimous, um, that this is indeed necessary. And earlier in the pandemic we didn't have, uh, the vaccines, we didn't have experience with the vaccines. We now have that. We've seen that, uh, the lack of vaccination, not just in the United States, but around the world, produces new and more contagious variants.

[00:22:02] I don't think it's fair to say that COVID has become less deadly. Perhaps the Omicron variant is less deadly, but the Delta variant is, uh, more serious than the early, uh, variants. And, uh, the government was reacting appropriately to the rise of this new and more dangerous, uh, variant. And, uh, I don't think any of us should be safe in the, in, uh, or, or feel assured that there won't be a variant soon that combines, uh, the contagiousness of Omicron with the severity of Delta.

[00:22:37] Um, and so I, I, you know, I would hope that, um, that courts and the, and the Supreme Court would show some deference to the expertise of public health officials in the midst of a crisis. Um, Chief Justice Roberts himself made this point early in the pandemic in a case involving, um, religious objections to, uh, uh, restrictions imposed on, um, churches, uh, at, at a point where we didn't have vaccines. He said it's very important in a fast-moving crisis like this to defer to public health authorities.

[00:23:11] And, and of course, you know, this isn't anything new. In the early 20th century, um, in, in the midst of the smallpox, uh, epidemic, the question of whether mandating vaccines was, uh, a constitutional problem came to the Supreme Court and in a case called Jacobson against Massachusetts, the Supreme Court, um, found that that was a, a permissible, um, step for public health authorities to take and is consistent with our constitution.

[00:23:40] Our constitution, after all is not a suicide pack. I don't wanna get ahead of things. I know we're gonna talk about the, the constitutional issues in greater depth, but I do think that has some, um, significance when the court is thinking about the role of the administrative state in a time of, uh, emergency.

[00:23:59] **Jeffrey Rosen:** Well, since you've mentioned the constitutional issues, why don't we put the second case on the table. The cases, Biden versus Missouri, and it involves the

administration's decision in November to pass an emergency rule through the centers for Medicare and Medicaid services, which requires all full-time employees, contract workers and volunteers at medical facilities that accept Medicaid or Medicare funds to receive one dose of the vaccine by December 6th, 2021. John, can you tell us what the major constitutional and statutory issues in this case are?

**[00:24:36] John Masslon:** Sure. And there's also a procedural question that the court is going to have to deal with first, and that's whether the Biden Administration has properly preserved its arguments. In one of the cases, the District Court made three independent findings for how the issuance of this emergency standard violated the relevant statute.

**[00:25:04]** And in their application to the Supreme Court, the Biden Administration only addresses one of those and does so only in a footnote. The other two arguments alone would be sufficient, independent grounds to affirm the District Court's grant of the preliminary injunction, and then the Court of Appeal's refusing to dissolve that preliminary injunction. So that's the first issue that the court is going to have to deal with, is whether these claims are even properly preserved by Biden Administration.

**[00:25:43]** Moving on to the constitutional issues, again, it of the same issues regarding the major questions in federalism concerns. Is there a clear statement that CMS has this authority and does it violate the federalism concern with respect to having unlawful conditions on the acceptance of funding by a state? So the OSHA case, OSHA is claiming authority under the constitution under the Commerce Clause. The CMS case that's claiming authority under the Spending Clause.

**[00:26:25]** Congress is permitted to put limitations on the acceptance of federal funding. When it puts conditions on the acceptance of federal funding by states, there are limitations to those conditions. Here the states are arguing that these are unlawful conditions to require them to impose the CMS mandate because doing so is such a large percentage of their Medicaid budgets.

**[00:26:59]** And so there's really no choice in the matter. If they want to continue with Medicaid, they have to accept this CMS mandate. So it's a federalism concern, but it's a bit different than in the OSHA case. Then there are also the statutory, um, and APA claims, the Administrative Procedure Act, regarding whether there were as proper consultation. So the act requires consultation with states, whether that occurred. And then whether there was sufficient evidence regarding these covered healthcare facilities and the risks that are there in the record to support CMS's mandate. So those are the statutory arguments in the CMS case on why the Biden Administration's rule is unlawful.

