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

REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required, as defendants-appellants are government entities and government officials sued in their official capacities. 5th Cir. R. 28.2.1.

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ARGUMENT

I. Issues Related To Mootness Should Be Addressed After The Head Start IFR's Vaccination Requirement Is Removed.

On April 10, 2023, the President signed into law a joint resolution of Congress terminating the COVID-19 national emergency. *See* Pub L. No. 118-3, 137 Stat. 6 (2023). On May 11, 2023, the declaration of COVID-19 as a public health emergency issued by the Secretary of the Department of Health and Human Services (HHS) expired. Accordingly, HHS announced that it will be removing the Head Start vaccination requirement that is at issue in this appeal. *See* Early Childhood Learning & Knowledge Ctr., Head Start, *Head Start Vaccine and Testing Announcement* (May 1, 2023), https://perma.cc/M5BY-GFSJ.

Once the Head Start vaccination requirement has been removed, we intend to file a motion to vacate the district court's permanent injunction as moot. The Supreme Court recently vacated the court of appeals decision in *Arizona v. Mayorkas*, No. 22-592, 2023 WL 3516120 (U.S. May 18, 2023), as moot after the underlying order of the Centers for Disease Control and Prevention (CDC) suspending the introduction of certain noncitizens into the country expired. Similarly, in *Health Freedom Defense Fund v. Biden*,

No. 22-11287 (11th Cir. May 23, 2023), the government has urged the court of appeals to vacate the district court's decision as moot because the challenged CDC transportation mask order expired.

Although plaintiff Sandy Brick addressed the anticipated removal of the vaccination requirement in her brief, *see* Brick Br. 16-34, the plaintiff States correctly recognized that such briefing is premature, *see* States' Br. 21 n.4. Moreover, although Ms. Brick's brief asserts that "COVID-19 restrictions have a propensity to recur," Brick Br. 18, her brief does not address the end of the national emergency or public health emergency and it was filed before the Supreme Court issued its vacatur order in *Mayorkas*. Accordingly, to ensure that all parties have an opportunity to address all issues relevant to mootness, we likewise refrain from addressing those issues here and intend to raise them by separate motion at the appropriate time.

II. If The Permanent Injunction Is Not Vacated As Moot, It Should Be Vacated On The Merits.

If this Court does not vacate the permanent injunction as moot, the Court should vacate the permanent injunction on the merits for the reasons discussed below and in our opening brief.

A. The Head Start IFR's Vaccination Requirement Was Within The Secretary's Statutory Authority.

1. The plaintiff States' attempt to defend the permanent injunction rests on a fundamental misconception of the Head Start program. They declare that "the power to issue a vaccine mandate has always belonged to local authorities" and argue that the vaccination requirement at issue here—which applied only to Head Start personnel—"illegally usurp[ed] authority from the States." States' Br. 48; *see also id.* at 37.

That argument disregards the central feature of Head Start, which is that it is a federal program funded by the federal government. For fiscal year 2023 alone, for example, Congress appropriated nearly $12 billion to carry out the Head Start Act. *See* Pub. L. No. 117-328, 136 Stat. 4459, 4872 (2022). Pursuant to the Head Start Act, federal grants are paid directly to grantees and cover the vast majority of the grantees' costs. *See* 42 U.S.C. § 9835(b) (requiring only a 20% contribution from the grantee and allowing the Secretary to waive that contribution). Federal grants for Head Start do

not pass through a State, and there is no requirement that a State contribute any matching funds.[1]

For childcare programs that are regulated by a state government, the State may decide whether to require staff vaccinations. *See, e.g.*, Cal. Health & Safety Code § 1596.7995 (providing that "a person shall not be employed or volunteer at a day care center if he or she has not been immunized against influenza, pertussis, and measles"). But because Head Start is a federal grant program, Congress vested oversight authority in federal officials: the HHS Secretary and his predecessor, the Secretary of Health, Education, and Welfare. From the start, Congress directed the Secretary to "prescribe[]" (1975) and "establish" (1994) standards for Head Start grantees. Pub. L. No. 93-644, § 8, 88 Stat. 2291, 2303 (1975); Pub. L. No. 103-252, § 108, 108 Stat. 623, 631 (1994). And in the 2007 legislation, on which the plaintiff States rely (States' Br. 24), Congress directed the Secretary to "modify, as necessary," those standards, taking into consideration "changes . . . in the circumstances and problems typically facing children

