No. 22-30748

In the 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; 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.; OFFICE OF HEAD START,

Defendants-Appellants,

On Appeal from the United States District Court for the Western District of Louisiana, 3:21-cv-4370

STATE APPELLEES' RESPONSE BRIEF

JEFF LANDRY
Attorney General of Louisiana

OFFICE OF THE ATTORNEY GENERAL
909 Poydras Street, Suite 1850
New Orleans, LA 70112
Telephone: 225-938-0779

ELIZABETH MURRILL
Solicitor General

SHAE MCPHEE
Deputy Solicitor General
mcphees@ag.louisiana.gov

MORGAN BRUNGARD
Assistant Solicitor General

CERTIFICATE OF INTERESTED PERSONS

In accordance with 5th Circuit Rule 28.2.1, counsel for State Appellees certifies that the following persons have an interest in this case.

Appellee:	**Counsel for Appellees:**
Sandy Brick	Jeffrey Jennings of Liberty Justice Center Chicago, IL Daniel Suhr of Liberty Justice Center Chicago, IL
States of Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming; Commonwealth of Kentucky	Jeff Landry, Attorney General for the State of Louisiana, Louisiana Department of Justice Elizabeth Baker Murrill, Solicitor General, Louisiana Department of Justice Shae McPhee, Deputy Solicitor General, Louisiana Department of Justice Morgan Brungard, Assistant Solicitor General, Louisiana Department of Justice
Appellant:	**Counsel for Appellants:**
Administration for Children & Families Xavier Becerra Joseph Biden	Alisa Klein of U.S. Department of Justice Washington, DC

Jooyeun Chang Bernadine Futrell Office of Head Start United States Department of Health and Human Services	Sarah Clark of U.S. Department of Justice Washington, DC Christopher Edelman of U.S. Department of Justice - Civil Division Washington, DC

/s/ *Shae McPhee*
Shae McPhee
Deputy Solicitor General
Attorney for State Appellees

STATEMENT REGARDING ORAL ARGUMENT

In view of the important issues in this appeal, State Appellees agree with the government that oral argument is likely to assist the Court.

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(2) Whether the controversy surrounding the masking requirement of the Head Start Mandate is moot even though the government vigorously defends its legality and could plausibly reinstitute it in the future.

(3) Whether an injunction tailored to apply to all the State Appellees is appropriate in scope.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The President's "Work-around" for a National Vaccine Mandate.

As President-Elect, Joe Biden promised that COVID–19 vaccines wouldn't be mandatory. ROA.48 (citing Jacob Jarvis, *Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020*, Newsweek (Sept. 10, 2021), bit.ly/3ndyTn5). But, as time passed, and vaccination rates remained lower than anticipated, "President Joe Biden's 'patience' began 'wearing thin' with those 'who haven't gotten vaccinated.'"

ROA.24516 (quoting White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), bit.ly/3Ey4Zj6). The President "voiced his displeasure with the country's vaccination rate" and his "Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 612 (5th Cir. 2021).

In September 2021, the President announced "a new plan to require more Americans to be vaccinated." White House, Remarks by President Biden on Fighting the COVID–19 Pandemic (Sept. 9, 2021), bit.ly/3Ey4Zj6. The President declared that he was "tak[ing] on elected officials and states" and that he would use his "power as President to get them out of the way." *Id.* The President's plan was to impose vaccine mandates on four different groups Americans: "employers with 100 or more employees, healthcare workers, executive branch federal employees, and 'all of nearly 300,000 educators' in the Head Start program." *Texas v. Becerra*, 577 F. Supp. 3d 527, 535 (N.D. Tex. 2021).

These vaccine mandates have been the subject of sprawling litigation across the country.

B. The Vaccine Mandates Have Not Survived Judicial Scrutiny Absent Clear Authority from Congress.

Understanding how the Head Start mandate fits within the constellation of litigation surrounding the other vaccine mandates will aid the Court as it resolves the issues in this appeal.

i. The Supreme Court Stayed the OSHA Mandate.

Start with the vaccine mandate for employers with at least 100 employees, which the Secretary of Labor imposed via the Occupational Safety and Health Administration (OSHA). Under the mandate, covered workers were required to receive a COVID–19 vaccine. The "only exception" was "for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 662 (2022). The mandate applied "to roughly 84 million workers" which amounts to "much of the Nation's work force." *Id.*

Because administrative agencies such as OSHA "are creatures of statute," they "possess only the authority that Congress has provided." *Id.* at 665. And the Supreme Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors v. Department of Health*

and Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted). The Occupational Safety and Health Act of 1970 authorizes OSHA to "promulgate, modify, or revoke any occupational safety or health standard." 29 U.S.C. § 655(b). Thus, the question before the Supreme Court when deciding whether to stay the OSHA mandate was whether that statute "plainly authorizes the Secretary's mandate." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665. (discussing 84 Stat. 1590, 29 U.S.C. § 651 *et seq.*).

The Supreme Court ultimately concluded that challengers to the OSHA mandate—"including States, businesses, trade groups, and nonprofit organizations"—were "likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate." *Id.* at 664–65. The Court reasoned that "[t]he Act empowers the Secretary to set *workplace* safety standards, not broad public health measures." *Id.* at 665; *see id.* at 663 ("As its name suggests, OSHA is tasked with ensuring *occupational* safety—that is, 'safe and healthful working conditions.'" (quoting § 651(b)).

Rejecting the argument that "the risk of contracting COVID–19 qualifies as such a danger," the Court explained that "[a]lthough COVID–

19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most." *Id.* at 665. The Court found it "telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind." *Id.* at 666.

In short, the Secretary of Labor lacked authority because "imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not part of what the agency was built for." *Id.* (internal quotation marks omitted).

ii. The Supreme Court Allowed the Healthcare Worker Vaccine Mandate to Go into Effect.

In November 2021, the Secretary of Health and Human Services "announced that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID–19." *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022) (citing 86 Fed. Reg. 61555 (2021)). Two district courts enjoined the mandate, but the Supreme Court lifted the injunctions and allowed it to go into effect.

The Supreme Court said that the Secretary wields "general statutory authority to promulgate regulations 'as may be necessary to the efficient administration of the functions with which [he] is charged.'" *Id.*

at 650 (quoting 42 U.S.C. § 1302(a)). By statute, he is empowered to "make and publish such rules and regulations" as necessary for those functions. 42 U.S.C. § 1302(a). And the Secretary's "most basic function," according to the Supreme Court, "is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety." *Missouri*, 142 S. Ct. at 650.