**[00:27:53] Jeffrey Rosen:** Thank you very much for that and for flagging the constitutional and statutory issues. Uh, Deepak among the constitutional issues that John flagged include whether the mandate by the Spending Clause? Louisiana argues that to place conditions on federal funds provided to the states, as, as John said, the federal government has to state the conditions unambiguously and here the claim is that the states that accepted the Medicaid and Medicare funds didn't have notice of the vaccine requirement.



**[00:28:22]** And then there's the constitutional question of whether the mandate impermissibly delegates legislative authority to the executive branch. Um, complicated, constitutional arguments, do you believe there's still alive before the court, and then tell us what you think of the constitutional arguments in the Biden case.

**[00:28:39] Deepak Gupta:** I don't think that the action, uh, in the, in the CMS cases primarily on constitutional issues, I think it's principally a, a statutory question. And the question is whether or not the secretary of health and human services and this agency that oversees, um, federal, uh, spending on medical care, whether, um, they acted within the, the ambit of their statutory authority. And they have really broad statutory authority to impose, um, measures to protect patients, uh, health and safety, um, it, at facilities that are receiving, um, federal funds.

**[00:29:14]** So it's really important I think for listeners to understand that this isn't some, again, this isn't some sweeping broad mandate that applies across to the board. You actually have to be taking Medicare and Medicaid funds and serving those patients. And all the federal government is saying is, if you're taking federal money and it's being used in a, in a nursing home or healthcare facility to serve Medicaid and Medicare patients, um, w- we're gonna ask that the workers take one dose of, of vaccine.

**[00:29:45]** I think the way that the constitutional issues that John, um, alluded to come in is because they, um, they supply just other variations of a kind of clear statement argument. So as I understand, the, the State of Missouri's argument, and the State of Missouri is the, the principle challenger to the, the CMS rule. What they're arguing is, um, that there's a kind of federalism clear statement rule because the, this mandate is an exercise of Spending Clause power. That just restates [laughs] in a, in a, in a way, um, the argument we were talking about earlier, which is, you know, it's another way of saying that there ought to be a clear statement.

**[00:30:23]** And, and again, I think that's because the challengers have a hard time denying that if we just use ordinary, um, interpretive principles, that this is, you know, e- even more clearly, perhaps, than in the OSHA case, within the ambit of the, of the kind of conditions that the federal government can impose on, um, the expenditure of its own funds for its own programs.

**[00:30:46]** So I, I am skeptical, um, that the Supreme Court is going to strike down, um, this mandate, perhaps even more so than I am in the OSHA case. And I, I think the court was careful here. The court was presented with a slew of challenges that had been filed all across the country to both of these policies. And they carefully selected, um, uh, only some of them. And I think they did so in part, because they wanted to cabin the arguments that would be before them.

**[00:31:16] Jeffrey Rosen:** John, your response to Deepak's claim that the court is less likely in his view to strike down, uh, the CMS mandate than the OSHA mandate. And what do you think about the, uh, status of the, the constitutional issues?

**[00:31:31] John Masslon:** I agree with Deepak that if you're looking at which one is more likely to be struck down, the OSHA mandate is more likely to be struck down than the CMS mandate.

But I think that there is a good chance that, uh, both mandates are struck down. The court was very careful. It had, I think at least 14 applications pending at the time that it granted argument on just the two in the OSHA case. And then there were also quite a few challenges to the CMS mandate.

**[00:32:05]** As far as the constitutional issues and how they're intertwined with the statutory issues, I also agree with Deepak that they are kind of intertwined, but I do think that it's important to recognize that especially in the Louisiana case, not as much in the Missouri case, that there is those kind of decisions out there that are supporting the constitutional challenges as separate from the statutory challenges.

**[00:32:45] Jeffrey Rosen:** The National Constitution Center relies on support from listeners like you to provide nonpartisan constitutional education to Americans of all ages. Every dollar you give to support We The People will be doubled with a generous one-to-one match, up to a total of \$234,000, made possible by the John Templeton foundation. And we're looking for the nation's, especially this week from Alaska, Kansas, North and South Dakota, Oklahoma and Wyoming. Please go to [constitutioncenter.org/wethepeople](http://constitutioncenter.org/wethepeople), that's all one word, all lower case. Now back to the show.