[1] The plaintiff States filed a declaration indicating that Iberville Parish has chosen to combine pre-K Head Start children with pre-K non-Head Start children in classrooms and to use blended funding sources, ROA.219, but there is no federal requirement that a Head Start grantee do so.

and families served by Head Start agencies." Pub. L. No. 110-134, § 8, 121 Stat. 1363, 1385-86 (2007) (codified at 42 U.S.C. § 9836a(a)(1), (a)(2)(B)(i)-(ii)).

The text of the 2007 legislation thus refutes the States' assertion (States' Br. 24) that Congress "cabined" the Secretary's authority to making only minor or moderate changes to the pre-2007 standards. To the contrary, Congress instructed the Secretary to modify—that is, update—the standards in light of changes in the circumstances and problems facing participating children and their families. The scope of the Secretary's authority to make changes to the standards is thus commensurate with the scope of the new problems that participating children and their families face.

When the IFR was issued, the most pressing problem facing participating children and their families was the risk that the resumption of in-person Head Start operations would expose them to the virus that causes COVID-19, a deadly and highly contagious disease. Accordingly, the Secretary updated the standards to protect participating children and their families from that risk. The pre-pandemic regulations had long made immunization against contagious diseases a condition of a child's

enrollment in Head Start, *see, e.g.*, 45 C.F.R. § 1308.5(e)(3) (2015), but most participating children were too young to receive a COVID-19 vaccination when the IFR was issued, *see Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68,052, 68,055 (Nov. 30, 2021). The Secretary thus modified the standards to require that Head Start personnel be vaccinated against COVID-19, a requirement that was designed to prevent staff from infecting the children and to prevent the continued disruption of in-person services that infections among staff had caused. *See id.* at 68,054, 68,057-58.

The IFR's vaccination requirement was an unsurprising addition to the longstanding regulations that require Head Start grantees to prevent the spread of contagious disease within their programs. Plaintiffs do not take issue with the requirement that *children* be immunized against contagious disease as a condition of enrollment in Head Start, *see* 45 C.F.R. § 1302.15(e), even though that longstanding requirement imposes (in the States' parlance) "conditions to participation" and "barriers to entry." States' Br. 40. Such conditions are nonetheless appropriate to prevent the spread of communicable disease within Head Start programs.

The IFR's staff-vaccination requirement was appropriate for the same reasons. As our opening brief explained, Head Start standards have always included a litany of requirements directed at personnel, including the requirement that staff and volunteers receive an injection of tuberculin fluid to prevent the spread of tuberculosis in Head Start programs. The COVID-19 vaccination requirement for Head Start personnel was thus even less surprising than the COVID-19 vaccination requirement that the Supreme Court upheld in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), where the Secretary had not previously required personnel at federally funded healthcare facilities to undergo a similar medical procedure. There, the Supreme Court observed that "[o]f course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control" but explained that "he has never had to address an infection problem of this scale and scope before." *Id.* at 653. Here, there was specific precedent—dating back to the inception of Head Start—for federal regulations requiring Head Start personnel to undergo an invasive medical procedure if they wished to work at a federally funded Head Start facility. The States' assertion that COVID-19 vaccination is a "medical *treatment*" (States' Br. 41) is both inaccurate—the vaccine prevents

rather than treats infection—and irrelevant because it does not distinguish the vaccination requirement at issue here from the one upheld in *Missouri*. Both requirements were incremental additions to infection-control regulations designed to protect the health and safety of the vulnerable populations served by federally funded entities. Both were manifestly appropriate during the COVID-19 public health emergency.