Covered providers include "hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and more." *Id.* And Congress expressly gave the Secretary authority to promulgate "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services" in hospitals, outpatient rehabilitations facilities, skilled nursing facilities, and ambulatory surgical centers. *Id.* (quoting 42 U.S.C. § 1395x(e)(9) and collecting citations). The Court concluded that the mandate "fits neatly within the language of the statute." *Id.* at 652.

Moreover, the Secretary has actually wielded his statutory authority to establish "long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds." *Id.* at 650. Those conditions require some providers to "maintain

and enforce an 'infection prevention and control program designed . . . to help prevent the development and transmission of communicable diseases and infections.'" *Id.* at 650–51 (quoting 42 C.F.R. § 483.80). This history and practice led the Court to conclude that "there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what [the Secretary] does." *Id.* at 653.

When adopting the mandate, the Secretary found that vaccination was "necessary for the health and safety of individuals to whom care and services are furnished." *Id.* at 651 (86 Fed. Reg. 61561). "Medicare and Medicaid patients are often elderly, disabled, or otherwise in poor health," and so the Secretary found that "transmission of COVID–19 to such patients is particularly dangerous." *Id.* (quoting 86 Fed. Reg. 61566, 61609). In view of these dangers, "[h]ealthcare workers around the country are ordinarily required to be vaccinated." *Id.* at 653.

In short, the Court upheld the mandate based on its view of the statute's plain language, the Secretary's recorded history of mandating health requirements, and the general practice of vaccination for healthcare workers. *Id.*

iii. This Court Upheld a Preliminary Injunction Against the Federal Contractor Mandate.

This Court has also considered the validity of President Biden's mandate that "would, with limited exceptions, require the government to include in its contracts a clause that would require federal contractors to ensure that their entire workforce is fully vaccinated against COVID–19." *Louisiana v. Biden*, 55 F.4th 1017, 1019 (5th Cir. 2022).[1] A district court in Louisiana entered a preliminary injunction against the mandate and the government appealed.

The President purported to issue the mandate under the authority of the Federal Property and Administrative Services Act of 1949. "The Procurement Act states that its purpose 'is to provide the Federal Government with an economical and efficient system' for procurement, contracting, and other related activities." *Id.* at 1020 (quoting 40 U.S.C.

[1] At least two other circuits have also considered the validity of the federal contractor mandate and concluded that the President lacked the necessary authority to impose it. *See Georgia v. President of the United States*, 46 F.4th 1283, 1289, 1291 (11th Cir. 2022) (upholding preliminary injunction covering Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia); *Commonwealth v. Biden*, 57 F.4th 545, 557 (6th Cir. 2023) (limiting the already-granted preliminary injunction to the named parties). The Ninth Circuit, by contrast, very recently held that the federal contractor mandate was a valid exercise of the President's power after concluding, among other things, that the major questions doctrine applies only to *agency* action, not *presidential* action. *Mayes v. Biden*, No. 22-15518, 2023 WL 2997037, at *10 (9th Cir. Apr. 19, 2023) ("We find that the Doctrine does not apply to Presidential actions and therefore does not bar the Contractor Mandate.").

§ 101). It empowers the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," so far as the policies are "consistent with [the] subtitle." *Id.* (quoting 40 U.S.C. § 121).

The government contended this "express grant of statutory authority permits the President to issue, among others, orders that improve the economy and efficiency of contractors' operations." *Id.* at 1023. The government further argued, among other things, that the federal contractor mandate was similar to the healthcare worker mandate upheld by the Supreme Court.

This Court rejected the government's arguments. The Court reasoned that, unlike the healthcare worker mandate, no statutory language authorized the federal contractor mandate with sufficient clarity—a necessary predicate to upholding the federal contractor mandate because it triggered the major questions doctrine: "OSHA's mandate may have been larger in scope than the mandate at issue in this case, but not perhaps by as much as may be expected." *Id.* at 1028; *see id.* at 1030–31 ("To allow this mandate to remain in place would be to ratify

an enormous and transformative expansion in the President's power under the Procurement Act." (internal quotation marks omitted)).

And the government's "analogy" to the healthcare worker mandate wasn't "apt." *Id.* at 1029. "[I]n stark contrast" to the healthcare worker mandate, no historical practice justified the mandate. *Id.* at 1029. "[T]his federal contractor mandate is neither a straight-forward nor predictable example of procurement regulations authorized by Congress to promote "economy and efficiency." *Id.* at 1029. And, "[e]ven assuming, *arguendo*, that as a matter of historical practice and judicial construction that the Procurement Act has been used to advance policy positions, this argument fails to account for the dramatic difference between this mandate and other exercises of Procurement Act authority." *Id.* at 1030.

iv. This Court Upheld an Injunction Against the Federal Worker Mandate.

As part of his plan to vaccinate America, President Biden also ordered "all federal *employees*" to be vaccinated. *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 369 (5th Cir. 2023) (*en banc*) (emphasis added); *see* 86 FR 50989; 86 FR 50985. Those who failed to comply "would face termination." *Id.* The *en banc* panel of this Court considered the legality of the federal employee mandate after a district court preliminarily

enjoined it. *Id.* at 389. This Court's opinion centered almost entirely on whether there was jurisdiction to consider the legality of the mandate.

But, after concluding it had jurisdiction to decide the question, the *en banc* panel held it was "unpersuaded that the district court abused its discretion" by issuing a nationwide injunction against the federal worker mandate. *Id.* at 387.

C. The Head Start Program.

Through the Head Start program, the United States Department of Health and Human Services provides funding for educational and related services to low-income families of preschool-age children. *See* 42 U.S.C. §§ 9831 et seq.; ROA.24516; *see, e.g., Doe v. Woodard*, 912 F.3d 1278, 1286 n.2 (10th Cir. 2019) ("Head Start primarily functions as an educational institution for very young children."); *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1339 (9th Cir. 1997) ("The Head Start program is devoted to providing quality pre-school education to needy children."). The statutorily defined purpose of the Head Start program is "to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development[.]" 42 U.S.C. § 9831.

The Head Start program "improves educational outcomes—increasing the probability that participants graduate from high school, attend college, and receive a post-secondary degree, license, or certification." Schanzenbach & Bauer, *The long-term impact of the Head Start program*, Brookings (Aug. 19, 2016), brook.gs/3lQ6JNY.

The Administration for Children and Families (ACF), a federal agency within the Department of Health and Human Services, has primary responsibility for overseeing the Head Start program.

All States have Head Start programs, and some States—like Georgia and Utah—directly participate as grantees. ROA.123. Some States also enforce Head Start standards. ROA.44. State funding is often blended into funding for these programs—which, in turn, is often blended into school district funding. ROA.44–45.