**[00:33:26]** Deepak, in, in good We The People fashion, we've dived directly into the legal and constitutional arguments. Let's pull back now and give our listeners a sense of how big a deal it would be if the court were to strike down one or both of these mandates. Is, is, this is part of a broader debate about the court's role in policing the boundaries of the administrative state. Are, are these likely to be important cases in that debate? And do you think that the court will strike down one or both of the mandates?

**[00:33:56] Deepak Gupta:** I don't think that the court will strike down these mandates. But, you know, that might be wish casting on my part. Sometimes it's hard to distinguish our, our hopes from, from our predictions. Um, but I really hope not because, uh, I think it is at times like this when, um, a society really needs to hold together and we need, we need our government, um, to be able to protect the people and, and promote the common welfare.

**[00:34:23]** And, uh, you know, I, I sincerely hope that we won't, um, read our constitution to be a kind of suicide pact. These really are matters of life and death. These really are cases that involve the most fundamental role of the government to protect, uh, people. And of course the government has to operate within the law. Of course, um, federal agencies, it's very important that they not act beyond the powers that have been conferred on them by Congress. I don't, I don't want to be heard to suggest, uh, otherwise.

**[00:34:55]** So these are important questions and it, it is certainly the right of the states and other challengers to take these matters before the Supreme Court and to get a, a clear ruling on whether these measures are lawful. But these cases could not be more important, um, for, for public health. They, they are literally, uh, a matter of life and death. And as I said, I think, um, that I don't think these are good vehicles for the Supreme Court to be making major changes in

the way we do administrative law or, or, or to decide, um, that there are major differences in how we think about the role of the administrative state.

**[00:35:32]** For some reason, these questions have become incredibly politicized. I've been quite surprised to see how much, um, vaccines and science have become politicized during this pandemic. And I think that makes these, um, bad vehicles for deciding these kinds of questions. I would rather that the court use a case, um, and as John mentioned, they have other cases where they can do this, that are on the docket, that are in the, the regular process where they, they hear from parties and take their time and decide those kinds of questions. So I, I'm hopeful, but I am worried.

**[00:36:08] Jeffrey Rosen:** John, your thoughts about whether the court is likely to strike down one or both of these mandates, the, the eviction moratorium case was indeed a, a six to three case. Do you imagine a similar six justice majority coalescing against one or both of these mandates? And, and how does the, how do these cases fit into the broader debates on the Roberts Court about the scope of the administrative state?

**[00:36:30] John Masslon:** I do think that the court is likely to at least strike down the OSHA mandate, six to three. I think that what happened in the Alabama realtors case after it went up the first time, the court refused to strike it down at that time. And Justice Kavanaugh wrote a little concurring opinion saying that, "I think this is institutional, but it's going to expire soon."

**[00:36:57]** And then when the Biden Administration extended further, he said, "Enough is enough. I'm done with this." And when it came back up, they struck it down. I think you're likely to see Justice Kavanaugh joined with Justices Gorsuch, Alito and Thomas, and that they'll be able to get either or both, uh, Chief Justice Roberts and Justice Barrett to come along. Every vaccine mandate case that the court has considered to date where they have refused to issue an injunction or overturn a lower court decision came from a state or locality.

**[00:37:34]** And Deepak mentioned, uh, *Jacobson v. Massachusetts*, that was also a case where it was mandated by the local government. It was not a mandate by the federal government. And I think that we've seen that the Roberts Court is very skeptical of broad federal action across the board. Typically the Roberts Court believes that these types of decisions, if not explicitly given to the federal government and the constitution, should be left to the states and to the local governments. Because the OSHA mandate and the CMS mandate take away that power from the states and give it to the federal government. I think that we're likely to see at least one, if not both of the mandates, struck down.

**[00:38:27] Jeffrey Rosen:** Deepak, what do you make of John's claim that the Roberts Court is more suspicious of federal and, than state power, which might distinguish these mandates from the vaccine mandate upheld in *Jacobson* long ago. And of, of course, some claim that a desire to roll back the scope of the administrative state was the distinguishing feature of the new Roberts Court with its new appointees. Are, are these the cases where, where the chickens could come home to roost and strike down federal actions that affect the lives of lots of Americans? And in, in, in that sense, how big a deal would striking down these mandates be?