Plaintiffs cannot seriously dispute that the Secretary has authority to issue standards that protect the health and safety of the children who participate in Head Start. That conclusion would be evident as a matter of common sense even if it the statutory text did not make it explicit. But in fact, as the Sixth Circuit explained in *Livingston Educational Service Agency v. Becerra*, 35 F.4th 489, 492 (6th Cir. 2022), Congress specified that the Secretary may require immediate corrective action if a grantee's failure to comply with a program standard "threatens the health or safety" of participating children. 42 U.S.C. § 9836a(e)(1)(B)(i); *see also id.* § 9832(2)(A). Plaintiffs miss the point when they note that the Secretary did not rely on this deficiency provision as authority to issue the IFR. States' Br. 35; Brick Br. 56. The IFR was not a deficiency proceeding; the Head Start Act's deficiency provision is relevant because it confirms that the Secretary's

underlying authority to set program standards includes standards designed to protect the health and safety of the children enrolled in Head Start.

The Secretary's authority to protect the health and safety of participating children would be clear even if, as the plaintiff States assert, "Head Start primarily functions as an educational institution for very young children." States' Br. 11 (quotation marks omitted). But in fact, the statutory provision that the States partially quote (*id.*) specifies that Head Start programs must provide "*health*, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary." 42 U.S.C. § 9831(2) (emphasis added). Providing health services has always been a cornerstone of Head Start. Indeed, when Congress first authorized the Head Start program, it did so "[i]n recognition of the role which" the original demonstration project "has played in the effective delivery of comprehensive *health*, educational, nutritional, social, and other services to economically disadvantaged children and their families." Pub. L. No. 93-644, § 8, 88 Stat. at 2300 (emphasis added). It would, of course, "be the very opposite of efficient and effective administration" for a program "that is supposed to make

people well to make them sick with COVID-19." *Missouri*, 142 S. Ct. at 652 (quotation marks omitted).

Moreover, as with workers in federally funded healthcare facilities, the Secretary "routinely imposes conditions of participation that relate to the qualifications and duties of [Head Start] workers themselves." *Missouri*, 142 S. Ct. at 653; *see, e.g.*, 45 C.F.R. § 1302.90 ("Personnel policies" for Head Start); *id.* § 1302.91 ("Staff qualifications and competency requirements"); *id.* § 1302.92 ("Training and professional development"). These unchallenged regulations belie any contention that the Secretary's administrative authority is confined to "bookkeeping and back-office compliance." Brick Br. 35; *see Missouri*, 142 S. Ct. at 653 (explaining that similar regulations showed that "the Secretary's role in administering Medicare and Medicaid goes far beyond that of a mere bookkeeper").

2. Plaintiffs' reliance on the major questions doctrine is wholly misplaced. As explained above, the grant condition at issue here was an unsurprising exercise of the Secretary's statutory authority, and plaintiffs do not dispute that its impact was far more modest than the impact of the vaccination requirement that the Supreme Court upheld in *Missouri*. Whereas the vaccination requirement upheld by the Supreme Court

affected 10 million workers in federally funded healthcare facilities, the vaccination requirement at issue here affected just 273,000 Head Start paid staff plus a share of the around 500,000 volunteers who interacted with children in certain in-person settings. *See* Gov. Br. 25-26.

For the same reason, there is no merit to plaintiffs' attempt to equate the vaccination requirement for Head Start personnel with requirements that were declared invalid by the Supreme Court or this Court. *See* States' Br. 32-34; Brick Br. 46-56. The Supreme Court emphasized in *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam), that the challenged OSHA standard affected an estimated 84.2 million workers. *Id.* at 664. Similarly, in addressing the requirement applicable to federal contractors, this Court emphasized that "roughly one-fifth of the entire U.S. Labor Force is employed by federal contractors." *Louisiana v. Biden*, 55 F.4th 1017, 1028 (5th Cir. 2022) (quotation marks omitted). Plaintiffs cannot plausibly contend that the impact of the Head Start requirement was comparable.[2]

[2] As the States acknowledge, the Ninth Circuit recently upheld the federal contractor mandate. *See* States' Br. 8 n.1. We recognize that this Court's contrary decision is controlling precedent here, however.

