IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, *et al.*, *Plaintiffs*, v. JOSEPH R. BIDEN, JR., in his official capacity as the President of the United States of America, *et al.*, *Defendants*.	No. 4:21-cv-01329

OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT

In arguing for dismissal, the Government conflates the transient with the final and the relevant with the irrelevant. The Government argues that the Supreme Court's non-merits decision in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), staying this Court's preliminary injunction, is equivalent to a final judgment rejecting arguments the States made in the First Amended Complaint (FAC)—months after the Supreme Court decision—and so mandates dismissal.

As a matter of law, fact, and logic, *Biden* does no such thing. The decision established at most the legal propositions that the CMS mandate likely "falls within the authorities that Congress has conferred upon" the Secretary (which is relevant to the States' Count Two), *id*. at 652, and that the Secretary likely "need not prepare a regulatory impact analysis discussing a rule's effect on small rural hospitals when he acts through an interim final rule" (which is relevant to the States' Count Six), *id.* at 654. But the ninety-one page, 389 paragraph, eleven count FAC involves so much more. For one, the States provide extensive allegations that the CMS mandate is arbitrary and capricious; more than that, the mandate is the product of a federal mindset that seeks to

suppress certain disfavored COVID narratives and to promote others. The Supreme Court's brief analysis of reasonableness of the mandate, based on allegations nowhere near as extensive as those in the FAC and in a completely different procedural posture, says nothing about whether the States' additional claims fail as a matter of law. It is not binding, or even on point, precedent on these issues.

But the Government's unjustified reliance on *Biden* is all it has. It ignores nearly all of the States' more than twenty reasons why the mandate is arbitrary and does nothing to undermine the main point: The Secretary said he was mandating a vaccine to prevent the spread of COVID-19, but in fact, he did so for no other purpose than to follow the pre-determined policy of the presidential administration to mandate a vaccine. The Secretary had no evidence that the vaccine actually prevents the spread of COVID-19; indeed, he had evidence that it does *not* prevent transmission. The administration simply wanted to appear like it was taking COVID seriously, and it thought a vaccine mandate would serve that purpose, regardless of whether the mandate prevented the spread of COVID. The Secretary could not implement that policy in the face of the contrary evidence. That is the opposite of reasoned decisionmaking.

The Government's opposition to the change-in-core-circumstances claim similarly fails. The Government argues that claims about changed circumstances extend only to legal changes. But precedent establishes that changes in facts likewise justify challenges to agency rules. And in all events, the Government ignores that there has been a key legal change: The CMS mandate was part of three interlocking vaccine mandates—the OSHA vaccine mandate and the federal contractor mandate—and those mandates are now withdrawn or enjoined in part. That change in the legal context surrounding the CMS mandate establishes the viability of the States' claim even on the Government's narrow terms.

In sum, the Government lacks anything substantial to justify its motion, so it resorts to overreading *Biden*. Indeed, even as to Counts Two and Six, the only counts where *Biden* is even relevant, the procedural posture of the case and the relevant rules of civil procedure support keeping those counts live based on the States' more-than-fair chance at getting the Supreme Court to revisit *Biden* after a final judgment. There is, therefore, no merit to the Government's motion.

BACKGROUND

The history of the CMS mandate is set out in the past papers and decisions of this Court. *See, e.g.*, ECF 52, at 2–14 (background section of the States' preliminary injunction motion). After the Supreme Court stayed this Court's preliminary injunction, *see generally Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), the Eighth Circuit vacated the injunction and remanded the case, *see Missouri v. Biden*, 2022 WL 1093036, at *1 (8th Cir. Apr. 11, 2022). On November 23, 2022, the States filed the FAC, *see* ECF 72, which this Court has deemed the operative complaint, *see* ECF 74. The FAC contains eleven counts falling into five categories: (1) The States' arbitrary-and-capricious claim (Count One), (2) the States' statutory claims (Count Two), (3) the States' procedural claims (Counts Three, Four, Five, and Six), (4) the States' constitutional claims (Counts Seven, Eight, Nine, and Ten), and (5) the States' changes-in-core-circumstances claim (Count Eleven).

On January 20, 2023, the Government moved to dismiss the FAC. *See* ECF 77. The Government's basis for dismissal of Counts One through Ten is that *Biden* mandates dismissal; its basis for Count Eleven is that the claim fails as a matter of the law. *See* Mot. Dismiss 1.

ARGUMENT

"[T]o survive a Rule 12(b)(6) motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Gleich v.*

Bi-State Dev. Agency, 2022 WL 15415876, at *2 (E.D. Mo. Oct. 27, 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Courts "accept[ ] as true the complaint's factual allegations and grants all reasonable inferences to the non-moving party." *Jordan v. Bell*, 2022 WL 4245440, at *4 (E.D. Mo. Sept. 15, 2022) (quoting *Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 911 F.3d 505, 512 (8th Cir. 2018) (citations omitted)).

I. *Biden v. Missouri* does not bar the States' arbitrary-and-capricious claim (Count One).

1. An agency acts arbitrarily and capriciously when it "fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1000–01 (8th Cir. 2018). The States provide over twenty reasons why the CMS mandate is arbitrary and capricious. *See* FAC ¶¶261–89. The Government's brief—to the extent it addresses any of them—discusses only two in a footnote: whether the Secretary failed to consider the States' reliance interests and whether there was pretext. Mot. Dismiss 7 n.3. That waives any opposition the Government may have on the other aspects of the States' arbitrary-and-capricious claim. "A footnote is no place to make a substantive legal argument . . . ; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture." *Caranchini v. Nationstar Mortg., LLC*, 2022 WL 1156543, at *3 n.2 (W.D. Mo. Apr. 19, 2022) (quoting *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014)). But the Government fares no better on the merits of the two points it does contest.

First, the Government says the States' reliance interests "rest[ ] on the premise that the Secretary previously had a policy opposing staff vaccination requirements," but "no such policy

existed." Mot. Dismiss 7 n.3. Rather, the Secretary "had simply declined to adopt [a vaccination] requirement at earlier stages of the pandemic and then reasonably changed course for reasons the Secretary fully explained." *Id.* To start, that misstates the States' argument. The States' reliance interests come from the fact that the Secretary has *never* imposed a vaccination requirement like the CMS mandate. *See* FAC ¶273. That is, the States' reliance interest stems from long-running government policy.

Setting that aside, the Government's argument is simply that the Secretary's switch in positions was reasonable. But this says nothing about whether the Secretary considered the States' reliance interests. An agency's duty to "display awareness that it *is* changing position," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), is in addition to its duty to "take account of legitimate reliance on prior" policy, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). *See also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (noting that, to be reasonable, agency action that rescinds prior policy "must consider the alternatives" and "whether there was legitimate reliance") (quotations omitted).

And the Secretary did neither. As to the Secretary's change in policy, the Government does not claim the Secretary displayed awareness that the agency was changing position—only that the change was reasonable. *See* Mot. Dismiss 7 n.3. But reasonableness is not enough. Agency action must "be reasonable *and* reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (emphasis added). The Secretary did not provide the reasonable explanation. For example, he "ignored the federal government's own pandemic response plans, which do not contemplate a federal vaccine mandate." FAC ¶218; *see also* FAC ¶274.

He also ignored the States' reliance interests. *See, e.g.*, FAC ¶273. Across decades, there have been dozens or even hundreds of diseases where the Secretary might have tried to impose a vaccine mandate. But the Secretary did not; the States did. *See Biden*, 142 S. Ct. at 653 (listing some "pre-existing state" vaccination requirements). That is, the States relied on the long-running absence of a similar vaccine mandate when establishing their health care systems, *see id.*, including by creating vaccine-related rules and regulations, *see* FAC ¶¶140–41 (noting the CMS mandate was implemented to impose uniformity on the "inconsistent web of State, local, and employer COVID-19 vaccination requirements") (quotations omitted). The Government does not claim that the Secretary considered those interests, which concedes the States' position. *See, e.g., Regents of Univ. of Cal.*, 140 S. Ct. at 1913 (noting agencies "must" consider reliance interests).

