IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY; ET AL, PLAINTIFFS, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; et al., DEFENDANTS.	CIVIL ACTION NO. 3:21-CV-04370-TAD-KDM

PLAINTIFFS STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR MOTION TO DISMISS

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INTRODUCTION

Defendants' motion to dismiss or for summary judgment (*see* Doc. 65-1) repeats a round of arguments that have already been rejected. First, they argue that Congress authorized the Head Start Mandate, but it did not. Because of the nature of the authority asserted, nothing less than a clear congressional authorization would suffice to authorize the Mandate. But the only statute that Defendants invoke confers only the extremely limited power to "modify" three categories of performance standards. The Head Start Mandate is not a "modif[ication]"—and the categories are inapposite. The truth is that Congress did not give the Executive Branch the power to condition preschool for children in poverty on compliance with the President's political agenda. Second, Defendants argue that the Mandate complies with other substantive and procedural law, but it does not. The Mandate conflicts with five provisions of the Head Start Act, does not qualify for an exception to notice-and-comment rulemaking, is arbitrary and capricious for eight reasons, contravenes the Treasury and General Government Appropriations Act, and violates the Constitution in four separate ways. Meanwhile, Defendants' jurisdictional arguments ignore the barrage of harms caused by the Mandate, including the preemption of and pressure to change State laws, the denial of procedural rights under the APA, the direct regulation of State programs, the loss of funding and impositions of new costs on the States, and the harm to States' citizens' physical and economic wellbeing as a result of the Mandate.

Because the Head Start Mandate is unlawful and Plaintiff States have standing, this Court should deny Defendants' motion.

BACKGROUND

I. THE HEAD START PROGRAM

Through the Head Start program, the Department of Health & Human Services and the Administration for Children and Families fund public, non-profit, and for-profit providers of

preschool education for children from low-income families. *See* 42 U.S.C. §§9831 et seq. *See, e.g.*, *Doe v. Woodard*, 912 F.3d 1278, 1286 n.2 (10th Cir. 2019) ("Head Start primarily functions as an educational institution for very young children"). Head Start "improves educational outcomes—increasing the probability that participants graduate from high school, attend college, and receive a post-secondary degree, license, or certification." Schanzenbach & Bauer, *The long-term impact of the Head Start program*, Brookings (Aug. 19, 2016), brook.gs/3lQ6JNY.

All States have Head Start programs. Some States run their Head Start programs directly and receive Head Start funds directly from the federal government. *See, e.g.*, Docs. 2-3, 2-16.

II. THE BIDEN ADMINISTRATION'S VACCINE AND MASK POLICY

For some time, President Biden and his Administration conceded that executive vaccine and mask mandates were lawless. "I cannot mandate people wearing masks," the Mr. Biden told voters before he took office. *Transcript of CNN Presidential Town Hall with Joe Biden*, CNN (Sept. 17, 2020), cnn.it/3rFcxNZ. Mandating vaccines is "not the role of the federal government," his Administration continued to acknowledge. *Press Briefing by Press Secretary Jen Psaki*, July 23, 2021, bit.ly/3pWnJVr. Early on, the Biden Administration made clear that "[t]he government is not now, nor will we be supporting a system that requires Americans to carry a [vaccine] credential." Samuels, *White House rules out involvement in 'vaccine passports'* (Apr. 6, 2021), bit.ly/3OYf1yH. In line with that promise, his Administration "allow[ed] Head Start programs to decide whether or not to require staff vaccination." *See Vaccine and Mask Requirements to Mitigate the Spread of COVID–19 in Head Start Programs*, 86 Fed. Reg. 68052, 68054 (Nov. 30, 2021).

But then in September 2021, the President announced that his "patience" was "wearing thin" with those "who haven't gotten vaccinated." White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), bit.ly/3Ey4Zj6. He called the concerns of those opposed to mask mandates "ugly" and "wrong." *Id.* And his Administration announced an unprecedented series of

federal mandates. Among other things, President Biden announced that he would impose—through unilateral executive action—a vaccine mandate on "all of nearly 300,000 educators" in Head Start. *Id.* President Biden declared that he was "tak[ing] on elected officials and states" and that he would "use my power as President to get them out of the way." *Id.*

III. THE HEAD START MANDATE

On November 30, 2021, HHS published an interim final rule requiring (1) vaccination of Head Start educators and (2) masking of all Head Start adults and children two years or older. *See* 86 Fed. Reg. 68052. The Head Start Mandate's vaccine requirement forces Head Start personnel—including all staff, all contractors who come into contact with or provide direct services to children and families, and all volunteers in classrooms or working directly with children—to submit to full COVID-19 vaccination. 86 Fed. Reg. at 68101; 45 C.F.R. §§1302.93(a)(1), 1302.94(a)(1). The Mandate currently defines full vaccination as the primary doses of an approved vaccine. *See* 86 Fed. Reg. at 68060. Other than for those who can establish a medical exception and those protected by other federal laws, the Mandate provides no alternative to vaccination. 45 C.F.R. §§1302.93(a)(1); 1302.94(a)(1). For those who qualify for an exemption, a Program must conduct, track, and document testing at least weekly and to use existing funds to do so.

The Head Start Mandate's masking requirement forces all children two years old and older and all adults to wear masks (1) "indoors in a setting when Head Start services are provided," (2) "outdoors in crowded settings or during activities that involve sustained close contact with other people" for those not fully vaccinated, and (3) in a Head Start vehicle with another person. 86 Fed. Reg. at 68101; 45 C.F.R. §1302.47(b)(5)(vi) ("the Toddler Mask Mandate"). Only eating, drinking, and napping are exempted from the mask requirement. *Id.* §1302.47(b)(5)(vi). All adults and toddlers must submit to the mask requirement unless already protected by federal disability law or a religious

exemption, or they get a healthcare provider's recommendation for an "alternative face covering." *Id.* §1302.47(b)(5)(vi)(C)-(D).

Defendants sought to make the Toddler Mask Mandate enforceable immediately and the vaccine requirements enforceable on January 31, 2022. 86 Fed. Reg. at 68052. They consider a person fully vaccinated two weeks after completing a primary vaccination series, which can itself take several weeks to complete. *Id.* at 68060; *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs* at 15, Office of Head Start (Dec. 2, 2021), bit.ly/3Gw4Sp8. The Head Start Mandate includes no exception for people with natural immunity and no exception for people who test negative for COVID-19 before entering school each day. If a Head Start provider does not comply with the Mandate, Defendants must initiate proceedings to terminate its funding. 42 U.S.C. §9836a(e)(1)(C).

