

Leah Litman article

<https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss2/5/>

A. 1/6 Anniversary

-Garland speech

<https://www.washingtonpost.com/context/read-merrick-garland-s-full-jan-6-speech/2101d6e0-d8be-4393-9a1b-958f62beac6e/>

Good afternoon. It's nice to see some of you here in the Great Hall. And to be able to connect with all of you virtually today. On my first day as Attorney General, I spoke with all of you — the more than 115,000 employees of the Department of Justice — for the first time. Today, I have brought us all together again, for two reasons. First and foremost, to thank you. Thank you for the work you have done, not just over the last 10 months, but over the past several years. Work that you have done in the face of unprecedented challenges — ranging from an unprecedented deadly pandemic to an unprecedented attack on our democracy. Thank you for your service, for your sacrifice, and for your dedication. I am honored to serve alongside you. And second, as we begin a new year — and as we prepare to mark a solemn anniversary tomorrow — it is a fitting time to reaffirm that we at the Department of Justice will do everything in our power to defend the American people and American democracy. We will defend our democratic institutions from attack. We will protect those who serve the public from violence and threats of violence. We will protect the cornerstone of our democracy: the right to every eligible citizen to cast a vote that counts. And we will do all of this in a manner that adheres to the rule of law and honors our obligation to protect the civil rights and civil liberties of everyone in this country. Tomorrow will mark the first anniversary of January 6th, 2021 — the day the United States Capitol was attacked while lawmakers met to affirm the results of a presidential election. In the early afternoon of January 6th — as the United States Senate and House of Representatives were meeting to certify the vote count of the Electoral College — a large crowd gathered outside the Capitol building. Shortly after 2 p.m., individuals in the crowd began to force entry into the Capitol, by smashing windows and assaulting U.S. Capitol police, who were stationed there to protect the members of Congress as they took part in one of the most solemn proceedings of our democracy. Others in the crowd encouraged and assisted those who attacked the police. Over the course of several hours, outnumbered law enforcement officers sustained a barrage of repeated, violent attacks. About 80 Capitol Police and 60 D.C. Metropolitan Police were assaulted. As our own court filings and thousands of public videos of the event attest, • Perpetrators punched dozens of law enforcement officers, knocking some officers unconscious. • Some perpetrators tackled and dragged law enforcement officers. Among the many examples of such violence: One officer was crushed in a door. Another was dragged down a set of stairs, face down, repeatedly tased and beaten, and suffered a heart attack. • Some perpetrators attacked law enforcement officers with chemical agents that burned their eyes and skin. • And some assaulted officers with pipes, poles, and other dangerous or deadly weapons. • Perpetrators also targeted, assaulted, tackled and harassed journalists and destroyed their equipment. With increasing numbers of individuals having breached the Capitol, members of the Senate and the House of Representatives — including the President of the Senate, Vice President Mike Pence — had to be evacuated. As a consequence, proceedings in both chambers were disrupted for hours — interfering with a fundamental element of American democracy: the peaceful transfer of power from one administration to the next. **Those involved must be held accountable, and there is no higher priority for us at the Department of Justice.** It is impossible to overstate the heroism of the Capitol Police

officers, Washington D.C. Metropolitan Police Department officers, and other law enforcement officers who defended and secured the Capitol that day. They demonstrated to all of us, and to our country, what true courage looks like. Their resolve, their sacrifice, and their bravery protected thousands of people working inside the Capitol that day. Five officers who responded selflessly to the attack on January 6th have since lost their lives. I ask everyone to please join me in a moment of silence in recognition of the service and sacrifice of: Officer Brian Sicknick. Officer Howard Liebengood. Officer Jeffrey Smith. Officer Gunther Hashida. And Officer Kyle DeFreytag. I know I speak for all of us in saying that tomorrow, and in our work in the days ahead, we will not only remember them — we will do everything we can to honor them. **In the aftermath of the attack, the Justice Department began its work on what has become one of the largest, most complex, and most resource-intensive investigations in our history. Only a small number of perpetrators were arrested in the tumult of January 6th itself. Every day since, we have worked to identify, investigate, and apprehend defendants from across the country. And we have done so at record speed and scale — in the midst of a pandemic during which some grand juries and courtrooms were not able to operate. Led by the U.S. Attorney’s Office for the District of Columbia and the FBI’s Washington Field Office, DOJ personnel across the department — in nearly all 56 field offices, in nearly all 94 United States Attorneys’ Offices, and in many Main Justice components — have worked countless hours to investigate the attack. Approximately 70 prosecutors from the District of Columbia and another 70 from other U.S. Attorney’s Offices and DOJ divisions have participated in this investigation. So far, we have issued over 5,000 subpoenas and search warrants, seized approximately 2,000 devices, pored through over 20,000 hours of video footage, and searched through an estimated 15 terabytes of data. We have received over 300,000 tips from ordinary citizens, who have been our indispensable partners in this effort. The FBI’s website continues to post photos of persons in connection with the events of January 6th, and we continue to seek the public’s assistance in identifying those individuals. As of today, we have arrested and charged more than 725 defendants, in nearly all 50 states and the District of Columbia, for their roles in the January 6th attack.**

**In charging the perpetrators, we have followed well-worn prosecutorial practices. Those who assaulted officers or damaged the Capitol face greater charges. Those who conspired with others to obstruct the vote count also face greater charges. Those who did not undertake such conduct have been charged with lesser offenses — particularly if they accepted their responsibility early and cooperated with the investigation. In the first months of the investigation, approximately 145 defendants pled guilty to misdemeanors, mostly defendants who did not cause injury or damage. Such pleas reflect the facts of those cases and the defendants’ acceptance of responsibility. And they help conserve both judicial and prosecutorial resources, so that attention can properly focus on the more serious perpetrators.**

**In complex cases, initial charges are often less severe than later charged offenses. This is purposeful, as investigators methodically collect and sift through more evidence. By now, though, we have charged over 325 defendants with felonies, many for assaulting officers and many for corruptly obstructing or attempting to obstruct an official proceeding. Twenty defendants charged with felonies have already pled guilty. Approximately 40 defendants have been charged with conspiracy to obstruct a congressional proceeding and/or to obstruct law enforcement. In the months ahead, 17 defendants are already scheduled to go to trial for their role in felony conspiracies. A necessary consequence of the prosecutorial approach of charging less serious offenses first is that courts impose shorter sentences before they impose longer ones. In recent weeks, however, as judges have sentenced the first defendants convicted of assaults and related violent conduct against officers, we have seen significant**

sentences that reflect the seriousness of those offenses — both in terms of the injuries they caused and the serious risk they posed to our democratic institutions.

**The actions we have taken thus far will not be our last. The Justice Department remains committed to holding all January 6th perpetrators, at any level, accountable under law — whether they were present that day or were otherwise criminally responsible for the assault on our democracy.** We will follow the facts wherever they lead. Because January 6th was an unprecedented attack on the seat of our democracy, we understand that there is broad public interest in our investigation. We understand that there are questions about how long the investigation will take, and about what exactly we are doing. **Our answer is, and will continue to be, the same answer we would give with respect to any ongoing investigation: as long as it takes and whatever it takes for justice to be done — consistent with the facts and the law. I understand that this may not be the answer some are looking for.** But we will and we must speak through our work. Anything else jeopardizes the viability of our investigations and the civil liberties of our citizens. Everyone in this room and on these screens is familiar with the way we conduct investigations, and particularly complex investigations. **We build investigations by laying a foundation. We resolve more straightforward cases first because they provide the evidentiary foundation for more complex cases. Investigating the more overt crimes generates linkages to less overt ones. Overt actors and the evidence they provide can lead us to others who may also have been involved. And that evidence can serve as the foundation for further investigative leads and techniques.** In circumstances like those of January 6th, a full accounting does not suddenly materialize.

