

# The Sun

## As the Supreme Court Prepares To Weigh Covid Rules, the Logic of Federal Mandates Starts to Fade

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January 4, 2022

The Supreme Court will hear on Friday challenges to President Biden's vaccine mandates, which require employees of private businesses with more than 100 employees, health care workers, and federal contractors all to get a Covid vaccine or undergo weekly testing. The orders face numerous legal challenges and so have not yet taken effect.

Legal issues aside, these federal mandates were never a good idea. The emergence of the omicron variant only strengthens that case. The argument for a government mandate is that vaccinated persons lower the infection risk of *others*. By preventing infections, vaccinated individuals stem viral replication, decreasing the chance of more infectious or vaccine-resistant variants.

So, because some individuals do not internalize the benefits their vaccinations bring to others, private choices about vaccination might fall short of what is desirable overall. Similarly, private mandates imposed by employers or other private institutions might not generate the socially efficient amount of vaccine take-up.

Yet these arguments seem weaker now with omicron because, with breakthrough infections more common, vaccinated individuals are more likely than before to transmit Covid. Moreover, if omicron proves milder than delta, as preliminary findings suggest, the third-party benefits of avoided infections are smaller, thereby weakening the case for government-imposed vaccination. If breakthrough infections become commonplace, vaccination will likely become less crucial to preventing viral replication and therefore new variants.

Similarly, as time goes by, unvaccinated individuals are more likely to have been infected by Covid, implying some natural immunity and therefore smaller extra benefits of getting a jab. This is especially true for mandates covering highly exposed individuals, such as healthcare workers.

Another change is that better Covid treatments are on the horizon. The FDA recently approved Merck's Molnupiravir and Pfizer's Paxlovid. Preliminary data suggest both could be highly effective against Covid, even omicron, and other promising treatments are in the pipeline. These

developments point to better ways of treating Covid and preventing severe illness, so the case for vaccines is less compelling than it would be in the absence of treatments.

None of this argues that vaccination has zero external benefits, or against vaccination *per se*. Getting jabs, and a booster, protects against severe illness and death, even for omicron. These, though, are becoming largely private benefits, especially if hospital utilization is below full capacity, accruing mainly to the vaccinated person, and so less and less convincing as a justification for government mandates.

Omicron has also added to the complexity of managing government mandates. New variants may require the vaccine dosing regimen to adapt often, such as by requiring booster shots or variant-specific boosters. But since political backlash against mandates is high, health agencies may be reluctant or slow to amend mandates, possibly rendering them obsolete or ineffective. Government mandates are better tools in a world where the appropriate vaccination regime is static, not changing over time.

Even before omicron, a federal mandate was already a bad idea because it spurred state-level backlash. Some states, like Florida and Texas, have banned private actors from requiring proof-of-vaccination from employees and customers, while many others have banned public agencies from requiring proof-of-vaccination certificates.

Private mandates are better than government mandates for several reasons. They are less likely to induce resistance, precisely because they are more avoidable. Private mandates are also better targeted because organizations have specific knowledge about benefits and costs of vaccines to customers and employees. Additionally, businesses can update requirements more quickly as information about omicron becomes available.

All things considered, the developments since Mr. Biden's latest vaccine policy announcements in early November suggest a government mandate — especially a federal one — is even less desirable now than when announced. Much uncertainty lingers, but the omicron variant, new treatments, and state-level backlashes against the federal mandate all suggest the Biden administration should reconsider.

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