IV. THE HEAD START MANDATE'S EFFECT ON FAMILIES, PROVIDERS, AND STATES

The Head Start Mandate targets 273,000 staff, up to one million volunteers, and up to 864,289 children at America's 20,717 Head Start Centers. 86 Fed. Reg. at 68068-69, 68077. It applies to staff regardless of whether they work in-person or remotely. Many Americans do not wish to submit to vaccination. If forced, some of them will submit to vaccination to maintain their livelihoods, while others will give up their livelihoods to protect their bodily autonomy. Defendants estimate that the vaccine requirements will force 29,953 staff to submit to the vaccine and 11,519 staff to lose their jobs. *Id.* at 68077-78. The National Head Start Association surveyed Head Start programs and found that over one-fourth of Head Start programs anticipate losing more than 30% of their staff as a result of the Mandate. Doc. 2-2 at 3. That number would increase if the definition of "fully vaccinated" expands. *Cf., e.g.*, *Stay Up to Date with Your COVID-19 Vaccines*, CDC.gov (July 19, 2022), bit.ly/3OX1LdZ ("You are up to date with your COVID-19 vaccines when you have received all doses in the primary series and all boosters recommended for you.").

Meanwhile, the masking requirement of the Head Start Mandate would force practically all of the 864,289 children subject to it to either submit to masking or surrender their places in Head Start. And it would force all of the 273,000 staff and nearly one million volunteers to either submit to masking or leave Head Start. Defendants did not indicate how many children, staff, or volunteers would leave the program due to the Head Start Mandate.

As a result of the Head Start Mandate, staff and volunteers will likely leave the Head Start program, certain providers will close, and low-income children in affected areas will be denied access to the preschool education that Congress guaranteed them. *See* Docs. 2-2 to 2-15, 2-16 to 2-19. Unsurprisingly, some parents would remove their children from Head Start programs because of the Mandate's masking requirements. *See* Docs. 2-8, 2-10, 2-16.

States have direct and indirect interests in the Head Start grant program. Some States directly participate as grantees but also enforce Head Start standards. *See* Docs. 2-3, 2-16. All States have Head Start programs, which are important safety-net education programs for pre-school aged children that improve educational readiness for entry into kindergarten, but also provide critical health and social support resources to families that States would have to find funding to backfill. Head Start funds sometimes go directly to public schools with preschool programs, and the States will be harmed by the loss of staff, children, and funding at those schools. *See* Docs. 2-4, 2-8, 2-17. States also have *parens patriae* interests in protecting children in poverty. States have long relied on Head Start as an integral part of their safety net and education services. *See* Doc. 1 ¶¶42-57.

V. THE HEAD START MANDATE IS ENJOINED

On January 1, 2022, this Court issued a preliminary injunction against implementation of the Head Start Mandate. *Louisiana v. Becerra*, No. 3:21-cv-04370, 2022 WL 16571 (W.D. La. Jan. 1). The Court first held that Plaintiff States had standing to pursue their claims on multiple independent grounds: harms to their sovereign, proprietary, and *parens patriae* interests. *Id.* at *5. The Court noted

that Plaintiff States would have standing under both the normal standing framework and under the special-solicitude framework to which States are entitled. *Id.* at 6 ("Although this Court has found that Plaintiff States have proven standing through the normal inquiry, they also can establish standing as a result of special solicitude.").

The Court went on to hold that the Mandate was likely unlawful for several reasons. First, the Mandate exceeds Defendants' statutory authority. *Id.* at *8-11. Second, Defendants' invocation of the good-cause exception to notice-and-comment rulemaking was unlawful. *Id.* at *11-13. Third, the Mandate violates the Tenth Amendment by infringing upon the States' police power. *Id.* at *13-14. Finally, the Court held that the remaining equitable factors all favored granting a preliminary injunction. *Id.* at *14-15. The Government did not appeal that injunction to the Fifth Circuit.

ARGUMENT

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Since this is an APA case, the summary judgment standard functions slightly differently because "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal." *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 396 Fed. Appx. 147, 151 (5th Cir. 2010). Put another way, "[t]he entire case on review is a question of law, and only a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Thus, whether the issue is one of reviewability or otherwise, the court must limit its review to the "administrative record" and the facts and reasons contained therein to determine whether the agency's action was "consistent with the relevant APA standard of review." *Ho–Chunk, Inc. v. Sessions*, 253 F.Supp.3d 303, 307 (D.D.C. 2017) (cleaned up); *see also Caiola v. Carroll*, 851 F.2d 395, 398 (D.C. Cir. 1988).

"In evaluating a motion to dismiss under Rule 12(b)(6), the Court must 'accept all well-pleaded facts in the complaint as true and view the facts in the light most favorable to the plaintiff.'" *Luv N' Care, Ltd. v. Jackel Int'l Ltd.*, 2020 WL 6881672, at *3 (W.D. La. Nov. 23). Accordingly, "courts 'are not authorized or required to determine whether the plaintiff's plausible inference ... is equally or more plausible than other competing inferences.'" *Id.* This plausibility standard is met "when the complaint pleads 'enough fact to raise a reasonable expectation that discovery will reveal evidence' in support of the alleged claims.'" *Id.* Regarding jurisdiction specifically, "[a]t the pleading stage, allegations of injury are liberally construed." *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009). And "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Under the APA, courts set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706 (2)(A). Generally, courts review arbitrary-and-capricious challenges to administrative actions to determine whether "an agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Univ. of Texas M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021).

I. THE HEAD START MANDATE IS UNLAWFUL.

A. The Head Start Mandate Is Beyond the Executive's Authority.

This case starts and ends with the Major Questions Doctrine. In the past two Terms, the Supreme Court has repeatedly held that the Executive Branch may not regulate questions of major "economic and political significance" without "clear congressional authorization." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022); *see also, e.g.*, *NFIB* v. *OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam). The Major Questions Doctrine reflects the commonsense assumption that Congress, like any ordinary speaker of the

English language, would take care to communicate important things clearly. "Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices." *West Virginia v. EPA*, 142 S. Ct. at 2609 (cleaned up). "Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *Id.*

The Major Questions Doctrine also protects the constitutional separation of powers and our fundamental liberties. "[T]he framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *Id.* at 2617 (Gorsuch, J., concurring) (quoting *The Federalist* No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton)). "As a result, the framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto." *Id.* at 2618. "The need for compromise inherent in this design … sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority." *Id.* (citing *The Federalist*, No. 51, at 322-324 (J. Madison)). It would betray this design to allow unaccountable bureaucrats to make important policy decisions without clear congressional authorization.