**To ensure that all those criminally responsible are held accountable, we must collect the evidence. We follow the physical evidence. We follow the digital evidence. We follow the money. But most important, we follow the facts — not an agenda or an assumption. The facts tell us where to go next. Over 40 years ago in the wake of the Watergate scandal, the Justice Department concluded that the best way to ensure the department’s independence, integrity, and fair application of our laws — and, therefore, the best way to ensure the health of our democracy — is to have a set of norms to govern our work.** The central norm is that, in our criminal investigations, there cannot be different rules depending on one’s political party or affiliation. There cannot be different rules for friends and foes. And there cannot be different rules for the powerful and the powerless. There is only one rule: we follow the facts and enforce the law in a way that respects the Constitution and protects civil liberties. We conduct every investigation guided by the same norms. And we adhere to those norms even when, and especially when, the circumstances we face are not normal. Adhering to the department’s long-standing norms is essential to our work in defending our democracy, particularly at a time when we are confronting a rise in violence and unlawful threats of violence in our shared public spaces and directed at those who serve the public. We have all seen that Americans who serve and interact with the public at every level — many of whom make our democracy work every day — have been unlawfully targeted with threats of violence and actual violence. Across the country, election officials and election workers; airline flight crews; school personnel; journalists; local elected officials; U.S. Senators and Representatives; and judges, prosecutors, and police officers have been threatened and/or attacked. These are our fellow citizens — who administer our elections, ensure our safe travel, teach our children, report the news, represent their constituents, and keep our communities safe. Some have been told that their offices would be bombed. Some have been told that they would be murdered, and precisely how — that they would be hanged; that they would be beheaded. Police officers, who put their lives on the line every day to serve our communities, have been targeted with extraordinary levels of violence. Flight crews have been assaulted. Journalists have been targeted. School personnel and their families have been threatened. A member of Congress was threatened in a gruesome voicemail that asked if she had ever seen what a 50-caliber shell does to a human head. Another member of Congress — an Iraq War veteran and Purple Heart recipient — received threats that left her “terrified for [her] family.” And in 2020, a federal judge in New Jersey was targeted by someone who had appeared before her in court. That person compiled information about where the judge and her family lived and went to church. That

person found the judge's home, shot and killed her son, and injured her husband. These acts and threats of violence are not associated with any one set of partisan or ideological views. But they are permeating so many parts of our national life that they risk becoming normalized and routine if we do not stop them. That is dangerous for people's safety. And it is deeply dangerous for our democracy. In a democracy, people vote, argue, and debate — often vociferously — in order to achieve the policy outcomes they desire. But in a democracy, people must not employ violence or unlawful threats of violence to affect that outcome. Citizens must not be intimidated from exercising their constitutional rights to free expression and association by such unlawful conduct. The Justice Department will continue to investigate violence and illegal threats of violence, disrupt that violence before it occurs, and hold perpetrators accountable. We have marshaled the resources of the department to address the rising violence and criminal threats of violence against election workers, against flight crews, against school personnel, against journalists, against members of Congress, and against federal agents, prosecutors, and judges. In 2021, the department charged more defendants in criminal threat cases than in any year in at least the last five. As we do this work, we are guided by our commitment to protect civil liberties, including the First Amendment rights of all citizens. The department has been clear that expressing a political belief or ideology, no matter how vociferously, is not a crime. We do not investigate or prosecute people because of their views. Peacefully expressing a view or ideology — no matter how extreme — is protected by the First Amendment. But illegally threatening to harm or kill another person is not. There is no First Amendment right to unlawfully threaten to harm or kill someone. As Justice Scalia noted in *R.A.V. v. City of St. Paul*, true “threats of violence are outside the First Amendment” because laws that punish such threats “protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.” The latter point hits particularly close to home for those of us who have investigated tragedies ranging from the Oklahoma City bombing to the January 6th attack on the Capitol. The time to address threats is when they are made, not after the tragedy has struck. As employees of the nation's largest law enforcement agency, each of us understands that we have an obligation to protect our citizens from violence and fear of violence. And we will continue to do our part to provide that protection. But the Justice Department cannot do it alone. The responsibility to bring an end to violence and threats of violence against those who serve the public is one that all Americans share. Such conduct disrupts the peace of our public spaces and undermines our democracy. We are all Americans. We must protect each other. The obligation to keep Americans and American democracy safe is part of the historical inheritance of this department. As I have noted several times before, a founding purpose of the Justice Department was to battle violent extremist attacks on our democratic institutions. In the midst of Reconstruction following the Civil War, the department's first principal task was to secure the civil rights promised by the 13th, 14th and 15th Amendments. This meant protecting Black Americans seeking to exercise their right to vote from acts and threats of violence by white supremacists. The framers of the Civil War Amendments recognized that access to the ballot is a fundamental aspect of citizenship and self-government.

The Voting Rights Act of 1965 sought to make the promise of those amendments real. To do so, it gave the Justice Department valuable tools with which to protect the right to vote. In recent years, however, the protections of the Voting Rights Act have been drastically weakened. The Supreme Court's 2013 decision in the Shelby County case effectively eliminated the preclearance protections of Section 5, which had been the department's most effective tool for protecting voting rights over the past half-century. Subsequent decisions have substantially narrowed the reach of Section 2 as well. Since those decisions, there has been a dramatic increase in legislative enactments that make it harder for millions of eligible voters to vote and to elect representatives of their own choosing. Those enactments range from: practices and procedures that make voting more difficult; to redistricting maps drawn to disadvantage both minorities and citizens of opposing political parties; to abnormal post-election audits that put the integrity of the voting process at risk; to changes in voting administration meant to diminish the authority of locally elected or nonpartisan election administrators. Some have even suggested permitting state legislators to set aside the choice of the voters themselves. **As I noted in an address to the Civil Rights Division last June, many of those enactments have been justified by unfounded claims of material vote fraud in the 2020 election. Those claims, which have corroded people's faith in the legitimacy of our elections, have been repeatedly refuted by the law enforcement and intelligence agencies of both the last administration and this one, as well as by every court — federal and state — that has considered them.**

The Department of Justice will continue to do all it can to protect voting rights with the enforcement powers we have. It is essential that Congress act to give the department the powers we need to ensure that every eligible voter can cast a vote that counts. **But as with violence and threats of violence, the Justice Department — even the Congress — cannot alone defend the right to vote. The responsibility to preserve democracy — and to maintain faith in the legitimacy of its essential processes — lies with every elected official and with every American. All Americans are entitled to free, fair, and secure elections that ensure they can select the representatives of their choice.** All Americans are entitled to live in a country in which their public servants can go about their jobs of serving the public free from violence and unlawful threats of violence. And all Americans are entitled to live in a country in which the transition from one elected administration to the next is accomplished peacefully. The Justice Department will never stop working to defend the democracy to which all Americans are entitled. As I recognized when I first spoke with you all last March, service in the Department of Justice is more than a job and more than an honor. It is a calling. Each of us — you and I — came to work here because we are committed to the rule of law and to seeking equal justice under law. We came to work here because we are committed to ensuring the civil rights and civil liberties of our people. We came to work here because we are committed to protecting our country — as our oath says — from all enemies, foreign and domestic. Together, we will continue to show the American people, by word and by deed, that these are the principles that underlie our work. The challenges that we have faced, and that we will continue to face, are extraordinary. But I am moved and humbled by the extraordinary work you do every single day to meet them. I look forward to seeing more of you in person, soon, and to our continued work together. Thank you all.

## B. Roberts Report on the Court

<https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>

Chief Justice John Roberts began his [2021 year-end report](#), as he so often does, with an anecdote from history to set the stage. But by the end of the first page, the message of Roberts' report, which he released as usual on the final day of the year, was clear. In a year when a presidential commission studied Supreme Court reform and members of Congress introduced major legislation to revamp aspects of the federal judiciary, Roberts argued that any changes to the court system should (and, he said, would) come from within.

Roberts started his 2020 year-end report by looking back over 200 years, to recount a tale involving the first chief justice, John Jay. For his 2021 report, he went back only a century, to the 10th chief justice, former President William Howard Taft. In his role as chief justice, Roberts wrote, Taft was a "visionary" who persuaded Congress to create the institution that eventually became the Judicial Conference of the United States, which makes policies for the federal courts. Taft, Roberts contended, also believed that courts "require ample institutional independence." "The Judiciary's power to manage its internal affairs," Roberts stressed, "insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and co-equal branch of government."

After noting that the Judicial Conference has spent significant time over the past two years dealing with the COVID-19 pandemic and cybersecurity, Roberts turned to three specific issues that, he said, "have been flagged by Congress and the press over the past year" and "will receive focused attention from the Judicial Conference and its committees in the coming months."

### 1. ethics

The first issue that Roberts addressed involved federal ethics rules, and in particular the obligation of federal judges to recuse themselves from any case in which they have a personal financial interest. In September, an [investigation](#) published in The Wall Street Journal revealed that over a seven-year period, 131 federal judges participated in 685 cases involving companies in which either they or their family members owned stock. Federal law and conflict-of-interest rules prohibit judges from hearing such cases.