D. The Head Start Mandate.

Early in the pandemic, ACF "initially chose, among other actions, to allow Head Start programs to decide whether or not to require staff vaccination rather than require vaccination." 86 Fed. Reg. 68054. But after the President announced his new plan to vaccinate the Nation, ACF

issued an Interim Final Rule imposing mask and COVID–19 vaccine mandates in Head Start programs. *See* 86 Fed. Reg. 68052.

Under the mandate, virtually all workers associated with the Head Start program must get a vaccine: "[A]ll staff who work with enrolled Head Start children, volunteers in classrooms, or volunteers working directly with children, and contractors whose activities involve contact with or providing direct services to children and families." ROA.608 (citing 86 Fed. Reg. 68052, 68060). By the President's own estimate, the vaccine mandate applies to "nearly 300,000 educators." White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), bit.ly/3Ey4Zj6. Those subject to the vaccine mandate were "required to be fully vaccinated by January 31, 2022." ROA.24517.

The Head Start Mandate also requires the masking of "all Head Start individuals two years of age or older." ROA.24517 (citing 86 Fed. Reg. 68052). The masking requirement applies when people are "indoors in a setting where Head Start services are provided." ROA.24517; *accord* 86 Fed. Reg. 68053. And "[t]hose not fully vaccinated" are obligated to wear masks "outdoors in crowded settings." ROA.24517. Children and adults may take off their masks only when eating, drinking, or napping.

86 Fed. Reg. 68052. Masking requirements were to take effect immediately. ROA.24517.

As authority for the Head Start Mandate, ACF relied solely on 42 U.S.C. § 9836a(a)(1)(C)–(E), provisions that authorize the Secretary to "modify, as necessary, program performance standards" in certain enumerated categories, including "administrative and financial management standards," "standards relating to the condition and location of facilities," and "other standards as the Secretary finds to be appropriate."

The Head Start Mandate targets 273,000 staff, up to one million volunteers, and up to 864,289 children at America's 20,717 Head Start Centers. 86 Fed. Reg. at 68068–69, 68077. According to the agency, the vaccine requirements will likely force 29,953 staff to submit to the vaccine and 11,519 staff to lose their jobs. *Id.* at 68077–78.

The Head Start Mandate conditions funding on "documenting, recordkeeping, and tracking of all staff members." ROA.24518 (quoting 86 Fed. Reg. 68061). But there is no "additional funding for recordkeeping and tracking or for additional cost of testing for those granted exceptions." 86 Fed. Reg. 68061, 68066. If a covered agency "fails to meet

the applicable standards, the Secretary must initiate proceedings to terminate its funding." ROA.24518 (citing 42 U.S.C. § 9836a(e)(1)(C)). The Head Start Mandate purports to preempt any conflicting state laws. 86 Fed. Reg. 68063.

The Secretary found there was "good cause" to waive the notice-and-comment procedures normally required when an agency promulgates a regulation. 86 Fed. Reg. 68059. Thus, the Rule took effect immediately on November 30, 2021.

II. PROCEDURAL HISTORY

A. The Preliminary Injunction.

A coalition of 24 States sued the Secretary and other government officials responsible for implementing the Head Start Mandate. *See* ROA.41–42. Contending that the Head Start Mandate exceeded the agency's authority and was contrary to federal law, the State coalition sought declaratory and injunctive relief in the Western District of Louisiana. ROA.71–91.

The States moved for a preliminary injunction—ROA.106–143—and the district court granted relief, limiting the scope of its injunction

to the 24 States in the lawsuit. ROA.603–34.[2] The district court concluded that the States were likely to succeed on the merits of the following claims: "(1) Agency Defendants did not have authority to issue the Head Start Mandate; (2) the Head Start Mandate violates the APA's notice-and comment requirements; [and] (3) the Head Start Mandate violates the Tenth Amendment to the U.S. Constitution." ROA.616. In view of this conclusion, the district court did not address the remainder of the States' claims against the government. ROA.616. The district court further concluded that the other preliminary injunction factors weighed in the States' favor. ROA.630–32.

B. The Permanent Injunction.

Unlike injunctions issued against President Biden's other vaccine mandates, the government did not appeal the preliminary injunction against the Head Start Mandate. Instead, the government moved the district court to dismiss or, alternatively, for summary judgment.

[2] The States also moved for a temporary restraining order, but the district court denied it as moot when it issued a preliminary injunction against the Head Start Mandate. *See* ROA.633.

ROA.23632–86. The States filed a cross-motion for summary judgment.[3] ROA.23952; ROA.24152–88.

The district court granted Plaintiffs' motion for summary judgment and permanently enjoined enforcement of the Head Start Mandate in the 24 Plaintiff States. ROA.24514–40.

After concluding that the States had standing to bring their suit, ROA.24519–25, the district court concluded that the Secretary lacked statutory authority to issue the Head Start Mandate. ROA.24527–37. The district court found "the Head Start Mandate, 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. And so it triggered the major questions doctrine. Nothing in the statutory authority relied on by the government clearly granted the government "the authority to impose the Head Start Mandate." ROA.24534. Moreover, the agency had never "impose[d] specific medical treatments on anyone." ROA.24534. Thus,

[3] The coalition of States' case was consolidated with Sandy Brick and Jessica Trenn's case. *See* ROA.23881–82. These two Plaintiffs also filed a cross-motion for summary judgment. ROA.24092.

"[m]andating specific medical treatment is outside the purpose and scope of Head Start's statutory structure and purpose." ROA.24534.

For the purposes of the permanent injunction, the district court concluded that Plaintiffs had succeeded on the merits, they would suffer an irreparable harm absent an injunction, and the other two factors weighed in Plaintiffs' favor. ROA.24537–39.

The district court entered final judgment in favor of the Plaintiffs. ROA.24541–42. The government timely appealed. ROA.24544–45.

SUMMARY OF THE ARGUMENT

1. The Secretary plainly lacks statutory authority to implement the Head Start Mandate. The statutory language merely allows the Secretary to "*modify*, as necessary, [Head Start] program performance standards." 42 U.S.C. § 9836a(a)(1) (emphasis added). Modify is a modest word. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225–26 (1994). It "means to change moderately or in minor fashion." *Id.* at 225. No *modification* of any of the standards in § 9836a(a)(1)(C)–(E)—the provisions the government used to promulgate the Head Start Mandate—could justify a sweeping vaccine

and masking mandate for the millions of people associated with the Head Start program.

Even assuming the statutory language is ambiguous, the Head Start Mandate fails under the major questions doctrine. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (explaining that the major questions doctrine is triggered when an agency seeks to use an ambiguous statutory provision to "exercise powers of vast economic and political significance." (internal quotation marks omitted)). Under the major questions doctrine, this Court should treat an agency's unprecedented power grab based on ambiguous statutory language "with a measure of skepticism." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014).