Second, the Government argues about pretext, saying there is not a " 'significant mismatch' between the Secretary's decision and the rationale he offered for it. … [T]he Secretary forthrightly acknowledged that the rule would protect other members of the public in addition to patients." Mot. Dismiss 7 n.3 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019)). The wide scope of the mandate is certainly relevant to the States' pretext argument, *see* FAC ¶107, but it is not the only piece—or even the main piece—of evidence.

For example, the States allege that at the time the Secretary implemented the mandate, the agency knew the vaccine was not effective at preventing transmission. *See, e.g.*, FAC ¶¶133–38. The Secretary therefore imposed the mandate not because of the evidence before him but because he was "bound and determined to impose the mandate as directed by President Biden … ." FAC ¶¶137–38 (quoting 86 Fed. Reg. 61,555, 61,615 (Nov. 5, 2021)). Imposing a rule regardless of the evidence is clear evidence of pretext. *See Dep't of Commerce*, 139 S. Ct. at 2575 (finding "significant mismatch between the decision the Secretary made and the rationale he provided"

suggested pretext). Also evidencing pretext is the mandate's "rigid one-size-fits-all rule that did not account" for SARS-CoV-2 mutations—mutations the Secretary knew would occur and could (even likely would) further reduce the vaccine's efficacy. *See* FAC ¶¶176–79, 192. If the goal is to prevent COVID transmission, it makes little sense to mandate a vaccine with minimal effect on transmission without considering that additional mutations may further reduce the vaccine's ability to stop transmission. Again, only an absolute determination to implement President Biden's plan "to 'require more Americans to be vaccinated'" at all costs explains the failure to plan for that contingency. FAC ¶92 (quoting the President).

Bolstering that conclusion is the federal government's "coordinated campaign … to censor what the government believes is" COVID mis- and dis-information. FAC ¶¶210–18. The Department of Health and Human Services (HHS) is actively involved in that effort, and CMS is a component of HHS. For that reason, "it is logical to believe that CMS was involved in" the censorship effort and, further, "that the CMS mandate and the agency's proffered reasoning was the product of that mentality" instead of a reasonable assessment of the facts before the agency. FAC ¶216.

That is not speculation. It is based on growing evidence from *Missouri ex rel. Schmitt v. Biden*, No. 3:22-cv-1213 (W.D. La.), which argues that demonstrated federal collusion with social media companies is violating, *inter alia*, the Constitution's guarantee of free speech. A number of emails in that litigation involve HHS personnel. *See* Ex. A, at 1–13 (providing examples).[1] Those emails show HHS officials working with social media platforms to promote certain narratives and to suppress others, *see, e.g.*, *id.* at 1, 4–5, 6–7, 13, including narratives involving

[1] Because these emails were filed in *Missouri ex rel. Schmitt v. Biden*, the Court may take judicial notice of their contents. *See Gregory v. Pritchett*, 2022 WL 17358895, at *2 n.1 (E.D. Mo. Dec. 1, 2022) (gathering authority).

vaccines, *see, e.g.*, *id.* at 1–2, 4, 6, 10. The Government tries to wash away the complaint as an attempt to rely on facts that occurred after adoption of the agency action. But in fact the States rely on substantial evidence from when the decision was made. These emails show that the collusion was occurring roughly when CMS implemented the mandate. *See id.* at 12–13 (providing emails sent between October 28 and November 3, 2021, that reference the "rollout for vaccines 5-11").[2]

At the end of the day, the Court should take President Biden at his word: The CMS mandate, like the OSHA vaccine mandate and federal contractor mandate, was part of President Biden's plan "to 'reduce the number of unvaccinated Americans.'" FAC ¶¶92–94. That, not preventing the spread of COVID, was the rationale for the mandate—and the Court need not pretend otherwise given the States' extensive allegations. *See Dep't of Commerce*, 139 S. Ct. at 2575 (Courts "are not required to exhibit a naiveté from which ordinary citizens are free.") (quotations omitted). So even if the CMS mandate is statutory authorized, *see Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam), the Secretary "ignored evidence [1] that would undermine the rationale for the CMS Mandate" (because that is the administration's policy) "and [2] that the rationale the agency did provide is pretextual" (because the agency's rationale for the mandate was not to prevent transmission but to increase vaccination rates). FAC ¶¶217, 288. "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered

[2] Even if such material is not in the administrative record, the collusion likely evidences "bad faith or improper behavior," *Voyageurs National Park Association v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004) (quotations omitted), or otherwise justifies discovery and supplementation of the administrative record, *cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 864 n.13 (8th Cir. 2013) (noting supplementation is arguably appropriate where an agency has engaged in "rulemaking masquerading as explication").

for the action taken in this case." *Dep't of Commerce*, 139 S. Ct. at 2576. The Secretary's explanation is pretext, and the CMS mandate is arbitrary and capricious.

2. That the States clearly have a viable arbitrary-and-capricious claims explains the Government's heavy reliance on *Biden*. The Government's argument on this front is essentially a law-of-the-case one—albeit one that does not mention the doctrine. But that makes sense, for the doctrine does not apply. *Biden* involved the Court's prior preliminary injunction, and "[t]he decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case … and does not limit or preclude the parties from litigating the merits." *Travelers Ins. Co. v. Westridge Mall Co.*, 826 F. Supp. 289, 293 n.2 (D. Minn. 1992) (quoting *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974)); *see, e.g.*, *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999) ("Of course, neither the District Court's denial of the [preliminary injunction] motion nor our affirmation of the District Court's judgment will bind the District Court or the parties in any further proceedings in this case."); *Patterson v. Masem*, 774 F.2d 251, 254 (8th Cir. 1985) (noting the nature of preliminary injunction proceedings "counsel against giving preclusive effect to [their] results"); *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697 (8th Cir. 1948) (citing "the rule that the decision of either the trial or appellate court in granting or denying the temporary injunction does not constitute the law of the case"); *see also, e.g.*, *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) ("We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata."); *Murphy v. FedEx Nat'l Ltl, Inc.*, 618 F.3d 893, 905 (8th Cir. 2010) ("The law-of-the-case doctrine only applies to final orders, not interlocutory orders.").

That goes double for stays pending appeal. Even from the Supreme Court, those decisions are not rulings "on the merits," *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays), but prognostications "based on an abbreviated record and made without the benefit of full briefing," *Stifel, Nicolaus & Co., Inc. v. Woolsey & Co., Inc.*, 81 F.3d 1540, 1544 (10th Cir. 1996); *see also Nyffeler Construction, Inc. v. Secretary of Labor*, 760 F.3d 837, 841 (8th Cir. 2014).[3] *But see* Mot. Dismiss 6–7 (saying that the Supreme Court "resolved all of [the States'] procedural challenges"). Such tentative rulings do little to establish whether the States' arbitrary and capricious claims, taken as true, fail as a matter of law.

Further weakening the Government's argument is that the interlocutory posture of *Biden* means the decision was made without the benefit of the administrative record or the additional evidence of pretext alleged in the operative complaint. The law-of-the-case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). But there has been no decision whether the CMS mandate is arbitrary and capricious, because the administrative record—"the focal point for judicial review," *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam)—has yet to be provided to this Court, the Eighth Circuit, or the Supreme Court. And no court has been provided the evidence of collusion supporting the States' pretext argument. Indeed, the arbitrary-and-capricious arguments the States' presented to the Supreme Court are not nearly as extensive as those in the FAC. *See* Resp. to Appl. for a Stay at 24–34, *Biden v. Missouri*, 142 S. Ct. 647 (2022) (No. 21A240) [hereinafter Resp. to Appl]. Because different facts may justify a different result, *Biden* is not the law of the case. *See Burton v.*

[3] There may be an exception, which is not applicable here, for a motion panel's "decision to deny a motion to dismiss for lack of jurisdiction . . . ." *Nyffeler Constr., Inc.*, 760 F.3d at 841.