The Major Questions Doctrine is triggered whenever an agency claims the power to resolve a matter of great "economic" or "political significance." *NFIB*, 142 S. Ct. at 665 (internal quotation marks omitted). This includes an agency's claimed power to end an "earnest and profound debate across the country." *Gonzales v. Oregon*, 546 U.S. 243, 248, 267-268 (2006). In *Gonzales*, the Court found that the doctrine applied when the Attorney General issued a regulation that would have effectively banned most forms of physician-assisted suicide, a hotly debated issue. *Id.* at 267. And in *NFIB* v. *OSHA*, the Court held the doctrine applied when an agency sought to mandate Covid–19 vaccines nationwide outside of the healthcare context amid great national division over vaccines. 142

S. Ct. at 664-65. The Doctrine also includes an agency's claimed power to regulate "a significant portion of the American economy," which is understood broadly to include everything from regulating tobacco products to subjecting private homes to Clean Air Act restrictions to suspending local housing laws and regulations. See *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000); *Utility Air Regulatory Grp. v. PA*, 573 U.S. 302, 324 (2014); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486-87.

The Head Start Mandate triggers the Major Questions doctrine because it seeks to force a private medical decision on hundreds of thousands of Head Start personnel and over one million volunteers, to force endless and perpetual masking on nearly a million additional children, and to impose an unprecedented degree of federal surveillance and control over preschool in America. It concerns an issue that has generated undeniable controversy and division. Liesman, *Americans are sharply divided over vaccine mandates, CNBC survey shows*, CNBC (Aug. 4, 2021), cnb.cx/3OScSEQ. Some States have imposed even more stringent vaccine mandates, but some States have outlawed vaccine mandates. The Mandate also affects hundreds of millions of dollars in funding that helps to sustain the most economically vulnerable Americans. If this is not an issue of sufficient economic or political importance or an attempt to end an earnest and profound debate across the country, then hardly anything ever will be. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021). Our Constitution left questions like this one to Congress.

Even putting aside the Major Questions Doctrine, the Mandate triggers another clear-statement requirement. When an agency regulates in an area traditionally left to States, it also must have clear congressional authorization. *Gregory v. Ashcroft*, 501 U.S. 452, 459-460 (1991). "[U]nsurprisingly, the major questions doctrine and the federalism canon often travel together" because "[w]hen an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States." *West Virginia*

v. EPA, 142 S. Ct. at 2621 (Gorsuch, J., concurring). The Head Start Mandate triggers the federalism canon because it seeks to regulate state and local governments, preempt their laws, and invade their traditional police power. *Louisiana v. Becerra*, 2022 WL 16571, at *14. Accordingly, both clear-statement requirements apply here. The Mandate is unlawful unless Congress clearly authorized it.

Yet Congress did not authorize the Head Start Mandate at all. Defendants invoked only one provision of law as authorization for the Mandate, and that provision of law comes nowhere close to the clear statement needed. That provision, codified at 42 U.S.C. §9836a(a)(1)(C)-(E), authorizes the Secretary to only:

> modify, as necessary … administrative and financial management standards … standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate) for such agencies, and programs … [and] such other standards as the Secretary finds to be appropriate.

42 U.S.C. §9836a(a)(1)(C)-(E).

Defendants largely ignore the statutory text because it is doubly fatal to their position. First, the word "modify" is crucial and dispositive. In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, the Supreme Court held that a statute authorizing the Federal Communications Commission to "modify any requirement" for tariff filing did not authorize the challenged regulation because it effected a fundamental change rather than a "modification." 512 U.S. 218, 225-26 (1994). As that Court explained, "[v]irtually every dictionary we are aware of says that 'to modify means to change moderately or in a minor fashion." *Id.* at 225; *see also id.* at 228 (holding that "'[m]odify' ... connotes moderate change").[1]

[1] The word "modify" means (1) "To make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness," (2) "To make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate," or (3) "To describe the or limit the meaning of." *Modify*, Black's Law Dictionary (10th ed. 2014); *see also* Random House Dictionary of the English Language 1236 (2d ed. 1987) ("to change somewhat the form or qualities of; alter partially; amend"); Webster's Third New International Dictionary 1452 (1981) ("to make minor changes in the form or structure of: alter without transforming"); 9 Oxford English Dictionary

Defendants offer no substantive response to *MCI Telecommunications*. Mot. 15-16. Instead, they try to paraphrase the statute as if it doesn't really use the word "modify" in the operative provision. *See* Mot. 14 ("adopt[]"); *id.* ("issue"); *id.* at 15 ("impos[e]"). But Congress said "modify," no matter how many times Defendants suggest Congress used a verb more in line with their preferred reading.

Once Defendants finally acknowledge *MCI Telecommunications*, they do not deny that the case is controlling. They instead suggest that "[r]equiring masking of children over age two and staff vaccinations" are minor modifications of the sort that the Court had in mind in *MCI Telecommunications*. Mot. 16. But the Mandate is anything but minor. It imposes sweeping and unprecedented control over the bodily autonomy of hundreds of thousands of Americans and effectively exiles tens of thousands of educators and children from Head Start. According to Head Start directors around the country, it will cause immediate and devastating closures. See Docs. 2-7 to 2-12. By any objective measure, it does not effect change in a "minor fashion." *MCI Telecommunications*, 512 U.S. at 225. It is therefore unauthorized by statute for the simple fact that it is not a "modification."

Second, even if the word "modify" could be replaced with one of the Government's preferred alternative verbs, §9836a(a)(1)'s three invoked categories do not encompass the Mandate. The Mandate is not an "administrative and financial management standard[]." 42 U.S.C. §9836a(a)(1)(C). That category refers to ministerial rules; it does not confer a roving power over participants' bodies and medical decisions. Nor is the Mandate a "standard[] relating to the condition and location of facilities." *Id.* §9836a(a)(1)(D). As the statute's specification of "indoor air quality assessment" demonstrates, that category refers to physical conditions and geographical placement of Head Start facilities rather than conditions on participation, employment, and volunteer eligibility.

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952 (2d ed. 1989) ("[t]o make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation").

Finally, the general "other standards as the Secretary finds to be appropriate" category, *id.* §9836a(a)(1)(D), cannot be relied upon as authority given the major questions implicated and the difference between a vaccine and masking mandate and the other authorities specifically enumerated. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012) ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."); *Yates v. United States*, 574 U.S. 528, 536 (2015) (when the phrase "tangible object" follows the words "record" and "document," it refers to "only objects one can use to record or preserve information, not all objects in the physical world"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) (when the phrase "any other class of workers engaged in foreign or interstate commerce" follows "seamen" and "railroad employees" it refers to only other workers involved in transportation). Just as the term "necessary" does not convey power to OSHA, *BST Holdings*, 17 F.4th at 613, or the CDC, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488, to impose a Covid vaccine mandate, the term "appropriate" is not an express grant of authority that would allow Defendants to impose such a mandate.