That standard is fatal to the Head Start Mandate in light of (1) its vast economic and political significance, (2) the statute's plain text, and (3) the agency's history of regulating Head Start grantees. The Head Start Mandate's impact is sweeping: It "imposes its requirements upon 273,600 Head Start staff, 864,000 children and approximately 1,000,000 volunteers." ROA.24534. But the Secretary's statutory authority to "modify" standards is limited. Again, "modify" is a modest word, and

"[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words." *W. Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted). Finally, in the agency's history and practice of regulating Head Start grantees, it has never before "impose[d] specific medical treatments on anyone." ROA.24534. That's no surprise since the purpose of Head Start is to "to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development[.]" 42 U.S.C. § 9831. The Head Start program simply wasn't "built for" implementing President Biden's plan to vaccinate the Nation. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.

2. The controversy surrounding the Head Start Mandate's masking requirements has not ended merely because the agency has rescinded those masking requirements. The Supreme Court has held under almost identical circumstances that the government's voluntary cessation of challenged conduct does not moot a controversy when an agency "vigorously defends" the legality of its approach and it "nowhere suggests that if this litigation is resolved in its favor it will not" reengage in the conduct. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (internal quotation marks omitted). The government vigorously defends

the legality of the masking requirement here. *See* Blue Br. at 29–32. And it could easily change its mind and issue a new masking mandate in the event of another COVID–19 outbreak.

3. Finally, the scope of relief was appropriate because. The district court adhered to this Court's precedent by limiting the scope of its injunction to the 24 States in this litigation.[4]

STANDARD OF REVIEW

The Court applies "*de novo* review to a grant of summary judgment, using the same standards as the district court." *Fam. Rehab., Inc. v. Becerra*, 16 F.4th 1202, 1204 (5th Cir. 2021). The Court reviews "permanent injunctions for abuse of discretion, but any issue of law underlying that decision is reviewed *de novo*." *Id.* The Court reviews the "scope of the injunction for abuse of discretion."[5] *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 470 (5th Cir. 2013) (*en banc*).

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[4] Shortly before this filing, the Administration announced its plan to end the Head Start Mandate on May 11, 2023. *See* White House, *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities* (May 1, 2023), bit.ly/44vzGDA. But as of this filing, the Mandate remains in effect and the government has not withdrawn its appeal.

[5] The government cites precedent from this Court holding that the standard of review for the scope of an injunction is *de novo*. Blue Br. at 16 (citing *Texas v. Equal Emp't Opportunity Comm'n*, 933 F.3d 433, 450 (5th Cir. 2019)). It appears there is an intra-circuit split on the issue.

ARGUMENT

I. THE SECRETARY LACKS STATUTORY AUTHORITY TO IMPLEMENT THE HEAD START MANDATE.

The district court correctly held that HHS lacks authority to issue the Head Start Mandate. The statutory language does not grant HHS such sweeping authority.

Even assuming the Court concludes the statutory language alone does not plainly resolve this question, it should nonetheless affirm the district court's judgment under the major questions doctrine. The Head Start Mandate is an exercise of vast and politically significant power, and Congress has not spoken clearly to grant HHS that power. Nothing in the agency's historical exercise of its authority suggests otherwise.

A. The Statutory Language Plainly Does Not Authorize the Head Start Mandate.

The government relied "solely on Title 42 U.S.C. § 9836a(a)(1)(C)–(E) for the authority to enact the Head Start Mandate." ROA.24516. These provisions authorize the Secretary to "modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs," including,

> (C) administrative and financial management standards;
>
> (D) standards relating to the condition and location of

> facilities for such agencies and programs used by Head Start agencies;
>
> (E) such other standards as the Secretary finds to be appropriate.

ROA.24516 (quoting or paraphrasing § 9836a(a)(1)(C)–(E)).

Nothing in this statutory language authorizes the Head Start Mandate.

i. "Modify" is a modest word.

To begin, the district court observed that the statutory text merely allows the Secretary to "*modify*" performance program standards. ROA.24528 (emphasis added). Modify is a "modest word." *W. Virginia*, 142 S. Ct. at 2609. In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, the Supreme Court held that a statute authorizing the Federal Communications Commission to "modify any requirement" for tariff filing did not authorize the challenged regulation because it effected a fundamental change rather than a "modification." 512 U.S. at 225–26. The Supreme Court observed that the word "modify" has "a connotation of increment or limitation." *MCI Telecommunications Corp.*, 512 U.S. at 225–26; *see id.* ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion.").

"Congress knows what the word 'modify' means." ROA.24528; *accord Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993) (explaining that Congress is presumed to be aware of settled judicial and administrative interpretations of words when it writes them into a statute). So it is important to note that Congress *limited* the Secretary's authority between 1994 and 2007 when it reauthorized the Head Start program. In 1994, Congress gave the Secretary authority to "*establish by regulation* standards applicable to Head Start" grantees. Pub. L. No. 110-134, § 8, 121 Stat. 1363, 1385 (emphasis added). But in 2007, Congress cabined that authority by allowing the Secretary merely to "*modify, as necessary*, program performance standards by regulation applicable to Head Start [grantees]." Pub. L. No. 110-134, § 8, 121 Stat. 1363, 1385 (emphasis added).

The district court held that "[b]y limiting Agency Defendants' power to only 'modify' the program performance standards, Congress only gave Agency Defendants the power to make *moderate* or *minor changes* in the program performance standards." ROA.24528 (emphasis added). And, because "[t]he Head Start Mandate is not a moderate or minor change in the program performance standards," the district court concluded that

"the Agency Defendants have exceeded their authority by implementing the Head Start Mandate." ROA.24529. This alone is sufficient reason to conclude that Congress has not authorized the Mandate.

On appeal, the government offers no real resistance to these points. Instead, it simply contends that, unlike the tariffs at issue in *MCI Telecommunications Corp.*, the Head Start Mandate is not a "radical or fundamental change." Blue Br. at 24. But, as will be shown, the Head Start Mandate is exactly that.

ii. No modification of the performance standards enables the government to implement the Mandate.

No modification of any of the three performance standards listed in §§ 9836a(a)(1)(C)–(E) could authorize the government to implement the Head Start Mandate.

The first of these provisions, § 9836a(a)(1)(C), allows the Secretary to modify as necessary any Head Start "administrative and financial management standards." The government contends that the Head Start Mandate is an "administrative standard." S*ee* Blue Br. at 21 ("It is difficult to imagine an administrative standard that is more appropriate than one designed to enable grantees to provide the very services for which the federal grants are made.").