In response to the Journal's reporting, the House of Representatives in early December passed, by a vote of 422-4, the Courthouse Ethics and Transparency Act. In a statement at the time, Gabe Roth of Fix the Court, a nonpartisan group that advocates for reforms to make the federal judiciary more accountable to the American people, said that the bill was intended to "help litigants and the general public identify conflicts" in real time. It would require federal judges (although not Supreme Court justices) to disclose stock sales and purchases greater than \$1,000 within 45 days of the transaction. Judges' financial disclosure reports would also have to be posted online and easily searchable. In his report, Roberts sought to simultaneously acknowledge the seriousness of the ethics violations identified by the Journal and, as he wrote "put these lapses in context." "[T]he Judiciary takes this matter seriously," he wrote. "We expect judges to adhere to the highest standards." But, he continued, "the 685 instances identified amount to a very small fraction — less than three hundredths of one percent — of the 2.5 million civil cases filed in the district cases in the nine years included in the study," and there is no indication that any of the judges benefited from the violations.

Roberts conceded that the judiciary needs to improve on both a concrete level — with more rigorous ethics training and better conflicts-checking programs — and in a more abstract way, by paying "greater attention to promoting a culture of compliance." But he left little doubt that he saw this as work for the

judiciary, rather than Congress, writing that the Administrative Office of the U.S. Courts “is already working with the Judicial Conference’s committees ... with jurisdiction to address these problems.”

## 2. Sexual harassment

Concerns about the judiciary’s response to allegations of sexual harassment in the workplace – the topic of Roberts’ 2018 year-end report – received similar treatment. In 2021, members of both parties introduced the Judiciary Accountability Act of 2021 to ensure (among other things) that employees of the judicial branch have the same protection against discrimination as other government employees and private-sector employees. **On Aug. 25, Judge Rosalyn Mauskopf, the director of the Administrative Office of the U.S. Courts, sent a letter to the House Judiciary Committee indicating that the Judicial Conference opposes the bill.**

Roberts reiterated in his 2021 report that a panel of judges and judicial administrators had concluded in 2018 that although there had been several serious high-profile incidents, “inappropriate workplace conduct is not pervasive within the Judiciary.” The Judicial Conference had adopted recommendations to “ensure that every court employee enjoys a workplace free from incivility and disrespect,” Roberts noted. So although he “appreciate[d] that Members of Congress have expressed ongoing concerns on this important matter,” he assured them (as well as the public) that “the Judicial Conference and its committees remain fully engaged.”

## 3. Patent law

Roberts concluded with what he described as an “arcane but important matter of judicial administration” – the procedures to assign patent cases in federal trial courts. In a Nov. 2 letter to Roberts, Sens. Patrick Leahy, D-Vt., and Thom Tillis, R-N.C., noted that a single judge in the Western District of Texas accounts for approximately 25% of all of the patent litigation currently pending in the country. The senators asked Roberts to “direct the Judicial Conference to conduct a study of actual and potential abuses that the present situation has enabled,” and to “complete this report by no later than May 1, 2022.”

Roberts observed that “[t]wo important and sometimes competing values are at issue” – the random assignment of cases and the idea of district judges as generalists, and Congress’ intentional creation of districts and divisions “so that litigants are served by federal judges tied to their communities.” “This issue of judicial administration,” Roberts concluded, “provides another good example of a matter that self-governing bodies of judges from the front lines are in the best position to study and solve — and to work in partnership with Congress in the event change in the law is necessary.”

## 4. Conclusion

Chief Justice Taft was prescient in recognizing the need for the Judiciary to manage its internal affairs, both to promote informed administration and to ensure independence of the Branch. He understood that criticism of the courts is inevitable, and he lived through an era when federal courts faced strident calls for reform, some warranted and some not. As President of the American Bar Association, Taft had observed: The agitation with reference to the courts, the general attacks on them, . . . all impose upon us, members of the Bar and upon judges of the courts and legislatures, the duty to remove, as far as possible, grounds for just criticism of our judicial system. As Chief Justice, Taft took vital steps to ensure



that the Judicial Branch itself could take the lead in fulfilling that duty. The Congress of his era appreciated the Judiciary's need for independence in our system of separate and co-equal branches, and it provided a sound structure for self-governance. Since that time, the Judicial Conference has been an enduring success. It is up to the task of addressing the three topics I have highlighted, as well as the many other issues on its agenda.

C. Update: Oral Argument TODAY, Friday Jan 7, in COVID rulings  
-why this is already a victory – not on the shadow docket

OA 554

<https://openargs.com/oa554-6th-circuit-overrules-atrocious-5th-circuit-ruling-on-vax-mandates/>

[https://www.supremecourt.gov/orders/courtorders/122221zr2\\_f20h.pdf](https://www.supremecourt.gov/orders/courtorders/122221zr2_f20h.pdf)

As the COVID-19 pandemic enters its third year and the omicron variant causes a spike in cases, challenges to efforts by policymakers to respond to the pandemic continue to arrive at the Supreme Court.

On Friday night, within hours of a [ruling by the U.S. Court of Appeals for the 6th Circuit](#) that reinstated the Biden administration's vaccine-or-test mandate for large employers, several of the plaintiffs challenging the rule came to the court, asking the justices to stay the 6th Circuit's ruling while their appeals proceed. Also pending before the justices is an emergency request from the administration to lift lower-court rulings that have blocked a vaccine mandate for workers at health care facilities that receive federal funding.

The vaccine-or-test mandate was issued by the Occupational Safety and Health Administration on Nov. 5. It requires all employers with more than 100 employees to mandate that those employees either be fully vaccinated against COVID-19 or be tested weekly and wear masks at work.

Numerous challenges to the rule followed immediately in courts around the country, filed by (among others) employers, business groups, religious groups, and Republican-led states. They contend that the policy exceeds OSHA's authority. The U.S. Court of Appeals for the 5th Circuit temporarily put the mandate on hold last month, calling the rule "fatally flawed" and "staggeringly overbroad." But through an obscure process known as the multicircuit lottery, all of the challenges were subsequently assigned to the 6th Circuit. A divided panel of that court reinstated the OSHA mandate on Friday after the full 6th Circuit rejected, by a vote of 8-8, a request to have the case be decided by the full court.

Judge Jane Stranch [began her 33-page opinion](#) by noting that the "COVID-19 pandemic has wreaked havoc across America." OSHA, Stranch stressed, "has long regulated health and safety in the workplace" – including to protect workers from infectious disease. And OSHA reasonably concluded, Stranch continued, that the mandate was necessary to guard against COVID-19.

Several of the challengers came quickly to the Supreme Court, asking the justices to follow the 5th Circuit's lead and put the mandate on hold while litigation over its validity continues. [One such request came from a group of companies](#) (located in, among other places, Ohio and Michigan). The companies argued that although the mandate "is one of the most far-reaching and invasive rules ever promulgated by the Federal Government," OSHA's authority to issue the mandate rests on a "workplace-safety provision" that "contains no explicit authority to mandate vaccination for an extensive portion of the American people." The companies also contended that the mandate "threatens to impose mass damage across the entire American economy including further hobbling already strained supply chains."

Another request to freeze the 6th Circuit’s ruling came from a group of Christian non-profits and businesses. They told the justices that OSHA cannot regulate religious non-profits because they are not “employers.” And in any event, they added, the mandate violates the First Amendment because it “commandeers” the religious institutions to require their employees to comply with the mandate. Louisiana grocery store owner Brandon Trosclair also asked the justices to stay the 6th Circuit’s decision allowing the mandate to go into effect, while a press release from First Liberty Institute indicated that the group similarly planned to seek emergency relief from the court.

The applications asking the justices to put the Biden administration’s test-or-vaccine mandate on hold came to the court just one day after the Biden administration sought emergency relief at the court regarding a different vaccine mandate. On Thursday, the federal government asked the justices to allow it to temporarily enforce a vaccine mandate, with religious and medical exemptions, for health-care workers at facilities that participate in the Medicare and Medicaid programs. Lower-court rulings have blocked the administration from enforcing that mandate in about half the states. The justices ordered the challengers in those cases to respond by the afternoon of Dec. 30.

With COVID-19 cases surging across the country, the Supreme Court fast-tracked two disputes over the Biden administration’s efforts to expand vaccinations. In an unusual move, the justices announced on Wednesday night that they will hear oral arguments on Jan. 7 on two federal policies: a vaccine-or-test mandate for workers at large employers, and a vaccine mandate for health care workers at facilities that receive federal funding.

The cases came to the court last week on an emergency basis, and the formal question in both disputes is whether the government should be allowed to enforce the policies while litigation challenging them continues. But the justices’ views on whether to grant emergency relief will likely be influenced by their views on the merits of the underlying challenges themselves.