Richmond, 370 F.3d 723, 728 (8th Cir. 2004) (noting a district court can "reassess" issues based on further factual development); *Pyramid Life Ins. Co. v. Curry*, 291 F.2d 411, 414 (8th Cir. 1961) ("The law of the case rule does not apply if the evidence on the later trial is substantially different from that on the former trial.").

The upshot: Reversals of a grant of a preliminary injunction do not establish the law of the case—as another judge of this Court has held. *See Traditionalist Am. Knights of the KKK v. City of Desloge*, 2016 WL 705128, at *3 (E.D. Mo. Feb. 23, 2016). *Biden* is thus not the law of the case as to the States' arbitrary and capricious claims.[4]

Thus, *Biden* has little relevance as to the States' arbitrary-and-capricious claims. From a precedential standpoint, the *Biden* Court's brief analysis has little bearing here. The factors the Court considered are far different from those in the FAC. *Compare Biden*, 142 S. Ct. at 653–54 (looking at the Secretary's "decisions to (1) impose the vaccine mandate instead of a testing mandate; (2) require vaccination of employees with 'natural immunity' from prior COVID–19 illness; and (3) depart from the agency's prior approach of merely encouraging vaccination"), *with* FAC ¶¶260–90 (providing the States' many, and different, reasons why the mandate is arbitrary and capricious). So with respect to Count One, *Biden* is only an interlocutory decision where "[t]he haste with which" it proceeded counsels "against giving" it dispositive weight. *Patterson*, 774 F.2d at 254.

II. *Biden v. Missouri* does not bar the States' procedural claims in Counts Three, Four, and Five.

The Government's argument against the States' claims that the Secretary violated the APA's and Social Security Act's notice-and-comment requirements and the requirement that the

[4] It is different for the States' claims in Counts Two and Six. *See* Argument § V, *infra*.

Secretary consult with the States (Counts Three, Four, and Five) is similar: The Government says *Biden* "effectively forecloses" them. Mot. Dismiss 5. The Government is wrong again.

First, whether there was good cause to waive the APA's notice requirement, *see* FAC ¶¶307–22 (Count Three), is subject either to an arbitrary-and-capricious-like or *de novo* review. *See United States v. Brewer*, 766 F.3d 884, 888 (8th Cir. 2014) (noting a circuit split and suggesting the Eighth Circuit follows the former). So as with the States' arbitrary-and-capricious claim, further development of the factual record may show that the Secretary improperly dispensed with notice and comment. Furthermore, the States' factual allegations—that the vaccine does not prevent transmission and viral mutations undermine CMS's purported need to move quickly, *see* FAC ¶¶318–19—were not before the *Biden* Court. *See* Resp. to Appl., *supra*, at 32–34; *see also Biden*, 142 S. Ct. at 654 (focusing on the coming flu season and any purported delay). In short, the interlocutory posture of *Biden*, plus the cursory analysis, plus the underdeveloped record all confirm that the *Biden* ruling did not establish the law of the case as to Count Three or provide on-point precedent establishing that the States' claim fails as a matter of law.

Second, the standard for notice and comment under the Social Security Act incorporates the APA standard. *See* 42 U.S.C. § 1395hh(b)(2)(C). The Government's argument for dismissal of Count Four, *see* FAC ¶¶323–32, is thus meritless for the same reason as Count Three.

Third, the Government's argument that it complied with the consultation requirement of 42 U.S.C. § 1395z is also unpersuasive. *See* FAC ¶¶333–40 (Count Five). The *Biden* Court said that consultation was not necessary "in advance of issuing the interim rule," but could be done "during the deferred notice-and-comment period . . . ." 142 S. Ct. at 654. But, as the States allege and as the Government does not dispute, there was no consultation, even during the deferred notice-and-comment period. FAC ¶339. The claim is therefore viable. Furthermore, because

such deferment must be "[c]onsistent with the existence of the good cause exception," *Biden*, 142 S. Ct. at 654, Count Five states a claim for all the same reasons as Counts Three and Four.

III. *Biden v. Missouri* does not bar the States' constitutional claims (Counts Seven, Eight, Nine, and Ten).

Next are the States' constitutional claims. *See* FAC ¶¶346–82. The start is the Government's reliance, yet again, on law-of-the-case principles. *See* Mot. Dismiss 7–8. But as the Government concedes, "this Court did not rely on Plaintiffs' constitutional claims in issuing its preliminary injunction." *Id.* at 7. To the extent *Biden* references or involves any constitutional arguments, those were arguments raised in *Louisiana v. Becerra*, which was consolidated at the Supreme Court with this case for oral argument, *see* Docket Entry, No. 21A240 (U.S. Dec. 22, 2021). *See* Mot. Dismiss 7 (noting that fact); Resp. to Appl., *supra*, at 8–38 (providing the States' arguments in *Biden*, which do not include constitutional claims). Thus, if *Biden* has any law-of-the-case implications as to constitutional issues, "it applies only in" *Louisiana* and not here. *Washington v. Countrywide Home Loans, Inc.*, 747 F.3d 955, 958 (8th Cir. 2014); *see also Window World of Chicagoland, LLC v. Window World, Inc.*, 811 F.3d 900, 903 (7th Cir. 2016) (noting that law-of-the-case doctrines apply only to cases that have been fully consolidated under Civil Rule 42(a)(2) instead of those, like this case and *Louisiana*, "joined for hearings").

On the merits, *Biden* has relevance to the States' Spending Clause claim only as to whether the underlying statutory authority gave the States notice of a "funding condition like" the mandate. *See* Mot. Dismiss 8–9. But that is insufficient to dismiss the States' Spending Clause claim that the CMS mandate is an attempt to regulate conduct outside the scope of a federal program. *See*

FAC ¶¶346–57. The Spending Clause[5] requires that a condition on spending "bear[s] some relationship to the purpose of the federal spending." *New York v. United States*, 505 U.S. 144, 167 (1992); *see also Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009). That is, while Congress may impose conditions that ensure "public funds [are] spent for the purposes for which they were authorized," it cannot use federal funds to regulate "conduct outside the scope of the federally funded program," which happens when the federal government places "a condition on the *recipient* of the" money. *Rust v. Sullivan*, 500 U.S. 173, 196–97 (2000).

That is what the mandate does. It applies to people "far removed from the supposed purpose of protecting patients" (such as construction crews temporarily working in a hospital) because it is part "of President Biden's … attempt to force COVID-19 vaccination on Americans in every sector of the economy." FAC ¶¶351–52. Like the federal contractor mandate that was announced at the same time, this mandate reaches beyond the spending program and extends "into the realm of public health," *Missouri v. Biden*, 576 F. Supp. 3d 622, 633 (E.D. Mo. 2021), by requiring providers who participate in the program to "adopt—as their own—the Government's view" that companies should mandate that its employees and independent contractors be vaccinated. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. (AID)*, 570 U.S. 205, 218 (2013). Such micromanagement of the business policies of providers impermissibly goes "beyond defining the limits of the federally funded program to defining the recipient." *Id.*

Similar logic underpins the States' non-delegation claim. *See* FAC ¶¶374–82 (Count Ten). For example, 42 U.S.C. 1395x(e)(9)[6] contains two requirements: (1) that mandates the Secretary

[5] The analysis of the States' Spending Clause (Count Seven) and Tenth Amendment (Count Nine) claims merge because the Tenth Amendment does not restrict lawful exercises of Congress's spending power. *See New York v. United States*, 505 U.S. 144, 173 (1992).

