IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, Defendants.	Civil Action No. 5:21-CV-00300-H

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

SUMMARY

Two years into the ongoing COVID-19 pandemic that has cost over one million Americans their lives, two Plaintiffs—the State of Texas and Lubbock Independent School District ("LISD")—continue to challenge an effort by the U.S. Department of Health and Human Services ("HHS") to implement effective safety measures to protect Head Start students. HHS's Interim Final Rule, Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs, 86 Fed. Reg. 68,052 (Nov. 30, 2021) (the "Rule"), requires that adult Head Start staff be vaccinated against COVID-19, or otherwise qualify for an exemption, and that all Head Start participants over the age of two wear masks. All of Plaintiffs' claims fail on the merits, for the reasons explained in Defendants' prior briefing. *See* Defs.' Br. in Supp. of Their Mot. to Dismiss, or in the Alternative, Mot. for Summ. J. ("Defs.' Br."), ECF No. 52; Defs.' Br. in Opp'n to Pls.' Mot. for Summ. J., ECF No. 59. But Texas's claims fail for an additional, threshold reason: it lacks Article III standing and should be dismissed as a Plaintiff in this case, as further explained below.

ARGUMENT

I. The State of Texas Has Not Established Standing.

The State of Texas has not established that it has standing as a plaintiff in this lawsuit. Defendants explained in their Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, that Texas has not suffered an injury in fact as a result of the Rule. Defs.' Br. at 11-14. While Plaintiffs set forth several theories that purportedly give Texas standing, each fails. Because Texas has no standing, it should be dismissed as a Plaintiff, and any relief granted by this Court should be limited to LISD. *See Fednav, Ltd. v. Chester*, 547 F.3d 607, 616-18 (6th Cir. 2008).

Parens patriae standing. Texas does not have standing *parens patriae* to bring suit against the federal government. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592 (1982), the Supreme Court held that a state could bring suit when it alleges its citizens have suffered a quasi-sovereign injury—*against a private entity*. *Id.* at 610 n.16 ("Here, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants."). The parts of *Snapp* to which Plaintiffs cite involve cases where a state can bring a suit in a *parens patriae* capacity

against a private party, not the federal government. *See id.* at 607. Indeed, *Snapp* expressly acknowledged the well-established rule that Plaintiffs ignore here: "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n.16. The state has no "duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). The Fifth Circuit recently affirmed this rule. *See Brackeen v. Haaland*, 994 F.3d 249, 292 n.13 (5th Cir. 2021) (en banc) ("[A] State [does not] have standing as the parent of its citizens . . . against the Federal Government, the ultimate *parens patriae* of every American citizen." (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966))), *cert. granted*, 142 S. Ct. 1205 (2022) (mem.). Plaintiffs' references to various executive orders issued by Texas' governor thus have no relevance to whether Texas has *parens patriae* standing. The caselaw clearly establishes that Texas is prohibited from suing the federal government in a *parens patriae* capacity.

Sovereign injury. Plaintiffs' claim that Texas has suffered a sovereign injury because the Rule preempts an executive order is also meritless. For starters, the vast majority of Executive Order GA-40 is unaffected by the Rule, which does not require that *all* Texans be vaccinated—it applies only to a small group of Head Start personnel. Regardless, "it is black-letter law that the federal government does not 'invade[]' areas of state sovereignty 'simply because it exercises its authority' in a way that preempts conflicting state laws"—to "conclude otherwise would mean that a state would suffer irreparable injury from all . . . federal laws with preemptive effect." *Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1291 (11th Cir. 2021) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981)). The plaintiffs in *Florida* identified "no cases establishing such a broad standard," *id.*, nor have Plaintiffs done so here. Plaintiffs' reliance on decisions balancing the equities in cases between states and their own citizens—not states and the federal government—is therefore misplaced. In *E.T. v. Paxton*, 19 F.4th 760 (5th Cir. 2021), for example, the plaintiffs challenged an executive order broadly prohibiting all "governmental entit[ies]" in Texas from requiring masks. *Id.* at 763. In concluding that the equities favored a stay pending appeal, the Fifth Circuit observed that