The Occupational Safety and Health Administration issued the vaccine-or-test mandate on Nov. 5. It requires all employers with more than 100 employees to mandate that those employees be either fully vaccinated against COVID-19 or be tested weekly and wear masks at work. Several challenges to the rule were filed around the country, by (among others) business groups, religious groups, and Republican-led states, arguing that the mandate exceeds OSHA’s authority. The U.S. Court of Appeals for the 5th Circuit temporarily put the mandate on hold in November, but the challenges were consolidated in the U.S. Court of Appeals for the 6th Circuit, which reinstated the mandate last week.

The challengers went quickly to the Supreme Court, filing over a dozen separate requests asking the justices to block the 6th Circuit’s ruling. **The justices on Wednesday night set two of those requests for oral argument – one filed by a group of trade associations (NFIB) and the other by a group of states, led by Ohio – on a highly expedited basis. The 6th Circuit’s ruling reviving the mandate will remain in force until the Supreme Court acts on the challengers’ request, although OSHA has indicated that it will not issue citations for failure to comply with the rule until Jan. 10 at the earliest.**

The Biden administration also came to the court last week, asking the justices to allow it to temporarily enforce a rule issued by the Department of Health and Human Services that requires all health care workers at facilities that participate in the Medicare and Medicaid programs to be fully vaccinated against COVID-19 unless they are eligible for a medical or religious exemption. Lower-court rulings blocked the administration from enforcing the vaccine mandate in approximately half of the states. The justices will hear argument on whether those rulings should remain in place.

Shortly after receiving the emergency requests last week, the court set a deadline of Dec. 30 for responses in both disputes. The decision on Wednesday to hear oral argument on the emergency requests came as somewhat of a surprise: It seemed more likely that the court would dispose of the requests with a brief order, as it normally does on the so-called “shadow docket.” Instead, and perhaps in response to [criticism](#) of the increased use of the shadow docket to litigate major policy disputes, the justices fast-tracked the cases for oral argument, as they have already done twice this year when fielding requests for emergency relief in the [battle over Texas’ controversial abortion law](#) and [a request by a Texas inmate](#) to have his pastor touch him and pray out loud during his execution.

Arguments:

1. OSH

[https://www.supremecourt.gov/DocketPDF/21/21A244/206997/20211230152222881\\_21A243%20et%20al%20OSHA%20stay%20opp.pdf](https://www.supremecourt.gov/DocketPDF/21/21A244/206997/20211230152222881_21A243%20et%20al%20OSHA%20stay%20opp.pdf)

Reply briefs

[https://www.supremecourt.gov/DocketPDF/21/21A244/207151/20220103094453006\\_Reply%20PDFA.pdf](https://www.supremecourt.gov/DocketPDF/21/21A244/207151/20220103094453006_Reply%20PDFA.pdf)

[https://www.supremecourt.gov/DocketPDF/21/21A244/207138/20220103082552049\\_SCOTUS%20Reply%20ISO%20Stay%20Application.pdf](https://www.supremecourt.gov/DocketPDF/21/21A244/207138/20220103082552049_SCOTUS%20Reply%20ISO%20Stay%20Application.pdf)

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#### A. Meat EO

- can't supersede what's been delegated (e.g. pushing the boundaries with DACA)
- subject to being undone by the next guy – especially subject to the Congressional Review Act
- makes a real difference to real people while it's in practice

The [meat and poultry processing sector](#) is a textbook example, with lack of competition hurting consumers, producers, and our economy.

Four large meat-packing companies control 85 percent of the beef market. In poultry, the top four processing firms control 54 percent of the market. And in pork, the top four processing firms control about 70 percent of the market. The meatpackers and processors buy from farmers and sell to retailers like grocery stores, making them a key bottleneck in the food supply chain.

When dominant middlemen control so much of the supply chain, they can increase their own [profits](#) at the expense of both farmers—who make less—and consumers—who pay more. Most farmers now have little or no choice of buyer for their product and little leverage to negotiate, causing their share of every dollar spent on food to decline. Fifty years ago, ranchers got over 60 cents of every dollar a consumer spent on beef, compared to about 39 cents today. Similarly, hog farmers got 40 to 60 cents on each dollar spent 50 years ago, down to about 19 cents today.

Even as farmers' share of profits have dwindled, American consumers are paying more—with meat and poultry prices now the [single largest contributor](#) to the rising cost of food people consume at home.

And, when too few companies control such a large portion of the market, our food supply chains are susceptible to shocks. When COVID-19 or other disasters such as fires or cyberattacks shutter a plant, many ranchers have no other place to take their animals. Our overreliance on just a handful of giant processors leaves us all vulnerable, with any disruptions at these bottlenecks rippling throughout our food system.

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/>

In July, President Biden signed an [Executive Order on Promoting Competition in the American Economy](#) to create a fairer, more resilient, and more dynamic economy. Over the last few decades, we've seen too many industries become dominated by a handful of large companies that control most of the business and most of the opportunities—raising prices and decreasing options for American families, while also squeezing out small businesses and entrepreneurs.

Link to EO 14036

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

-comprehensive – affects labor and employment, health care and medicine, transportation, agriculture, technology, and defense procurement

[sec 1 – policy goals]

- Enforce existing antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony – especially as these issues arise in labor markets, agricultural markets, Internet platform industries, health care markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.

Sec. 2. The Statutory Basis of a Whole-of-Government Competition Policy.

(a) The antitrust laws, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act (Public Law 63-203, 38 Stat. 717, 15 U.S.C. 41 et seq.), are a first line of defense against the monopolization of the American economy.

(b) The antitrust laws reflect an underlying policy favoring competition that transcends those particular enactments. As the Supreme Court has stated, for instance, the Sherman Act “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.” *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

(c) Consistent with these broader policies, and in addition to the traditional antitrust laws, the Congress has also enacted industry-specific fair competition and anti-monopolization laws that often provide additional protections. Such enactments include the Packers and Stockyards Act, the Federal Alcohol Administration Act (Public Law 74-401, 49 Stat. 977, 27 U.S.C. 201 et seq.), the Bank Merger Act, the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417, 98 Stat. 1585), the Shipping Act of 1984 (Public Law 98-237, 98 Stat. 67, 46 U.S.C. 40101 et seq.) (Shipping Act), the ICC Termination Act of 1995 (Public Law 104-88, 109 Stat. 803), the Telecommunications Act of 1996, the Fairness to Contact Lens Consumers Act (Public Law 108-164, 117 Stat. 2024, 15 U.S.C. 7601 et seq.), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, 124 Stat. 1376) (Dodd-Frank Act).

(d) These statutes independently charge a number of executive departments and agencies (agencies) to protect conditions of fair competition in one or more ways, including by:

- (i) policing unfair, deceptive, and abusive business practices;
  - (ii) resisting consolidation and promoting competition within industries through the independent oversight of mergers, acquisitions, and joint ventures;
  - (iii) promulgating rules that promote competition, including the market entry of new competitors;
- and
- (iv) promoting market transparency through compelled disclosure of information.

(e) The agencies that administer such or similar authorities include the Department of the Treasury, the Department of Agriculture, the Department of Health and Human Services, the Department of Transportation, the Federal Reserve System, the Federal Trade Commission (FTC), the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Communications Commission, the Federal Maritime Commission, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, the Consumer Financial Protection Bureau, and the Surface Transportation Board.

(f) Agencies can influence the conditions of competition through their exercise of regulatory authority or through the procurement process. See 41 U.S.C. 1705.

(g) This order recognizes that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy. Such an

approach is supported by existing statutory mandates. Agencies can and should further the policies set forth in section 1 of this order by, among other things, adopting pro-competitive regulations and approaches to procurement and spending, and by rescinding regulations that create unnecessary barriers to entry that stifle competition.

### Sec. 3. Agency Cooperation in Oversight, Investigation, and Remedies.

(a) The Congress frequently has created overlapping agency jurisdiction in the policing of anticompetitive conduct and the oversight of mergers. It is the policy of my Administration that, when agencies have overlapping jurisdiction, they should endeavor to cooperate fully in the exercise of their oversight authority, to benefit from the respective expertise of the agencies and to improve Government efficiency.

(b) Where there is overlapping jurisdiction over particular cases, conduct, transactions, or industries, agencies are encouraged to coordinate their efforts, as appropriate and consistent with applicable law, with respect to:

- (i) the investigation of conduct potentially harmful to competition;
- (ii) the oversight of proposed mergers, acquisitions, and joint ventures; and
- (iii) the design, execution, and oversight of remedies.