Any argument that Congress clearly authorized the Mandate is further undermined by the longstanding pre-2021 view that no federal statute authorized vaccine mandates in any context. *See, e.g.*, Cong. Research Serv., *Mandatory Vaccinations: Precedent and Current Laws* 9 (RS21414; May 21, 2014), bit.ly/3sEnEaf ("No mandatory vaccination programs are specifically authorized, nor do there appear to be any regulations regarding the implementation of a mandatory vaccination program at the federal level during a public health emergency.").

Defendants seem to suggest that the Supreme Court's recent vaccine-mandate decisions favor their position here. Mot. 13, 15-17. That couldn't be more wrong. First, in *NFIB v. OSHA*, the Supreme Court considered a statute providing much more broadly that "[t]he Secretary may by rule *promulgate, modify, or revoke* any occupational safety or health standard." 29 U.S.C. §655(b) (emphasis

added). The Court held that this statute did *not* authorize imposing a vaccine mandate on workers subject to the Secretary's authority. *NFIB*, 142 S. Ct. at 665-66. It held that there "can be little doubt" that an employee vaccine mandate triggers the Major Questions Doctrine. *Id.* at 665. An employee vaccine mandate, it explained, is a "significant encroachment into the lives—and health—of a vast number of employees." *Id.* The Court held that even when an agency enjoys broad power to regulate safety, it may not issue a public-health regulation that "falls outside of [the agency's] sphere of expertise." *Id.* It emphasized that a vaccine mandate "cannot be undone at the end of the workday" and is "not part of what the agency was built for." *Id.* (cleaned up).

Second, in *Biden v. Missouri*, the Court considered statutes providing even more broadly that an agency could impose "requirements as [it] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." 42 U.S.C. §1395x(e)(9). The Court held that in the realm of Medicare and Medicaid, where the agency specializes in healthcare and has long imposed regulations governing medical decisions, a vaccine mandate may be lawful if it is "necessary for the health and safety of individuals to whom care and services are furnished." *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022). It emphasized the importance of the "express 'health and safety' language" in the authorizing statute, the agency's expertise, and the litany of similar past regulations. *Id.* at 652, n.*.

Here, the relied-upon statutory authority comes nowhere close to the broad delegations at issue in either case. The power to "modify" three inapposite categories of standards is narrower than the power to "*promulgate, modify, or revoke* any occupational safety or health standard." 29 U.S.C. §655(b) (emphasis added). And it is certainly narrower than the power to impose "requirements as [the Secretary] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." 42 U.S.C. §1395x(e)(9). More to the point, Congress included no "health and safety" language in its enabling legislation for Head Start. And whereas Medicare and Medicaid

are healthcare programs with special experience and expertise concerning vaccinations, Head Start is a preschool education program.

Nor can Defendants justify the Head Start Mandate by invoking past regulations. Mot. 17-20. Defendants' invoked regulations seem to derive from other statutes or involve subject matter more likely to fall within Defendants' authority. For instance, Plaintiff States agree that Defendants once required in-home providers to confirm that pets were appropriately managed, immunized, and free from dangerous conditions. *See* Mot. 19; 73 Fed. Reg. 1285, 1297 (Jan. 8, 2008). But the pet regulation derived from a different statutory authorization not at issue in this case. *See id.* at 1286 ("The authority for this final rule is found in … 42 U.S.C. [§§]9839(a), 9839(c), and 9840a(b)(9)."). Nor does it seem right to compare the interests of Head Start teachers like Amanda Gros, Lisa Sanburn, and Tammie Slayter, Docs. 2-13 to 2-15, who could lose their livelihoods because of this Mandate, to the interests of rabid dogs.

As for the 1975 rules that Defendants emphasize, Mot. 19, the rules imposed no vaccination requirements on teachers. 40 Fed. Reg. 27561 (Jun. 30, 1975), bit.ly/3qz3BHH. They merely required that Head Start programs make immunizations available to children and support families who want them. *Id.* at 27565. Similarly, modern rules impose no vaccination requirements on teachers and merely require Head Start programs make immunizations available to children and support families who want them. 45 C.F.R. §1302.42(b)(1). Needless to say, an ocean of difference exists between making vaccines available to willing recipients and forcing them on unwilling subjects. Defendants also say that a 1975 rule "required [participants] to complete all recommended immunizations, including for diphtheria/pertussis/tetanus, polio, rubeola, rubella, and mumps." Mot. 19. But that rule did no such thing. Instead it said Head Start programs should "provide for treatment and follow-up services," including "[c]ompletion of all recommended immunizations," and "[e]xtraction of non-restorable teeth." 40 Fed. Reg. at 27565; 45 C.F.R. §1304.3-4 (1975). The "provi[sion]" of services for low-

income children describes a *benefit* of the program, not a mandate. As this Court already explained, the Secretary's past modifications underscore the uniqueness of this one. *Louisiana v. Becerra*, 2022 WL 16571, at *10. And notably, Defendants cite no case upholding any of those regulations as legal.

Defendants' scattershot attempts to rely on other statutes all fail. Mot. 17-18. Most important, Defendants did not rely on any statutes except 42 U.S.C. §9836a(a)(1) to justify the Mandate. But the statutes newly invoked here would not provide any authority in any event. For instance, one says that a Head Start teacher's "professional development" includes "activities" that assist his or her ability to "provide effective instruction" regarding language, math, science, art, "physical health and development," and other things. 42 U.S.C. §9832(21)(G)(i). To state the obvious, when Congress encourages Head Start teachers to offer the preschool equivalent of health class, those teachers retain autonomy over their private medical decisions. Similarly, another statute says that the Secretary should "address the unique needs of programs located in rural communities, including ... removing barriers to obtain health screenings for Head Start participants[.]" *Id.* §9843(a)(3)(B)(xii)(VI). But the Mandate does not remove any "barriers" to "health screenings"; if anything, it creates them because it harms programs in rural communities most when they are shut down. Likewise, Defendants' reliance on the Act's definition of "deficiency," Mot. 16, cannot make up for the lack of a primary grant of authority. The deficiencies identified by the Act refer to a failure to comply with the performance standards modified under §9836a(a)(1). *See* 42 U.S.C. §9836a(e)(1). But Defendants' whole problem is that §9836a(a)(1) does not authorize the Mandate in the first place. At best, these statutes are non-sequiturs.

The Head Start Mandate is not authorized by one line of statutory authority—much less the clear statement necessary to wade into a matter of immense public importance and push the limits of congressional and federal power.