The district court properly rejected the government's argument, concluding that the language of § 9836a(a)(1)(C) is unambiguous: "Administrative and financial management standards obviously deal with administering the Head Start program and financial issues." ROA.24529. The Head Start Mandate plainly encompasses far more than mere financial or administrative issues.[6] Moreover, if the government's reading of § 9836a(a)(1)(C) is correct, then "nearly anything could be an administrative standard." ROA.24529. This provision "is a wafer-thin reed on which to rest such sweeping power." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489.

The district court also rejected the argument that the Head Start Mandate could be authorized under § 9836a(a)(1)(D),[7] which "deals with

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[6] Indeed, before a Texas district court, the government has expressly admitted that the Head Start Mandate "could not qualify as a financial management standard." *Texas v. Becerra*, 577 F. Supp. 3d 527, 537 (N.D. Tex. 2021) (internal quotation marks omitted).

[7] Specifically, the statute provides that the Secretary shall modify, as necessary,

> 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

standards relating to the condition and location of *facilities* for such agencies and programs." ROA.24529 (emphasis added). The district court concluded that the government's reading of the provision was "overbroad" because the "Head Start Mandate deals with the condition of Head Start students, volunteers, and workers (vaccinated and/or masked), not with the condition of the facilities." ROA.24530.

On appeal, the government criticizes the district court's distinction between people and facilities, labeling it a "false dichotomy." Blue Br. at 22. According to the government, vaccination is necessary "to protect the air quality at Head Start facilities." Blue Br. at 22. And the government compares the Head Start Mandate to the "longstanding prohibition on smoking in Head Start facilities." *Id.*

The government's analogy to smoking is inapt. As a district court in Texas has observed, "[m]andating facility standards is a far cry from mandating a medical procedure for all staff under the threat of termination." *Texas v. Becerra*, 577 F. Supp. 3d 527, 541 (N.D. Tex. 2021).

> (ii) shall be accessible by State and local authorities for purposes of monitoring and ensuring compliance, unless State or local laws prohibit such access

42 U.S.C. § 9836a(a)(1)(D).

Under the government's broad reading of § 9836a(a)(1)(D), it seems there are no limits to HHS's authority to protect a Head Start facility's air quality. Accepting the government's argument here could lead to absurd results: For the purpose of protecting the air quality of Head Start facilities, the agency could claim the authority to regulate sources of air pollution. This Court should decline to read § 9836a(a)(1)(D) so broadly.

Finally, the third performance standard—which allows the Secretary to modify "such other standards as the Secretary finds to be appropriate"—does not and could not authorize the Head Start Mandate. § 9836a(a)(1)(E). It refers only to standards of the "same general kind or class" as the preceding categories, none of which contemplate mandating specific medical interventions. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012); *Yates v. United States*, 574 U.S. 528, 536 (2015); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001).

This Court should affirm the district court's judgment simply by concluding that this statutory language does *not* authorize the Head Start Mandate.

B. Even Assuming the Statuary Language Is Ambiguous, the Head Start Mandate Runs Afoul of the Major Questions Doctrine.

The district court observed that § 9836a(a)(1)(E)—which allows the Secretary to modify "such other standards as the Secretary finds to be appropriate"—"is arguably broad enough to encompass the Head Start Mandate (or anything else)." ROA.24530. Even assuming the statutory language alone does not resolve this question, then the statute's ambiguity—coupled with the agency's attempt to use the ambiguous language "to exercise powers of vast economic and political significance"—triggers the major questions doctrine. *Util. Air Regul. Grp.*, 573 U.S. at 324.

Under the major questions doctrine, the Court should treat the agency's reliance on § 9836a(a)(1)(E) to implement the Head Start Mandate "with a measure of skepticism." *Id.* This Court should "presume" that "Congress does not hide fundamental details of a regulatory scheme in vague or ancillary provisions." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (internal quotation marks omitted). Because the agency's long history of using this

provision has never included healthcare mandates, the district court properly rejected the agency's reliance on it here.

i. The Head Start Mandate is an exercise of vast and politically significant power.

The government faults the district court for relying on the major questions doctrine when enjoining the Head Start Mandate: "In relying on the major questions doctrine, the district court failed to recognize that the impact of the Head Start IFR is even more modest than was the impact of the IFR at issue in [the healthcare worker mandate]." Blue Br. at 14–15. Apparently, the government thinks that the Healthcare Worker Mandate did not implicate the major questions doctrine because that mandate's impact was relatively "modest." *Id.* The government is mistaken—both about the tremendous impact of the Healthcare Worker Mandate *and* the scope of the major questions doctrine.

The major questions doctrine is triggered when two conditions are satisfied: (1) *a statute is ambiguous* and (2) an agency attempts to rely on the statute's ambiguity "to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors*, 141 S. Ct. at 2489 (internal quotation marks omitted); *see W. Virginia*, 142 S. Ct. at 2609 ("[I]n certain extraordinary cases, both separation of powers principles and a

practical understanding of legislative intent make us 'reluctant to read into *ambiguous* statutory text' the delegation claimed to be lurking there." (emphasis added) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)). If statutory text *unambiguously* grants authority to an agency to act, the major questions doctrine is not implicated. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).

The Supreme Court held that the Healthcare Worker Mandate "fits neatly within the language of the statute." *Missouri*, 142 S. Ct. at 652. In other words, the Court viewed the scope of the authority given to the Secretary by the statute as not ambiguous. That conclusion was reinforced by the agency's history of creating "long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds." *Id.* at 650. In the Supreme Court's view, the statute's clear text and the agency's historical practice made the Healthcare Worker Mandate "a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose." *Id.* at 653; *see id.* at 654 ("[U]nprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."); *see also Louisiana v.*

Biden, 55 F.4th at 1029. In short, because there was no ambiguity in the authority that Congress gave to the agency, the major questions doctrine was not implicated.

The Supreme Court never suggested—as the government contends here—that the Healthcare Worker Mandate was insignificant or anything other than of tremendous impact. On the contrary, the Supreme Court explained the Healthcare Worker Mandate was necessarily broad because the Secretary "has never had to address an infection problem of this scale and scope before." *Biden v. Missouri*, 142 S. Ct. at 653.

The government raised the same modesty argument against the Federal Contractor Mandate in this Court. *See Louisiana v. Biden*, 55 F.4th at 1029. But this Court properly rejected that argument after observing that "OSHA's mandate may have been larger in scope" than the Federal Contractor Mandate, "but not perhaps by as much as may be expected" considering that the "Department of Labor has suggested that roughly one-fifth of the entire U.S. Labor Force is employed by federal contractors." *Id.* at 1028. Moreover, whereas past presidential actions under the Procurement Act have regulated *employers*, "the vaccine mandate purports to govern the conduct of *employees*—and more than

their conduct, purports to govern their individual healthcare decisions." *Id.* at 1030. And "a vaccination cannot be undone at the end of the workday." *Id.* (cleaned up). Accordingly, this Court held that allowing the Federal Contractor Mandate "to remain in place would be to ratify an enormous and transformative expansion in the President's power under the Procurement Act." *Id.* at 1031 (cleaned up).

