



Federal Court Expected To Address Constitutionality Of Vaccine Mandates In Puerto Rico Case

The case heard Tuesday on the extreme government measure is one of the most advanced of the cases in litigation, and may well be the landmark case that reaffirms or overrules Jacobson.

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September 20th, 2021

On Tuesday, a federal court in Puerto Rico will hear arguments on the constitutionality of the territory's vaccine mandate for public employees. The case, *Rodriguez Velez et. al. v. Pierluisi-Urrutia*, represents the first time a federal court will weigh in on the constitutionality of a government mandate. And while the outcome of tomorrow's hearing will have no precedential authority, an appeal to the First Circuit Court of Appeals will surely follow no matter the victor, making this case one to watch. Here's what you need to know.

First, things first: Puerto Ricans are American citizens and for purposes of the question at issue — the constitutionality of the vaccine mandate — they hold the same rights under the United States Constitution as do citizens of the fifty states. Like states, which also have their own constitutions, Puerto Ricans also have protection guaranteed by the Puerto Rico constitution. While the lawsuit alleges violations of both constitutions, of interest nationally, will be how the federal courts interpret the U.S. Constitution.

The vaccine mandate at issue in *Rodriguez Velez* came in the form of an Executive Order signed by Puerto Rico Governor Pedro Pierluisi on July 28, 2021. Executive Order 58 spanned fourteen pages, the first nine of which recited in numerous "WHEREAS" paragraphs the details of the COVID-19 pandemic and various Centers for Disease Control and Prevention and Food and Drug Administration pronouncements, as well as identifying current precedent on vaccination mandates. The mandate then ordered, "all public agencies of the Executive Branch [to] require employees who work in-person—except as otherwise provided hereinbelow—to receive a COVID-19 vaccine."

Employees exempted from the mandate include individuals with compromised immune systems or those allergic to vaccines or with another medical condition making the vaccine dangerous to the employees. The Executive Order also provides a religious exemption, but requires the

employee to provide an affidavit signed by both the employee and his minister attesting under penalty of perjury that they are rejecting the vaccine on the basis of their religious beliefs.

Strangely, while the Executive Order only carves out two exemptions from the vaccination mandate, the section entitled “vaccination refusal” allows government employees to refuse vaccines if they either provide evidence of a positive COVID-19 test from the last three months, along with documents establishing they have recovered, or submit to weekly COVID-19 testing, within seventy-two hours of the start of the Monday workweek. Employees exempt because of a medical condition or a religious belief must likewise submit to the weekly COVID-19 testing, absent proof of a COVID diagnosis within 3 months.

After the governor issued the Executive Order, four executive agency employees sued, seeking a preliminary injunction barring enforcement of the vaccination mandate, claiming, in the main, that the mandate violated their “substantive due process” rights, namely their liberty interest “in their personal autonomy, bodily integrity, and medical choice,” and their “right not to be medically tested for a virus.”

While there are some aspects of this case that make the situation in Puerto Rico unique, namely the territory’s limited medical resources for testing, the fundamental questions facing the court on Tuesday are the same issues all courts will need to resolve in ruling on challenges to vaccination mandates: Whether there is a liberty interest in denying a vaccination and if so, what standard must a state satisfy to justify the mandate.

Here, the focus will rest on the Supreme Court’s decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In *Jacobson*, the Supreme Court considered the constitutionality of a Massachusetts statute that authorized the board of health of local cities to require adults to be vaccinated, with violators subject to a five-dollar fine. In February of 1902, Cambridge’s Board of Health mandated residents to obtain the smallpox vaccination. After Henning Jacobson refused to be vaccinated, he was prosecuted and fined the statutorily amount of \$5.00. Jacobson then challenged the constitutionality of mandatory vaccinations.

The Supreme Court in *Jacobson* held that Massachusetts had acted within its “state police power “to enact a compulsory vaccination law and it was not for courts to second guess whether the vaccination is the best mode to prevent smallpox and protect public health.

The *Jacobson* Court’s analysis included several passages of import to the current question of the constitutionality of COVID-19 mandates.

First, the Court noted that a State’s police power extends to “such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety,” adding that such authority may be delegated to local authorities. The Supreme Court next considered Jacobson’s argument that his constitutional right to liberty trumped the vaccine mandate. The Court rejected that argument, stating “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not important an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”

Jacobson also considered the argument that there was some disagreement about whether the vaccination argument prevented smallpox or brought about other diseases. The Supreme Court

rejected that argument, noting that “the fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone.” Further, “the possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive, for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.”

This precedent puts the plaintiffs in the Puerto Rico case in a difficult position. The plaintiffs seek to sidestep the holding in *Jacobson*, by stressing the development of constitutional law since the justices handed down that decision in the early 1900s. They also stress the relatively minor consequence for violating the vaccine mandate, a five-dollar fine, which even in today’s dollars is inconsequential compared to the requirement that unvaccinated employees undergo (and pay for) weekly COVID-19 testing or, in essence, forfeit their jobs.

Here, the plaintiffs stress that, given Puerto Rico’s limited health care resources, weekly testing may not even be possible. They also note that rather than require vaccinations, the government could permit remote work arrangements. The employees further highlight the reasons set forth in the executive order to justify the vaccination mandate make no sense from a factual matter given the already high vaccination rates.

Tuesday’s hearing will provide a glimpse into how such arguments fair, but given the Seventh Circuit Court of Appeal’s refusal to stay, pending appeal, Indiana University’s vaccine mandate for students based on *Jacobson*, it will likely take a trip to the Supreme Court for citizens to succeed in challenging a government-implemented vaccination mandate — even if there is little justification for the mandate and even where the state (or territory’s) own incompetence limits COVID-19 testing availability.

Puerto Rico’s handling of the COVID-19 pandemic and its draconian vaccination mandates is further evidence of the government’s incompetence, said Jorge L. Rodriguez, the CEO and founder of the recently established Puerto Rico Institute for Economic Liberty (“ILE”), which is handling the litigation.

“Puerto Rico’s lack of government institutional capability, demonstrates once again, how it can impact negatively the well-being of the People of Puerto Rico,” he told me.

In addition to the lawsuit challenging the E.O. mandating vaccinations for public employees, the ILE, through General Counsel Arturo Bauermeister, is suing over the E.O. vaccination mandate for private employers. Rodriguez tells me that Puerto Rico is the only U.S. jurisdiction that has established a vaccination mandate for the private sector, with only a few cities attempting to require COVID vaccines and those limited to restaurants and bars.

“Puerto Rico’s vaccine mandates, applied through a series of rolling executive orders with seemingly no end, are the most extreme policies in any U.S. jurisdiction at this point in the pandemic,” elaborated Ilya Shapiro, a vice president for constitutional studies at the Cato Institute, who is advising the lawyers leading the Puerto Rico lawsuits. “That’s bizarre, because the Commonwealth is both doing better on all COVID-related measures than almost every other state or territory and has less institutional capacity for vaccination and testing.”

It may be bizarre, but is it constitutional? The case heard Tuesday, as it involves the most extreme government measure and is one of the most advanced of the cases in litigation, may well be the landmark case that reaffirms or overrules *Jacobson*, so stay tuned.