B. The Head Start Mandate Is Contrary to Law.

The Head Start Mandate not only lacks clear congressional authorization—it violates several provisions of the Head Start Act. *First*, the Mandate violates the Head Start Act's text and structure. The Head Start program's purpose is "to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development." 42 U.S.C. §9831. The program has been reauthorized several times for the purpose of expanding eligibility and enrollment. *See, e.g.*, Improving Head Start for School Readiness Act of 2007 (P.L. 110-134). The Act's structure is designed to ensure that Defendants cannot issue measures that harm student well-being or decrease enrollment. *See* 42 U.S.C. §§9836a (a)(2)(C)(ii) (no reduction in quality of education or care), (b)(3)(B) (no reduction in enrollment). But the Head Start Mandate has decreased student enrollment already and will continue to do so. *See* Docs. 2-8, 2-10, 2-16. It will decrease staff and volunteer levels, which will harm the school readiness of low-income children. *See* Docs. 2-3, 2-4, 2-5, 2-22.

Second, the Mandate violates 42 U.S.C. §9836a(a)(2)(B)(x), which requires the Secretary to "take into consideration ... the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations." Defendants nowhere mention the impact of the Mandate on rural areas.

Third, the Mandate violates 42 U.S.C. §9836a(2)(A), which requires that the Secretary "shall consult with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head Start programs." The Secretary did not do so before issuing the Mandate and does not claim otherwise. Mot. 25.

Fourth, the Mandate violates 42 U.S.C. §9836a(a)(2)(C)(ii), which requires the Secretary to "ensure that any such revisions in the standards will not result in the elimination of or any reduction

in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services required to be provided under such standards as in effect on December 12, 2007." By excluding children and reducing eligible staff and volunteers, the Mandate will result in the reduction of the quality, scope, and types of health, education, parental involvement, nutrition, social, and other services provided to students. *See, e.g.*, Doc. 2-23.

Fifth, the Mandate violates 42 U.S.C. §9836a(b)(3)(B)'s fundamental command that measures promulgated under the authority of Section 641A "shall not be used to exclude children from Head Start programs." That is precisely the Mandate's purpose—excluding the children of parents who refuse to have their children comply with the masking requirement. And children are already being excluded from Head Start programs due to the Mandate. *See* Docs. 2-8, 2-10, 2-21, 2-22. Andrea Johnson, *Head Start must close classrooms, fire staff due to federal COVID-19 vaccine mandate*, Minot Daily News (Dec. 10, 2021), bit.ly/3ykUvBT.

C. The Head Start Mandate Violates the APA's Notice-and-Comment Requirement.

The Administrative Procedure Act requires agencies to publish notice of all "proposed rule making" in the Federal Register, 5 U.S.C. §553(b), and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* §553(c). Defendants acknowledge that the Mandate is a legislative rule that normally would have to go through the APA's notice-and-comment procedures and admit that they did not receive the benefit of notice and comment. 86 Fed. Reg. at 68058. Defendants try to justify this failure by invoking the narrow "good cause" exception to the APA's notice-and-comment requirement.

"The 'good cause' exception in 5 U.S.C. §553 is read narrowly in order to avoid providing agencies with an escape clause from the APA notice and comment requirements." *Louisiana v. Becerra*, 2022 WL 16571, at *12. Defendants' cursory good-cause analysis comes nowhere close to establishing

good cause. Defendants state that although "COVID-19 cases, hospitalizations and deaths have begun to trend downward at a national level," notice and comment must be avoided because of the "threat to the country's progress on the COVID-19 pandemic" posed by the unvaccinated. 86 Fed. Reg. at 68058-59. But this justification amounts to no more than a claim of administrative inconvenience—precisely the justification courts have repeatedly rejected. *See, e.g.*, *United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) ("[T]he good cause exception should not be used 'to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them.'"); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 498 (D. Md. 2020) ("[A]n agency may not dispense with notice and comment procedures merely because it wishes to implement what it sees as a beneficial regulation immediately."). Indeed, this Court and the Fifth Circuit have rejected precisely the same claims of exemption from APA and other notice-and-comment requirements. *See BST Holdings*, 17 F.4th at 611-12 ("The Mandate's stated impetus—a purported 'emergency' that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to—is unavailing as well.").

And Defendants' concerns about the onset of winter and flu season represent a crisis of their own making, which is not sufficient to establish good cause. *See, e.g.*, *United States Steel Corp. v. EPA*, 595 F.2d 207, 213-14 & n. 15 (5th Cir. 1979); *see also NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) ("We cannot agree ... that an emergency of [an agency's] own making can constitute good cause."). Defendants waited months to issue this supposedly emergency measure. This delay does not constitute good cause "because '[o]therwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures.'" *NRDC v. NHTSA*, 894 F.3d 95, 114-15 (2d Cir. 2018) (collecting cases). Nor can this failure be saved by *Biden v. Missouri*, given that the "good cause" there involved vaccinations in acutely high-risk medical

institutions and the delay was one month shorter. 142 S. Ct. at 651. Accordingly, Defendants failed to adhere to the APA's vital notice-and-comment rulemaking procedures without sufficient justification.

D. The Head Start Mandate Is Arbitrary and Capricious.

Federal administrative agencies must engage in reasoned decisionmaking. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained."). "[A]gency action is lawful only if it rests on a consideration of the relevant factors" and "important aspect[s] of the problem." *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring "reasoned decisionmaking"). This review "is not toothless." *State v. Biden*, 10 F.4th 538, 552 (5th Cir. 2021). The Mandate fails this review, and is arbitrary and capricious for eight independently sufficient reasons.

First, the Mandate undermines the Act's focus on providing children with education and care. It will shrink the number of eligible students, staff, and volunteers, undermining the Head Start Act's focus on student enrollment, education, and wellbeing. *See* 42 U.S.C. §9831. Each prong of the President's vaccination policy is aimed at the same overarching goal: increasing individual vaccination rates in society. *See Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), bit.ly/3oI0pKr (Head Start Vaccine Mandate part of President's plan to "increase vaccinations among the unvaccinated with new vaccination requirements"). But as extensively documented, the Mandate would cause Head Start programs to fire at least 11,519 staff and 42,000 volunteers, shut down programs, and undermine child education. *See, e.g.*, Frey, *Vaccine mandate affecting Newton Head Start staff*, The Kansan (Nov. 9, 2021), yhoo.it/3vJ7XPY; Kurtz, *Mayville State University's Head Start program could be impacted by vaccine mandate*, Grand Forks Herald (Dec. 9, 2021), yhoo.it/3buI7bk ("Van Horn said he was concerned about being able to maintain services for all of those children if the mandate remains in place.").