The government's argument that the Head Start Mandate is too modest to trigger the major questions doctrine cannot be reconciled with that precedent, especially in view of the district court's finding that the Head Start Mandate "imposes its requirements upon 273,600 Head Start staff, 864,000 children and approximately 1,000,000 volunteers." ROA.24534. Like President Biden's other mandates, the Head Start Mandate prescribes "healthcare decisions that amount to a significant encroachment into the lives—and health—of a vast number of employees." *Louisiana v. Biden*, 55 F.4th at 1028 (cleaned up). As Justice Gorsuch has pointed out, "[f]ar less consequential agency rules have run afoul of the major questions doctrine." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)

(eliminating rate-filing requirement)). At any rate, if the Federal Contractor Mandate triggered the major questions doctrine, the Head Start Mandate does too.

During President Biden's September 2021 announcement, he told the Nation that his orders relating to schools are "maybe the most important" part of his plan to combat COVID–19. White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), bit.ly/3Ey4Zj6). This Court should take the President at his word. The Head Start Mandate amounts to an exercise of vast and politically significant power.

ii. Congress has not "sp[oken] clearly" enough to authorize the Head Start Mandate.

"When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," federal courts "typically greet its announcement with a measure of skepticism." *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted). Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* (internal quotation marks omitted). "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,'

'vague terms,' or 'subtle device[s].'" *W. Virginia*, 142 S. Ct. at 2609 (quoting *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001)).

As discussed, the statutory language here uses the modest word "modify." *MCI Telecommunications Corp.*, 512 U.S. at 225–26; ROA.24528; § 9836a(a)(1)(C)–(E) (authorizing the Secretary to "*modify*, as necessary, program performance standards by regulation . . . ."). And the broad language of § 9836a(a)(1)(E) granting the Secretary authority to modify "such other standards as the Secretary finds to be appropriate" lacks the necessary specificity required by the major questions doctrine. The Secretary's heavy reliance on this modest and vague statutory language to enact a sweeping vaccine/masking mandate cries out for the Court's application of the major questions doctrine.

Although the government relied solely on 42 U.S.C. § 9836a(a)(1) to justify the Head Start Mandate, on appeal the government also points to 42 U.S.C. § 9836a(e)(1)(B)(i)[8]—which allows the government to identify

[8] The statute provides, in relevant part:

> If the Secretary determines . . . that a Head Start agency designated pursuant to this subchapter fails to meet the standards described in subsection (a)(1) . . . the Secretary shall . . . with respect to each identified deficiency, require the agency . . . to correct the deficiency

and correct deficiencies committed by Head Start agencies. According to the government, this statutory text shows that the "underlying performance standards set by the Secretary may protect the health and safety of the children enrolled in Head Start." Blue Br. at 18.

A Sixth Circuit motions panel relied on this provision when declining to enjoin the Head Start Mandate pending appeal. *Livingston Educ. Serv. Agency v. Becerra*, 35 F.4th 489, 491–92 (6th Cir. 2022), *reh'g denied*, No. 22-1257, 2022 WL 2286410 (6th Cir. June 21, 2022). It did not analyze the relevance of the word "modify," and it followed the district court's decision even though that decision was based on the application of *Chevron* deference. *Id.*; *see Livingston Educ. Serv. Agency v. Becerra*, 589 F. Supp. 3d 697, 709–10 (E.D. Mich. 2022). The district court here "respectfully decline[d]" to follow the Sixth Circuit motions panel's reasoning. ROA.24536.

The district court was right not to follow the Sixth Circuit motions panel. The government's reliance on § 9836a(e)(1)(B)(i), in addition to being forfeited, fails because the "deficiencies" identified by the Act refer

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> immediately, if the Secretary finds that the deficiency threatens the health or safety of staff or program participants.

42 U.S.C. § 9836a(e)(1)(B)(i).

to a failure to comply with the performance standards modified under § 9836a(a)(1). *See* 42 U.S.C. § 9836a(e)(1). The government's problem, as discussed, is that § 9836a(a)(1) does not authorize the Mandate in the first place. In other words, because the government lacks authority to issue the Head Start mandate under § 9836a(e)(1), it necessarily follows that the government lacks authority under § 9836a(e)(1)(B)(i) to correct a Head Start grantee's failure to comply with the Head Start Mandate. Thus, the government's reliance on the Act's definition of "deficiency," Blue Br. at 17–18, is unavailing.

iii. The agency has never mandated specific medical treatments in the Head Start Program.

When enjoining the OSHA Mandate, the Supreme Court explained that imposing a vaccine mandate "in response to a worldwide pandemic is simply not part of what the agency was built for." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666. The same is true here.

The purpose of Head Start is to "to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development[.]" 42 U.S.C. § 9831. "Mandating specific medical treatment" falls outside this purpose. ROA.24534. The district court found that the agency has no expertise in "making medical decisions for

its students, volunteers, or employees." ROA.24533. The Supreme Court has explained that "[w]hen [an] agency has no comparative expertise" in making certain policy judgments, "Congress presumably would not" task it with doing so. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019).

It should come as no surprise that mandating specific medical treatments falls outside of the purpose and scope of Head Start. Public health and safety regulation has always belonged first and foremost to the States. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25, 38 (1905) (recognizing that the "safety and the health of the people" is for States to "guard and protect" through their general "police power[s]"); *Zucht v. King*, 260 U.S. 174, 176 (1922); *BST Holdings, L.L.C.*, 17 F.4th at 617 ("[T]o mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power.").

The government points to a litany of past modifications to show that the Head Start Mandate is consistent with its prior practice.[9] The

[9] Here is the list, as provided by the district court:

(1) funding to be used to support health services;

(2) teaching and instruction involving physical health and development;

(3) health screenings in rural communities;

(4) recognizing health problems in children in rural communities for appropriate medical referrals;

government argues that these "address both the health services that grantees must provide, *see, e.g.*, 45 C.F.R. § 1302.42, and the qualifications and duties of the workers themselves, *see, e.g., id.* § 1302.91." Blue Br. at 18. And, pointing to its history of requiring invasive testing for tuberculosis, the government also disagrees with the

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(5) allowing families of homeless children to apply, to enroll in, and attend Head Start programs which requires immunization and medical records for enrollment;

(6) allowing consideration of the effects of revisions in standards as to the quality, scope, or types of health care services to be provided by Head Start;

(7) health screenings for all Head Start staff;

(8) meeting the childcare standards of the states in which they operate;

(9) verification of immunization records;

(10) appropriate treatment for children with HIV;

(11) health examinations for Head Start staff;

(12) health and wellness standards;

(13) staff training on prevention and control of infectious diseases;

(14) spacing cribs 3 feet apart;

(15) temporarily excluding children with acute or short-term contagious illnesses;

(16) determining whether children are up to date on state required vaccinations, and, with parental consent, assist the child and parents in getting up to date vaccinations;

(17) using Head Start program funds for professional health care services when no other funding is available; and

(18) requiring vaccinations for pets with children enrolled in in-home Head Start programs.