**[00:39:04] Deepak Gupta:** Yeah, I mean, there, those are all fair points. And I, and, you know, I did say earlier, I am worried. And [laughs] part of the reason I am worried about these cases is because it is, it is true. Um, this court is more suspicious of, of, uh, federal power, and particularly the, the role of the federal administrative state. It is true that the, um, vaccine requirements in the past have been imposed by state and local governments.

**[00:39:30]** It is true that the, uh, Jacobson case involved, in that case, it was the City of Cambridge, Massachusetts that imposed the, the smallpox vaccination requirements. So all those things are true. And, um, and that is reason why people are taking these cases so seriously, watching them so carefully, because they are really matters of, of life and death. It was why I felt, uh, it was important to represent, um, the American Public Health Association and the public health community in these cases.

**[00:39:59]** Uh, I mean, people should realize that, you know, when the Supreme court hears these cases, they will be doing so to an empty courtroom. Um, the justices will be there. The advocates will be there. The advocates will have taken PCR tests at a special court-approved facility, um, within 24 hours of the oral argument. Nobody is allowed into the building, um, without that kind of assurance.

**[00:40:19]** And so the, the justices will be able to decide these cases, uh, from the, the comfort and safety, um, of a specially screened courtroom in, in their own homes. But millions of Americans don't have that luxury. People who work in slaughterhouses, people who work in nursing homes, people who are on the front lines, trying to prevent this epidemic from overwhelming our healthcare system, and who are dealing with what is now really a pandemic of the unvaccinated.

**[00:40:48]** I mean, those of us who are vaccinated are, are relatively safe at this point. Uh, but those who are unvaccinated are not. And there are many, many people who don't have the luxury, um, that the justices and that you and I may have to keep ourselves safe. And so the stakes here are, are very, very high. Uh, there's real reason for concern. Uh, and, and I hope that the court will do the right thing and conclude that these, these agencies have acted, um, in, responsibly and within the power that was delegated to them by Congress.

**[00:41:22] Jeffrey Rosen:** Let's take one round on the religious liberty claims before closing arguments. John, in the OSHA case, there are several briefs arguing that the OSHA mandate violates, uh, the free exercise of religion rights of corporations, uh, under the first amendment. One brief filed by the [TORE 00:41:41] says LLC invokes the ninth amendment, which the brief says prohibits the government from imposing the mandates on corporations and protects unenumerated rights of bodily autonomy setting *Roe v. Wade*. Uh, what do you make of the religious liberty arguments? And do you think they're likely to succeed?

**[00:42:00] John Masslon:** First, I don't think that the court is going to reach the religious Liberty arguments. I think if the court were t- wanted to reach those arguments, it would have granted the petition that Alliance Defending Freedom filed. It was one of the first date that was

filed on the night the Sixth Circuit made its decision. So in the end, I don't think that the court is going to decide it.

**[00:42:26]** I think that the statutory religious arguments are actually probably stronger than the constitutional. In addition to the free exercise claims, there's also a federal statute called the Religious Freedom Restoration Act, which bars the government from putting substantial burdens on the free exercise of religion, unless it can meet what's called strict scrutiny, and show that there is a compelling governmental interest and that the government's means are narrowly tailored to advancing that interest. I do not think that OSHA can show that this passes strict scrutiny.

**[00:43:09]** There are other alternatives that could have been considered, they're detailed in the applications, on other ways that could have protected the unvaccinated. As Deepak said, this is so something that mostly affects the unvaccinated. And it's their choice on whether to get vaccinated or not. So the free exercise claim is that these individuals have a choice.

**[00:43:38]** Do they want to be vaccinated or not? And they know the risks associated with not being vaccinated, but they also may believe, as a religious tenant, that they do not want to take a vaccine that has any connection to aborted fetuses. They may have religious objections to all vaccines. And they shouldn't have to choose between being fired from their job or violating their religious rights. That's what the court said in [inaudible 00:44:12] and Our Lady of Guadalupe. The government should not be able to force individuals to make that decision. And that's what the mandate does.