[6] The States do not claim that the provisions the Secretary claims authorizes the CMS mandate are similar. *See Biden*, 142 S. Ct. at 656 (Thomas, J., dissenting). Throughout this litigation, however,

imposes be ones he "finds necessary in the interest of" (2) "the health and safety of individuals who are furnished services . . . ." If the wide-reaching CMS mandate satisfies the second clause, then the second clause does little to constrain the Secretary, and the statute is an unbridled grant of discretion. In other words, if the Secretary can use § 1395x(e)(9) (or similar statutes, *see* FAC ¶¶ 158–74) to mandate the vaccination of everyone with "potential to have contact with anyone at the site of care" based on the theory that doing so reduces "the risks of transmission of SARS-CoV-2," *see* 86 Fed. Reg. at 61,571, then the law permits the Secretary to mandate anything he believes could have a downstream effect on patient health—for example, a hospital's greenhouse gas emissions[7] or the type of elevator music it plays.[8]

It is not clear what limits the Secretary's exercise of that discretion. It isn't the text. The Government's reading of the second requirement renders it a nullity. And the first requirement—that the mandates the Secretary imposes be ones he "finds necessary"—"fairly exudes deference" to the point of not providing "any meaningful judicial standard of review." *Webster v. Doe*, 486 U.S. 592, 600 (1988) (analyzing a similar law for purposes of applying 5 U.S.C. § 701(a)(2)). And the Government does not provide a limiting principle "in light of the larger aim of the" Medicare

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the Government has focused on § 1395x(e)(9)—presumably because it provides the strongest support for the mandate. *See* Appl. for Stay at 2, *Biden v. Missouri*, 142 S. Ct. 647 (2022) (No. 21A240) (focusing on § 1395x(e)(9) in the introduction to the Government's stay application); *see also Biden*, 142 S. Ct. at 652 & n.* (similarly focusing on the same provision). So if § 1395x(e)(9) does not authorize the mandate, neither do the other cited provisions. Furthermore—though it is gilding the lily—the Secretary's failure to pinpoint clear statutory authority for the mandate underscores that he acted arbitrarily and capriciously.

[7] *See* Press Release, U.S. Dep't of Health & Human Servs., Biden-Harris Administration Catalyzes Private Health Sector Commitments to Reduce Climate Impacts and Protect Public Health (June 30, 2022), https://www.hhs.gov/about/news/2022/06/30/biden-harris-administration-catalyzes-private-health-sector-commitments-reduce-climate-impacts-protect-public-health.html.

[8] John Hopkins Med., *Keep Your Brain Young with Music* (last visited Feb. 15, 2022), https://www.hopkinsmedicine.org/health/wellness-and-prevention/keep-your-brain-young-with-music.

and Medicaid Acts. *Bhatti v. FHFA*, 15 F.4th 848, 854 (8th Cir. 2021) (quotations omitted). The CMS mandate, insofar as statutory authorized, thus reveals a non-delegation issue in the underlying statutory authorities.

Last is the States' anti-commandeering claim. *See* FAC ¶¶358–63 (Count Eight). To start, the Government does not address the States' argument that the mandate commandeers the States' surveyors. FAC ¶361. The Government's failure to address this aspect of the FAC is inexcusable since *Louisiana v. Becerra*, 2022 WL 17408035, at *6 (W.D. La. Nov. 3, 2022), discusses this theory. The Government has therefore forfeited any argument it may have as to this part of Count Eight. *See Green v. Missouri*, 734 F. Supp. 2d 814, 848 (E.D. Mo. 2010) ("As a general rule, courts will not consider arguments raised for the first time in a reply.").

More fundamentally, the Government and the *Louisiana* court ignore that this case involves the spending power. Even-handed, direct regulation may not violate the anti-commandeering prohibition. *See* Mot. Dismiss 9 (citing *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018)). But in the spending context, the anti-commandeering principle considers whether "Congress is … using financial inducements to exert a 'power akin to undue influence.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 577 (2012) (opinion of Roberts, C.J.) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)); *see also id.* at 677 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Congress thus cannot "directly command[ ] a State to regulator"—as was the case in *Murphy*, for example—"or indirectly coerce[ ] a State to adopt a federal regulatory system as its own"—which is the issue here. *Id.* at 578.

The States' anti-commandeering argument therefore overlaps with their Spending Clause claim. *Compare* FAC ¶¶352–55 (Spending Clause claim), *with* FAC ¶¶361–62 (Anti-Commandeering claim). And again, the scope of power the CMS mandate reveals the problem.

If the CMS mandate is statutorily authorized, *see Biden*, 142 S. Ct. at 652, it would permit the Secretary to micromanage providers' businesses—including State providers. That "accomplishes a shift in kind, not merely degree," *NFIB*, 567 U.S. at 583 (opinion of Roberts, C.J.), from past patient safety rules that more directly relate to Medicare and Medicaid funding. *See Biden*, 142 S. Ct. at 653 (The CMS mandate "goes further than what the Secretary has done in the past . . . ."). Because the law accomplishes that micromanagement by putting at risk the States' existing Medicare and Medicaid funding, it is, as the Supreme Court has already held (discussing Medicaid), "economic dragooning" and impermissibly coercive. *NFIB*, 567 U.S. at 582 (opinion of Roberts, C.J.); *see also id.* at 684–85 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

IV. Count Eleven states a viable claim for change in core circumstances.

Plaintiffs' change in core circumstances claim seeks relief consistent with the APA and equity based on significant factual and legal developments postdating publication of the mandate. The mandate was premised on the vaccines' supposed efficacy against the Delta variant's risk of severe illness. But today, COVID-19 vaccines have proven ineffective in preventing transmission of the virus and new variants are less likely to lead to serious health outcomes. *See* FAC ¶¶175-92, 385.[9] In addition, the mandate was designed to work in tandem with other vaccine mandates on employers in other sectors. However, changes in law have prevented those vaccine mandates from being enforced, leaving the CMS mandate alone without the complementary mandates the Secretary said were needed to make it effective. *See* FAC ¶¶94, 209, 386 (noting the simultaneous rollout of the three mandates and alleging they were to work in tandem). And extending over both is the Government's imminent plan to end the COVID-19 public health emergency. *See, e.g.*,

[9] This argument is in addition to the States' argument that subsequent developments establish that the Secretary acted arbitrarily and capriciously. *See* FAC ¶¶278–83. The Government never addresses this, which again underscores that its motion is meritless.

Sharon LaFraniere & Noah Weiland, *U.S. Plans to End Public Health Emergency for COVID in May*, N.Y. Times (Feb. 3, 2023).[10]

The Government attempts to narrow the change-in-core-circumstances doctrine to changes of law. But the "leading case" for the change in core circumstances doctrine involved a factual development. *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 283 (D.C. Cir. 1971) (discussing *Fleming v. F.C.C.*, 225 F.2d 523, 526 (D.C. Cir. 1955)). Outside the D.C. Circuit, *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1511 n.11 (E.D. Pa. 1986), spoke approvingly of a change in core circumstances claim based on factual developments, while ruling for the plaintiff on other grounds. Significant post-rule changes in vaccine efficacy and virus mutations "go to the very heart of the case." *Greater Boston Television Corp.*, 463 F.2d at 283. At a minimum, the States are entitled to a remand to the agency based on these changes in core circumstances.

Even if the change in core circumstances doctrine is limited to legal changes, the States adequately allege that the changes in law concerning the other vaccine mandates changed the legal circumstances surrounding this mandate. Last year, the Supreme Court stayed the OSHA vaccine mandate, *see NFIB v. OSHA*, 142 S. Ct. 661, 662 (2022) (per curiam), and OSHA ultimately withdrew the rule, *see* 87 Fed. Reg. 3,928, 3,928 (Jan. 26, 2022). Likewise, the federal contractor mandate is enjoined in numerous States. *NFIB v. OSHA*, 142 S. Ct. 661, 662 (2022) (per curiam); *Commonwealth v. Biden*, 57 F.4th 545, 557 (6th Cir. 2023); *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1308 (11th Cir. 2022); FAC ¶¶94, 209 (second citation referencing *Missouri v. Biden*, 576 F. Supp. 3d at 635, involving the

[10] https://www.nytimes.com/2023/01/30/us/politics/biden-covid-public-health-emergency.html?smid=url-share.

injunction against the federal contractor applicant applicable to many of the States in this case). The CMS mandate worked in tandem with these later-enjoined mandates to achieve the President's stated goal "to 'require more Americans to be vaccinated.'" FAC ¶92 (quoting the President). The non-enforcement of the companion vaccine mandates significantly upends the ability of the CMS mandate to achieve this purpose because medical professionals who object to the COVID-19 vaccine now have countless other employment options that were not available when this rule issued. These developments qualify as a change in core circumstances. FAC ¶386.