The Mandate will also force practically all of the 864,289 children subject to it to either submit to masking or surrender their place in Head Start. And Defendants did not indicate how many children, staff, or volunteers would leave the program due to the Mandate. The inevitable drop in students whose parents are unwilling to comply with the Mandate's requirements will undermine the Act's central focus on maintaining student enrollment. *See* 42 U.S.C. §9836a(b)(3)(B) ("Such measures shall not be used to exclude children from Head Start programs."); *see* Brown, *Day care says parents are removing kids due to state masking mandate*, ABC/WHAM (Sept. 16, 2021), bit.ly/3y8ltMU; Kailey Schuyler, *Parents pulling students out of school systems due to mask mandates*, WAFF/NBC (Aug. 15, 2021), bit.ly/3JwZ9Cw. The Mandate ignores that some experts, including the World Health Organization, have concluded mask wearing may not be in the best interest of children this young. *Coronavirus disease (COVID-19): Children and masks*, World Health Org. (Aug. 21, 2020), bit.ly/3Gxzg2n. The Mandate also ignores the best interest of speech- or language-impaired children, autistic children, and deaf children in experiencing a complete preschool education. *See, e.g.*, Shivaram, *New normal of masks is an 'added barrier' for deaf and hard-of-hearing community*, NBC News (May 23, 2020), nbcnews.to/3pHBply. Indeed, the Mandate never once mentions the interests of those students and the Mandate's disparate impact on those populations. *But see* 42 U.S.C. §9836a(b)(2)(F) ("The measures under this subsection shall ... provide for appropriate accommodations for children with disabilities."). Finally, the Mandate utterly ignores another statutorily mandated factor—its disparate impact on rural areas. *See* 42 U.S.C. §9836a(a)(2)(B)(x) (HHS must "take into consideration ... the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations").

Second, Defendants failed to consider or arbitrarily rejected obvious alternatives to vaccine and masking requirements. Studies show that natural immunity affords benefits comparable to or better than vaccination. *See, e.g.*, Healy, *Study shows dramatic decline in effectiveness of all three COVID-19 vaccines*

over time, L.A. Times (Nov. 4, 2021), lat.ms/30hQIbj ("As the Delta variant became the dominant strain of the coronavirus across the United States, all three COVID-19 vaccines available to Americans lost some of their protective power, with vaccine efficacy among a large group of veterans dropping between 35% and 85%, according to a new study."); Gazit et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, Medrxiv (Aug. 25, 2021), bit.ly/3DnKzIZ; Goel et al., *mRNA vaccines include durable immunity to SARS-CoV-2 and variants of concern*, Science (Oct. 14, 2021), bit.ly/3DXLS1K. Additional studies support this conclusion.

The Mandate is arbitrary because it fails to even consider or mention natural immunity as an alternative to vaccination or mask wearing. *See* Doc. 20 at 19-22; *cf. BST Holdings*, 17 F.4th at 615 ("[A] naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus."). And Defendants did not engage with studies showing the declining effects of the vaccines over time. *See* Cohn, *SARS-Cov-2 vaccine protection and deaths among US veterans during 2021*, Science (2021) bit.ly/307PLCP (reporting that within six months, efficacy of vaccines against infection declined to 13% (Johnson & Johnson), 43% (Pfizer), and 58% (Moderna)); *see also* Doc. 2-21.

Third, the Head Start Mandate is arbitrary and capricious because its rationales are pretextual. As recounted above, the President has stated several times that the Head Start Mandate is part of a broader program aimed at increasing vaccination rates throughout American society, writ large. The Mandate, however, eschews this rationale and tries (unsuccessfully and after-the-fact) to pigeonhole the Mandate into the Head Start Act's statutory factors. Such obvious regulatory reframing of the Mandate here leads to the inescapable conclusion that the Mandate's stated rationale is pretextual. And the presence of such blatant pretext is enough to render the Mandate arbitrary and capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019). What's more, the Administration's shifting rationales across all vaccine mandates demonstrate pretext. *See BST Holdings*, 17 F.4th at 614. For

example, the OSHA ETS declares that vaccines are necessary to protect worker safety. The CMS Mandate purported to focus on patient safety. But those rationales would not be sufficient under the Head Start Act. So Defendants manufactured a new rationale to cram the mandate into the Head Start Act. Accepting Defendants' description of the Head Start Mandate requires this Court to "'exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 139 S. Ct. at 2575-76.

Fourth, the Head Start Mandate ignores State reliance interests. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020). Specifically, the Mandate ignores: (1) the Plaintiff States' reliance interests in public and private Head Start programs continuing to operate under existing rules without facing this new Mandate that threatens to cause significant harm to the States' children, particularly those in rural communities; (2) Head Start providers' similar reliance interests in staffing their facilities under the existing rules without facing this new Mandate that threatens their workforce, the services they provide, and their very existence; and (3) Head Start workers' reliance interests, especially the interests of minority workers in rural communities, in selecting a job and building a career under the existing rules. *See* Docs. 2-3 to 2-12, 2-16 to 2-19.

Fifth, the Mandate fails to consider the uncertainty it imposes on providers due to the existence of potentially conflicting State provisions. Providers are already feeling the effects of such uncertainty. *See, e.g.*, Solochek, *Head Start providers caught in crossfire of conflicting mask, vaccine rules*, Tampa Bay Times (Dec. 9, 2021), bit.ly/3lT0NDA. Due to the uncertainty surrounding the legality of the Head Start Mandate, particularly in the wake of other mandates being enjoined, providers (especially smaller and rural providers without ready access to expert legal advice) face an excruciating practical conundrum about whether to follow State law or the likely void and illegal Head Start Mandate.

Sixth, the Mandate is arbitrary and capricious because it "is staggeringly overbroad." *BST Holdings*, 17 F.4th at 615. Like the OSHA Mandate, the Head Start Mandate is "a one-size-fits-all

sledgehammer that makes hardly any attempt to account for differences in" community measures, transmission levels, hospitalization levels, or levels of infection across communities. *Id.* at 612.

Seventh, Defendants fail to account for the fact that Head Start students often go to the same school with students who are not in Head Start. Defendants never consider the harms that will result from removing Head Start students from classrooms or facilities in order to allow other students to go unmasked, effectively segregating students and imposing stricter treatment on them because of their poverty level. They also don't consider the alternative possibility that the Mandate will force programs to mandate masking on students who themselves are not part of the Head Start program, which would exacerbate all of the costs of the Toddler Mask Mandate and cause even more children to lose their preschool education.