**[00:44:22]** And Deepak was talking about how the terminology matters and how isn't truly a vaccine mandate because you can have the choice to test and mask instead. There's a great brief by two unions that show why that's not the case in much of America. The OSHA rule requires that if you do choose the test and mask route, that you could be forced to pay for the testing and that you don't get any time off for the testing like you do with the vaccines.

**[00:44:58]** That might not matter in Philadelphia or Washington, D.C. but it does matter in rural Montana or rural Alaska, where you might have to drive three or four hours to get a COVID test, and then three or four hours back once a week, and pay for the testing. Low income workers simply cannot afford that. And so it really is making them choose between violating their religious faith and keeping their job.

**[00:45:28] Jeffrey Rosen:** Deepak, your thoughts on the religious freedom claims in these cases and whether or not you think the courts are likely to reach them.

**[00:45:34] Deepak Gupta:** I, I do think that throughout the pandemic there have been religious free exercise, uh, claims that, uh, deserved to be taken seriously. Um, particularly in the early pandemic claims by churches, um, before the vaccines came into view. I don't think that these, uh, challenges in, in the cases that have come before the Supreme Court on the, um, vaccine

requirements are terribly serious. I don't think they have much merit. And I, I'd be very surprised if the court, um, thought they did.

**[00:46:05]** And I agree with John that if the court were more interested in the religious claims, it would have, uh, chosen vehicles to, to clearly present the, the questions. Um, so th- there are, uh, religious free exercise claims in the OSHA cases, as you said. First of all, I think it's important to understand that, that nothing about the OSHA, um, standard precludes employers from, uh, establishing religious exemptions and, um, accommodating, um, the religious needs of the, of, of employees.

**[00:46:37]** Certainly these objections don't bear on the facial validity of the standard, uh, which recognizes the availability of, of individualized ex- exemptions, including for religious reasons. And I also think that even assuming that we're talking about, um, the higher standard under, um, the religious freedom restoration act, that still requires that there be a substantial burden on religion.

**[00:47:03]** And I don't think that the applicants here, um, have identified any religious exercise that the standard substantially burdens. Um, they, they claim that there's a, a religious objection to requiring employees to be vaccinated, but the OSHA standard permits, uh, employers to choose the mask and test option instead. Um, and so that takes care of any kind of burden or objection, um, to a vaccine mandate. Again, this is not a vaccine mandate.

**[00:47:34]** And so then you have this argument, um, this is the, the, uh, the folks, I think they're called the Word of God, um, they argue that they don't have any objection to testing. Um, but they claim that the, um, the mask requirement, imposing a mask requirement for unvaccinated employees would forcibly identify those who are unvaccinated, right? Because they would be wearing the masks and presumably the others would not. And this they say is contrary to their biblical duty to promote unity within their organizations.

**[00:48:08]** But, you know, again, nothing in the standard prohibits employers from requiring, uh, masking for both unvaccinated and vaccinated employees. And many employers in fact do so. So I just think, um, you know, with all due respect to these objections, they're, they're pretty feeble. And I, I, I would, would be very surprised, uh, if the court found that the OSHA standard failed on this particular ground.

**[00:48:33] Jeffrey Rosen:** Well, it's time for closing arguments in this thorough and illuminating discussion of the important statutory and constitutional issues in both of these cases. Uh, John, the first one is to you. Please tell our We The People listeners who are listening eagerly why you believe that the mandates in these cases violate federal law and the constitution.

**[00:48:57] John Masslon:** We are a nation of laws and we must follow those laws even if they're inconvenient. We shouldn't be resorting to emotion or to cries, this is just a suicide pact of if we allow unvaccinated individuals to work either in a company larger than 100 people or in a

medical facility. Congress did not make a clear statement giving either OSHA or CMS the authority to pass such a broad mandate for a non-workplace danger.

**[00:49:46]** The statutes only give OSHA and CMS the authority to pass temporary standards in limited circumstances that aren't present here. If Congress wants to give those agencies the authority to pass these mandates, it's more than able to do so. The fact that it hasn't showed that the people's representatives do not want to have these mandates, therefore the court should strike them down and hold that these decisions should be left up to the states.