B. The Head Start IFR's Masking Requirement Was Within The Secretary's Statutory Authority.

If the Court reaches the issue, it likewise should hold that the IFR's masking requirement was within the Secretary's statutory authority. As a threshold matter, however, plaintiffs' briefs fail to show that any plaintiff had standing to seek a permanent injunction with respect to the masking requirement.[3]

To obtain relief at the final judgment stage, plaintiffs were required to establish, with evidence, standing to make their claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Plaintiff Sandy Brick's brief argues that the Secretary lacked statutory authority to mandate that "toddlers wear masks." Brick Br. 34 (argument heading II). But the declaration on which she relies (Brick Br. 61 n.11) did not claim that she was the parent or guardian of a toddler enrolled in Head Start. *See* ROA.24970-24972. That declaration described Ms. Brick as "a teacher at Allen Action Agency Inc.'s Head Start Center ('employer') in Kinder, Louisiana." ROA.24970 ¶ 3. No parent or guardian of a child enrolled in Head Start joined this suit.

[3] As noted above, we will address the issue of mootness by separate motion. *See supra* pp.1-2.

Furthermore, Ms. Brick's declaration did not state that she personally objected to wearing a mask. It stated that she had "not taken any vaccines related to COVID-19 and d[id] not wish to do so" and that, "without an injunction from this Court against the federal Head Start vaccine mandate, I will be forced to choose between continuing to serve preschool students and their families as a teacher, or taking the vaccine." ROA.24971 ¶¶ 5, 8. The declaration made no comparable objection to the masking requirement. Indeed, by the time Ms. Brick submitted that declaration, HHS had already announced that it would not monitor grantees for compliance with the IFR's masking requirement. *See* Gov. Br. 27.

In any event, plaintiffs make no serious attempt to show that the masking requirement exceeded the Secretary's statutory authority. They instead rely on unexplained pronouncements. For example, the plaintiff States declare that "[f]orcing small children to wear a mask for the majority of the day is uniquely burdensome." States' Br. 46 (quotation marks omitted). Similarly, Brick's brief declares: "Requiring staff to wear gloves in limited circumstances, for example, is not the same thing as masking toddlers." Brick Br. 60. But as explained above, plaintiffs do not take issue with the longstanding regulation that generally requires grantees to

exclude children from participating in a Head Start program if they are not immunized against communicable disease. *See supra* p.6. And because the Secretary can exclude children from participating to prevent the spread of contagious disease, it follows that the Secretary could take the more modest step of requiring that participating children wear masks during the COVID-19 public health emergency.

With respect to staff, plaintiffs concede that the Secretary can require Head Start personnel to wear gloves as an infection-control measure. *See* States' Br. 45-46; Brick Br. 60. They likewise concede that the Secretary can prevent Head Start personnel from exhaling smoke into the indoor air that the children breathe. *See* States' Br. 27; Brick Br. 39. They identify no sound reason why the Secretary could not likewise require Head Start personnel to wear masks to prevent the release of toxic viral particles into the same air. Our opening brief explained—and plaintiffs do not dispute—that masking is a conventional means to prevent the spread of communicable disease. *See* Gov. Br. 31.

III. Any Relief Should Be Limited To Plaintiff Sandy Brick And Any Head Start Grantees That Are Arms Of The Plaintiff States And Established Standing.

If the permanent injunction is not vacated in its entirety, it should be vacated except insofar as necessary to provide relief to Sandy Brick and any Head Start grantees that are arms of a plaintiff State and have demonstrated standing through record evidence.

The plaintiff States declare: "The government apparently thinks that some Appellee States and Head Start grantees lack standing—though it does not say which ones." States' Br. 47. That pronouncement gets the inquiry backwards. It was plaintiffs' burden to establish standing and, at the final judgment stage, they were required to do so with evidence. *Lujan*, 504 U.S. at 561-62. Moreover, the Supreme Court has emphasized that standing is "substantially more difficult to establish" when, as here, the plaintiff is not itself "the object of the government action or inaction [it] challenges." *Id.* at 652 (quotation marks omitted). States are ineligible for Head Start grants, which HHS pays directly to private entities or local public agencies. *See* 42 U.S.C.A. § 9836. The Head Start Act does not give States a role in administering the Head Start program, nor does the Act require States to contribute any matching funds.