(c) The means of cooperation in cases of overlapping jurisdiction should include, as appropriate and consistent with applicable law:

- (i) sharing relevant information and industry data;
- (ii) in the case of major transactions, soliciting and giving significant consideration to the views of the Attorney General or the Chair of the FTC, as applicable; and
- (iii) cooperating with any concurrent Department of Justice or FTC oversight activities under the Sherman Act or Clayton Act.

(d) Nothing in subsections (a) through (c) of this section shall be construed to suggest that the statutory standard applied by an agency, or its independent assessment under that standard, should be displaced or substituted by the judgment of the Attorney General or the Chair of the FTC. When their views are solicited, the Attorney General and the Chair of the FTC are encouraged to provide a response to the agency in time for the agency to consider it in advance of any statutory deadline for agency action.

### Sec. 4. The White House Competition Council.

(a) There is established a White House Competition Council (Council) within the Executive Office of the President.

(b) The Council shall coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy, including efforts to:

- (i) implement the administrative actions identified in this order;
- (ii) develop procedures and best practices for agency cooperation and coordination on matters of overlapping jurisdiction, as described in section 3 of this order;
- (iii) identify and advance any additional administrative actions necessary to further the policies set forth in section 1 of this order; and
- (iv) identify any potential legislative changes necessary to further the policies set forth in section 1 of this order.

(c) The Council shall work across agencies to provide a coordinated response to overconcentration, monopolization, and unfair competition in or directly affecting the American economy. The Council shall also work with each agency to ensure that agency operations are conducted in a manner that promotes fair competition, as appropriate and consistent with applicable law.

(d) The Council shall not discuss any current or anticipated enforcement actions.

(e) The Council shall be led by the Assistant to the President for Economic Policy and Director of the National Economic Council, who shall serve as Chair of the Council.

(f) In addition to the Chair, the Council shall consist of the following members:

(i) the Secretary of the Treasury;

(ii) the Secretary of Defense;

(iii) the Attorney General;

(iv) the Secretary of Agriculture;

(v) the Secretary of Commerce;

(vi) the Secretary of Labor;

(vii) the Secretary of Health and Human Services;

(viii) the Secretary of Transportation;

(ix) the Administrator of the Office of Information and Regulatory Affairs; and

(x) the heads of such other agencies and offices as the Chair may from time to time invite to participate.

(g) The Chair shall invite the participation of the Chair of the FTC, the Chair of the Federal Communications Commission, the Chair of the Federal Maritime Commission, the Director of the Consumer Financial Protection Bureau, and the Chair of the Surface Transportation Board, to the extent consistent with their respective statutory authorities and obligations.

(h) Members of the Council shall designate, not later than 30 days after the date of this order, a senior official within their respective agency or office who shall coordinate with the Council and who shall be responsible for overseeing the agency's or office's efforts to address overconcentration, monopolization, and unfair competition. The Chair may coordinate subgroups consisting exclusively of Council members or their designees, as appropriate.

(i) The Council shall meet on a semi-annual basis unless the Chair determines that a meeting is unnecessary.

(j) Each agency shall bear its own expenses for participating in the Council.

#### Sec. 5. Further Agency Responsibilities.

(a) The heads of all agencies shall consider using their authorities to further the policies set forth in section 1 of this order, with particular attention to:

(i) the influence of any of their respective regulations, particularly any licensing regulations, on concentration and competition in the industries under their jurisdiction; and

(ii) the potential for their procurement or other spending to improve the competitiveness of small businesses and businesses with fair labor practices.

(b) The Attorney General, the Chair of the FTC, and the heads of other agencies with authority to enforce the Clayton Act are encouraged to enforce the antitrust laws fairly and vigorously.

(c) To address the consolidation of industry in many markets across the economy, as described in section 1 of this order, the Attorney General and the Chair of the FTC are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.

(d) To avoid the potential for anticompetitive extension of market power beyond the scope of granted patents, and to protect standard-setting processes from abuse, the Attorney General and the Secretary of Commerce are encouraged to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019.

(e) To ensure Americans have choices among financial institutions and to guard against excessive



market power, the Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency, is encouraged to review current practices and adopt a plan, not later than 180 days after the date of this order, for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956 (Public Law 84-511, 70 Stat. 133, 12 U.S.C. 1841 et seq.) that is in accordance with the factors enumerated in 12 U.S.C. 1828(c) and 1842(c).

(f) To better protect workers from wage collusion, the Attorney General and the Chair of the FTC are encouraged to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016.

(g) To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

(h) To address persistent and recurrent practices that inhibit competition, the Chair of the FTC, in the Chair's discretion, is also encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as:

(i) unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy;

(ii) unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment;

(iii) unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars;

(iv) unfair competition in major Internet marketplaces;

(v) unfair occupational licensing restrictions;

(vi) unfair tying practices or exclusionary practices in the brokerage or listing of real estate; and

(vii) any other unfair industry-specific practices that substantially inhibit competition.

(i) The Secretary of Agriculture shall:

(i) to address the unfair treatment of farmers and improve conditions of competition in the markets for their products, consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture's regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences, advantages, prejudices, or disadvantages, with the purpose of furthering the vigorous implementation of the law established by the Congress in 1921 and fortified by amendments. In such rulemaking or rulemakings, the Secretary of Agriculture shall consider, among other things:

(A) providing clear rules that identify recurrent practices in the livestock, meat, and poultry industries that are unfair, unjustly discriminatory, or deceptive and therefore violate the Packers and Stockyards Act;

(B) reinforcing the long-standing Department of Agriculture interpretation that it is unnecessary under the Packers and Stockyards Act to demonstrate industry-wide harm to establish a violation of the Act and that the "unfair, unjustly discriminatory, or deceptive" treatment of one farmer, the giving to one farmer of an "undue or unreasonable preference or advantage," or the subjection of one farmer to an "undue or unreasonable prejudice or disadvantage in any respect" violates the Act;

(C) prohibiting unfair practices related to grower ranking systems — systems in which the poultry companies, contractors, or dealers exercise extraordinary control over numerous inputs that determine the amount farmers are paid and require farmers to assume the risk of factors outside their control, leaving them more economically vulnerable;



(D) updating the appropriate definitions or set of criteria, or application thereof, for undue or unreasonable preferences, advantages, prejudices, or disadvantages under the Packers and Stockyards Act; and

(E) adopting, to the greatest extent possible and as appropriate and consistent with applicable law, appropriate anti-retaliation protections, so that farmers may assert their rights without fear of retribution;

(ii) to ensure consumers have accurate, transparent labels that enable them to choose products made in the United States, consider initiating a rulemaking to define the conditions under which the labeling of meat products can bear voluntary statements indicating that the product is of United States origin, such as “Product of USA”;

(iii) to ensure that farmers have greater opportunities to access markets and receive a fair return for their products, not later than 180 days after the date of this order, submit a report to the Chair of the White House Competition Council, with a plan to promote competition in the agricultural industries and to support value-added agriculture and alternative food distribution systems through such means as:

(A) the creation or expansion of useful information for farmers, such as model contracts, to lower transaction costs and help farmers negotiate fair deals;

(B) measures to encourage improvements in transparency and standards so that consumers may choose to purchase products that support fair treatment of farmers and agricultural workers and sustainable agricultural practices;

(C) measures to enhance price discovery, increase transparency, and improve the functioning of the cattle and other livestock markets;

(D) enhanced tools, including any new legislative authorities needed, to protect whistleblowers, monitor agricultural markets, and enforce relevant laws;

(E) any investments or other support that could bolster competition within highly concentrated agricultural markets; and

(F) any other means that the Secretary of Agriculture deems appropriate;

(iv) to improve farmers’ and smaller food processors’ access to retail markets, not later than 300 days after the date of this order, in consultation with the Chair of the FTC, submit a report to the Chair of the White House Competition Council, on the effect of retail concentration and retailers’ practices on the conditions of competition in the food industries, including any practices that may violate the Federal Trade Commission Act, the Robinson-Patman Act (Public Law 74-692, 49 Stat. 1526, 15 U.S.C. 13 et seq.), or other relevant laws, and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises; and

(v) to help ensure that the intellectual property system, while incentivizing innovation, does not also unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act (see 35 U.S.C. 100 et seq. and 7 U.S.C. 2321 et seq.), in consultation with the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, submit a report to the Chair of the White House Competition Council, enumerating and describing any relevant concerns of the Department of Agriculture and strategies for addressing those concerns across intellectual property, antitrust, and other relevant laws.