**[00:50:28] Jeffrey Rosen:** Thank you so much for that. Uh, Deepak, the last word in this excellent conversation is to you. Please tell our We The People listeners why you believe that the mandates at issue in this case do not violate federal law or the constitution.

**[00:50:43] Deepak Gupta:** So we are a nation of laws and we are democracy. And so the principal law making authority resides with Congress, the people's elected representatives, not unelected judges who may have different policy preferences, uh, from the people who made the laws. And in this case, Congress charged the Occupational Safety and Health Administration with setting nationwide standards to protect the health and safety of American workers.

**[00:51:11]** Um, and they, they gave the agency special authority to do so in emergency situations. If ever there were an emergency, it's this one. We are confronted with the deadliest pandemic in the nation's history. It's infected more than 50 million people and killed more than 800,000 people in the United States alone, which by the way, is the largest death total in the world. OSHA found that, that workers are becoming seriously ill and dying. And the only thing, the only tool that is available, and thank God we have this tool is the ability for people to become, uh, vaccinated.

**[00:51:47]** And so OSHA made abundant findings based on the scientific evidence, and there is really no contest about the scientific evidence here, and adopted a common sense standard that doesn't even require that everyone in large workplaces, uh, get vaccinated, but merely requires that they either get vaccinated or tested and masked. Um, and that standard false squarely within the authority that Congress gave the agency.

**[00:52:17]** And as I said, I think it's telling that the challengers don't start with, um, arguments about the words of the, of the statute, the words of the enactments from Congress. But instead resort principally to arguments that say that the court should put those words aside, put aside what Congress actually said, put aside the ordinary tools of how we interpret laws. And instead have unelected judges say, this is a, this is a "major question". And so we shouldn't just interpret the words enacted by Congress.

**[00:52:53]** Um, I think it's precisely in situations where there's a lot of political controversy, um, that it is especially important for courts to follow the, the ordinary rules, to read statutes they, the way they would in cases where there wasn't so much, uh, political controversy. And I think if the

Supreme Court does that here, um, they will conclude that the government has acted, um, within its authority.

**[00:53:19]** And I think it's even clearer when that comes to, um, the, the regulation of nursing homes and hospitals, where after all, all that's happened is that a federal, uh, healthcare agency has, you know, adopted federal, uh, health and safety requirements to protect people in, in federal healthcare programs. So I think in both of these cases, um, if the court simply follows the ordinary, uh, tools that it would use to interpret the laws enacted by Congress, um, these requirements will stand. And, and I sure hope they do for the health and safety and wellbeing of the American people as we weather this crisis.

**[00:54:00] Jeffrey Rosen:** Thank you so much, John Masslon and Deepak Gupta, for a civil, thorough and illuminating conversation about the vaccine mandate and the constitution. John, Deepak, thank you so much for joining.

**[00:54:14] Deepak Gupta:** Thanks for having us.

**[00:54:19] John Masslon:** Thank you.

**[00:54:19] Jeffrey Rosen:** Today's show was produced by Melody Raul and engineered by Dave Stotz. Research was provided by Michael Esposito, Chase Hanson and Lana Ulrich. Homework of the week, read the transcript of the oral argument in vaccine cases at the Supreme Court, that's [scotus.gov](https://www.scotus.gov), and make up your own mind. Please rate, review and subscribe to We The People on Apple and recommend the show to friends, colleagues, or anyone who is eager for a weekly dose of constitutional debate. And always remember that the National Constitution Center is a private nonprofit.

**[00:54:52]** Thanks so much to those of you who have donated to our We The People crowdsourcing campaign. It's so meaningful that we've received 381 donations from 44 states, plus Washington, D.C. and the Northern Mariana Islands. And we're looking for donations, uh, still from Alaska, Kansas, and North and South Dakota, Oklahoma and Wyoming. Uh, if you're listener in one of those states, please go to [constitutioncenter.org/wethepeople](https://www.constitutioncenter.org/wethepeople), all one word, all lower case, and consider donating to support our work. On behalf of the National Constitution Center, I'm Jeffrey Rosen.