when an executive order is enjoined by a lower court, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Id.* at 770. Likewise, in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 734 F.3d 406 (5th Cir. 2013), the plaintiffs challenged a state law regulating abortion providers, and the court recited that same proposition in granting a stay pending appeal. *Id.* at 419. But the weight accorded to a state's interests in the equitable balance when its statutes are enjoined by a court order in a case against its own citizens does not bear on the question here, which is whether Texas can demonstrate a cognizable Article III harm merely by asserting that its governor issued an executive order that has some overlap with federal law. Texas cannot do so, nor do Plaintiffs point to any authority to the contrary.

Costs to Head Start programs. Texas does not oversee a Head Start program. States are not eligible for Head Start grants, and HHS administers Head Start funding directly to "local public or private nonprofit agenc[ies], including community-based and faith-based organizations, or for-profit agenc[ies], within a community." 42 U.S.C. § 9836(a)(1). Texas has made no allegation that it operates an Early Head Start program, either. *See id.* § 9840a. None of the declarations referenced by Plaintiffs, *see* Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss, or in the Alternative, Mot. for Summ. J. ("Pls.' Br."), ECF No. 61, involve *state* entities that run Head Start programs. Texas thus receives no Head Start funding, and accordingly, no Texas employees are subject to the requirements of the Rule. And because Texas cannot assert *parens patriae* standing, it likewise cannot maintain that simply because these Head Start programs are located in Texas, it is injured on their behalf.[1]

Procedural injury. Plaintiffs cannot claim that Texas suffered a procedural injury from the deprivation of notice and comment. To the extent that they assert that the state of Texas was deprived of the opportunity to comment on the Rule, HHS did, in fact, hold a notice and comment period from November 30, 2021 to December 30, 2021, so Texas could have submitted a comment then. 86

[1] Moreover, Plaintiffs' prediction that certain Head Start programs will lose funding entirely and thus cease operations is speculative. *See* Pls.' Br. at 6. A more plausible (although still speculative) effect of the Rule would be that a small number of Head Start staff who decline to be vaccinated would be terminated by their local Head Start program. The Rule has been in effect in 25 states for nearly six months, and Plaintiffs do not point to any program in those states that has lost federal funding as a result.

Fed. Reg. at 68,052. Regardless, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). For the reasons already stated, Texas has not demonstrated that it has any concrete interest in the Head Start program or the Rule. This also differentiates this case from *Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433 (5th Cir. 2019), which involved a far more concrete state interest than the alleged interests here. In that case, Texas challenged a guidance document that mandated that state agencies change a number of their hiring policies. *Id.* at 447. By contrast, Texas has not demonstrated that any of its state entities or employees are affected by the Rule. As a result, Plaintiffs are effectively arguing that any plaintiff who alleges an APA procedural violation automatically has standing, but that is plainly incorrect. *Summers*, 555 U.S. at 496; *see also United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (explaining that "a generalized grievance" does not support standing). Since Plaintiffs have again failed to demonstrate any injury to Texas that is concrete and particularized, Texas has no standing. Texas should be dismissed as a Plaintiff, and any relief granted should be limited to LISD. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("A plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.") (citation omitted).

II. Defendants Have Not Violated Any Statutory or Constitutional Provision in Promulgating the Rule.

In their opposition to Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, Plaintiffs either repeat or merely refer to arguments they already set forth in their own Motion for Summary Judgment, *see* Pls.' Br. in Supp. of Their Mot. for Summ. J., ECF No. 54-1, which Defendants have already addressed elsewhere. Thus, to avoid duplicative briefing, in support of their argument that Plaintiffs have failed to establish that the Rule violates any statutory or constitutional provision, Defendants respectfully refer the Court to their brief supporting their Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, and their brief in opposition to Plaintiffs' Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion to dismiss, or in the alternative, motion for summary judgment.

Dated: May 18, 2022

Respectfully submitted,

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