ROA.24533.

district court's conclusion that the Head Start standards don't impose specific medical treatments on anyone.[10] Blue Br. at 19–20 (citing 40 Fed. Reg. at 27565).

But the Head Start program does not provide "health services" to children or establish performance standards by requiring universal masking and vaccination of Head Start staff. The existing regulations differ fundamentally from the mask and vaccine requirements: They do not operate as conditions to participation. As a Texas district court considering the legality of the Head Start Mandate observed, "the provision of health services, like screenings and immunization assistance, for children already participating in Head Start programs promotes school readiness, but they are not required." *Texas v. Becerra*, 577 F. Supp. 3d 527, 543 (N.D. Tex. 2021). By contrast, mandatory vaccines and universal masking present barriers to entry. *Id.* Needless to say, there is an ocean of difference between the Head Start program's

[10] Before a Texas district court, however, the government expressly acknowledged that "while other health services made available to children by Head Start are 'strongly encouraged,' this is the first time that Head Start has ever mandated a medical procedure as a precondition to new or ongoing employment." *Texas v. Becerra*, 577 F. Supp. 3d 527, 537 (N.D. Tex. 2021).

historical practice of making vaccines available to willing recipients and the Head Start Mandate's forcing them on unwilling subjects.

For a similar reason, the government's heavy reliance here on the now-discontinued practice of tuberculosis testing is also unavailing. *See* 81 Fed. Reg. 61294, 61357, 61433 (Sept. 6, 2016). Requiring medical *testing*, even invasive testing, is simply incomparable to mandating a specific medical *treatment*—which the district court found is not an ordinary practice of the Head Start program. ROA.24535 ("Agency Defendants refer Head Start children for health screenings and treatment but do not recommend specific treatment."); ROA.24535 ("Other than requiring the vaccination of pets, the Agency Defendants have never mandated specific medical treatment.").

In sum, nothing in the agency's historical use of its statutory authority suggests that it has power to mandate specific medical treatment for people associated with the Head Start program.

* * *

At bottom, the district court was exactly right when it concluded "there is a disconnect between the Agency's challenged actions and its assigned mission and expertise." ROA.24533. The "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's legitimate reach. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.

II. THE SECRETARY LACKS STATUTORY AUTHORITY TO IMPLEMENT THE HEAD START MANDATE'S MASKING REQUIREMENT.

Since this litigation began, the government has formally rescinded the Head Start Mandate's masking requirement. *See* Blue Br. at 27–28 ("On January 6, 2023, the Secretary issued a final rule that (as relevant here) eliminated the masking requirement." (citing 88 Fed. Reg. 993)). According to the government, rescinding the masking mandate mooted this controversy, and so the Court should vacate the district court's permanent injunction in so far as it pertains to the masking requirement. Alternatively, the government defends the merits of the masking requirement.

The government is wrong on both counts. The controversy is not moot and this Court should affirm the permanent injunction and judgment of the district court in its entirety.

A. The Masking Mandate Is Not Moot.

The government acknowledges that "a defendant cannot automatically moot a case simply by ending its allegedly unlawful

conduct once sued." Blue Br. at 28 (internal quotation marks and alterations omitted). But, according to the government, this Court usually assumes "that formally announced changes to official governmental policy are not mere litigation posturing." Blue Br. at 28–29 (citing *Spell v. Edwards*, 962 F.3d 175, 178–79 (5th Cir. 2020); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009)). And, once a law is off the books, there is nothing injuring a plaintiff. *Id.* at 28 (citing *Spell*, 962 F.3d at 179).

But the Supreme Court directly addressed this issue under almost identical circumstances in *West Virginia v. EPA*. There, as here, the government contended that an agency's "actions subsequent to the [lower] court's entry of judgment have eliminated any possibility of injury." 142 S. Ct. at 2606. Specifically, "EPA informed the Court of Appeals that it does not intend to enforce the Clean Power Plan because it has decided to promulgate a new . . . rule." *Id.*

The Supreme Court emphasized, however, that the government "bears the burden to establish that a once-live case has become moot." *Id.* at 2607. And the government's burden is "heavy" when "[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 Env't 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.* (quoting *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007)).

The Supreme Court noted that the agency "nowhere suggests that if this litigation is resolved in its favor it will not" reengage in the challenged behavior. *Id.* On the contrary, the agency "vigorously defend[ed]" the legality of its approach. *Id.* The Supreme Court simply held that it will "not dismiss a case as moot in such circumstances." *Id.* So too here.

The government in this case bears a heavy burden to show that the controversy is moot. But it "nowhere suggests" that, if this litigation is resolved in its favor, it will not reimpose a masking mandate in the future if, say, there is a resurgence of COVID–19. On the contrary, the agency vigorously defends the legality of the masking mandate. *See* Blue Br. at 29–32.

Even if the case were moot, the government would not be entitled to vacatur because it unilaterally caused any mootness. The government "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal …, thereby surrendering [its] claim to the equitable remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

B. The Secretary Lacks Statutory Authority to Implement the Masking Mandate.

Alternatively, the government contends that Congress has given the Secretary authority to implement the masking requirement of the Head Start Mandate. But the government points to no separate sources of statutory authority that might justify the masking requirement. Thus, the problems identified in the Secretary's authority to issue the vaccine mandate—including the modesty of the Secretary's authority merely to "modify" standards—apply with equal force here too. And, again, nothing in §§ 9836a(a)(1)(C)–(E) clearly justifies the masking requirement.

The government tries to distinguish the masking mandate from the vaccine mandate by pointing to its history of setting routine standards to prevent the spread of communicable disease. *See* Blue Br. at 29–31. For example, the government has required the use of latex gloves "by staff

when they are in contact with spills of blood." Blue Br. at 30 (citing 61 Fed. Reg. at 57215). And it has required staff and volunteers to wash their hands before providing medication, preparing food, and treating a wound, among other things. *See id.* (citing 81 Fed. Reg. at 61427).

According to the government, requiring everybody to wear a mask throughout the day is analogous to these routine standards. That's incorrect. This is no "everyday exercise of federal power." *Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 665 (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C. J., dissenting)). Forcing small children to wear a mask for "the majority of the day" is uniquely burdensome. ROA.24533.

