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Arizona Republicans Sue to Block Biden's Vaccine Mandate, Claim It Discriminates in Favor of Immigrants

In a somewhat baffling argument, Arizona's attorney general thinks the order discriminates against citizens.

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The state of Arizona is preemptively suing Joe Biden's administration over its forthcoming vaccine mandate, even though the text of the rule isn't published yet and it remains unclear when that will happen.

Biden's order will require all federal employees and healthcare workers at facilities that receive Medicare or Medicaid funding to be vaccinated, as well as force employers of 100 individuals or more to implement mandatory policies that staff shall be vaccinated or tested for the novel coronavirus at least once a week. Additionally, employers could face fines of up to \$14,000 per violation (after a grace period) and will be required to provide paid time off for workers to get vaccines. All told, the move could potentially affect up to 100 million workers. Other vaccine requirements, such as one that applies to anyone seeking to fly within the U.S., might be forthcoming.

The order has been vehemently opposed by Republicans, with 19 GOP governors almost immediately announcing their plans to sue and block it from ever entering force. The Occupational Safety and Health Administration (OSHA) is still in the process of drafting the emergency rule.

In a complaint filed on Tuesday in the U.S. District Court of Arizona, state attorney general Mark Brnovich relied on the bizarre argument that because the Biden administration had not implemented vaccination requirements for undocumented immigrants, the rules violate the Equal Protection Clause of the 14th Amendment. Brnovich wrote this constituted "an unmistakable—and unconstitutional—brand of favoritism in favor of unauthorized aliens." The complaint goes on to allege that Biden's order also violates the rights of citizens to bodily integrity, principles of federalism, and the legislative authority of Congress.

This argument is particularly weird for several reasons. First, on Tuesday, the Biden administration issued coronavirus vaccination requirements for immigrants seeking to become "lawful permanent residents," joining a long list of other diseases they must be inoculated against. It's also announced plans to vaccinate migrants crossing the U.S. border with Mexico. Two, Biden's order applies to employers, not individual citizens. This means that the vaccination status of undocumented immigrants is a totally separate issue, amounting to legal whataboutism. Any undocumented people working in jobs that would be affected by the order are also

presumably as subject to the mandate as anyone else but their employment would, presumably, not be legal.

The suit names Biden, as well as the heads of the Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement as defendants.

According to Insider, Brnovich's office claims this is the first suit to be filed against the order. The site noted that the particular legal strategy pursued here is quite different from those predicted by legal scholars, who said in interviews with Law&Crime and Barron's that the OSHA has clear authority to implement the rule and it will likely win out in the courts in the end. Brian Dean Abramson, one of the leading experts on vaccine law, previously told Insider he expected the most likely arguments that Republicans will bring against the order in court would be that OSHA is overstepping its jurisdiction under the Commerce Clause, that the order is overly burdensome or discriminatory against people with vaccine exemptions, and whether those who already have antibodies from a previous coronavirus infection could claim their rights to due process have been violated.

Experts interviewed by CBS generally agreed the order will withstand legal challenges, with Georgetown University's O'Neill Institute for National and Global Health Law faculty director Larry Gostin saying it falls on "rock-solid ground." Walter Olson of the libertarian Cato Institute's Robert A. Levy Center for Constitutional Studies, however, tweeted that OSHA will be citing emergency authorities that courts have often slapped down in the past.

The bum rush to be the first may ultimately backfire for Brnovich because he's suing to stop an executive order without necessarily having any idea what its text will say.

"It's a complex question about whether the regulation for the 100-plus-employee companies is permissible, but you can't answer that question until you see the actual regulation," Jeffrey Toobin, CNN's legal analyst, said on Tuesday. "I don't think that this issue is a slam dunk either way. But it is a slam dunk that you can't file a lawsuit against a regulation that doesn't exist yet."