Eighth, Defendants failed to engage with other fundamental questions. They did not explain why they did not require children to wear masks in the Head Start program before now, including when case numbers were higher and everybody was unvaccinated and despite President-elect Biden stating in December 2020, that he would require masks "everywhere [he] can." Joe Biden (@JoeBiden), Twitter (Dec. 9, 2020, 8:59 a.m.), bit.ly/3dmWYC4. Defendants did not explain why they would require masks now even though such a requirement was not mentioned in President Biden's COVID-19 action plan, which described mandatory vaccination in Head Start and increased penalties for failing to abide by other mask mandates. *See* The White House, *Path Out of the Pandemic*, bit.ly/3adkMXx. *But see Texas v. Biden*, 10 F.4th 538, 554 (5th Cir. 2021) ("[A]n agency must provide 'a more detailed justification' when a 'new policy rests upon factual findings that contradict those which underlay its prior policy.'").

E. The Head Start Mandate Violates the Treasury and General Government Appropriations Act of 1999.

The Mandate also violates Section 654 of the Treasury and General Government Appropriations Act of 1999, which requires that agencies "shall" prepare an impact assessment "[b]efore implementing policies and regulations that may affect family well-being." Public Law 105-277, 5 U.S.C. §601 note. The impact analysis must meet several specific requirements including, among others, an assessment of whether the regulatory action "strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children," whether "the action may be carried out by State or local government or by the family," and whether "the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society." 5 U.S.C. §601 note.

Defendants acknowledged that Section 654 applies to the Head Start Mandate. *See* 86 Fed. Reg. at 68062. But they rejected the need for an impact assessment with the conclusory claim that the Mandate "will not have *any* impact on the autonomy or integrity of the family as an institution." *Id.* (emphasis added). The Mandate, however, intrudes into fundamental decisions about whether a child must wear a mask or not at school, imposes obligations on parents picking children up from school, and goes straight to the heart of the allocation of power between government and family. The Mandate is therefore contrary to Section 654 of the Act and must be vacated.

F. The Mandate Violates the Nondelegation Doctrine, Spending Clause, Tenth Amendment, and Anti-Commandeering Doctrine.

The Head Start Mandate violates several constitutional provisions and doctrines.

First, the Mandate violates the Nondelegation Doctrine. The Constitution vests Congress with all legislative powers granted to the federal government. U.S. Const. art. 1, §1. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is … vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935). If the Head Start

Act authorizes the President to require Head Start programs to mandate vaccines and masks based on the amorphous phrase "such other standards as the Secretary finds to be appropriate," this provision lacks an intelligible principle and is thus an unconstitutional delegation of legislative power to the Executive. *See BST Holdings*, 17 F.4th at 611. Because the word "appropriate" is not an intelligible principle, §9836a(1)(E) is an unconstitutional delegation of legislative power, is void, and therefore cannot justify the Mandate. *See id.*; *see also Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021) (rejecting reading on delegation grounds that "would grant the CDC director near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries as freely as she could ban evictions").

Second, the Mandate violates the Tenth Amendment by intruding into two core areas of State police power. No clause of the Constitution authorizes the federal government to impose the Head Start Mandate. Education and public health have long been recognized as aspects of police powers reserved to the *States*, not the Federal Government. *See, e.g.*, *BST Holdings*, 17 F.4th at 617 ("[T]o mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power."); *see also Hillsborough Cty. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurral) (our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect"); *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring); *accord id.* at 564 (majority op.); *Missouri v. Jenkins*, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring) ("We have long recognized that education is primarily a concern of local authorities.").

The Mandate expressly conflicts with State laws, rules, and policies issued under their long-established police powers over education and public health. *See, e.g.*, Solochek, *supra*. And the Head Start Mandate purports to expressly preempt State and local provisions. 86 Fed. Reg. at 68063. By

encroaching upon these inherent State powers, particularly without clear authorization from Congress, Defendants have exceeded their authority and violated the Tenth Amendment. *See BST Holdings*, 17 F.4th at 618 ("The States ... have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach.").

Third, the Mandate violates the Anti-Commandeering Doctrine by requiring State entities to enforce it. The Tenth Amendment and structure of the Constitution deprive Congress of "the power to issue direct orders to the governments of the States," *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018), or to commandeer State entities "into administering federal law," *Printz v. United States*, 521 U.S. 898, 928 (1997). The Mandate violates this doctrine by requiring State entities to enforce the Mandate against students, employees, and volunteers. By "conscript[ing] state [agencies] into the national bureaucratic army," the Mandate violates the Anti-Commandeering Doctrine. *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012).

Fourth, the Mandate violates the Spending Clause by conditioning the receipt of federal funds on enforcement of the Mandate. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Head Start Act does not clearly authorize or unambiguously impose the Head Start Mandate. And there is no nexus between Head Start grants and vaccine or mask requirements. *Cf. South Dakota v. Dole*, 483 U.S. 203 (1987). Accordingly, the Head Start Mandate is an unconstitutional condition on the receipt of federal funds.

To avoid these grave constitutional issues, the Court should reject Defendants' expansive interpretation of §9836a. *See BST Holdings*, 17 F.4th at 618 ("[E]ven if the statutory language were susceptible to OSHA's broad reading—which it is not—these serious constitutional concerns would counsel this court's rejection of that reading."); *see also Tiger Lily*, 5 F.4th at 672 ("[T]o put 'extra icing on a cake already frosted,' the government's interpretation of §264(a) could raise a nondelegation

problem."). But if the Court agrees with Defendants that the text of the §9836a does grant them unbounded discretion to impose a Head Start Mandate, §9836a is unconstitutional.

II. PLAINTIFF STATES HAVE STANDING.

This Court has already extensively discussed why Plaintiff States have standing to bring the present suit. Defendants fail to contest multiple valid bases for standing and misapprehend the remaining bases.

First, Defendants fail to contest Plaintiff States' standing based on preemption. Preemption of or pressure to change a State law injures a State. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *Texas v. United States*, 787 F.3d 733, 752 n.38 (5th Cir. 2015); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017). As this Court has found, Plaintiff States would have to change their own laws and policies to comply with the Mandate. *Louisiana v. Becerra*, 2022 WL 16571, at *5; *see also* Doc. 2-1 at 24 ("In other States, such as Montana, Alabama, and Florida, Programs would be placed in direct conflict with state law prohibitions on vaccine mandates.") (citing Mont. H.B. 702 (2021); Ala. Act. 2021-493 §1(a); Fla. H.B. 1B (2021)).