No Head Start grantee joined the plaintiffs in this suit. Echoing the district court, the plaintiff States nonetheless assert that without a permanent injunction, "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." States' Br. 47 (quoting ROA.24538). But the Head Start Act does not give States responsibility to enforce Head Start standards or to train Head Start personnel. The record documents that plaintiffs cite do not suggest otherwise.

For example, the States' brief declares that "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.'" States' Br. 49 (alterations in original) (quoting ROA.24143). The cited document is the States' district court brief, which is not record evidence. As noted above (*supra* p.4 n.1), the States filed a declaration indicating that Iberville Parish has chosen to combine pre-K Head Start children with pre-K non-Head Start children in classrooms and to use blended funding sources, ROA.219, but there is no federal requirement that

a Head Start grantee do so. Thus, any indirect impact that this blending of resources might have had on Louisiana was both speculative and the result of voluntary action by a grantee. Moreover, at most, that declaration might have provided a basis for an injunction that barred HHS from enforcing the IFR against Iberville Parish. It would not have provided a basis to enjoin the IFR's enforcement against all Head Start grantees located within Louisiana, much less against all Head Start grantees located within all 24 plaintiff States.

Similarly, the plaintiff States do not substantiate their assertion that absent the permanent injunction, they would have been "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)." States' Br. 49. The cited document is the district court's opinion, which is not record evidence and which did not cite record evidence. And even if the district court had cited record evidence showing that a particular grantee was an arm of a plaintiff State and would have incurred training costs attributable to the IFR absent an injunction, at most that would have been a basis to enjoin the enforcement of the IFR against that grantee.

The plaintiff States also echo the district court's pronouncement that the IFR "conflicts with," and thus preempts, a Louisiana law that "allows Louisiana students in schools and colleges to opt out of the required vaccines by a written dissent." States' Br. 49 (quoting ROA.24523). But on its face, that Louisiana law did not conflict with the IFR, which did not require students to obtain a COVID-19 vaccination. *See* Gov. Br. 34-35. Moreover, even if there had been a conflict between Louisiana law and the IFR, that would not have provided a basis to enjoin the IFR's enforcement in the other 23 plaintiff States. As the Sixth Circuit recently emphasized in vacating a permanent injunction as applied to Kentucky, "[s]tanding is not dispensed in gross." *Kentucky v. Yellen*, 54 F.4th 325, 341 n.12 (6th Cir. 2022) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)). "Rather, to win summary judgment and obtain injunctive relief," each State "had to demonstrate, with evidence, why it was suffering *particularized* continuing or imminent injuries in fact." *Id.* "Thus, the district court had no authority to issue an injunction protecting a party that failed to demonstrate that its challenge was even justiciable." *Id.* "Instead, a 'remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff

has established.'" *Id.* (alteration in original) (quoting *DaimlerChrysler Corp.*, 547 U.S. at 353).

The separation of powers principles that plaintiffs invoke (States' Br. 30-31; Brick Br. 63) are equally important when considering the limits on the authority of a district court judge, who by constitutional design is insulated from political accountability. The district court erred in failing to acknowledge the limits on its authority.[4]

[4] Plaintiff Brick's argument (Brick Br. 62) that the Administrative Procedure Act would have allowed the district court to vacate the IFR universally is not properly before this Court because the district court did not do so. In any event, the problems arising from universal vacatur are well catalogued. *See, e.g.*, *Arizona v. Biden*, 40 F.4th 375, 395-98 (6th Cir. 2022) (Sutton, C.J., concurring).

CONCLUSION

The judgment of the district court should be reversed and the permanent injunction vacated.

Respectfully submitted,

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MAY 2023

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2023, I electronically filed the foregoing reply brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Sarah J. Clark
Sarah J. Clark

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,742 words. This reply brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

s/ Sarah J. Clark
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