(j) To protect the vibrancy of the American markets for beer, wine, and spirits, and to improve market access for smaller, independent, and new operations, the Secretary of the Treasury, in consultation with the Attorney General and the Chair of the FTC, not later than 120 days after the date of this order, shall submit a report to the Chair of the White House Competition Council, assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants, including:

(i) any unlawful trade practices in the beer, wine, and spirits markets, such as certain

exclusionary, discriminatory, or anticompetitive distribution practices, that hinder smaller and independent businesses or new entrants from distributing their products;

(ii) patterns of consolidation in production, distribution, or retail beer, wine, and spirits markets; and

(iii) any unnecessary trade practice regulations of matters such as bottle sizes, permitting, or labeling that may unnecessarily inhibit competition by increasing costs without serving any public health, informational, or tax purpose.

(k) To follow up on the foregoing assessment, the Secretary of the Treasury, through the Administrator of the Alcohol and Tobacco Tax and Trade Bureau, shall, not later than 240 days after the date of this order, consider:

(i) initiating a rulemaking to update the Alcohol and Tobacco Tax and Trade Bureau's trade practice regulations;

(ii) rescinding or revising any regulations of the beer, wine, and spirits industries that may unnecessarily inhibit competition; and

(iii) reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries.

(l) To promote competition, lower prices, and a vibrant and innovative telecommunications ecosystem, the Chair of the Federal Communications Commission is encouraged to work with the rest of the Commission, as appropriate and consistent with applicable law, to consider:

(i) adopting through appropriate rulemaking "Net Neutrality" rules similar to those previously adopted under title II of the Communications Act of 1934 (Public Law 73-416, 48 Stat. 1064, 47 U.S.C. 151 et seq.), as amended by the Telecommunications Act of 1996, in "Protecting and Promoting the Open Internet," 80 Fed. Reg. 19738 (Apr. 13, 2015);

(ii) conducting future spectrum auctions under rules that are designed to help avoid excessive concentration of spectrum license holdings in the United States, so as to prevent spectrum stockpiling, warehousing of spectrum by licensees, or the creation of barriers to entry, and to improve the conditions of competition in industries that depend upon radio spectrum, including mobile communications and radio-based broadband services;

(iii) providing support for the continued development and adoption of 5G Open Radio Access Network (O-RAN) protocols and software, continuing to attend meetings of voluntary and consensus-based standards development organizations, so as to promote or encourage a fair and representative standard-setting process, and undertaking any other measures that might promote increased openness, innovation, and competition in the markets for 5G equipment;

(iv) prohibiting unjust or unreasonable early termination fees for end-user communications contracts, enabling consumers to more easily switch providers;

(v) initiating a rulemaking that requires broadband service providers to display a broadband consumer label, such as that as described in the Public Notice of the Commission issued on April 4, 2016 (DA 16-357), so as to give consumers clear, concise, and accurate information regarding provider prices and fees, performance, and network practices;

(vi) initiating a rulemaking to require broadband service providers to regularly report broadband price and subscription rates to the Federal Communications Commission for the purpose of disseminating that information to the public in a useful manner, to improve price transparency and market functioning; and

(vii) initiating a rulemaking to prevent landlords and cable and Internet service providers from inhibiting tenants' choices among providers.

(m) The Secretary of Transportation shall:

(i) to better protect consumers and improve competition, and as appropriate and consistent with applicable law:

(A) not later than 30 days after the date of this order, appoint or reappoint members of the Advisory Committee for Aviation Consumer Protection to ensure fair representation of consumers, State and local interests, airlines, and airports with respect to the evaluation of aviation consumer protection programs and convene a meeting of the Committee as soon as practicable;

(B) promote enhanced transparency and consumer safeguards, as appropriate and consistent with applicable law, including through potential rulemaking, enforcement actions, or guidance documents, with the aims of:

(1) enhancing consumer access to airline flight information so that consumers can more easily find a broader set of available flights, including by new or lesser known airlines; and

(2) ensuring that consumers are not exposed or subject to advertising, marketing, pricing, and charging of ancillary fees that may constitute an unfair or deceptive practice or an unfair method of competition;

(C) not later than 45 days after the date of this order, submit a report to the Chair of the White House Competition Council, on the progress of the Department of Transportation's investigatory and enforcement activities to address the failure of airlines to provide timely refunds for flights cancelled as a result of the COVID-19 pandemic;

(D) not later than 45 days after the date of this order, publish for notice and comment a proposed rule requiring airlines to refund baggage fees when a passenger's luggage is substantially delayed and other ancillary fees when passengers pay for a service that is not provided;

(E) not later than 60 days after the date of this order, start development of proposed amendments to the Department of Transportation's definitions of "unfair" and "deceptive" in 49 U.S.C. 41712; and

(F) not later than 90 days after the date of this order, consider initiating a rulemaking to ensure that consumers have ancillary fee information, including "baggage fees," "change fees," and "cancellation fees," at the time of ticket purchase;

(ii) to provide consumers with more flight options at better prices and with improved service, and to extend opportunities for competition and market entry as the industry evolves:

(A) not later than 30 days after the date of this order, convene a working group within the Department of Transportation to evaluate the effectiveness of existing commercial aviation programs, consumer protections, and rules of the Federal Aviation Administration;

(B) consult with the Attorney General regarding means of enhancing effective coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation and the ability of new entrants to gain access; and

(C) consider measures to support airport development and increased capacity and improve airport congestion management, gate access, implementation of airport competition plans pursuant to 49 U.S.C. 47106(f), and "slot" administration;

(iii) given the emergence of new aerospace-based transportation technologies, such as low-altitude unmanned aircraft system deliveries, advanced air mobility, and high-altitude long endurance operations, that have great potential for American travelers and consumers, yet also the danger of early monopolization or new air traffic control problems, ensure that the Department of Transportation takes action with respect to these technologies to:

(A) facilitate innovation that fosters United States market leadership and market entry to promote competition and economic opportunity and to resist monopolization, while also ensuring safety, providing security and privacy, protecting the environment, and promoting equity; and

(B) provide vigilant oversight over market participants.

(n) To further competition in the rail industry and to provide accessible remedies for shippers, the Chair of the Surface Transportation Board (Chair) is encouraged to work with the rest of the Board to:

(i) consider commencing or continuing a rulemaking to strengthen regulations pertaining to

reciprocal switching agreements pursuant to 49 U.S.C. 11102(c), if the Chair determines such rulemaking to be in the public interest or necessary to provide competitive rail service;

(ii) consider rulemakings pertaining to any other relevant matter of competitive access, including bottleneck rates, interchange commitments, or other matters, consistent with the policies set forth in section 1 of this order;

(iii) to ensure that passenger rail service is not subject to unwarranted delays and interruptions in service due to host railroads' failure to comply with the required preference for passenger rail, vigorously enforce new on-time performance requirements adopted pursuant to the Passenger Rail Investment and Improvement Act of 2008 (Public Law 110-423, 122 Stat. 4907) that will take effect on July 1, 2021, and further the work of the passenger rail working group formed to ensure that the Surface Transportation Board will fully meet its obligations; and

(iv) in the process of determining whether a merger, acquisition, or other transaction involving rail carriers is consistent with the public interest under 49 U.S.C. 11323-25, consider a carrier's fulfillment of its responsibilities under 49 U.S.C. 24308 (relating to Amtrak's statutory rights).

(o) The Chair of the Federal Maritime Commission is encouraged to work with the rest of the Commission to:

(i) vigorously enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage pursuant to the Shipping Act, as clarified in "Interpretive Rule on Demurrage and Detention Under the Shipping Act," 85 Fed. Reg. 29638 (May 18, 2020);

(ii) request from the National Shipper Advisory Committee recommendations for improving detention and demurrage practices and enforcement of related Shipping Act prohibitions; and

(iii) consider further rulemaking to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions.