Second, Defendants fail to mention or contest Plaintiff States' procedural injury, another independent basis for standing. A plaintiff has a "cognizable injury if it has been deprived of a procedural right to protects its concrete interests." *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019) (quotations and alterations omitted). And "[a] violation of the APA's notice-and-comment requirements is one example of a deprivation of a procedural right." *Id.* Here, the States were denied their procedural right to notice and comment under the APA, which exists to protect their wide range of concrete interests in avoiding the Mandate. *See Louisiana v. Becerra*, 2022 WL 16571, at *6 ("Plaintiff States assert a congressionally bestowed procedural right, the APA, and the government action at issue affects the Plaintiff States' quasi-sovereign interests (damage to citizens, loss of jobs, businesses,

reliance interests, loss of tax funding and/or protection of State laws).”). Thus this constitutes another independent basis of standing not mentioned by Defendants.

Third, Defendants assert that Plaintiff States’ extensive allegations of monetary harms are “purely speculative.” Mot. 12. But this ignores that the Mandate directly imposes costs on States because it will cause them to lose direct federal funding, cause public schools to lose federal funding, cause all public entities involved with Head Start—many of which will turn to States for additional funding—to spend their own money enforcing compliance and providing tests, and cause the States to spend more in public benefits as a result of children leaving the program and staff and parents becoming unemployed. *See* Docs. 2-2 to 2-16; *see also* Doc. 2-17 at 2-3 (“the [Head Start] programs and classrooms themselves [are] funded with different sources of state, federal, and local dollars” and “costly [compliance] measures would have to come from our blended grant dollars and local funds as they are not covered costs by the federal government who is forcing us to comply”). There is nothing speculative about these injuries. *Louisiana v. Becerra*, 2022 WL 16571, at *6 (“Here, there is an obvious link between the Head Start Mandate and the Plaintiff States’ alleged injuries.”). And Defendants’ theory really amounts to a requirement that the Mandate be the very last stage of the chain of causation. But that is not the law. *See id.* (“The plaintiff need not demonstrate that the defendant’s actions are ‘the very last step in the chain of causation.”) (quoting *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997)).

Fourth, although they concede that State entities are direct recipients of Head Start grants, Defendants assert that Plaintiff States are not directly injured by the Mandate because a public university like Southern Utah University is not a State entity. Mot. 11. Contrary to Defendants’ representation, receiving money from the State is not the SUU’s only relationship with the State of Utah. Rather, SUU is governed by the Utah Board of Higher Education—a State entity created by the Legislature and appointed by the Governor. *See* Utah Code §53B-1-402. Similarly, Defendants cannot

contest that the Georgia Department of Early Care and Learning is a State entity. Instead, they attempt to portray the grants received by Georgia as "more administrative in nature." Mot. 11. Defendants' distinction between normal Head Start grants and those that are supposedly "administrative in nature" is nowhere found in the rule itself and is a post-hoc litigating position.

Fifth, Defendants' fail to overcome the evidence that the Mandate injures the States' citizens and thereby injures the States' *parens patriae* interests. As this Court has recognized, a State has a paradigmatic sovereign interest in "the health and well-being both physical and economic of its residents in general ... and in having its citizens not discriminated against." *Louisiana v. Becerra*, 2022 WL 16571, at *5 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982)). The Mandate irreparably injures those interests because it will naturally and foreseeably cause a reduction in the availability of Head Start services due to lost staff—or the denial of funding to existing Head Start preschools due to noncompliance—and thereby deny families the benefits of the federal system. Docs. 2-4 to 2-6. The widespread closure of Head Start programs will be devastating to the health and well-being of each State's residents. Docs. 2-7, 2-11, 2-12, 2-17. The Mandate will also place a substantial burden on the liberty interests of the preschool staff who must within weeks decide to either submit to vaccination or lose their jobs. Docs. 2-13 to 2-16, 2-18. It further burdens the liberty interests of the toddlers who must submit to masking Docs. 2-8, 2-10, 2-21.

Defendants do not attempt to rebut Plaintiffs States' extensive allegations of economic harm to their citizens. Instead, they assert that States categorically do not have *parens patriae* standing to sue the federal government. Mot. 12-13. But "Defendants' rebuttal to the States' *parens patriae* argument is not as simple as they would suggest." *Texas v. United States*, 86 F. Supp. 3d 591, 626 (S.D. Tex. 2015). Instead, Defendants' argument "ignores an established line of cases that have held that states may rely on the doctrine of parens patriae to maintain suits against the federal government." *Id.* (collecting cases). There is an "important distinction" between a State "bringing suit to *protect* their citizens *from*

the operation of a federal statute" and "bringing suit to *enforce* the rights guaranteed by a federal statute." *Id.*; *see also Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) ("[T]here is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).").[2] Because Plaintiff States seek redress for an Executive violation of federal law, they may proceed as *parens patriae* against the federal government. *Texas v. United States*, 86 F. Supp. 3d at 626 (*parens patriae* standing not precluded because "the States are suing to ... prevent the implementation of a policy that undermines those laws" "passed by Congress"); *accord Aziz v. Trump*, 231 F. Supp. 3d 23, 31-32 (E.D. Va. 2017) ("[A] state is not … barred by the *Mellon* doctrine from a parens patriae challenge to executive action when the state has grounds to argue that the executive action is contrary to federal statutory or constitutional law."); *see also Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802 n.10 (2015); *Texas*, 2021 WL 3683913, at *15 ("[A] long train of federal courts have applied or mirrored the Supreme Court's careful circumscription of *Mellon* to hold that a state may bring a parens patriae action against the federal government where it does not challenge the operation of a federal statute and it asserts a proper right.").[3]

And if there were any doubt about the many independent bases for Plaintiffs' States standing, special solicitude, ignored by Defendants, puts it beyond question.

[2] This distinction accords with *Brackeen*, which involved an Equal Protection Clause challenge seeking to protect citizens from the operation of a federal law, the Indian Child Welfare Act. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc).

[3] Defendant's citation to the D.C. Circuit's holding in *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173 (D.C. Cir. 2019), is not convincing because the "persuasive force of that opinion is diminished by the majority opinion in *Massachusetts v. EPA*" and *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015). *Aziz*, 231 F. Supp. 3d at 32 n.10.

CONCLUSION

This Court should deny Defendants' Motion to Dismiss and Motion for Summary Judgment.

Dated: August 10, 2022

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY, et al., PLAINTIFFS, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; et al., DEFENDANTS.	CIVIL ACTION NO. 3:21-CV-04370-TAD-KDM

[PROPOSED] ORDER

IT IS ORDERED that Defendants' Motion to Dismiss or Motion for Summary Judgment is **DENIED**.

Signed this ___ day of _____, 202__.

_____
THE HONORABLE TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE