No. 22-30748

United States Court of Appeals
for the Fifth Circuit

State of Louisiana; State of Alabama; State of Alaska; State of Arizona; State of Arkansas; State of Florida; State of Georgia; State of Indiana; State of Iowa; State of Kansas; Commonwealth of Kentucky; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Tennessee; State of Utah; State of West Virginia; State of Wyoming; and Sandy Brick,
Plaintiffs–Appellees,

v.

Xavier Becerra, in his official capacity as Secretary of Health & Human Services; United States Department of Health and Human Services; Administration for Children & Families; Jooyeun Chang, in her official capacity as Principal Deputy Assistant for Children & Families; Bernadine Futrell, in her official capacity as the director of the Office of Head Start; Joseph R. Biden, Jr.; and Office of Head Start,
Defendants–Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana
Case No. 3:21-cv-4370

BRIEF OF APPELLEE SANDY BRICK

Jeffrey D. Jennings
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-263-7668
jjennings@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
504-952-8016
sarah@pelicaninstitute.org
Attorneys for Sandy Brick

CERTIFICATE OF INTERESTED PERSONS

Case No. 22-30748, *Louisiana v. Becerra*

The undersigned counsel of record for Plaintiff-Appellee Sandy Brick certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Person or entity	Connection to case and interest
Judge Terry A. Doughty	U.S. District Court Judge below
Xavier Becerra	Defendant-Appellant
U.S. Department of Health & Human Services	Defendant-Appellant
Administration for Children & Families	Defendant-Appellant
Jooyeun Chang	Defendant-Appellant
Bernandine Futrell	Defendant-Appellant
Joesph R. Biden, Jr.	Defendant-Appellant
Office of Head Start	Defendant-Appellant
Brian M. Boynton	Counsel for Defendants-Appellants
Brandon Bonaparte Brown	Counsel for Defendants-Appellants

Alisa B. Klein	Counsel for Defendants-Appellants
Sarah Clark	Counsel for Defendants-Appellants
U.S. Department of Justice	Counsel for Defendants-Appellants
Michelle R. Bennett	Counsel for Defendants-Appellants
Christopher D. Edelman	Counsel for Defendants-Appellants
Michael P. Clendenen	Counsel for Defendants-Appellants
Madeline M. McMahon	Counsel for Defendants-Appellants
State of Louisiana	Plaintiff-Appellee
Elizabeth B. Murrill	Counsel for State Plaintiffs-Appellees
Louisiana Attorney General's Office	Counsel for State Plaintiffs-Appellees
Louisiana Department of Justice	Counsel for Plaintiff-Appellee Louisiana
Elisabeth Ashley Daigle	Counsel for Plaintiff-Appellee Louisiana
Joseph Scott St John	Counsel for Plaintiff-Appellee Louisiana
Attorney General Jeff Landry	Counsel for Plaintiff-Appellee State of Louisiana
Louisiana Department of Justice	Counsel for Plaintiff-Appellee State of Louisiana
Morgan Elizabeth Brungard	Counsel for Plaintiff-Appellee State of Louisiana

Shae McPhee	Counsel for Plaintiff-Appellee State of Louisiana
State of Alabama	Plaintiff-Appellee
Attorney General Steve Marshall	Counsel for Plaintiff-Appellee State of Alabama
Office of the Attorney General State of Alabama	Counsel for Plaintiff-Appellee State of Alabama
Edmund G. LaCour Jr.	Counsel for Plaintiff-Appellee State of Alabama
Thomas Alexander Wilson	Counsel for Plaintiff-Appellee State of Alabama
Jones Day	Counsel for Plaintiff-Appellee State of Alabama
State of Montana	Plaintiff-Appellee
Montana Attorney General Austin Knudsen	Counsel for Plaintiff-Appellee State of Montana
David M.S. Dewhirst	Counsel for Plaintiff-Appellee State of Montana
Christian B Corrigan	Counsel for Plaintiff-Appellee State of Montana
State of Alaska	Plaintiff-Appellee
Attorney General of Alaska Treg R. Taylor	Counsel for Plaintiff-Appellee State of Alaska
Charles E. Brasington	Counsel for Plaintiff-Appellee State of Alaska
State of Nebraska	Plaintiff-Appellee
Attorney General Douglas J. Peterson	Counsel for Plaintiff-Appellee State of Nebraska
James A. Campbell	Counsel for Plaintiff-Appellee State of Nebraska

State of Arizona	Plaintiff-Appellee
Attorney General Mark Brnovich	Counsel for Plaintiff-Appellee State of Arizona
Robert J. Makar	Counsel for Plaintiff-Appellee State of Arizona
Brett W Johnson	Counsel for Plaintiff-Appellee State of Arizona
Snell & Wilmer	Counsel for Plaintiff-Appellee State of Arizona
State of North Dakota	Plaintiff-Appellee
North Dakota Attorney General Drew H. Wrigley	Counsel for Plaintiff-Appellee State of North Dakota
Matthew Sagsveen	Counsel for Plaintiff-Appellee State of North Dakota
State of Arkansas	Plaintiff-Appellee
Arkansas Attorney General Leslie Rutledge	Counsel for Plaintiff-Appellee State of Arkansas
Office of the Arkansas Attorney General	Counsel for Plaintiff-Appellee State of Arkansas
Dylan L. Jacobs	Counsel for Plaintiff-Appellee State of Arkansas
State of Ohio	Plaintiff-Appellee
Ohio Attorney General Dave Yost	Counsel for Plaintiff-Appellee State of Ohio
Benjamin M. Flowers	Counsel for Plaintiff-Appellee State of Ohio
State of Florida	Plaintiff-Appellee
Florida Attorney General Ashley Moody	Counsel for Plaintiff-Appellee State of Florida

Office of the Attorney General	Counsel for Plaintiff-Appellee State of Florida
Natalie P. Christmas	Counsel for Plaintiff-Appellee State of Florida
State of Oklahoma	Plaintiff-Appellee
Oklahoma Attorney General John M. O'Conner	Counsel for Plaintiff-Appellee State of Oklahoma
Oklahoma Office of the Attorney General	Counsel for Plaintiff-Appellee State of Oklahoma
Bryan Cleveland	Counsel for Plaintiff-Appellee State of Oklahoma
State of Georgia	Plaintiff-Appellee
Georgia Attorney General Christopher M. Carr	Counsel for Plaintiff-Appellee State of Georgia
Office of the Attorney General of Georgia	Counsel for Plaintiff-Appellee State of Georgia
Stephen J. Petrany	Counsel for Plaintiff-Appellee State of Georgia
State of South Carolina	Plaintiff-Appellee
Attorney General Alan Wilson	Counsel for Plaintiff-Appellee State of South Carolina
Office of the Attorney General of South Carolina	Counsel for Plaintiff-Appellee State of South Carolina
Thomas T. Hydrick	Counsel for Plaintiff-Appellee State of South Carolina
State of Indiana	Plaintiff-Appellee
Attorney General Theodore E. Rokita	Counsel for Plaintiff-Appellee State of Indiana
Thomas M. Fisher	Counsel for Plaintiff-Appellee State of Indiana

James A Barta	Counsel for Plaintiff-Appellee State of Indiana
State of South Dakota	Plaintiff-Appellee
Attorney General Mark Vargo	Counsel for Plaintiff-Appellee State of South Dakota
David M. McVey	Counsel for Plaintiff-Appellee State of South Dakota
State of Iowa	Plaintiff-Appellee
Attorney General Jeffrey S. Thompson	Counsel for Plaintiff-Appellee State of Iowa
Office of the Attorney General	Counsel for Plaintiff-Appellee State of Iowa
Samuel P. Langholz	Counsel for Plaintiff-Appellee State of Iowa
State of Tennessee	Plaintiff-Appellee
Attorney General and Reporter of Tennessee Herbert H. Slatery III	Counsel for Plaintiff-Appellee State of Tennessee
Andree S. Blumstein	Counsel for Plaintiff-Appellee State of Tennessee
State of Kansas	Plaintiff-Appellee
Attorney General Derek Schmidt	Counsel for Plaintiff-Appellee State of Kansas
Office of the Kansas Attorney General	Counsel for Plaintiff-Appellee State of Kansas
Shannon Grammel	Counsel for Plaintiff-Appellee State of Kansas
State of Utah	Plaintiff-Appellee
Attorney General Sean D. Reyes	Counsel for Plaintiff-Appellee State of Utah
Utah Attorney General's Office	Counsel for Plaintiff-Appellee State of Utah

Melissa A. Holyoak	Counsel for Plaintiff-Appellee State of Utah
Commonwealth of Kentucky	Plaintiff-Appellee
Attorney General of Kentucky Daniel Cameron	Counsel for Plaintiff-Appellee Commonwealth of Kentucky
Office of the Attorney General	Counsel for Plaintiff-Appellee Commonwealth of Kentucky
Jeremy J. Sylvester	Counsel for Plaintiff-Appellee Commonwealth of Kentucky
State of Wyoming	Plaintiff-Appellee
Wyoming Attorney General Bridget Hill	Counsel for Plaintiff-Appellee State of Wyoming
Wyoming Attorney General's Office	Counsel for Plaintiff-Appellee State of Wyoming
Ryan Schelhaas	Counsel for Plaintiff-Appellee State of Wyoming
State of Mississippi	Plaintiff-Appellee
Mississippi Attorney General Lynn Fitch	Counsel for Plaintiff-Appellee State of Mississippi
Office of the Attorney General	Counsel for Plaintiff-Appellee State of Mississippi
Whitney H. Lipscomb	Counsel for Plaintiff-Appellee State of Mississippi
State of West Virginia	Plaintiff-Appellee
West Virginia Attorney General Patrick Morrisey	Counsel for Plaintiff-Appellee State of West Virginia
Lindsay S. See	Counsel for Plaintiff-Appellee State of West Virginia
State of Missouri	Plaintiff-Appellee

Missouri Attorney General Eric S. Schmitt	Counsel for Plaintiff-Appellee State of Missouri
Missouri Attorney General's Office	Counsel for Plaintiff-Appellee State of Missouri
D. John Sauer	Counsel for Plaintiff-Appellee State of Missouri
Maria A Lanaham	Counsel for Plaintiff-Appellee State of Missouri
Sandy Brick	Plaintiff-Appellee
Jeffrey D. Jennings	Counsel for Plaintiff-Appellee Sandy Brick
Liberty Justice Center	Counsel for Plaintiff-Appellee Sandy Brick
Sarah Harbison	Counsel for Plaintiff-Appellee Sandy Brick
Pelican Institute for Public Policy	Counsel for Plaintiff-Appellee Sandy Brick

Plaintiff-Appellee Sandy Brick is a natural person, and thus, has nothing to disclose under Federal Rule of Appellate Procedure 26.1.

/s/ Jeffrey D. Jennings
Attorney for Plaintiff-Appellee Sandy Brick

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee Sandy Brick requests oral argument. This case involves important issues surrounding the separation of powers and the "liberty interests of reluctant individual[s]" teaching in the Head Start program "put to a choice between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other authorities

JURISDICTIONAL STATEMENT

The district court has jurisdiction over this action under 28 U.S.C. § 1331, because it arises under a federal statute (Administrative Procedure Act, 5 U.S.C § 704) and the U.S. Constitution. Plaintiff-Appellee Sandy Brick agrees with the Defendants-Appellants that this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Is this case moot when the government has defended the legality of its vaccine and mask mandates in the Head Start program and offered no assurances that it will not reimplement the mandates in response to a virus that is constantly evolving?

II. The Secretary of Health & Human Services ("Agency") promulgated a rule with a COVID-19 vaccine and mask mandate for all staff of Head Start programs as well as contractors and volunteers who interact with Head Start students. To justify this mandate, the Agency has cited the Head Start Act's provisions authorizing the Agency to modify a specific set of Head Start program performance standards in areas such as administration, facilities, and financial management. Do the Head Start vaccine and mask mandates exceed the Agency's statutory authority?

III. Was the district court's injunction barring the Head Start mandate's enforcement in the twenty-four states that are plaintiffs in this lawsuit proper as to its geographical scope?

STATEMENT OF THE CASE

I. Background of the Head Start program and the Rule.

Head Start was created in 1965 as part of President Lyndon Johnson's war on poverty, premised on the idea that education and early intervention programs were keys to breaking the chain of generational poverty. Across the country, Head Start programs serve approximately 850,000 young children living in families at or below the federal poverty line, providing early childhood education and other support for families.

Nine months after the start of the COVID-19 pandemic, and a year before the program's vaccine and mask mandate was released, a Centers for Disease Control study commended the Head Start program's safety record, finding that "programs that successfully implemented CDC-recommended guidance for childcare programs were able to continue offering safe in-person learning." Vaccine and Mask

Requirements to Mitigate the Spread of COVID-19 in Head Start Programs**,** 86 Fed. Reg. 68,052, 68,056 (Nov. 30, 2021) (to be codified at 45 CFR Part 1302) (the "Rule") (citing CDC Morbidity and Mortality Weekly Report (Dec. 11, 2020)[1] ("CDC MMWR Report")). They did this, in part, by "appl[ying] other innovative approaches" and "allowing maximum program flexibility." CDC MMWR Report, *supra* note 1 (Discussion).

But on September 9, 2021, President Biden spoke to the American people about the nation's battle against COVID-19 and announced five federal vaccine mandates: a vaccine-or-test mandate for large employers by the Occupational Safety and Health Administration; a vaccine mandate for healthcare workers whose employers participate in the Medicare or Medicaid programs by the Centers for Medicare & Medicaid Services ("CMS"); vaccine mandates for all federal employees and all employees of federal contractors; and a vaccine mandate for educators in Head Start. ROA.24516; *see also* Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021).[2]

[1] https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6949-H.pdf

[2] www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3.

By the time the Head Start mandate was released on the last day of November 2021 as an Interim Final Rule with comment period—the final of the five mandates to launch—it had expanded to encompass the one million Head Start volunteers who interact with children in addition to the 273,000 Head Start staff across the country. Rule at 68,068-69. The Rule also imposes a "toddler mask mandate" that requires staff, children, and family members over age two to wear masks while at Head Start program sites or receiving services within their homes. 86 Fed. Reg. at 68101; 45 C.F.R. § 1302.47(b)(5)(vi).

The Interim Final Rule relies on "the authority granted to the Secretary by sections 641A(a)(1)(C), (D) and (E) of the Head Start Act, 42 U.S.C. 9836a(a)(1)(C)-(E)), (D)." 86 Fed. Reg. at 68052. Those provisions state:

(a) Standards

(1) Content of standards

> The Secretary shall modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs under this subchapter, including...
>
> (A) . . .
>
> (B) . . .

> (C) administrative and financial management standards;
>
> (D) standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate) for such agencies, and programs, including regulations that require that the facilities used by Head Start agencies (including Early Head Start agencies and any delegate agencies) for regularly scheduled center-based and combination program option classroom activities-
>
> > (i) shall meet or exceed State and local requirements concerning licensing for such facilities; and
> >
> > (ii) shall be accessible by State and local authorities for purposes of monitoring and ensuring compliance, unless State or local laws prohibit such access; and
>
> (E) such other standards as the Secretary finds to be appropriate.

Id.; ROA.24528.

II. Plaintiff-Appellee Sandy Brick.

Plaintiff-Appellee Sandy Brick works as a teacher for a preschool that serves Head Start students in Kinder, Louisiana. ROA.24517. After the Rule's publication, and only because of the Rule, Brick's employing Head Start agency informed her that she must either submit proof of vaccination or have an exemption approved by January 28, 2022. ROA.24970-71 (Brick Decl. ¶ 4). Her employer also warned that if she failed to meet either the vaccination requirement or receive an exemption, she would be subject to termination. ROA.24970-71 (Brick

Decl. ¶ 4). Brick does not wish to take the COVID-19 vaccine because she believes that whether to receive a COVID-19 vaccine is a "personal medical decision" and that the government should not force her to take it "under the duress of losing [her] livelihood." ROA.24970-71 (Brick Decl. ¶¶ 5,6).

Shortly after the district court preliminary enjoined the Head Start federal vaccine mandate in Louisiana in this case, Brick's employer informed her that the vaccination policy was not being enforced because a court had blocked the federal Head Start vaccine mandate from going into effect. ROA.24971 (Brick Decl. ¶ 7). Since then, her employer has not required staff to take the COVID-19 vaccine or required them to wear masks. ROA.24971 (Brick Decl. ¶ 7).

III. Procedural history and district court opinion.

To protect her job, Brick filed this lawsuit on December 22, 2021. ROA.24560 (Brick Decl. ¶¶ 5-6). The Plaintiff-Appellee States filed their corresponding lawsuit and motion for a preliminary injunction challenging the mandate on December 21, 2021. ROA.12. The district court granted the motion for a preliminary injunction on January 1, 2022, enjoining the Rule in the twenty-four states that filed the lawsuit.

ROA.15. The district court consolidated Brick's case with the States' case on May 23, 2022. ROA.23, 24560.

On May 23, 2022, the Agency filed a motion to dismiss, or in the alternative for summary judgment. ROA.24. On August 5, 2022, Brick and the States filed their respective cross-motions for summary judgment. ROA.27.

On September 21, 2022, the district court granted the cross-motions for summary judgment and denied the Agency's motion. ROA.24515. The district court held that the Agency exceeded its statutory authority in promulgating the Rule. ROA.24529. It noted that the Head Start statute allowed the Agency to "'modify'" performance standards, which means that the Agency may make "moderate or minor change[s] in the program performance standards." ROA.24529. It then concluded that the Rule "is not a moderate or minor change in the program performance standards." ROA.24529.

The district court also reasoned that none of the three "types of performance program performance standards that could be modified allow the Agency Defendants to impose the Head Start Mandate." ROA.24529. It explained that performance standards concerning

"'administrative and financial management standards'" did not authorize the Rule. ROA.24529 (quoting 42 U.S.C. § 9836a(a)(1)(C)). It reasoned that such language deals with "administering the Head Start program and financial issues" and not vaccines. ROA.24529. The court concluded that interpreting this language to allow the Agency to mandate vaccines and masks would mean that "nearly anything could be an administrative standard." ROA.24529.

Next, the court held that the provision authorizing performance standards for the "condition and location of facilities" for Head Start programs did not authorize the Rule. ROA.24529 (citing § 9836a(a)(1)(D)). It reasoned that this provision deals with facilities but the Rule deals with the "condition of Head Start students, volunteers, and workers (vaccinated and/or masked)." ROA.24530.

The court also held that the third provision allowing the Agency "to modify 'such other standards as the [Agency] finds to be appropriate'" did not authorize the Rule because of the major questions doctrine. ROA.24530-33. The court explained that under that doctrine "Congress must 'speak clearly if it wishes to assign to an agency decisions of vast

economic and political significance.'" ROA.24530 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324, (2014)). Thus, Congress "'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" ROA.24530 (quoting *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001)).

The court held that the Rule, "which imposes its requirements upon 273,600 Head Start staff, 864,000 children and approximately 1,000,000 volunteers, involves an agency decision of vast economic and political significance." ROA.24534 (internal footnote omitted). It explained that "[h]ere, the elephant is the Head Start Mandate and its vaccine and mask requirements." ROA.24531. And "[t]he mousehole is Agency Defendant's attempt to disguise the Head Start Mandate as a mere modification of Head Start performance standards." ROA.24531. The court concluded that "[t]here is nothing in 42 U.S.C. § 9836a which would allow Agency Defendants to make medical decisions for employees and volunteers, and/or to require two (2), three (3), and four (4), year-old students to wear masks the majority of the day." ROA.24533. Because the statute lacks a

clear statement authorizing the Rule, the court held that the "such other standards" provision (§ 9836a) did not authorize the Rule. ROA.24533.

The court rejected the Agency's argument that the "history of modifications," such as "health examinations for Head Start staff" and "vaccinations for pets" shows its statutory authority for the Rule. ROA.24534. The court reasoned that "these past modifications do not allow Agency Defendants to impose the [Rule] because, unlike what Agency Defendants attempted to do here, these past modifications do not impose specific medical treatments on anyone." ROA.24534. And "[m]andating specific medical treatment is outside the purpose and scope of Head Start's statutory structure and purpose." ROA.24534.

Lastly, the court distinguished *Biden v. Missouri*, 142 U.S. 647 (2022). ROA.24535. The court explained that *Missouri* involved the Center for Medicare and Medicaid's COVID-19 vaccine mandate "for the staff of healthcare facilities participating in Medicare and Medicaid." ROA.24535. It noted that the U.S. Supreme Court upheld the mandate because the underlying statute "authorized the Secretary to impose conditions on the recipient of Medicare and Medicaid funds that the

Secretary found necessary in the interest of the health and safety of individuals who were furnished services." ROA.24535. And "CMS had a longstanding litany of health-related participation conditions imposed upon the staff of the participating healthcare facilities." ROA.24535. In contrast, the court said "[o]ther than requiring the vaccination of pets, the Agency Defendants have never mandated specific medical treatment." ROA.24535. The court also noted that CMS's purpose is dealing with "healthcare facilities," but the Agency's purpose is "promoting school readiness of Louisiana children by enhancing their cognitive, social, and economic development." ROA.24535 (citing 42 U.S.C. § 9831).

Because the court district court held that the Agency had exceeded its statutory authority, it declined "to address the other alleged constitutional and statutory violations" that the Plaintiffs raised. ROA.24537. The Court then entered a permanent injunction in the twenty-four states that filed this lawsuit. ROA.24539.

IV. Developments after the district court's judgment.

On January 6, 2023, the Agency promulgated a final rule repealing the mask mandate. Mitigating the Spread of COVID–19 in Head Start Programs, 88 Fed. Reg. 993, 994 (Jan. 6, 2023). But the final rule "requires Head Start programs to have an evidence-based COVID-19 mitigation policy developed in consultation with their Health Services Advisory Committee (HSAC)." *Id.*

On March 31, 2022, the U.S. District Court for the Northern District of Texas issued nationwide vacatur of the Rule after holding that it exceeded the Agency's statutory authority. *Texas v. Becerra* (*Texas II*), No. 5:21-CV-300-H, 2023 U.S. Dist. LEXIS 56119, at *88 (N.D. Tex. Mar. 31, 2023).

The Biden Administration announced on May 1, 2023, that HHS and DHS "will start the process to end their vaccination requirements for Head Start educators." *The Biden-Harris Administration will end COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities*, White House (May 1, 2023) [hereinafter *White House*

announcement ending vaccine mandate].[3] And that "[i]n the coming days, further details related to ending these requirements will be provided." *Id.* The announcement added that, "[i]n the coming days, further details related to ending these requirements will be provided."

In a separate announcement, the Agency stated: "Although the [U.S. Department of Health and Human Services' Administration for Children ("ACF")] will remove the vaccine and testing requirements, ACF strongly recommends that Head Start programs use vaccines and tests as part of their mitigation policy to reduce the spread of COVID-19 and reduce the likelihood of mortality or morbidity from infection." Head Start Vaccine and Testing Announcement, U.S. Department of Health & Human Servs., Admin. for Children & Families (last updated May 2, 2023).[4]

SUMMARY OF THE ARGUMENT

The Court should hear this case despite the Biden Administration's recent announcement that it will end the Head Start vaccine mandate.

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[3]https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/the-biden-administration-will-end-covid-19-vaccination-requirements-for-federal-employees-contractors-international-travelers-head-start-educators-and-cms-certified-facilities/

[4] https://eclkc.ohs.acf.hhs.gov/about-us/press-release/head-start-vaccine-testing-announcement

This case satisfies the voluntary cessation exception to the mootness doctrine as well as the exception for government actions that are capable of repetition but evading review exception. The Agency has vigorously defended the legality of its Head Start mask and vaccine mandates throughout this litigation, the litigation in *Texas*, and in other circuits. The Agency has not offered any assurances to Brick or the Plaintiff States that it will not reenact the Rule if it later believes that COVID-19 conditions have worsened. Nor has it promised to refrain from imposing mask and vaccine mandates in response to other diseases. Instead, its announcement that it was repealing the vaccine mandate reiterates the importance of COVID-19 vaccines to containing the virus. The evolving nature of viruses also makes it more likely that restrictions will reoccur. And the nature of virus-related restrictions means that any future mandates may be amended or repealed before a case has the time to work its way through the court system. Under these circumstances, the case is not moot.

The district court correctly held that the Agency exceeded its statutory authority in issuing the vaccine and mask mandates. None of the statutory provisions that the Agency relies on ("administrative and

financial management standards," "condition and location of facilities," and "such other standards as the Secretary finds to be appropriate") remotely concern public health. 42 U.S.C. § 9836a(a)(1)(C)-(E). Interpreting "such other standards" to include vaccine and mask mandates lacks a limiting principle and renders the statute's more specific provisions (i.e., "condition of facilities") superfluous.

Not only that, the Rule is both a major political and economic question, so the Agency needed a clear statutory statement authorizing vaccine or mask mandates under this Court's decision in *BST Holdings, LLC v. OSHA*. 17 F.4th 604, 617 (5th Cir. 2021) (striking down OSHA vaccine mandate under major questions doctrine). There is none. Thus, *Missouri* is inapposite because there the statute authorized the Secretary to promulgate regulations that he "finds necessary in the interest of the health and safety of individuals who are furnished services." 142 S. Ct. at 652. Additionally, the agency in *Missouri* (Center for Medicare and Medicaid Services) has expertise in health matters but the Agency here does not. The Agency relies on its past practices as evidence, but its previous rules differ in kind from rules mandating a medical procedure (vaccination) and requiring toddlers to wear masks.

Lastly, the scope of the injunction that the district court issued was proper, but nationwide vacatur is appropriate too given that such relief is the default rule in the Fifth Circuit. *Texas*, 2023 U.S. Dist. LEXIS 56119, at *88.

Therefore, this Court should affirm the district court.

STANDARD OF REVIEW

"This court reviews 'a district court judgment on cross-motions for summary judgment de novo.'" *McCorkle v. Metro. Life Ins. Co.*, 757 F.3d 452, 456 (5th Cir. 2014) (quotation omitted). "All evidence and inferences must be construed in the light most favorable to the non-moving party." *Id.* "'Summary judgment is only appropriate if the evidence shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.'" *Id.* (quotation omitted).

ARGUMENT

I. Brick's challenges to the Rule's vaccine and mask mandates are not moot.

Brick's challenges to the Rule's vaccine and mask mandates are not moot because the government's voluntary cessation of a challenged

practice cannot render a challenge moot, and because Brick challenges a government action that is capable of repetition but evading review.

A. The voluntary cessation exception to mootness applies.

The Agency's repeal of the mask mandate and planned repeal of the vaccine mandate do not moot this case under the "exception to mootness" involving "'a defendant's voluntary cessation of a challenged practice.'" *Freedom from Religion Found., Inc. v. Abbott*, 58 F.4th 824, 833 (5th Cir. 2023). The "[g]overnment . . . bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). "That burden is 'heavy' where, as here, '[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). "'[V]oluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 2607; *see also Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017); *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring).

Trinity Lutheran Church of Columbia, Inc. confirms that even government actors have a heavy burden of showing mootness under the voluntary cessation doctrine. There, a state offered state funds to schools and nonprofits to help them build playgrounds but excluded churches from this program. 137 S. Ct. at 2017. A church sued claiming the exclusion violated the Free Exercise Clause and lost at the district court and courts of appeals levels. *Id.* at 2018-19. While its appeal was pending at the Supreme Court, the state's governor announced "that he had directed the [state] to begin allowing religious organizations to compete for and receive [state agency] grants on the same terms as secular organizations." *Id.* at 2019 n.1. The Court held that the state had not "carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations." *Id.* Thus, the case was not moot. *Id.*

Likewise, the Agency cannot meet its heavy burden of making it absolutely clear that it will not revert to mask and vaccine mandates for two reasons: because the Agency has offered no assurances that it will not reimplement mask and vaccine mandates, and because COVID-19 restrictions have a propensity to recur.

1. *The Agency's failure to offer assurances that it will not reinstitute the Rule forecloses a finding of mootness.*

A government actor's failure to offer assurances that its wrongful conduct will not reoccur is a factor weighing against mootness. *West Virginia*, 142 S. Ct. at 2607 (2022). This is especially so when the government actor defends the conduct's legality. *Id.*

The Agency defends its Rule just as the EPA defended a rule's legality in *West Virginia*. There, the D.C. Circuit reinstituted the EPA's Clean Power Plan ("CPP") and a group of parties appealed the CPP's legality to the Supreme Court. *Id.* at 2603-06. The EPA claimed the case was moot because it had no intention of enforcing the CPP while it considered promulgating a new rule. *Id.* at 2607.

But the Supreme Court held that the CPP's repeal was a live controversy. *Id.* at 2607. It explained that the EPA's burden of showing mootness was "'heavy'" because the "'[t]he only conceivable basis for a finding of mootness in th[e] case is [its] voluntary conduct." *Id.* (quotation omitted). It held that it was not "'absolutely clear'" that "'the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quotation omitted). It reasoned that the EPA "'nowhere suggest[ed] that if this litigation is resolved in its favor it [would] not' reimpose [the

CPP] . . . indeed, it 'vigorously defends' the legality of such an approach." *Id.*

Here, the Agency's voluntary conduct is the only conceivable basis for a finding that the challenge to the vaccine and mask mandates are moot. Thus, the Agency bears a heavy burden of showing that it is absolutely clear that its wrongful behavior in promulgating the Rule will not reoccur. It cannot meet that burden because it has not suggested that it will not reimpose the vaccine and mask mandates if COVID cases and hospitalizations increase. Instead, it has vigorously defended the Rule's legality in litigating this case and cases in other courts. *See Livingston Educ. Serv. Agency v. Becerra*, No. 22-1257 (6th Cir.); *Etherton v. Biden*, No. 22-2085 (4th Cir.); *Texas II,* 2023 U.S. Dist. LEXIS 56119, at *88.

Indeed, Judge Ho has also explained that an important factor in voluntary cessation situations is whether the government "assures the plaintiffs and the courts that it will *never* return to its previous course of conduct." *Tucker*, 40 F.4th at 295 (Ho, J., concurring). And "if the government refuses to offer any such assurance, then the case can't be moot." *Id.* Thus, the Agency's lack of assurances here not to reinstate

the Rule dooms its claim that the mask mandate is moot and its likely forthcoming assertion that the vaccine mandate is too.

2. *COVID-19 restrictions have a propensity for reoccurring.*

The nature of pandemic restrictions also weighs against a finding of mootness as *Roman Catholic Diocese* shows. There, the New York governor issued COVID-19 orders limiting attendance at religious services depending on whether their locality was categorized as a "'red' or 'orange' zone." 141 S. Ct. at 66. He also "regularly change[d] the classification of particular areas without prior notice." *Id.* at 68. The governor changed the capacity limits for the religious groups' locality after they asked the Supreme Court for an emergency stay. *Id.*

But the Court held that "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." *Id.* at 68. The Court noted: "If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.*

Justice Gorsuch's concurrence explained that the shifting nature of COVID-19 restrictions and the government's continued defense of their

legality weighed against a finding of mootness. *Id.* at 71-72 (Gorsuch, J., concurring). He reasoned that the fact that churches and synagogues "had been subject to unconstitutional restrictions for months" and that the Governor recently changed the restrictions for their location "only advances the case for intervention." *Id.* at 71. He explained that "just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant." *Id.* at 72. Thus, declining review would "sacrifice" the rights at stake because "nothing would prevent the Governor from reinstating the challenged restrictions tomorrow" and "the Governor has fought this case at every step of the way." *Id.*

Likewise, nothing prevents the Agency from reinstating the mask and vaccine mandates if COVID conditions worsen in the coming months. In fact, the Biden Administration continues to defend the Rule's wisdom. In its announcement that it was repealing the vaccine mandate, it asserts that "vaccination remains one of the most important tools in advancing the health and safety of employees and promoting the efficiency of workplaces." *White House announcement ending*

vaccine mandate, *supra* note 3. The Agency's separate announcement also states that "[a]lthough the [U.S. Department of Health and Human Services' Administration for Children ("AFC")] will remove the vaccine and testing requirements, ACF strongly recommends that Head Start programs use vaccines and tests as part of their mitigation policy to reduce the spread of COVID-19 and reduce the likelihood of mortality or morbidity from infection."[5] And the Agency argues in its opening brief that "[m]asking is a conventional means to prevent the spread of communicable disease." Agency Br. 31. Thus, the Agency has not renounced the wisdom or legality of its policies. Additionally, it plans to repeal the vaccine mandate just as this Court begins its review and only shortly after *Texas II* issued nationwide vacatur of the Rule. 2023 U.S. Dist. LEXIS 56119, at *88.

Not only that, Judge Ho has cautioned against a finding of mootness when it comes to COVID-19 restrictions. *Tucker*, 40 F.4th at 293 (Ho, J., concurring). He noted that sister circuits have erred in dismissing cases involving COVID-19 restrictions as moot "despite the fact that the

[5] https://eclkc.ohs.acf.hhs.gov/about-us/press-release/head-start-vaccine-testing-announcement

officials refused to promise never to return to their challenged conduct." *Id.* at 296. He noted that the sister circuits in those cases "preached deference to political officials in the administration of COVID-19 policy." *Id.* But Judge Ho concluded that "when it comes to the protection of constitutional rights, our job is not to defer—it's to review." *Id.*

This reasoning applies to the COVID-19 policy at issue here. The Agency violated the Constitution's separation of powers by issuing the mask and vaccine mandates without statutory authority, i.e., Congressional authorization (as argued below). And the Agency has offered neither Brick, nor the Plaintiff States any assurances that it will not reinstate the mask or vaccine mandate if COVID-19 cases increase. COVID-19 restrictions also have the propensity to reoccur and linger as the initial pitch of "15 days to slow the spread" to justify restrictions on liberty shows. Merdit McGraw & Caitlin Oprysko, *Inside the White House during '15 days to slow the spread*,' Politico (Mar. 29, 2020).[6]

[6] https://www.politico.com/news/2020/03/29/inside-the-white-house-coronavirus-response-153058

3. *The Agency's cited cases do not support a mootness finding.*

The cases on which the Agency relies do not support finding that the mask mandate is moot. Agency Br. 28-29.

The Agency relies on *Spell v. Edwards*, but that case involved a challenge to a COVID-19 stay-at-home order that expired by a specific date. 962 F.3d 175, 178 (5th Cir. 2020). This Court held that the order's expiration mooted the case because "a statute that expires by its own terms does not implicate" the concerns with "litigation posturing" or voluntary cessation generally. *Id.* at 179.

But here, neither the mask mandate, nor the vaccine mandate had expiration dates. *Texas v. Becerra* (*Texas I*), 577 F. Supp. 3d 527, 553 (N.D. Tex. 2021). Indeed, the district court in *Texas I* found the Rule's endless nature was one factor in making the Rule arbitrary and capricious and grounds for a preliminary injunction. *Id.* The Agency has asserted that the mandates depend on its determination of the risks that COVID-19 poses to Head Start programs. 86 Fed. Reg. at 68058 ("We recognize that newly reported COVID-19 cases, hospitalizations, and deaths have begun to trend downward at a national level; nonetheless, they remain substantially elevated relative to numbers

seen in May and June 2021."). Thus, this case is more like *Roman Catholic Diocese*, where a governor asserted the ability to reinstate restrictions. 141 S. Ct. at 72 (Gorsuch, J., concurring).

Freedom from Religion Foundation is also distinguishable. There, a state agency issued a regulation allowing the public to "submit an exhibit for display in the Capitol" if it "met certain undemanding requirements and be sponsored by a qualifying state official." 58 F.4th at 827. Governor Greg Abbott directed the state agency to remove an exhibit that a nonprofit submitted even though it satisfied the agency's criteria, and the nonprofit sued on First Amendment grounds. *Id.* at 827-28.

The district court held that excluding the display violated the First Amendment and entered declaratory relief but not injunctive relief. *Id.* On the first appeal to this Court, "[t]he State did not challenge the merits of the finding that its exclusion of the [nonprofit's] exhibit violated the First Amendment, instead arguing that the district court lacked jurisdiction to enter the judgment." *Id.* at 830. The nonprofit argued the district court erred by not entering an injunction. *Id.* at 830. This Court held that the declaratory judgment was improper "because it

was purely retrospective" and that the district court should have considered an injunction. *Id.* at 830.

After remand, the state agency changed its policy to endorse "all subsequent exhibits as government speech" and tightened the criteria that determined whether a display would be approved. *Id.* at 830. It then argued to the district court that the First Amendment claim was moot. *Id.* at 831. But the district court disagreed and ordered the state agency to display the nonprofit's proposed display. *Id.* Despite the district court's ruling, the nonprofit did not apply to have its exhibit displayed. *Id.* at 834 n.6. The state agency appealed, but during the appeal's pendency, it changed the policy to close the Capitol to displays that the public submits. *Id.* The state agency then argued that this mooted the case. *Id.*

This Court agreed and held that the voluntary cessation exception did not apply. *Id.* at 833. It reasoned that nothing suggested that the state agency would "reimplement" the policy. *Id.* And, "[m]ore specifically, nothing in the record suggest[ed] that the [state agency] [would] continue to accept exhibit applications from the public—but [would] reject an application from the [nonprofit] based on the exhibit's

viewpoint." *Id.* The Court also rejected the nonprofit's argument that the state agency was engaging in "'litigation posturing'" because the nonprofit did not even apply for its exhibit to be displayed before the state agency closed the Capitol to displays. *Id.* at 834 n.6. Thus, there was "no way of knowing whether the State would have rejected that subsequent application." *Id.*

Thus, *Freedom from Religion Foundation* does not control. The Agency here defends the mask and vaccine mandates' legality. Conversely, in *Freedom from Religion Foundation* it was "not seriously disputed that the State treated the [nonprofit] unequally by refusing to display the exhibit at issue." *Id.* at 832. Without a serious dispute over a case's merits, there can be no live controversy. That is not the case here.

Additionally, the Agency here continues to celebrate the wisdom of mask and vaccine mandates and ties their repeal to improving COVID-19 conditions. This implies that the Agency could reimplement them if it believes that pandemic conditions have reversed course. In contrast, the state agency in *Freedom from Religion Foundation* completely changed its program, evincing its intent to abandon soliciting displays

from the public in the future. And, again, the very nature of COVID-19 restrictions means that they are likely to change as conditions with the virus change.

Lastly, the Agency relies on *Sossamon v. Lone Star State of Texas*, but that case does not help it. 560 F.3d 316 (5th Cir. 2009). There, an inmate challenged a prison's policy of restricting prisoners from attending religious services if they were "on cell restriction for disciplinary infractions." *Id.* at 321-22. After the inmate filed a grievance, the prison amended its policy to allow inmates to attend religious services even while on "cell restriction." *Id.* at 322. The district court granted the prison summary judgment. *Id.* at 324. While the appeal was pending, the state agency that administered prisons submitted an affidavit saying that it adopted relaxed restrictions state-wide. *Id.* at 322.

This Court held that the challenge to the policy was moot. *Id.* at 326. It noted that government actors have a "lighter burden" than a private party of showing that the allegedly wrongful behavior will not reoccur. *Id.* at 325. The Court then reasoned that it was "too speculative" to assume that the inmate would be "removed from the general

population" in the future. *Id.* It also pointed to the policy change being state-wide so local prison officials could not change it. *Id.* And it reasoned that the prison won before the lower court and therefore was less likely to be engaging in litigation posturing. *Id.* It explained: "[h]ad the trial court granted the injunction, we might view any attempt to force a vacatur of such a determination (particularly in favor of a *pro se* prisoner) with a jaundiced eye." *Id.*

But here, the Agency *lost* before the district court so its attempt to claim mootness and ask for vacatur of the decision below should be viewed with a "jaundiced eye." It is not entitled to the lighter burden of showing that its conduct will not reoccur like the prison in *Sossamon*. And, again, the reoccurrence is more likely here because the COVID-19 situation has changed so frequently.[7]

[7] For this reason, *New York State Rifle & Pistol Ass'n v. City of New York* (not cited by the Agency) is distinguishable. 140 S. Ct. 1525 (2020). That case involved a firearm restriction that was repealed by the state legislature and not constantly evolving COVID-19 restrictions. *Id.* at 1526. The gunowners there did not argue the voluntary cessation exception. *Id.* at 1526-27. And the majority and dissenting opinions did not analyze it. *Id.*; *see also id.* at 1527-44 (Alito, J., dissenting). It is also less likely that a repealed statute will reoccur compared to a repealed agency rule because statutes go through bicameralism and presentment and agency rules do not.

B. The capable of repetition but evading review exception applies.

This case also satisfies the mootness doctrine's exception for government actions capable of repetition yet evading review. Two factors determine whether the exception applies. First, courts consider whether "'(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration.'" *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). A case evades review if its duration is too short to receive "complete judicial review," including Supreme Court review. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978). *Wis. Right to Life, Inc.*, 551 U.S. at 462. Second, courts consider whether there is "'a reasonable expectation that the same complaining party will be subject to the same action again.'" This case satisfies both factors.

First, COVID-19's rapidly evolving nature and the government's corresponding rapidly evolving restrictions have made windows long enough for challenging such restrictions before their amendment or repeal elusive. *Roman Catholic Diocese* is again instructive. The Court concluded that the stay request was not moot because "[t]he Governor regularly changes the classification of particular areas without prior notice." 141 S. Ct. at 68. The Court concluded that "[i]f that occurs again,

the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.* The Court explained that if the governor reinstated the restrictions, then the Court might not be able to issue a stay quickly enough to ensure the religious groups could attend that week's planned religious services. *Id.* at 68.

Justice Gorsuch's concurrence added that it had taken "weeks" for the religious groups to "work their way through the judicial system and bring their case to us." *Id.* at 71 (Gorsuch, J., concurring). Thus, *Roman Catholic Diocese* shows that COVID-19 conditions and corresponding restrictions change too quickly for judicial review.

Here, it has taken months for Brick's challenge to reach this Court and it will take longer than that for it to reach a final resolution at the Supreme Court. Thus, Brick has not had enough time to receive a final resolution to the Rule's legality—which is unsurprising, given that COVID-19 conditions and government restrictions in response have constantly evolved and cannot be expected to remain static for years at a time.

In other circumstances, the Supreme Court has held that months and even years is too short of a window for a party to seek review. *See Kingdomware Tech., Inc. v. United States*, 579 U.S. 162, 170 (2016) (two years is too short); *see also Turner v. Rogers*, 564 U.S. 431, 440 (2011) (twelve months is too short); *First Nat'l Bank*, 435 U.S. at 774 (eighteen months is too short); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (266 days is too short), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *S. Pac. Terminal Co. v. Interstate Commerce Com.*, 219 U.S. 498, 515 (1911) (two years is too short). COVID-19 restrictions present a similar situation, given how long it takes to litigate a case from start to finish and how quickly COVID-19 restrictions evolve.

Second, this case satisfies the second factor (capable of repetition) because COVID-19 restrictions have a propensity for reoccurring as *Roman Catholic Diocese* shows. Additionally, just like the governor there gave no assurances that he wouldn't reimplement the restrictions on religious gatherings if the Supreme Court dismissed the application for a stay, the Agency has not promised that it will not impose the Rule again if COVID-19 conditions change.

Thus, this case also satisfies the capable of repetition but evading review exception to mootness. The Court should proceed then to the merits and affirm the district court.

II. The district court correctly ruled that the Agency lacks the statutory authority to mandate that preschool teachers take the vaccine and that toddlers wear masks.

The Rule exceeds the Agency's statutory authority. "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022). That authority must be especially clear when an agency asserts broad powers. *Id.* "The question, then, is whether the Act plainly authorizes the Secretary's mandate." *Id.* It does not.

As stated in the "Statutory Authority" section of its preamble, the Rule relies only on the "authority granted to the [Agency] by sections 641A(a)(1)(C), (D) and (E) of the Head Start Act," 42 U.S.C. § 9836a(a)(1)(C)–(E). 86 Fed. Reg. at 68,052. Section 9836a(a)(1) empowers the Agency to modify specified types of "performance standards" for programs that receive Head Start funding. Subsection (C) provides authority to modify "administrative and financial management standards." Subsection (D) provides authority to modify "standards

relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate)." And Subsection (E) allows modification of "such other standards as the [Agency] finds to be appropriate." But none of these three provisions clearly authorize a vaccine or mask mandate.

A. The Rule is not an administrative standard.

A vaccination or mask mandate is not an "administrative or financial management standard." 42 U.S.C. § 9836a(a)(1)(C). That subsection instead covers things like bookkeeping and back-office compliance. *Texas II*, 2023 U.S. Dist. LEXIS 56119, at *37-38.

The U.S. District Court for the Northern District of Texas reviewed the same Rule at issue here and held that "administrative standards" is not the power to mandate vaccines. *Id.* at *37-38. (It also noted in dicta that this provision did not authorize the toddler mask mandate. *Id.* at *90 n.23.). It reasoned that dictionaries define "administration" as "'performance of executive duties: management.'" *Id.* (quoting Administrative, Merriam-Webster's Collegiate Dictionary (11th ed. 2014)). It also explained that "[s]tatutory terms are often known by the 'company they keep.'" *Id.* at *38. Thus, the "scope of 'administrative

standards' is informed by the term to which it is joined: 'financial management standards.'" *Id.*

The court then reasoned that "read together" the two terms "appear to contemplate management standards like those found in 45 C.F.R. § 1302.101(a)(1), which requires programs to use effective 'fiscal[] and human resource management structure[s].'" *Id.* at *38-39. The court then concluded that this is "entirely different" from a "vaccine mandate" that is "aimed at children's health." *Id.*; *c.f. In re Babyland Family Services, Inc.*, HHS Dept. Appeals Bd., DAB No. 2109, 2007 HHSDAB Lexis 62, at *15 (Aug. 28, 2007). (upholding termination of Head Start grant for failure to observe "administrative and financial management standards" when it found misuse of funds, failure to pay employer-side taxes, lack of internal recordkeeping, and lack of an employee code of conduct).

The Agency's defense of its reliance on this statutory provision misses the mark. Agency Br. 17, 21. It just claims that the vaccine mandate is "an administrative standard" because it allegedly helped programs "resume fully in-person service," but this ignores that "administrative" is conjoined to, and therefore limited by, "financial

standards" as *Texas II* held. Agency Br. 21. It also shows that there is no limiting principle to "administrative standards" as the district court here warned, because the Agency's definition essentially means the Agency can do whatever it wants. ROA.24529. Yet by using the term "administrative standards" Congress limited both the ends and means of what the agency could do. Thus, "administrative standards" cannot be stretched to include mask or vaccine mandates.

B. The Rule is not a standard relating to the condition of facilities

Subsection (D) provides the Agency authority to modify "standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate)." 42 U.S.C. § 9836a(a)(1)(D). A plain reading of this provision gives the Agency the power to regulate the safety of buildings and their surrounding spaces. *Texas II*, 2023 U.S. Dist. LEXIS 56119, at *39.

As *Texas II* explained "[t]he 'condition' of facilities—as the references to 'indoor air quality assessment standards,' licensing, and accessibility make clear—thus relates to the physical conditions of buildings and equipment." *Id.* It "does not refer to adults' employment or volunteer eligibility." *Id.* at *40. Accordingly, the court held that because "the Rule

governs the conditions of people, not buildings," the language about performance standards surrounding the condition and location of facilities does not authorize the Rule. *Id.*

The Agency resists this by arguing that vaccines protect the "air quality at Head Start facilities," but [c]onjoining "facilities" with "indoor air quality" shows that this provision deals with physical buildings and not people just as *Texas II* reasoned. Agency Br. 22. Indeed, the EPA, explains on its website that "[i]ndoor air quality" refers to things like "asbestos," "tobacco products," "nitrogen dioxide," and "carbon monoxide" that emanate from sources such as "fuel-burning combustion appliances." *Introduction to Indoor Air Quality*, EPA.[8] It is telling that the EPA's list does not mention infectious diseases emanating from human beings. In fact, the EPA explicitly contrasts "indoor air pollutants" with infectious diseases by saying "[c]ertain immediate effects are similar to those from colds or other viral diseases, so it is often difficult to determine if the symptoms are a result of exposure to indoor air pollution." *Id.* Thus, infections diseases are not air

[8] https://www.epa.gov/indoor-air-quality-iaq/introduction-indoor-air-quality#:~:text=Indoor%20Air%20Quality%20(IAQ)%20refers,risk%20of%20indoor%20health%20concerns.

pollutants. It's also telling that this Rule came from HHS, but we've seen no nationwide rule from the Biden Administration EPA regulating COVID via its air-quality powers.

To be sure, the Agency points to its previous regulation banning smoking in Head Start facilities, but that regulation's thrust is stopping "air pollutants," not naturally occurring viruses. Agency Br. 22. That regulation states that grantees "must provide a center-based environment free of toxins, such as cigarette smoke, lead, pesticides, herbicides, and other air pollutants." 45 C.F.R. § 1304.53(a)(8). All these are unnatural chemicals that humans introduce into an environment. Indeed, if people stopped smoking cigarettes, there would be no more cigarette smoke. But a virus occurs naturally and is not typically thought of as an "air pollutant" as the EPA's website explains.

This accords with *NFIB* where the Supreme Court struck down the OSHA vaccine mandate. 142 S. Ct. at 665. The Court reasoned that the OSHA statute "empowers the Secretary to set workplace safety standards, not broad public health measures." *Id.* Thus, "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most" given that it "can and does spread at

home, in schools, during sporting events, and everywhere else that people gather." *Id.* at 665. The Court thus rejected Justice Sotomayor's suggestion at oral argument that if OSHA can mandate masks around machines "where sparks are flying," then it might also be able to mandate vaccines because a "human being" is "like a machine" "if it's spewing a virus, blood-borne viruses." Tr. of Oral Argument at 29:11-25, *NFIB*, 142 S. Ct. 661.

NFIB's reasoning that "workplace safety" does not equal public health shows that the "condition of facilities" does not encompass public health or the power to regulate people who use those facilities. Indeed, the air that human beings exhale throughout the day is not the same thing as the "condition of facilities" or even "indoor air quality." Just as human beings are not machines that emit sparks, they are not facilities.

This also accords with the agency's previous regulations applying the "condition and location of facilities" language. Those regulations require that "premises are . . . kept free of undesirable and hazardous materials and conditions" and that "each facility's space, light, ventilation, heat, and other physical arrangements are consistent with the health, safety and developmental needs of children." 45 C.F.R. §1304.53(10). And they

address circumstances such as a playground with "vines with berries, cluttered trash and leaves, and a play structure with splinters and rusty nails." *In re Camden Cty. Council on Econ. Opportunity*, HHS Dept. Appeals Bd., DAB No. 2116, 2007 HHSDAB Lexis 79 (Sept. 25, 2007). They do not include restrictions related to infectious diseases.

Therefore, the Agency lacks authority under the "condition of facilities" provision to regulate the public health of Head Start participants by imposing vaccine or mask mandates.

C. The Rule does not fit within the provision permitting modification of other "appropriate" performance standards.

Subsection E, which authorizes the Agency to modify "such other standards as [it] finds to be appropriate" does not authorize the Rule. 42 U.S.C. § 9836a(a)(1)(E). Catch-all provisions in a statute must be interpreted in light of surrounding statutory provisions. *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2486 (2021); *Texas*, 2023 U.S. Dist. LEXIS 56119, at *40-41. The surrounding statutory provisions here do not support the Agency's interpretation.

Alabama Association of Realtors demonstrates this canon of statutory construction. There, the CDC claimed that a statute gave it authority to issue a moratorium on rental housing evictions nationwide. 141 S. Ct.

at 2486. It pointed to a public health statute authorizing it to "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." *Id.* at 2487. This was despite the subsequent sentence authorizing things like "fumigation, disinfection, and sanitation." *Id.*

But the Supreme Court held that this provision did not authorize the moratorium because "the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary" such as "fumigation, disinfection, sanitation." *Id.* So too here: the subsections concerning "administrative and financial management standards" and the "condition and location of facilities" inform the scope of the "such other standards" provision. The specific provisions (administration and facilities) have nothing to do with masks and vaccines, so neither does the catch-all provision.

Indeed, *Texas II* applied the reasoning of *Alabama Association of Realtors* to hold that Subsection E does not authorize the Rule. 2023 U.S. Dist. LEXIS 56119, at *40-41. It reasoned that "[t]hough seemingly expansive, 'such other' standards fall under the banner of 'performance standards,' so it must be defined in relation to subsections (A)-(D)." *Id.*

Texas II also reasoned that if "'such other performance standards' could include mandates such as the vaccine requirement at issue here, there would be no genuine limiting principle to the Agency's authority to regulate in the name of 'health and safety standards.'" *Id.* at *42. The court explained that this weighed against the agency's interpretation because *Alabama Association of Realtors* rejected the CDC's use of a "catch-all provision, similar to the one this case" because under the CDC's broad interpretation "it was 'hard to see what measures [it] would place outside the CDC's reach.'" *Id.* at 42 (quoting 141 S. Ct. at 2489). This reasoning in *Texas* also extends to the toddler mask mandate, as that court noted in dicta. *See id.* at *90 n.23.

Accordingly, the district court below was rightly concerned with the lack of a limiting principle because as it reasoned "hundreds of federal agencies . . . have statutes similar to Section (E), which give the Secretary or Director general authority to make appropriate modifications." ROA.619 (district court's preliminary injunction order). Under the Agency's view, these provisions would allow most of the federal government to do whatever it wanted. Our constitutional system

does not authorize—and Congress could not have intended—such broad grants of authorities to agencies.

Not only does the Agency's interpretation lack limits, it would also render the other statutory provisions superfluous. *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 671 (6th Cir. 2021). Under the agency's reading, Congress could have passed a much shorter law: a purpose statement in § 9831 and an authorization statement allowing any rules the Agency thinks are appropriate to accomplish that purpose. But that is not the law Congress passed. Rather, the law Congress passed includes a list of specified standards the Agency shall set and standards regarding participants' health are not on the list. The Act also tells the Agency not to adopt rules that would reduce access to services or to undermine local flexibility, both of which this Rule does. The Rule therefore is not "appropriate."

The Agency responds by attacking the district court's use of the major questions doctrine when it interpreted "such other standards." Agency's Opening Br. 25. But *Texas* held that "such other standards" did not authorize the Rule "under traditional principles of statutory interpretation," and it explicitly disclaimed reliance on the major

questions doctrine. 2023 U.S. Dist. LEXIS 56119, at *54 n.14. The Agency has no answer to the above arguments concerning traditional principles of statutory interpretation.

D. The major questions doctrine bolsters the conclusion that the statute does not authorize the Rule.

The major questions doctrine provides a separate and independent reason for not reading the statute as authorizing the Rule. Under the doctrine, courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast 'economic and political significance.'" *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quoting *Utility Air Regulatory Group*, 573 U.S. at 324); *see also West Virginia*, 142 S. Ct. at 2620. Here, the Rule involves a major political question (mandatory vaccination and forcing toddlers to wear masks) and a major economic question. But the Agency lacks a clear statement from Congress that it can answer such questions.

1. *The Rule is a major political question.*

The major questions doctrine applies when "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West*

Virginia, 142 S. Ct. at 2608 (quotation omitted); *see also NFIB*, 142 S. Ct. at 665; *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

The Supreme Court has already held that President Biden's September 9, 2021, package of COVID-19 vaccine mandates is a major political question in *NFIB*. There, the Court considered a challenge to the OSHA rule in the President's package, which required employers with 100 or more employees to impose COVID-19 vaccine mandates on their employees or require them to test weekly. 142 S. Ct. at 662. OSHA argued that its statute authorized the vaccine mandate because the statute authorized OSHA to set "'occupational safety and health standards.'" *Id.* at 665 (quotation omitted). It then argued that COVID-19 is an occupational hazard because it spreads at the workplace. *Id.*

But the Court rejected this argument. *Id.* It observed that the mandate is "a significant encroachment into the lives—and health—of a vast number of employees." *Id.* It then reasoned that "'[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'" *Id.* (quotation omitted). It then explained that "[t]here can be little doubt that OSHA's mandate qualifies

as an exercise of such authority." *Id.* The Court continued: "The question, then, is whether the Act plainly authorizes the Secretary's mandate." *Id.*

So too here. The Rule is one of the vaccine mandates in the package of vaccine mandates that *NFIB* determined was a question of vast political significance. Thus, the Agency needs a clear statement to impose the Rule. For the reasons explained below, it lacks it.

Indeed, this Court in *BST Holdings, LLC* also held that the OSHA COVID-19 vaccine mandate triggered "the major questions doctrine." 17 F.4th at 617. It reasoned that the mandate "purports to definitively resolve one of today's most hotly debated political issues." *Id.* The Court also acknowledged that vaccine mandates "burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *Id.* at 618.

This Court further noted the OSHA mandate's political overtones. *Id.* at 612. It explained that President Biden had "voiced his displeasure with the country's vaccination rate in September" 2021 and that his Administration then "pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." *Id.* The Court reasoned that the "[t]he underinclusive nature of the Mandate implies

that the Mandate's true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary." *Id.* at 616.

That logic applies here too. The Rule was part of the same package of vaccine mandates as the OSHA mandate that *BST Holdings, LLC* considered. The Rule seeks to resolve the hotly debated political issues of the day—mandatory vaccines and masks (what is more, masking toddlers). The Rule arises from the Biden Administration's displeasure with unvaccinated individuals. And it is part of its general scheme to search the U.S. Code to work-around the federal government's lack of a general police power to impose national vaccine and mask mandates.

Not only that, mandatory vaccines and masks are similar in their political significance to the euthanasia law that *Gonzalez* considered. There, Oregon passed a law authorizing doctors to prescribe life-ending drugs to terminally ill patients. 546 U.S. at 249. "In 2004, 37 patients ended their lives by ingesting a lethal dose of medication prescribed" under the law. *Id.* at 252. But federal statutes regulated the types of drugs Oregon doctors used for euthanasia. *Id.* at 249. In response to the Oregon law, the U.S. Attorney General issued an "interpretive rule" declaring that euthanasia "is not a legitimate medical practice and that

dispensing or prescribing them for this purpose is unlawful" under federal law. *Id.* Oregon doctors challenged the interpretive rule and argued that it exceeded the Attorney General's statutory authority. *Id.* at 254.

The U.S. Supreme Court agreed with the doctors. *Id.* at 275. The Court reviewed the federal statute that the Attorney General relied on and held that a provision allowing him to revoke licenses for prescribing drugs when it is in the "public interest" did not authorize the interpretive rule. *Id.* 261. The Court explained that such an interpretation would give the Attorney General "extraordinary authority" and "unrestrained power." *Id.* at 262. The Court then applied the major questions doctrine to hold that the federal law did not give the Attorney General such broad powers "through an implicit delegation." *Id.* at 267 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The Court reasoned that "[t]he importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country, makes the oblique form of the claimed delegation all the more suspect." *Id.* (citation omitted).

This reasoning confirms that the Rule is a major political question. It seeks to end an earnest and profound debate across the country on whether the government should mandate COVID-19 vaccines and force toddlers to wear masks. This Court can take judicial notice of the intense debate in all sectors of American society since COVID-19 started on these issues.

Still, the Agency may claim that the major questions doctrine does not apply because the Head Start program does not have major economic consequences, but that is wrong for two reasons. *First*, the Rule does in fact have major economic consequences as explained below. *Second*, the major questions doctrine applies even when a major political question does not have major economic consequences. In *Gonzales*, only forty-seven patients used the Oregon law for euthanasia. 546 U.S. at 252. While forty-seven patients dying is tragic, it does not have major economic implications in a nation of 330 million individuals. What is more, the law at issue in *Gonzales* only involved Oregon and the limited number of other states that legalize euthanasia. Most states are unlikely to legalize euthanasia, so the law at issue in *Gonzales* was unlikely to

broadly impact the economy. But the Court applied the major questions doctrine nonetheless.

And *West Virginia* confirms that *Gonzales* is a major questions case. There, the majority discussed *Gonzales* in its review of the major questions cases that "have arisen from all corners of the administrative state." 142 S. Ct. at 2608 (discussing *Gonzales*, 546 U.S. at 267); *see also Id.* at 2622 (Gorsuch, J., concurring) (citing *Gonzales* for the proposition that whether an agency decision involves a major political question is one "trigger" for the major questions doctrine to apply). This Court in *BST Holdings, LLC* also categorized *Gonzales* as a major questions case. 17 F.4th at 617-18 (relying on *Gonzales*, 546 U.S. at 262).

Thus, even if this Court were to conclude that the Rule does not have major economic consequences, the Rule would still trigger the major questions doctrine because it seeks to answer a major political question.

2. *The Rule is a major economic question.*

But the Court should hold that the Rule is a major economic question too. The Rule's economic consequences should be viewed in light of the broader package of vaccine mandates that President Biden announced on September 9, 2021. As this Court held, the OSHA vaccine mandate was

nothing more than the "Administration por[ing] over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." *BST Holdings, LLC*, 17 F.4th at 612.

And as Chief Justice Roberts observed, the problem the White House felt it faced was a "pandemic of the unvaccinated," and the solution was to "work across the waterfront" to avoid Congress by leveraging aggressive interpretations of executive authority in several agencies. Chief Justice Roberts, Transcript of Oral Argument at 79, *NFIB v. OSHA*.[9] He continued: "[I]t's a little hard to accept the idea that this is particularized to this thing, that it's an OSHA regulation, that it's a CMS regulation, that it's a federal contractor regulation." *Id.*

Thus, the Rule is another piece of this broader package that had vast economic consequences. The OSHA rule alone threatened to impose "billions of dollars in unrecoverable compliance costs." *NFIB*, 142 S. Ct. at 666; *see also BST Holdings, LLC*, 17 F.4th at 617 (estimating compliance costs at "$3 billion."). And the vaccine mandate for federal contractors that was also part of the Administration's package covered at

[9] www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a244_kifl.pdf.

least "20% of the nation's labor force." *Kentucky v. Biden,* 57 F.4th 545, 548 (6th Cir. 2023). Viewed in that context, the Rule addresses a major economic question.

3. *The Agency lacks a clear statement from Congress that authorizes the Rule.*

An agency lacks a clear statement to regulate on a major political or economic question if it relies on "'modest words,' 'vague terms,' or 'subtle device[s].'" *West Virginia*, 142 S. Ct. at 2609 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). A court is also likely to find a clear statement lacking if the regulation falls outside the agency's "expertise" and mission. *NFIB*, 142 S. Ct. at 665. Further evidence that the agency lacks a clear statement are a "'lack of historical precedent'" for a rule and the agency claiming sweeping authority for the first time. *Id.* at 666.

NFIB shows that these factors are present here. As discussed above, that case considered OSHA mandating vaccines based on a statute authorizing it to "set '*occupational* safety and health standards.'" *Id.* at 665. (quotation omitted). But the Court held that this was not a statement that clearly authorized the mandate. *Id.* It reasoned that COVID-19 is not an "*occupational* hazard" because it is a risk that is not

unique to the workplace. *Id.* The Court observed that "COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases." *Id.* The Court concluded that allowing OSHA to regulate the "hazards of daily life —simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization." *Id.*

Lastly, the Court rejected OSHA's argument that the vaccine mandate was similar to "fire or sanitation regulation" that it imposed in the past. *Id.* at 665. The Court reasoned that a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. *Id.* It continued: "A vaccination, after all, 'cannot be undone at the end of the workday.'" *Id.* (quotation omitted). Justice Gorsuch concurred, noting that the "[t]he Court rightly applies the major questions doctrine." *Id.* at 668 (Gorsuch, J., concurring).

The Court further reasoned that "[i]t is telling that OSHA, in its half century of existence, has never before adopted a broad public health

regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace." *Id.* at 666. It concluded that "[t]his 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency' legitimate reach." *Id.* (quotations omitted).

This reasoning applies here too. The Agency shoehorns the Rule into provisions concerning administrative standards, facility standards, or "such other standards," which is cryptic language for Congress to use if it wished to authorize public health mandates. Additionally, issuing public health mandates is outside the Agency's expertise and "is simply 'not part of what the agency was built for." *Id.* at 665. And although the Head Start program had existed for over half a century, it had never before imposed a vaccine or mask mandate for participants until it promulgated the Rule. These are telling indicators that the Agency lacks a clear statement from Congress that authorizes the Rule.

The Agency claims that *Missouri* shows that the major questions doctrine cannot apply, but that case is distinguishable. Agency Br. 25-26 (relying on 142 S. Ct. 647). There, the statutory language authorized rules "'in the interest of the health and safety of individuals who are

furnished services' by facilities that receive Medicare or Medicaid funds." *Missouri*, 142 S. Ct. at 650. Thus, the Court held that the vaccine mandate there "fits neatly within the language of the statute." *Id.* at 652. Thus, the rule there satisfied the major questions doctrine because the agency had a clear statement from Congress that specifically authorized such a rule for healthcare facilities.

E. Statutory language addressing "deficiencies" deals with how performance standards are to be enforced and not what those standards should be in the first place.

To be sure, the Agency points to language in its statute authorizing it to correct "deficiencies" in meeting performance standards that address "*a threat to the health, safety*, or civil rights of children or staff," but that fails for two reasons. Agency Br. 17 (quoting 42 U.S.C. § 9836a(e)(1)(B)(i) (emphasis added)). *First,* the Agency did not identify this language in its claim of statutory authority in the Rule itself. The Rule states that is authority was "the authority granted to the Secretary by sections 641A(a)(1)(C), (D) and (E) of the Head Start Act." 86 Fed. Reg. 68,052. The Agency does not get a "do over" in litigation to identify new provisions it did not believe supplied it with authority at the time of the rulemaking. *Michigan v. EPA*, 576 U.S. 743, 758 (2015)

(noting "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action").

Second, the "deficiency" provision does not support the Rule. Under a plain reading of the statutory scheme, the Agency's ability to correct "deficiencies" under § 9836a(e)(1) cannot expand the Agency's separate authority to modify specific performance standards under § 9836a(a)(1). Instead, the authority to correct deficiencies is tied to the Agency's power to review individual programs; it is not a basis for issuing a nationwide vaccine and mask mandate. 42 U.S.C. § 9836a(e)(1) (permitting the Agency to require correction of deficiencies only "on the basis of a review pursuant to subsection (c)"); § 9836a(c) (permitting the Agency to conduct routine reviews, follow-up reviews, and unannounced inspections of individual Head Start programs for compliance with performance standards).

Such reviews for deficiencies would unsurprisingly relate to health and safety when, for example, the Agency finds fault with a program's use of poorly ventilated facilities, which ties to an express performance standard under § 9836a(a)(1)(D). But the Agency's authority to review

individual programs does not equate to an open-ended delegation to issue additional nationwide standards on whatever health or safety topic it chooses. *See Texas I*, 2021 U.S. Dist. LEXIS 248309, at *25-*29 (rebutting Defendants' "deficiency" arguments). Any other reading would render the statute's earlier enumeration of specific performance standards superfluous.

F. The Agency's past practices do not confer it statutory authority to promulgate the Rule.

The Agency proffers its past practices as showing that the statute authorizes the mandate, but that fails for three reasons. Agency Br. 18-19.

First, and most fundamentally, an agency's "past practice" cannot "create power where the statute creates none." *Kentucky*, 57 F.4th at 554.

Second, none of the Agency's past practices comes even close to imposing a medical procedure on Head Start staff and volunteers. The Agency especially focuses on its prior regulation that staff and volunteers have a health examination, including a screening for tuberculosis. Agency Br. 19. But requiring a health exam is different in kind from mandating vaccinations, which "'cannot be undone at the end of the workday.'" *NFIB*, 142 S. Ct. at 665 (quotation omitted). This Court has

recognized that mandatory COVID-19 vaccinations "substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BST Holdings, LLC*, 17 F.4th at 618. A tuberculosis test may puncture the skin, but it is a far cry from injecting a foreign substance into the body that irreversibly alters its immune system. Likewise, the Agency's regulation that Head Start schools "'establish, train staff on, implement, and enforce a system of health and safety practices that ensure children are kept safe at all times,'" is nothing like mandating vaccines. Agency Br. 18 (quoting 45 C.F.R. § § 1302.47(a)(1)).

Third, and for similar reasons, the Agency's past practices do not, in fact, suggest that its statute authorizes the mask mandate. The Agency has no long-standing practice of it requiring toddlers to wear masks to stop respiratory viruses, even though there have been several flu seasons since the Program's inception during which hospitalizations have been high. *See* Amanda Macmillan, *Hospitals Overwhelmed by Flu Patients Are Treating Them in Tents*, Time (Jan. 18, 2018).[10]

[10] https://time.com/5107984/hospitals-handling-burden-flu-patients/

The examples it cites are simply different in kind from forcing participants to wear masks all day. Agency Br. 30 (citing regulations requiring staff to wear gloves "when they are in contact with spills of blood or other visibly bloody bodily fluids," or to wash their hands "after diapering or toilet use, before food preparation, and whenever hands are contaminated with blood or other bodily fluids"). Requiring staff to wear gloves in limited circumstances, for example, is not the same thing as masking toddlers.

To be sure, *Missouri* upheld the CMS vaccine mandate because the agency's "longstanding practice" included imposing requirements concerning the "qualifications and duties of healthcare workers themselves," but that case ultimately turned on the statute's language. Again, the statute authorized the agency to promulgate regulations that it "finds necessary in the interest of the health and safety of individuals who are furnished services." *Id.* at 652. The Court then turned to past practices to respond to the dissent's argument that even this language was not broad enough to authorize a vaccine mandate. *Id.* at 652 ("The States and Justice Thomas offer a narrower view of the various authorities at issue."). But here, as argued above, there is no statutory

language authorizing health and safety performance standards. Thus, the Agency's past practices here are irrelevant for interpreting the statute's text. Indeed, past practice cannot trump statutory language. *Kentucky*, 57 F.4th at 554.

In sum, the Agency lacks statutory authority for the Rule whether one uses traditional canons of statutory construction or the major questions doctrine to interpret the statute.[11]

III. The district court correctly provided broad injunctive relief.

Brick agrees with the district court and the Plaintiff-Appellee States that the injunction should include all Head Start programs within those States' borders. State Appellees' Resp. Br. 47-52. But she also submits

[11] The Agency inaccurately claims that Brick never challenged the mask mandate. Agency Br. 32-33. But the record shows that Brick challenged the mask mandate in the operative complaint. ROA.24754, 24761 (First Am. Compl. ¶ 58), 24764 (First Am. Compl. ¶ 68), 24770 (First Am. Compl. ¶ B). Her sworn statement supporting her cross-motion for summary judgment evinces her desire not to wear a mask because it states that her employer was no longer enforcing the mask mandate due to a court injunction. ROA.24971 (¶ 7). And she included that fact in her statement of undisputed facts. ROA.24968 (¶ 13). The Agency also offered no evidence to the contrary, and thus, it was proper for the district court to consider it undisputed for summary judgment purposes that Brick challenged the mask mandate. Fed. R. Civ. Pro. 56(e)(2).

that this Court can and should order even broader relief by issuing nationwide vacatur of the Rule.

The APA gives courts the power to "hold unlawful and set aside agency action[s]." *Data Mktg. P'ship, LP v. United States DOL*, 45 F.4th 846 (5th Cir. 2022) (quoting 5 U.S.C. § 706(2)). In fact, this Court has held that "[t]he default rule is that vacatur is the appropriate remedy." *Id.*; *see also Texas II*, 2023 U.S. Dist. LEXIS 56119, at *83.

Not surprisingly, *Texas II* recently issued nationwide vacatur of the Rule on March 31, 2023. *Texas II*, 2023 U.S. Dist. LEXIS 56119, at *90. It explained that the "'the seriousness of the deficiencies'" of the agency action and "'the disruptive consequences of the vacatur'" determine the appropriateness of vacatur. *Id.* at *84 (quoting *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 529 (5th Cir. 2021)). It concluded that the Head Start Rule is seriously deficient because the Agency lacks statutory authority for it and the Agency is unlikely to be able to justify the Rule on remand. *Id.* at *84. It also explained that this "strong showing of deficiencies" outweighed any disruption that vacatur would cause. *Id.* at *86.

Next, *Texas II* held that vacatur should extend nationwide and rejected the Agency's argument that relief should only cover the plaintiffs there. *Id.* at *87. The court reasoned that "the Supreme Court has affirmed lower court decisions universally vacating an agency action." *Id.* at *87. It also pointed to *Texas v. United States*, where this Court "did not limit the scope of vacatur to only Texas and the other plaintiff states." *Id.* (relying on 50 F.4th 498, 529-30 (5th Cir. 2022)).

Accordingly, for all the reasons the district court in *Texas II* explained, nationwide vacatur is appropriate here too.

CONCLUSION

James Madison taught that separation of powers means that "[a]mbition must be made to counteract ambition" and that "such devices" are "necessary to control the abuses of government." The Federalist No. 51 (James Madison) (Library of Congress).[12] He noted that "dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." *Id.* One of those auxiliary precautions, of course, is the judicial branch, and this Court specifically.

[12]https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493427

Here, President Biden and the Agency had the ambition to impose a national COVID-19 vaccine mandate on American adults given its "displeasure with the country's vaccination rate." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th at 618. It then "pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." *Id.* at 612. Indeed, it was willing to "any means necessary" in its quest to "ramp up vaccine uptake." *Id.* at 616.

It settled on the Head Start statute as one of its means. And shoehorned a vaccine and mask mandate into provisions in the Head Start statute having nothing to do with participants' personal medical decisions. Indeed, "administrative and financial management standards," "standards relating to the condition and location of facilities," and "such other standards as the [Agency] finds to be appropriate" fall far short of authorizing public health mandates. The fact that masking toddlers and mandating vaccines in response to COVID-19 are major political and economic questions only highlights the Administration's ambition to ramp up vaccine uptake by any means necessary. As a result, it usurped power from Congress and violated the Constitution's separation of powers.

This Court's job is to act as a check on the President's ambition and enforce the Constitution by holding that Congress never authorized this Rule. And "when it comes to the protection of constitutional rights," this Court's "job is not to defer" to the government's argument that a case is moot. *Tucker*, 40 F.4th at 296 (Ho, J., concurring). Rather, "it's to review." *Id.* Indeed, "[l]ooking the other way when government claims mootness is an abdication of judicial duty." *Id.* This is especially so when, as here, it makes no assurances that it will not reenact the challenged policy.

The district court's decision should be affirmed.

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Respectfully Submitted,

/s/ Jeffrey D. Jennings
Jeffrey D. Jennings
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-263-7668
jjennings@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
504-952-8016
sarah@pelicaninstitute.org

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,447 words, excluding the parts that can be exempted by Rule 32(f) and 5th Cir. R. 5, which is under the limit of 13,000 words for such a brief. I also certify that it complies with Rule 32(a)(5)-(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font, size 14.

Dated: May 5, 2023

/s/ Jeffrey D. Jennings

Attorney for Plaintiff-Appellee
Sandy Brick