(p) The Secretary of Health and Human Services shall:

(i) to promote the wide availability of low-cost hearing aids, not later than 120 days after the date of this order, publish for notice and comment a proposed rule on over-the-counter hearing-aids, as called for by section 709 of the FDA Reauthorization Act of 2017 (Public Law 115-52, 131 Stat. 1005);

(ii) support existing price transparency initiatives for hospitals, other providers, and insurers along with any new price transparency initiatives or changes made necessary by the No Surprises Act (Public Law 116-260, 134 Stat. 2758) or any other statutes;

(iii) to ensure that Americans can choose health insurance plans that meet their needs and compare plan offerings, implement standardized options in the national Health Insurance Marketplace and any other appropriate mechanisms to improve competition and consumer choice;

(iv) not later than 45 days after the date of this order, submit a report to the Assistant to the President for Domestic Policy and Director of the Domestic Policy Council and to the Chair of the White House Competition Council, with a plan to continue the effort to combat excessive pricing of prescription drugs and enhance domestic pharmaceutical supply chains, to reduce the prices paid by the Federal Government for such drugs, and to address the recurrent problem of price gouging;

(v) to lower the prices of and improve access to prescription drugs and biologics, continue to promote generic drug and biosimilar competition, as contemplated by the Drug Competition Action Plan of 2017 and Biosimilar Action Plan of 2018 of the Food and Drug Administration (FDA), including by:

(A) continuing to clarify and improve the approval framework for generic drugs and biosimilars to make generic drug and biosimilar approval more transparent, efficient, and predictable, including improving and clarifying the standards for interchangeability of biological products;

(B) as authorized by the Advancing Education on Biosimilars Act of 2021 (Public Law 117-8, 135 Stat. 254, 42 U.S.C. 263-1), supporting biosimilar product adoption by providing effective educational materials and communications to improve understanding of biosimilar and interchangeable products among healthcare providers, patients, and caregivers;

(C) to facilitate the development and approval of biosimilar and interchangeable products, continuing to update the FDA’s biologics regulations to clarify existing requirements and procedures related to the review and submission of Biologics License Applications by advancing the “Biologics Regulation Modernization” rulemaking (RIN 0910-A114); and

(D) with the Chair of the FTC, identifying and addressing any efforts to impede generic drug and biosimilar competition, including but not limited to false, misleading, or otherwise deceptive statements about generic drug and biosimilar products and their safety or effectiveness;

(vi) to help ensure that the patent system, while incentivizing innovation, does not also unjustifiably delay generic drug and biosimilar competition beyond that reasonably contemplated by applicable law, not later than 45 days after the date of this order, through the Commissioner of Food and Drugs, write a letter to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office enumerating and describing any relevant concerns of the FDA;

(vii) to support the market entry of lower-cost generic drugs and biosimilars, continue the implementation of the law widely known as the CREATES Act of 2019 (Public Law 116-94, 133 Stat. 3130), by:

(A) promptly issuing Covered Product Authorizations (CPAs) to assist product developers with obtaining brand-drug samples; and

(B) issuing guidance to provide additional information for industry about CPAs; and

(viii) through the Administrator of the Centers for Medicare and Medicaid Services, prepare for Medicare and Medicaid coverage of interchangeable biological products, and for payment models to support increased utilization of generic drugs and biosimilars.

(q) To reduce the cost of covered products to the American consumer without imposing additional risk to public health and safety, the Commissioner of Food and Drugs shall work with States and Indian Tribes that propose to develop section 804 Importation Programs in accordance with the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108-173, 117 Stat. 2066), and the FDA’s implementing regulations.

(r) The Secretary of Commerce shall:

(i) acting through the Director of the National Institute of Standards and Technology (NIST), consider initiating a rulemaking to require agencies to report to NIST, on an annual basis, their contractors’ utilization activities, as reported to the agencies under 35 U.S.C. 202(c)(5);

(ii) acting through the Director of NIST, consistent with the policies set forth in section 1 of this order, consider not finalizing any provisions on march-in rights and product pricing in the proposed rule “Rights to Federally Funded Inventions and Licensing of Government Owned Inventions,” 86 Fed. Reg. 35 (Jan. 4, 2021); and

(iii) not later than 1 year after the date of this order, in consultation with the Attorney General and the Chair of the Federal Trade Commission, conduct a study, including by conducting an open and transparent stakeholder consultation process, of the mobile application ecosystem, and submit a report to the Chair of the White House Competition Council, regarding findings and recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the ecosystem.

(s) The Secretary of Defense shall:

(i) ensure that the Department of Defense’s assessment of the economic forces and structures shaping the capacity of the national security innovation base pursuant to section 889(a) and (b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283, 134 Stat. 3388) is consistent with the policy set forth in section 1 of this order;

(ii) not later than 180 days after the date of this order, submit to the Chair of the White House Competition Council, a review of the state of competition within the defense industrial base, including

areas where a lack of competition may be of concern and any recommendations for improving the solicitation process, consistent with the goal of the Competition in Contracting Act of 1984 (Public Law 98-369, 98 Stat. 1175); and

(iii) not later than 180 days after the date of this order, submit a report to the Chair of the White House Competition Council, on a plan for avoiding contract terms in procurement agreements that make it challenging or impossible for the Department of Defense or service members to repair their own equipment, particularly in the field.

(t) The Director of the Consumer Financial Protection Bureau, consistent with the pro-competition objectives stated in section 1021 of the Dodd-Frank Act, is encouraged to consider:

(i) commencing or continuing a rulemaking under section 1033 of the Dodd-Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products; and

(ii) enforcing the prohibition on unfair, deceptive, or abusive acts or practices in consumer financial products or services pursuant to section 1031 of the Dodd-Frank Act so as to ensure that actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law.

(u) The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs, shall incorporate into its recommendations for modernizing and improving regulatory review required by my Memorandum of January 20, 2021 (Modernizing Regulatory Review), the policies set forth in section 1 of this order, including consideration of whether the effects on competition and the potential for creation of barriers to entry should be included in regulatory impact analyses.

(v) The Secretary of the Treasury shall:

(i) direct the Office of Economic Policy, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, to submit a report to the Chair of the White House Competition Council, not later than 180 days after the date of this order, on the effects of lack of competition on labor markets; and

(ii) submit a report to the Chair of the White House Competition Council, not later than 270 days after the date of this order, assessing the effects on competition of large technology firms' and other non-bank companies' entry into consumer finance markets.



## Labor and employment

The EO calls on federal agencies to take actions against practices that impede worker mobility, suppress wages, and restrict competition. Specifically, the EO:

- **Encourages the FTC to ban or limit non-compete agreements.**
- Encourages the FTC to ban unnecessary occupational licensing restrictions that impede economic mobility.
- Encourages the FTC and the Department of Justice (DOJ) to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information.

## Health care and medicine

The EO tackles a number of areas where the lack of competition in health care may increase prices and reduce access to quality care. Specifically, the EO:

- **Directs the FDA to work with states and tribes to safely import prescription drugs from Canada, under the Medicare Modernization Act of 2003.**
- Directs HHS to increase support for generic and biosimilar drugs, which provide low-cost options for patients.
- Directs HHS to issue a comprehensive plan within 45 days to combat high prescription drug prices and price gouging.
- Encourages the FTC to ban “pay for delay” and similar agreements by rule.
- Directs HHS to consider issuing proposed rules within 120 days for allowing hearing aids to be sold over the counter.
- Underscores that hospital mergers can be harmful to patients and encourages the DOJ and the FTC to review and revise their merger guidelines to ensure patients are not harmed by such mergers.
- Directs HHS to support existing hospital price transparency rules and to finish implementing bipartisan federal legislation to address surprise hospital billing.
- Directs HHS to standardize plan options in the National Health Insurance Marketplace so people can comparison shop more easily.

## Transportation

The EO addresses issues unique to the transportation sector, primarily resulting from the fact that the air travel, rail travel, and shipping industries are now dominated by large corporations. To combat the identified issues, the EO:

- **Directs the DOT to consider issuing clear rules requiring the refund of fees when baggage is delayed or when service is not actually provided (i.e., when the plane’s Wi-Fi or in-flight entertainment system is not in service).**
- **Directs the DOT to consider issuing rules that require baggage, change, and cancellation fees to be clearly disclosed to the customer.**
- Encourages the STB to require railroad track owners to provide rights of way to passenger rail and to strengthen their obligations to treat other freight companies fairly.
- Encourages the FMC to ensure vigorous enforcement against shippers charging American exporters exorbitant fees.

## Agriculture

Because key agricultural markets have become more concentrated and less competitive in recent years, the Biden administration has recognized that the markets for seeds, equipment, feed, and fertilizer are now dominated by a few large companies. Accordingly, family farmers and ranchers now have to pay more for these inputs. **Additionally, domestic farmers are being threatened by the import of meat by foreign corporations that often use labels that mislead customers about the origin of that meat.** To combat these issues and others, the EO:

- **Directs the Department of Agriculture (USDA) to consider issuing new rules under the Packers and Stockyards Act that will make it easier for farmers to bring and win claims, stopping chicken processors from exploiting and underpaying chicken farmers, and adopting anti-retaliation protections for farmers who speak out about bad practices.**
- **Directs the USDA to consider issuing new rules defining when meat can bear “Product of USA” labels, so that consumers have accurate, transparent labels that enable them to choose products made here.**
- **Directs the USDA to develop a plan to increase opportunities for farmers to access markets and receive a fair return, including supporting alternative food distribution systems like farmers’ markets and developing standards and labels so that consumers can choose to buy products that treat farmers fairly.**
- Encourages the FTC to limit powerful equipment manufacturers from restricting people’s ability to use independent repair shops or do their own repairs, even when farm equipment manufacturers put policies in place that attempt to block farmers from repairing their own farm equipment.



The Biden-Harris Administration will dedicate \$1 billion in American Rescue Plan funds for expansion of independent processing capacity. USDA reviewed [nearly 450 comments](#) received over the summer in response to its request for input on how best to increase independent processing capacity. Through their analysis of stakeholder input, USDA identified an urgent need to:

- Expand and diversify meat and poultry processing capacity;
- Increase producer income;
- Provide producers an opportunity to have ownership in processing facilities;
- Create stable, well-paying jobs in rural regions;
- Raise the bar on worker health, safety, training, and wages for meatpacking jobs;
- Spur collaboration among producers and workers;
- Prompt state, tribal, and private co-investment; and
- Provide consumers with more choices.

To these ends, USDA has increased available funding and is releasing new program details to support the meat and poultry supply chain. Specifically, the Biden-Harris Administration will:

### **1] Expand independent processing capacity**

- Increase competition and create more options for producers and consumers in the near-term by jump-starting independent processing projects that will increase competition and enhance the resiliency of the food supply chain. This new processing capacity will build momentum in a currently concentrated market. For example, 50 beef slaughter plants owned by just a handful of companies currently process nearly all the cattle in the United States. USDA will provide gap financing grants totaling up to \$375 million for independent processing plant projects that fill a demonstrated need for more diversified processing capacity.
  - USDA will publish a Request for Proposals for Phase I of this initiative this Spring. Phase I will invest approximately \$150 million to jump-start an estimated 15 projects, focused on deploying financial support for projects with the greatest near-term impact. USDA will deploy an additional \$225 million to support additional projects in Phase II, which will open in Summer 2022. USDA will also ensure these funds truly expand capacity outside the largest meat and poultry processors, funding only independent operations.
- Strengthen the financing systems for independent processors. USDA will work with lenders to make more capital available to independent processors that need credit. To address the credit access gap, USDA will deploy up to \$275 million in partnership with lenders that will, in turn, provide loans and other support to businesses at rates and on terms that increase access to long-term, affordable capital. USDA will solicit applications from potential partners by Summer 2022, with an initial focus on lenders that provide financing in underserved communities.
- Back private lenders that invest in independently owned food processing and distribution infrastructure. From cold storage to specialized equipment, building a more distributed and resilient food system requires independent producers to have access to food processing and distribution infrastructure that enables them to move their product throughout the supply chain. To assist in the financing of this infrastructure, USDA has [deployed \\$100 million](#) in American Rescue Plan funds, to make more than \$1 billion in guaranteed loans available immediately. Applications for these guaranteed loans will be accepted until funds are expended; more information on how to apply can be found [here](#).

## **2] Support workers and the independent processor industry**

- Build a pipeline of well-trained workers and support safe workplaces with fair wages. New and expanded meat and poultry processing facility capacity will create new job opportunities in rural communities. Building a well-trained workforce and ensuring that meat and poultry processing jobs are safe requires dedicated attention and investment. USDA will dedicate \$100 million to support development of a well-trained workforce, safe workplaces, and good-paying, quality jobs by working closely with partner organizations, including labor unions, with expertise in workforce development and worker health and safety.
- Promote innovation and lower barriers to entry via publicly accessible expert knowledge. Meat and poultry processing is a complex and technical sector that requires strict adherence to a host of environmental, food safety, and worker safety requirements. Creating new business models that support both workers and producers is similarly complex and time-intensive. At the same time, processors need access to new and emerging innovative practices and technologies. USDA will invest an estimated \$50 million in technical assistance and research and development to help independent business owners, entrepreneurs, producers, and other groups, such as cooperatives and worker associations, create new capacity or expand existing capacity.
- Provide \$100 million in reduced overtime inspection costs to help small and very small processing plants keep up with unprecedented demand. With bipartisan support in Congress, [USDA is reducing](#) the financial burden of overtime and holiday inspection fees for small and very small poultry, meat, and egg processing plants, by 30 percent and 75 percent respectively, which provide farmers and ranchers with local alternatives to process livestock and poultry.
- In addition to the above investments from the American Rescue Plan, USDA has made \$32 million in grants to 167 existing meat and poultry processing facilities to help them reach more customers by becoming Federally inspected through the [Meat and Poultry Inspection Readiness Grants Program](#). With this grant funding, meat and poultry processing businesses can cover the costs for improvements, such as expanding existing facilities, modernizing processing equipment, and meeting packaging, labeling, and food safety requirements needed to achieve a Federal Grant of Inspection under the Federal Meat Inspection Act or the Poultry Products Inspection Act, or to operate under a state's Cooperative Interstate Shipment program. These changes will allow these facilities to serve more customers in more markets. An additional round of funding for this program will be made available through a forthcoming Request for Applications.

## **3] The Biden-Harris Administration will strengthen the rules that protect farmers, ranchers, and consumers. Specifically, in 2022, the Biden-Harris Administration will:**

- Issue new, stronger rules under the Packers and Stockyards Act—the law designed to combat abuses by the meatpackers and processors. The law was systematically weakened by the Trump Administration USDA, and in the Biden Administration, USDA has [already begun work](#) on three proposed rules to provide greater clarity and strengthen enforcement under the Act. USDA is also currently working with the Federal Trade Commission to prepare a report on access to retail and competition's role in protecting new market entrants in meat processing.
- Issue new "Product of USA" labeling rules so that consumers can better understand where their meat comes from. Under current labeling rules, meat can be labeled "Product of USA" if it is only processed here—including when meat is raised overseas and then merely processed into cuts of meat here. We believe this could make it hard for American consumers to know what they are getting. USDA has [already begun](#) its top-to-bottom review of the current labeling rules and consumers' understanding of the labels, with the goal of new rulemaking to clarify "Product of USA" standards.

It is the policy of the Administration to promote vigorous and fair enforcement of the existing competition laws, and to ensure “all of government” works together to promote competition:

- Today, DOJ and USDA are announcing a new joint initiative to better coordinate their efforts—including launching within 30 days a new portal for reporting concerns about potential violations of the competition laws. The President’s Executive Order on Promoting Competition established the White House Competition Council to coordinate a “whole of government approach” to promoting competition. In furtherance of this approach, Competition Council members USDA and DOJ will provide a new joint channel for farmers and ranchers to report complaints of potentially unfair and anticompetitive practices in the agricultural sector to them—whether under the Sherman and Clayton Acts or the Packers and Stockyards Act. This joint channel will facilitate the agencies’ ability to work together based on a common understanding of farmers’ and ranchers’ concerns. The agencies will protect the confidentiality of the complainants to the fullest extent allowed under the law. The agencies also announced their commitment to the strongest possible whistleblower protections. DOJ and USDA further announced that they will enhance their collaboration on referrals, information sharing, and identifying areas of the law in need of modernization.

**4] The Biden-Harris Administration will work to increase transparency in cattle markets so that ranchers can get a fair price for their work:**

- USDA is using its existing authorities to increase transparency to the extent possible. Right now, meatpackers have outsized power in setting the prices for beef. The dominance of opaque contracts and insufficient competition undermine price discovery and fairness in the independent livestock markets, which ultimately lock producers into prices that aren’t the product of free and fair negotiation. In August, USDA began issuing [new market reports](#) on what beef-processors pay to provide additional insight into formula cattle trades and help promote fair and competitive markets. USDA is looking at what more can be done under existing authorities.
- The Biden-Harris Administration will also work with Congress to make cattle markets fairer and more transparent. The Administration is encouraged to see bipartisan legislation in the Senate by Senators Grassley, Fischer, Tester, and Wyden, and in the House by Representatives Axne and Feenstra, that seeks to improve price discovery in the cattle markets and facilitate actual negotiation of prices between livestock producers and packers. We look forward to working with Congress on these important issues, and we hope that they will also look for ways to ensure farmers and ranchers have fair access to processing capacity.

So again, this may not be your issue

B. Nirvana no more?

<https://www.nytimes.com/2022/01/04/arts/music/nirvana-baby-nevermind-cover-lawsuit.html>

compliant filed 8/24

<https://www.courthousenews.com/wp-content/uploads/2021/08/nirvana-lawsuit.pdf>

MTD filed 12/22

<https://openargs.com/wp-content/uploads/Nirvana-MTD-brief.pdf>

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Usually you get 14 days, what gives?

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