In sum, nothing in the text of the Head Start Act or in the history of the agency's regulations provides the Secretary with the power to mandate masking. This Court should affirm the district court's conclusion that, "[b]y mandating COVID-19 vaccines and/or masks for 2- to 4-year-old children, Agency Defendants veered outside of the authority for which Head Start was created." ROA.24535.

III. THE SCOPE OF RELIEF WAS APPROPRIATE.

Finally, the government contends that, should it lose on the merits, the Court should nonetheless limit the scope of the injunction to Sandy Brick and "any Head Start grantee that is an arm of a plaintiff State and objected to the IFR's requirements." Blue Br. at 33 (providing Southern Utah University as an example). The government apparently thinks that some Appellee States and Head Start grantees lack standing—though it does not say which ones. Thus, according to the government, the injunction should be "narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *Id.* at 34 (citation omitted).

The district court's injunction is not overbroad. Enforcement of the Head Start Mandate would cause every Plaintiff State *irreparable* injury—far more than what is required merely to establish standing. Indeed, absent a permanent injunction, the district court found that the States would suffer several irreparable injuries: "Plaintiff States will incur the increased cost of training and of enforcing the Head Start Mandate, will be unable to enforce their laws, and will have their police power encroached." ROA.24538.

The record confirms the district court's finding that the States will suffer irreparable harm absent an injunction.

"States have a sovereign interest in 'the power to create and enforce a legal code." *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), as revised (Nov. 25, 2015); *see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). Those sovereign interests give States standing to challenge "federal assertions of authority to regulate matters they believe they control" and "federal preemption of state law." *Id.* Intrusions upon a State's sovereign power are irremediable by definition. *See* ROA.24523 ("[T]he Plaintiff States have standing to regulate matters they control, to attack preemption of state law by a federal agency, and to protect the enforcement of state law.")

The Head Start Mandate illegally usurps authority from the States. As discussed, the power to issue a vaccine mandate has always belonged to local authorities. *See Jacobson*, 197 U.S. at 25, 38; *Zucht*, 260 U.S. at 176; *BST Holdings, L.L.C.*, 17 F.4th at 617. *Congress* must employ "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1850 (2020) (citing *Gregory v. Ashcroft*, 501

U.S. 452, 460 (1991)). An agency can *never* unilaterally alter the balance between federal and state power. But implementing the Head Start Mandate would do exactly that. Thus, the Mandate necessarily inflicts an irreparable injury on every State in this litigation.

Moreover, "an increased regulatory burden typically satisfies the injury in fact requirement." *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 446 (5th Cir. 2019). Head Start programs are "funded with different sources of state, federal, and local dollars" and "costly [compliance] measures would have to come from [] blended grant dollars and local funds as they are not covered costs by the federal government." *See* ROA.24143. States would also be required to spend time and resources training Head Start grantees on how to comply with the mandates. ROA.24538 (explaining the States will incur training costs).

There is no dispute that the Head Start Mandate purports to preempt contrary State laws. 86 Fed. Reg. 68063; ROA.24523 ("La. R.S. § 17:170 allows Louisiana students in schools and colleges to opt out of the required vaccines by a written dissent. This statute conflicts with the Head Start Mandate."). If it in fact did so, that alone would constitute an irreparable injury. *See, e.g., Wyoming ex rel. Crank v. United States*,

539 F.3d 1236, 1242 (10th Cir.2008); *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443–44 (D.C. Cir. 1989); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985). Moreover, the Head Start Mandate pressures the States to change their laws. And "being pressured to change state law constitutes an injury." *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 446 (5th Cir. 2019).

The Supreme Court has long "recognized that States are not normal litigants." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *see also id.* at 520 (holding States are "entitled to special solicitude in our standing analysis"); *accord In re Gee*, 941 F.3d 153, 166–67 (5th Cir. 2019). Indeed, they are "residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). For that reason, "a State can seek relief based on its 'quasi-sovereign interest in not being discriminatorily denied its rightful status in the federal system.'" *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607.

When an *agency* takes power from a State without clear authorization from Congress, it necessarily denies a State its rightful status in the federal system. *See BST Holdings, L.L.C.*, 17 F.4th at 619 (Duncan, J., concurring) ("Whether Congress could enact such a sweeping

[vaccine] mandate under its interstate commerce power would pose a hard question. Whether OSHA can do so does not." (internal citation omitted)). Federal courts have authority to issue injunctions to prevent agency encroachment on State authority.

This Court's *en banc* panel recently upheld a *nationwide* injunction against the Federal Worker Mandate. *Feds for Med. Freedom*, 63 F.4th at 387 (explaining that nationwide injunctions are not "verboten"). Here, by contrast, the district court limited the scope of its injunction to the 24 Plaintiff States. Even when this Court has in the past revisited the scope of injunctions, it has not independently assessed the injuries of each plaintiff, but instead simply required that the injunction be tailored to the plaintiffs. For example, after a nationwide injunction against the healthcare vaccine mandate, a motions panel of this Court limited the scope of the injunctions to the 14 plaintiff states' territories without assessing each of their injuries independently. *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021).

Maintaining the proper balance of power between States and the federal government is in the public interest. In light of the important liberty interests at stake, the balance of the equities clearly falls in favor

of Appellee States. Absent a permanent injunction, Appellee States will suffer an irreparable injury.

CONCLUSION

Appellee States respectfully ask the Court to uphold the permanent injunction and affirm the judgment of the district court.

JEFF LANDRY
Attorney General of Louisiana

OFFICE OF THE ATTORNEY GENERAL
909 Poydras Street, Suite 1850
New Orleans, LA 70112
Telephone: 225-938-0779

ELIZABETH MURRILL
Solicitor General

/s/ Shae McPhee
SHAE MCPHEE
Deputy Solicitor General
mcphees@ag.louisiana.gov

MORGAN BRUNGARD
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically filed on the 5th day of May, 2023, using the court's CM/ECF system, which will provide a notice of electronic filing to counsel of record. I further certify that on this same date, a copy of this brief was served on the counsel of record for the Petitioner via Electronic Mail.

/s/ Shae McPhee
Shae McPhee
Deputy Solicitor General
Attorney for State Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains approximately 10,020 words and 1,012 lines of text excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that in compliance with the typeface requirements of Fed. R. App. P. 32(a)(5), this brief was prepared using Microsoft Office Word 2010, using Century Schoolbook 14 point font for the principal text, and Century Schoolbook 12 point font for footnotes.

/s/Shae McPhee
Shae McPhee
Deputy Solicitor General
Attorney for State Appellees