The Government's concern that the States' success on this changed circumstances claim would open the floodgates to plaintiffs seeking "*de novo* review of regulations promulgated years or decades prior" is also misplaced. Mot. Dismiss 11. Only 15 months have passed since Defendants published the Rule on an accelerated timeline under the APA's good-cause exception. *See Biden*, 142 S. Ct. at 651. Of course, a successful change-in-core-circumstances claim is unusual, *Northwest Airlines, Inc. v. U.S. Department of Transportation*, 15 F.3d 1112, 1117 n.2 (D.C. Cir. 1994), but so too is the CMS mandate and the abbreviated process the Secretary used to issue it, *see Biden*, 142 S. Ct. at 653, 654. So while courts normally confine themselves to the administrative record before the agency at the time of the agency's decision, *see* Mot. Dismiss 11 (citing *South Dakota v. U.S. Department of Interior*, 423 F.3d 790, 802–03 (8th Cir. 2005)), the unique nature of this case justifies analysis of subsequent changes affecting the mandate. *See Esch v. Yeutter*, 876 F.2d 972, 991 (D.C. Cir. 1989) (permitting "use of extra-record evidence . . . in cases where evidence arising after the agency action shows whether the decision was correct or not"); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) (considering testimony provided subsequent to an agency rule that bore "directly upon the plausibility of certain predictions made by the Administrator in promulgating the Regulations"); *cf. Iowa League of*

Cities v. EPA, 711 F.3d 844, 864 n.13 (8th Cir. 2013) (suggesting "the informality of the agency's decisionmaking process" justifies supplementation of the record).

V. The Court should not dismiss Count Two or Count Six even in light of *Biden v. Missouri*.

After just six days of review following oral argument, the Supreme Court stated that the Government was likely to succeed on its arguments that the CMS mandate "falls within the authorities that Congress has conferred upon" the Secretary, *Biden*, 142 S. Ct. at 652, and that the Secretary "need not prepare a regulatory impact analysis discussing a rule's effect on small rural hospitals when he acts through an interim final rule," *id.* at 654. But neither of these statements require this Court to dismiss Counts Two and Six, *contra* Mot. Dismiss 1, especially given that the standard of review requires just "a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). For starters, such a dismissal would resolve only two claims, and so is an interlocutory decision subject to revision "at any time" before final judgment. Fed. R. Civ. P. 54(b). More fundamentally, neither the Supreme Court nor the Eighth Circuit has directed this Court to dismiss those counts. Rather, the Eighth Circuit remanded the case "for a determination of the merits of the State of Missouri's claim for permanent injunctive relief"—that is, for proceedings as usual. Ex. B, at 2.[11]

[11] Exhibit B is the order mentioned in the Eighth Circuit's judgment vacating the injunction and remanding the case. *See Missouri v. Biden*, 2022 WL 1093036, at *1 (8th Cir. Apr. 11, 2022). The order references Civil Rule 65(a)(2), *see* Ex. B, at 2, which permits, but does not mandate, district courts to consolidate a preliminary injunction hearing with trial on the merits. The citation to that discretionary provision underscores that the Eighth Circuit's mandate "directed the district court to move forward and try this case within its sound discretion," not to dismiss any, or all, of the case. *Cole v. Carson*, 957 F.3d 484, 486–87 (5th Cir. 2020) (Ho, J., dissenting from denial of recall and of subsequent stay of the mandate).

Nothing therefore compels dismissal of Counts Two and Six. By contrast, there is good reason to keep them. As mentioned, the Supreme Court's decision to stay this Court's injunction was "not a ruling on the merits." *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring in grant of applications for stays). The States therefore have a good-faith basis for concluding that the law is not settled and, furthermore, for concluding that the questions they raise are worthy of further review. *See Maryland v. King*, 567 U.S. 1301, 1303 (2013) (Roberts, C.J., in chambers). And to the extent the States may need to engage in (likely relatively minimal) discovery related to those claims, keeping them live would allow them to do so. *See Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 281 (5th Cir. 2019) (Ho, J., concurring in judgment), *rev'd* 142 S. Ct. 2228 (2022) ("[N]othing in the Federal Rules of Civil Procedure forecloses discovery based on a good faith expectation of legal change. To the contrary, the Rules expressly envision that parties may need to litigate in anticipation of such change.") (gathering authority).

CONCLUSION

For the reasons stated, the States respectfully ask the Court to deny Defendants' Motion to Dismiss the First Amended Complaint.

Dated: February 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 15, 2023, a true and correct copy of the foregoing and any attachments were filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system and to be served on those parties that have not appeared who will be served in accordance with the Federal Rules of Civil Procedure by mail or other means agreed to by the party.

/s/ *Michael E. Talent*
Counsel for Plaintiffs

EXHIBIT

A

From: [redacted]fb.com]
Sent: 8/20/2021 3:08:20 PM
To: [redacted]hhs.gov]
CC: [redacted]hhs.gov] [redacted]gmail.com; [redacted]fb.com]
Subject: Facebook Covid actions

Dear [redacted]

Many thanks again for the recent opportunity to discuss our Covid related work. You asked for an update on existing and new steps that Facebook is taking. As you know, Facebook takes its responsibility during this prolonged, unprecedented public health crisis extremely seriously. In light of our conversation we have been reviewing our efforts to combat COVID-19, and are eager to continue working towards our shared goal of helping more people get vaccinated and limiting the spread of harmful misinformation.

The White House described four recommendations to social media platforms in July, which cover access to authoritative information, enforcement and speed of enforcement, and transparency. Those are priorities we have shared throughout the COVID-19 pandemic. In this update, we describe both our historic actions in these areas, as well as new information on boosting access to authoritative information, and further policy work to enable stronger action against persistent distributors of vaccine misinformation. Finally, as agreed at our last meeting, we remain eager to meet with you and/or your team about our ideas regarding data that could potentially be shared with the public.

Elevating access to better information
We continue to review, experiment and adapt to find better ways to increase access to quality information, as we have done since the start of the pandemic:

- We have heard your and others' concern that people should be better able to access authoritative information on our platform. We agree, and have already taken action to make it easier for people to find more authoritative and trusted information in News Feed. We would be happy to describe these efforts to you in a specific briefing.
- We continue to help people directly access accurate information through the COVID Information Center, and will keep adding to this as the situation evolves and especially as guidance for various populations is updated - including when children should get vaccinated, and when the already vaccinated should be getting boosters.
- So far we have connected over 2 billion people globally with resources about COVID, and in the US alone we've helped over 4 million people get vaccinated through our Vaccine Finder, which connects them with appointment information, directions, and contact information.
- We're continuing to refine how we help health partners reach communities with less access to information or lower vaccination rates, leveraging the CDC's Social Vulnerability Index and other resources to reach those populations with high-quality, authoritative information.

Limiting Potentially Harmful Information
We continue to improve and refine measures that reduce the spread of potentially harmful content and limit the distribution of actors who share misleading information about COVID and the vaccine:

- We will shortly be expanding our COVID policies to further reduce the spread of potentially harmful content on our platform. These changes will apply across Facebook and Instagram.
  - We are increasing the strength of our demotions for COVID and vaccine-related content that third party fact checkers rate as "Partly False" or "Missing Context." That content will now be demoted at the same strength that we demote any content on our platform rated "False."
  - We are making it easier to have Pages/Groups/Accounts demoted for sharing COVID and vaccine-related misinformation by also counting content removals under our COVID and vaccine-related Community Standards violations towards their demotion threshold.
  - Any entity linked to another entity that is removed for violating our COVID or vaccine misinformation policies will be rendered "non-recommendable" on our platform.
  - Lastly, we will also be strengthening our existing demotion penalties for websites that are repeatedly fact-checked for COVID and vaccine misinformation content shared on our platform. Together, we intend for these policies to further limit the traction that misinformation can get on our platform.

- To date, we've removed over 20 million pieces of content for COVID- and vaccine-related misinformation. We've also taken action against people who repeatedly post content that violates our policies. Since the beginning of the pandemic, we have removed over 3,000 accounts, Pages, and groups for repeatedly violating our rules against spreading COVID and vaccine misinformation.
- We've specifically investigated the people sometimes identified in the media as the 'Disinfo Dozen'. We've applied penalties to some of their website domains as well so any posts, including their website content, are moved lower in News Feed. The remaining accounts associated with these individuals are not posting content that breaks our rules, have only posted a small amount of violating content, which we've removed, or are simply inactive. In fact, these 12 people are responsible for about just 0.05% of all views of vaccine-related content on Facebook. This includes all vaccine-related posts they've shared, whether true or false, as well as URLs associated with these people. In total we have removed three dozen Pages, groups and Facebook or Instagram accounts linked to these 12 people, including at least one linked to each of the 12 people, for violating our policies.
- We continue to notify people when content that they have interacted with is removed for violating our policies on COVID and vaccines.
- We have implemented and continue to experiment with signals that we can use -- around specific kinds of sharing behavior, specific page types, and specific types of language, among other factors -- to demote content that we predict will contain low quality information.

Increasing Transparency
We will continue to seek to ensure the actions we are taking (as well as misses) are apparent and discernible by people who don't work at Facebook. We are especially keen to discuss with you what form shared data could take in order to be most valuable to analysts and researchers, both inside and outside of government.

In terms of what we're doing now:
- We already have a wide amount of data available for analysis through our academic partnerships like FORT, but we are keenly aware that more kinds of data, or more specific cuts, may be valuable to the people actively looking to study this area more closely. We also share data with the public through our quarterly Community Standards Enforcement Report releases, most recently this past Wednesday, and have also just launched a Widely View Content Report to further increase transparency with the public.
- We are currently deep in internal discussions to identify the best ways we can share with the public information about some of the most widely viewed content on Facebook. We're actively considering how we can best share that information so that it is valuable to the public and to researchers, which to the best of our knowledge no other company provides.
- We're also looking at ways we can produce more data and deeper data sets that can create richer opportunities for researchers to analyse the reach of various kinds of content.
- We have examined the distribution patterns of the so-called 'Disinfo Dozen' (as above - https://about.fb.com/news/2021/08/taking-action-against-vaccine-misinformation-superspreaders/).
- To advance public understanding of how social media and behavioral sciences can be leveraged to improve the health of communities around the world, we've supported researchers attempting to understand so cial media's role in the ongoing pandemic. One report has already been published, and we are pleased to see that social media can have positive impacts on public health needs. There are other researchers we are supporting, and look forward to reviewing their work as it is completed and peer reviewed.
- While separate from the issue of content online, researchers are also able to access our COVID-19 Trends and Impact Survey, which is a global survey gathering insights about symptoms, testing, mask-wearing, social distancing, mental health, vaccine acceptance, reasons for vaccine hesitancy, and more. We believe this is the largest public health survey in history. Over 70 million responses from more than 200 countries and territories have been collected, and the data can be broken down by self-reported demographic information like gender and race as well as by hyper-local geographic regions. The data is available in near real-time and is collected off-platform by academic partners at the University of Maryland (UMD) and Carnegie Mellon University (CMU). Academic and nonprofit researchers are able request access to non-public, non-aggregated survey data for their research.

I hope this is a useful update, pending further work and discussions we will continue to update you and your teams and we are happy to meet and discuss any of the work we have outlined here. Please do not hesitate to reach out to me or my team with any further questions.

Best wishes,

[redacted]

From: [redacted]fb.com]
Sent: 7/10/2021 8:00:40 AM
To: [redacted]y@hhs.gov]
CC: Slavitt, Andrew M. [redacted]who.eop.gov]; [redacted]fb.com]
Subject: Re: Facebook Covid report
Attachments: 7_8 - COVID-19 Insights.pdf

Dear [redacted]

Attached is the latest Covid report covering the most recent two week period for which we have stats etc. I understand from [redacted] that my team is meeting with yours next week to delve deeper into our covid misinformation efforts. As always, please don't hesitate to reach out when/if needed.

All best

[redacted]

From: [redacted]@fb.com>
Date: Friday, June 25, 2021 at 11:19 PM
To: [redacted]y@hhs.gov>
Cc: "Slavitt, Andrew M. [redacted]who.eop.gov>, [redacted]fb.com>
Subject: Facebook Covid report

Dear [redacted]

Attached is the latest Covid report covering the past two weeks. As always, happy to answer any questions you might have with respect to the report's contents.

Additionally, I want to highlight two vaccine-related efforts that launched this week:

The first is the WhatsApp chat bot we launched with the CDC. This Spanish-language bot not only surfaces local vaccine appointments, it also links users with free Uber/Lyft rides to their appointments and childcare availability nearby. We're excited by the impact this will have on the LatinX vaccination rate.

Second, I wanted to share that we launched a notification to every Instagram user in the United States encouraging them to visit vaccines.gov. After months of state-specific notifications to IG's +150M users in the US, this is Instagram's first push to vaccines.gov. Based on the demographics of Instagram, we're looking forward to reaching the nation's youth and to having a positive impact on their vaccination rates.

Thanks and please don't hesitate to reach out.

Best

[redacted]

From: [redacted]fb.com]
Sent: 6/25/2021 6:19:30 PM
To: [redacted]@hhs.gov]
CC: Slavitt, Andrew [redacted]who.eop.gov]; [redacted]fb.com]
Subject: Facebook Covid report
Attachments: 6_25 - COVID-19 Insights.pdf

Dear [redacted],

Attached is the latest Covid report covering the past two weeks. As always, happy to answer any questions you might have with respect to the report's contents.

Additionally, I want to highlight two vaccine-related efforts that launched this week:

The first is the WhatsApp chat bot we launched with the CDC. This Spanish-language bot not only surfaces local vaccine appointments, it also links users with free Uber/Lyft rides to their appointments and childcare availability nearby. We're excited by the impact this will have on the LatinX vaccination rate.

Second, I wanted to share that we launched a notification to every Instagram user in the United States encouraging them to visit vaccines.gov. After months of state-specific notifications to IG's +150M users in the US, this is Instagram's first push to vaccines.gov. Based on the demographics of Instagram, we're looking forward to reaching the nation's youth and to having a positive impact on their vaccination rates.

Thanks and please don't hesitate to reach out.

Best

[redacted]

From: [redacted]fb.com]
Sent: 5/28/2021 5:48:14 PM
To: Slavitt, Andrew M. EOP/WHO [redacted]who.eop.gov]; [redacted]@hhs.gov]
CC: [redacted]fb.com]
Subject: Message from [redacted]
Attachments: 5_28 - COVID-19 Insights.pdf

Dear Andy, dear [redacted] (if I may),

Thanks again for the time the other day.

As promised, I'm sending our latest report that includes topline performing posts for the weeks of 5/3-5/9 and 5/9-5/15. Report is attached, and myself and the team are of course happy to discuss anything within.

I also want to highlight a few policy updates we announced yesterday regarding repeat misinformation. The full Newsroom post with product mock ups is available here, but I wanted to call out a few key points:

1. We've added more context about Pages that repeatedly share false claims;
2. We are expanding penalties for individual Facebook accounts that share misinformation; and
3. We've redesigned notifications when they share content that a fact-checker later rates.

Finally, I wanted to include here the data I mentioned on our call earlier that point to the positive (if not as publicly discussed) influence we're having on attitudes toward vaccines:

Overall trends in vaccine acceptance amongst Facebook users are positive: this has increased considerably since January, and racial/ethnic disparities have also decreased.
Since January, vaccine acceptance in the US from a daily survey of Facebook users (done in partnership with CMU) has *increased* by 10-15 percentage points (e.g. 70%->80-85%), and racial/ethnic disparities in acceptance have shrunk considerably (e.g. some of the populations that had the lowest acceptance in January had the highest increases since).

Not only are the overall trends increasing, we also have data showing our efforts are contributing: including some of our specific collaborations with HHS/CDC and work around trusted messengers and messaging.
Over the same time period, we've been working closely with partners to run the largest scale on line campaign in support of vaccination efforts. We've delivered over 10B ad impressions from health partners worldwide since January, and have also run significant on-platform product promotions. These have been focused on 3 goals: i) increase access to vaccines; ii) help people get questions answered; iii) socially normalize the vaccine.

Early evidence that these are increasing drivers of vaccination, at scale, include:

- ***Social Norming: 50 percent of Facebook users have seen someone they follow (e.g. friend, family member, community leader, public figure) use an HHS/CDC vaccine frame***. Research from MIT shows that similar types of social normalization efforts can meaningfully improve people's likelihood to get vaccinated, which is consistent with other expert advice (e.g. "Encouraging those who are vaccinated to show their vaccination status with pride, both online and offline, can nudge their family, friends and networks to follow suit."). We are seeing some encouraging preliminary results in vaccine sentiment (the safety and importance of COVID-19 vaccines) in the US through our surveys as a result of vaccine profile frame promotions. As a result, we are scaling the launch of these features globally.
- ***Access: Over 3M people have used our Vaccine Finder since March, developed in partnership with Boston Children's Hospital.*** We've been promoting Vaccine Finder and eligibility information to all people on Facebook in close partnership with states, which are seeing impact. For example, West Virginia reported a meaningful increase in vaccine registrations after we started our efforts.
- ***Education: A single "Facts about COVID19" News Feed campaign—that reached 100s of millions of people worldwide--increased belief in key facts about vaccine safety*** **and testing by 3% across *5 countries*.** We've directed 2B+

people to expert health resources through the Covid Info Center, which in the US includes information from local county-level public health departments. We observed a particularly large increase in vaccine acceptance within certain populations in the US. Vaccine acceptance increased 26% among Black adults and 14% among Hispanic adults.

- ***Equity: We're more frequently reaching people in areas with lower vaccination rates using CDC's Social Vulnerability Index.*** We are partnering with a wide range of organizations to deliver trusted, accessible messages; Spanish-language campaigns from AARP and Johns Hopkins University's Bloomberg School of Public Health; and CARE US for conservative audiences. Our work to promote information on how to get a vaccine to high-SVI zip codes increased confidence that people in those zip codes have in being able to get a vaccine.

This builds on work—and uses similar strategies—to what we did over the last few years to support flu vaccination, mask wearing, blood donation, and voting, all of which also had meaningful population-level positive impact.

- *Flu Vaccination:* We employed similar strategies with partners around a major flu vaccination campaign last fall. These reached 10s of millions of people in the US; some of these campaigns increased perceived safety or intent by 3-5%.
- *Mask Wearing:* Social normalization campaigns reaching millions of people featuring trusted public figures increased mask wearing behavior and attitudes by 3-8%. This included the "You Will See Me" campaign from CDC Foundation/Ad Council. Note that mask wearing attitudes and reported behaviors increased dramatically since early spring 2020, and by summer the vast majority of all people in the US reported wearing masks, a trend mirrored in CMU's large-scale survey of Facebook users.
- *Blood Donations:* Our blood donations product—which notifies people nearby about opportunities to donate blood, and makes it easy for them to find a schedule an appointment—increased first time donors across the US by 19% when we rolled it out across sites from the American Red Cross, Vitalant, Versiti, and New York Blood Centers.

We think there's considerably more we can do in partnership with you and your teams to drive behavior. We're also committed to addressing the defensive work around misinformation that you've called on us to address. But we don't want to miss the full story of Facebook's impact on attitudes toward vaccine acceptance —we believe our work is paying real dividends in the form of more people getting shots, and we believe data bears this out. We're eager to find additional ways to partner with you.

All my best wishes,

[redacted]

From: [redacted]fb.com>
Sent: Wednesday, July 28, 2021 9:20 PM
To: [redacted] (HHS/OASH) <[redacted]hhs.gov>; [redacted]ostp.eop.gov
Cc: [redacted]fb.com>
Subject: Re: Follow up - data discussion

[redacted]—making sure you saw this as well, as I know there's been a lot of attention directed toward vaccination mandates in recent days. Happy to connect on this front if helpful.

"As our offices reopen, we will be requiring anyone coming to work at any of our US campuses to be vaccinated. How we implement this policy will depend on local conditions and regulations. We will have a process for those who cannot be vaccinated for medical or other reasons and will be evaluating our approach in other regions as the situation evolves. We continue to work with experts to ensure our return to office plans prioritize everyone's health and safety." [redacted]

From: [redacted] (HHS/OASH) [redacted]@hhs.gov>
Date: Wednesday, July 28, 2021 at 5:42 PM
To: [redacted]fb.com>, [redacted]ostp.eop.gov [redacted]ostp.eop.gov>
Cc: [redacted]fb.com>
Subject: RE: Follow up - data discussion

Really appreciate it.

From: [redacted]fb.com>
Sent: Wednesday, July 28, 2021 5:41 PM
To: [redacted] (HHS/OASH) <[redacted]hhs.gov>; [redacted]ostp.eop.gov
Cc: [redacted]fb.com>
Subject: Re: Follow up - data discussion

Got it—thanks [redacted] completely understand why you would have been a little busy this week! Will stand by, and will continue to be in touch as things develop on our end as well.

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From: [redacted] (HHS/OASH) <[redacted]hhs.gov>
Sent: Wednesday, July 28, 2021 5:34:10 PM
To: [redacted]fb.com>; [redacted]ostp.eop.gov <[redacted]ostp.eop.gov>
Cc: [redacted]fb.com>
Subject: RE: Follow up - data discussion

Hey [redacted]

Thanks for your patience. The CDC updated guidance has kept us pretty busy this week(!). Appreciate these additional materials.

I'll circle back with more, but appreciate you understanding. [Also, [redacted] is out on leave for the rest of this week, so trying to sync calendars].

All the best,

[redacted]

From: [redacted]fb.com>
Sent: Wednesday, July 28, 2021 1:16 PM
To: [redacted] (HHS/OASH) <[redacted]hhs.gov>; [redacted]ostp.eop.gov
Cc: [redacted]fb.com>
Subject: Follow up - data discussion

Hi [redacted] and DJ,

We're looking forward to our next meeting, where we are hoping to do a deeper dive on how we are measuring data and what steps we might be able to take to address concerns you've raised.

In the meantime, I wanted to make sure you have our response to the Washington Post piece from yesterday (linked here) that made certain claims based on survey data. Hoping this might be a useful addition to our conversation, along with making sure we cover the statistics put forward by the CCDH that have been cited by the White House regarding the disinfo dozen.

The statement is below — look forward to discussing next steps at your earliest convenience.

"The sensationalized, overstated findings of this research are not supported by what the authors report to have measured. It is unclear what their overall sample represents with respect to generalizability to the US population. For example it shows Fox News and CNN have the same size of audience, which they do not. Moreover what they claim as 'Facebook users' is a non-representative idiosyncratic subset of the Facebook population. These are examples of how their data is biased to start with and that matters when attempting to make these claims. The authors claim that people who rely on Facebook to get news and information about the coronavirus are less likely than the average American to be vaccinated. But this isn't valid without describing a representative sample of the American population, Facebook users, or measuring reliance instead of mere self-reported exposure over a short time window. What this data and methodology does suggest is that people who have not yet been vaccinated are less reachable by CNN, MSNBC, or the Biden Administration than on Facebook, making our ongoing efforts to share authoritative information and encourage vaccine uptake more important than ever."

From: [redacted]fb.com>
Date: Tuesday, July 27, 2021 at 8:15 PM
To: [redacted] (HHS/OASH) <[redacted]hhs.gov>
Cc: [redacted]fb.com>
Subject: Re: Message from [redacted]

Hi [redacted] just checking at the end of the day. I'm sure you're swamped. Making sure we don't let too much time pass before getting back together with you and [redacted], and whomever else might make sense.

From: [redacted]fb.com>
Date: Monday, July 26, 2021 at 2:54 PM
To: [redacted] HHS/OASH) <[redacted]@hhs.gov>
Cc: [redacted]fb.com>
Subject: Re: Message from [redacted]

[redacted]—let me know if it makes sense to sync on next steps? Would love to move forward with the meetings we identified as next steps as soon as your team is ready.

From: [redacted]fb.com>
Date: Friday, July 23, 2021 at 11:20 PM
To: [redacted]fb.com> [redacted] (HHS/OASH) <[redacted]hhs.gov>
Cc: [redacted]fb.com>, [redacted] (HHS/OASH) [redacted]hhs.gov>
Subject: Re: Message from [redacted]

Including this week's updated report here. Look forward to scheduling our next working session. As always please let us know if you have any questions.

[redacted]

From: [redacted]fb.com>
Date: Friday, July 23, 2021 at 7:29 PM
To: [redacted] (HHS/OASH) <[redacted]hhs.gov>
Cc: [redacted]fb.com>, [redacted]fb.com>, [redacted]
<[redacted]hhs.gov>
Subject: Message from [redacted]

Dear [redacted] (if I may),

Thanks again for taking the time to meet earlier today. It was very helpful to take stock after the past week and hear directly from you and your team, and to establish our next steps.

We talked about the speed at which we are all having to iterate as the pandemic progresses. I wanted to make sure you saw the steps we took just this past week to adjust policies on what we are removing with respect to misinformation, as well as steps taken to further address the "disinfo dozen": we removed 17 additional Pages, Groups, and Instagram accounts tied to the disinfo dozen (so a total of 39 Profiles, Pages, Groups, and IG accounts deleted thus far, resulting in every member of the disinfo dozen having had at least one such entity removed). We are also continuing to make 4 other Pages and Profiles, which have not yet met their removal thresholds, more difficult to find on our platform. We also expanded the group of false claims that we remove, to keep up with recent trends of misinformation that we are seeing.

We hear your call for us to do more and, as I said on the call, we're committed to working toward our shared goal of helping America get on top of this pandemic. We will reach out directly to [redacted] to schedule the deeper dive on how to best measure Covid related content and how to proceed with respect to the question around data. We'd also like to begin a regular cadence of meetings with your team so that we can continue to update you on our progress. You have identified 4 specific recommendations for improvement and we want to make sure to keep you informed of our work on each.

I want to again stress how critical it is that we establish criteria for measuring what's happening on an industry-wide basis, not least to reflect the way platforms are used interchangeably by users themselves. We believe that we have provided more transparency, both through CrowdTangle (the flaws of which we discussed in some detail) and through our Top 100 report, than others and that any further analysis should include a comprehensive look at what's happening across all platforms--ours and others – if we are going to make progress in a consistent and sustained manner.

Finally, we will be sending you the latest version of our Top 100 report later today, per our regular schedule. [redacted] will do the honors this week as it will likely be completed at our end later today East Coast time. We really do hope that we can discuss our approach to this data set in greater detail during our next session with [redacted], as we genuinely believe it is an effective way of understanding what people are actually seeing on the platform.

Once again, I want to thank you for setting such a constructive tone at the beginning of the call. We too believe that we have a strong shared interest to work together, and that we will strive to do all we can to meet our shared goals.

Best wishes

[redacted]

From: [redacted]
Sent: 11/3/2021 2:57:44 PM
To: [redacted]fb.com]; [redacted] [redacted]fb.com]
Subject: RE: Our announcement

Hi [redacted]

Thanks for your note. I really appreciate it.

Let me get back to you next week once we are done crashing on our rollout for vaccines 5-11.

All the best,
[redacted]

From: [redacted]@fb.com>
Sent: Friday, October 29, 2021 9:42 PM
To: [redacted](HHS/OASH) <[redacted]@hhs.gov>; [redacted]@fb.com>
Subject: Re: Our announcement

Thanks [redacted]—we'd appreciate the opportunity to meet and discuss concerns you have related to the recent press reports. We feel strongly that much of the reporting is based on documents that have been taken out of context and don't tell the full story of our work. Please let me know if you'd have time to connect next week.

Thanks—have a good weekend.

[redacted]

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From: [redacted](HHS/OASH) <[redacted]hhs.gov>
Sent: Friday, October 29, 2021 10:18 AM
To: [redacted]
Subject: FW: Our announcement

Good afternoon, [redacted],

I hope this email finds you well. I'm back from my paternity leave stint and getting my sea legs in the office with a six week old at home.

Thank you for this note to [redacted] I did want to say that we have seen the recent public reports around Facebook and misinformation. We are certainly concerned about what we are seeing, given our emphasis on health misinformation in our advisory and the ongoing conversations our teams have been having. As has been the case, you'll continue to see us raising the issue of health misinformation in public and private as a critical public health issue.

All the best,

[redacted]

From: [redacted]fb.com>
Date: October 28, 2021 at 6:31:51 PM EDT
To: [redacted]hhs.gov>
Cc: [redacted]fb.com>
Subject: Our announcement

Dear [redacted]

I hope you are well. It's been a while since we connected. I know our teams have remained in close contact with respect to our work to provide authoritative information about the vaccine and we are working on how we can partner in this next push to vaccinate children. We appreciate the opportunity to partner with your team.

I also wanted to be in touch to update you on an announcement we made today. Mark announced that we will have a new company brand - Meta - which signals our commitment to build the next evolution of social technology - beyond what digital connection makes possible today. We believe the ultimate promise of technology is to improve people's lives. With the metaverse, we see the opportunity to bring people together in ways never before possible in the next decade. We are starting this conversation early so that we can make sure it's built on solid foundations when it comes to things like privacy, safety, and economic opportunity.

While we are looking to the future, our mission hasn't changed, and neither has the sense of responsibility that we have to the billions of people who use our apps and services every day. We're proud of our record navigating the complex tradeoffs involved in operating services at global scale, and of our massive investments in safety and security. We also continue to believe more regulation is necessary. We are on the cusp of a new era of technology but - in many countries - we still don't yet have rules in place for this one.

As we begin to work on the next evolution of technology and of our company, I wanted to let you know and make myself available to hear your thoughts, questions, and feedback. We know the metaverse can be hard to grasp - not unlike trying to describe the World Wide Web in the early 1990s - but we believe this technology will be an important part of our collective future, and it is something that we will all be building together.

I also recognize the intense debate that's been prompted by the documents that have been disclosed by a former employee. You and I have touched on the subject of wellbeing in our previous conversations and I know it's an area of concern for you and for the White House. I would welcome the opportunity to meet again to hear from you and to address the claims that have been made against the company.

Best regards,

[redacted]

EXHIBIT

B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3725

State of Missouri, et al.

Appellees

v.

Joseph R. Biden, Jr., in his official capacity as the President of the United States of America, et al.

Appellants

Reliant Care Management Company, L.L.C.

Amicus Curiae

American Academy of Family Physicians, et al.

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:21-cv-01329-MTS)

ORDER

Before LOKEN, BENTON, and KELLY, Circuit Judges

In November 2021, the Secretary of Health and Human Services (the "Secretary") issued an interim final rule requiring that participating facilities ensure that their staff are vaccinated against COVID-19 to receive Medicare and Medicaid funding (unless exempt for medical or religious reasons). *See* 86 Fed. Reg. 61555 (2021).

Many states challenged the rule. Two district courts, including the United States District Court for the Eastern District of Missouri, enjoined its enforcement. *See Missouri v. Biden*, No. 4:21-CV-01329-MTS, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021). The district court ruled that the states were likely to succeed on the merits of their claims that the Secretary lacked statutory authority to issue the rule. *Id*.

The federal government filed an emergency motion in this court to stay the preliminary injunction pending appeal. This court denied the motion.

The federal government petitioned the United States Supreme Court for a stay of the preliminary injunction pending further review by this court. The Supreme Court stayed the preliminary injunction pending the outcome of this appeal. *Biden v. Missouri*, 142 S. Ct. 647 (2022).

Based on the Supreme Court's opinion, this court vacates the preliminary injunction and remands to the district court for a determination of the merits of the State of Missouri's claim for permanent injunctive relief. *See* Fed. R. Civ. P. 65(a)(2).

April 11, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans