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

MOTION TO VACATE DISTRICT COURT'S PERMANENT INJUNCTION AND REMAND WITH INSTRUCTIONS TO DISMISS CASE AS MOOT

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INTRODUCTION

The government respectfully moves for this Court to vacate the district court's permanent injunction and remand with instructions to dismiss this case as moot. Plaintiffs challenged an interim final rule (IFR) issued by the Secretary of Health and Human Services (HHS) that required federally funded Head Start programs to ensure that their staff were vaccinated against COVID-19. The district court entered a permanent injunction that bars enforcement of the IFR within the 24 plaintiff States. The government's appeal is fully briefed.

Recently, however, the COVID-19 national emergency and public health emergency ended and HHS issued a final rule removing the vaccination requirement. *Removal of the Vaccine Requirements for Head Start Programs*, 88 Fed. Reg. 41,326 (June 26, 2023). Accordingly, this Court should vacate the permanent injunction and remand to the district court with instructions to dismiss the case as moot. Under this Court's controlling precedent, "a permanent injunction relating to a challenged law or regulation cannot continue after the law or regulation is removed." *Freedom From Religion Found., Inc. v. Abbott*, 58 F.4th 824, 837 (5th Cir. 2023). No exception to mootness applies here. On the contrary, since the end of

the COVID-19 national emergency and public health emergency, courts—including the Supreme Court and this Court—have found challenges to defunct pandemic-control mandates to be moot. *See Livingston Educational Service Agency v. Becerra*, No. 22-1257, 2023 WL 4249469 (6th Cir. June 29, 2023) (vacating prior orders in a case challenging the same Head Start IFR at issue here and remanding with instructions to dismiss the case as moot); *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (dismissing as moot a motion by a States to intervene in a case involving the defunct "Title 42" orders of the Centers for Disease Control and Prevention (CDC)); Order, *Louisiana v. CDC*, No. 22-30303 (5th Cir. June 13, 2023) (per curiam) (vacating a preliminary injunction in a case challenging the same Title 42 orders and remanding with instructions to dismiss the case as moot); *Health Freedom Def. Fund v. President of the United States*, -- F.4th --, No. 22-11287, 2023 WL 4115990 (11th Cir. June 22, 2023) (vacating the district court's final judgment in a case challenging the CDC's defunct transportation mask mandate and remanding with instructions to dismiss the case as moot).

Plaintiffs' counsel informed us that plaintiffs oppose this motion. We do not yet know the reasons for their opposition, which we will address in our reply in support of this motion. But if this Court concludes that this

case is not moot, this Court should vacate the permanent injunction on the merits for the reasons set out in our briefs. And if the Court does not vacate the permanent injunction in its entirety, recent Supreme Court decisions require that it be vacated on standing grounds except insofar as it grants relief to plaintiff Sandy Brick and to those Head Start grantees that are instrumentalities of a plaintiff State. *Compare Biden v. Nebraska*, 600 U.S. --, No. 22-506, 2023 WL 4277210, at *8 (June 30, 2023) (allowing a State to seek relief on behalf of a directly injured state instrumentality), *with Haaland v. Brackeen*, 143 S. Ct. 1609, 1640-41 & 1640 n.11 (2023) (reaffirming that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government" and rejecting a State's "attempt to circumvent the limits on *parens patriae* standing") (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982)); *United States v. Texas*, 599 U.S. --, No. 22-58, 2023 WL 4139000, at *6 n.3 (June 23, 2023) (cautioning that "federal policies frequently generate indirect effects on state revenues or state spending" and that, "when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated").

STATEMENT

1. On January 31, 2020, the Secretary of Health and Human Services issued a determination that a public health emergency existed as a result of the virus that causes COVID-19. *See Determination that a Public Health Emergency Exists* (Jan. 31, 2020), https://perma.cc/VZ5XCT5R. That declaration was issued pursuant to section 319 of the Public Health Service Act, 42 U.S.C. § 247d, and, by statute, it would expire after 90 days unless renewed, *see id.* § 247d(a).

On March 13, 2020, then-President Trump issued a determination that the COVID-19 outbreak in the United States constituted a national emergency. *See Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 18, 2020). That declaration was issued pursuant to 50 U.S.C. § 1621 and, by statute, it would remain in effect for one year (if not extended) or until terminated either by the enactment into law of a joint resolution of Congress or by a proclamation of the President, *see id.* § 1622(a), (d).

On April 10, 2023, President Biden signed into law a joint resolution of Congress terminating the national emergency. *See* Pub. L. No. 118-3, 137 Stat. 6 (2023). On May 11, 2023, the Secretary's declaration of COVID-19 as

a public health emergency expired after having been periodically renewed over the course of the pandemic. *See, e.g.*, *Renewal of Determination that a Public Health Emergency Exists* (Feb. 9, 2023), https://perma.cc/NWQ3-L23D?type=image.

2. The IFR at issue in this case generally required Head Start programs to ensure that their staff were vaccinated against COVID-19. *See Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68,052, 68,060-61 (Nov. 30, 2021). The IFR also imposed a masking requirement, but the Secretary stopped monitoring compliance with that requirement in February 2022 and removed it in a final rule issued in January 2023. *See Mitigating the Spread of COVID-19 in Head Start Programs*, 88 Fed. Reg. 993 (Jan. 6, 2023).

The district court first entered a preliminary injunction and then, on cross-motions for summary judgment, a permanent injunction that bars enforcement of the IFR within the 24 plaintiff States. *See* ROA.24541-24652 (final judgment); *Louisiana v. Becerra*, 629 F. Supp. 3d 477 (W.D. La. 2022) (opinion). The government's appeal is fully briefed, but the case has not been scheduled for oral argument.

3. As discussed above, the COVID-19 public health emergency and national emergency have ended. On June 26, 2023, the Secretary issued a final rule removing the Head Start COVID-19 vaccination requirement at issue in this case. *See Removal of the Vaccine Requirements for Head Start Programs*, 88 Fed. Reg. 41,326 (June 26, 2023). The Secretary explained that the vaccination requirement was removed in light of the end of the COVID-19 public health emergency and national emergency; the fact that Head Start programs are required by a final rule issued on January 6, 2023, to have an evidence-based COVID-19 mitigation policy; and comments received on the IFR. *See id.* at 41,327. The Secretary noted that the change in pandemic conditions reflected in the termination of the national emergency and public health emergency likewise would make it appropriate to rescind the masking requirement if that requirement were still in effect. *See id.* at 41,329. The final rule made the removal of the vaccination requirement effective immediately to allow Head Start programs to recruit and hire staff for the upcoming program year without uncertainty as to the continued presence of a vaccination requirement. *See id.* at 41,327.

ARGUMENT

A. The Permanent Injunction Should Be Vacated As Moot.

The district court entered a permanent injunction that bars enforcement of the Head Start IFR within the 24 plaintiff States. The challenged requirements have been removed by final rule. Accordingly, the permanent injunction must be vacated as moot. Under controlling Circuit precedent, "a permanent injunction relating to a challenged law or regulation cannot continue after the law or regulation is removed." *Freedom From Religion Found., Inc. v. Abbott*, 58 F.4th 824, 837 (5th Cir. 2023). Thus, in *Freedom From Religion*, this Court vacated a permanent injunction after a Texas agency repealed the challenged rule. And in *Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020), this Court vacated a preliminary injunction after Texas amended the challenged law. "There is no need to enjoin policies that no longer exist." *U.S. Navy SEALs 1-26 v. Biden*, -- F.4th --, No. 22-10077, 2023 WL 4362355, at *4 (5th Cir. July 6, 2023).

Here, too, "this case is moot because" plaintiffs' "asserted injury was tied to the existence of the [challenged] Rule." *Freedom From Religion*, 58 F.4th at 832. Federal courts "are not in the business of pronouncing that

past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

No exception to mootness applies. Formal changes to governmental policy generally "overcome[] concerns of voluntary cessation," *Amawi*, 956 F.3d at 821, and "the government's ability to reimplement the statute or regulation at issue is insufficient to prove the voluntary-cessation exception," *Freedom From Religion*, 58 F.4th at 833. "'Without evidence to the contrary," this Court "assume[s] that formally announced changes to official government policy are not mere litigation posturing." *U.S. Navy SEALs 1-26*, 2023 WL 4362355, at *5 (quoting *Yarls v. Bunton*, 905 F.3d 905, 911 (5th Cir. 2018) (quoting *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009))). Likewise, the "theoretical possibility" that the government might reinstate the challenged policy does not bring a case within the "capable of repetition, yet evading review" exception, which the Supreme Court has emphasized "'applies only in exceptional situations.'" *Spell v. Edwards*, 962 F.3d 175, 180 (5th Cir. 2020) (first quoting *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010), and then quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016)).

Even before the COVID-19 public health emergency and national emergency ended, this Court and other courts rejected reliance on mootness exceptions in cases challenging COVID-19 public-health measures that had been rescinded or had expired. For example, in *Spell*, 962 F.3d at 180, this Court concluded in June 2020 that challenges to the Louisiana Governor's expired stay-at-home orders were moot even though no one knew at that time "what the future of COVID-19" would be. *Id.* This Court reasoned that it was "speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one." *Id.* Recently, this Court found an interlocutory appeal to be moot in a case challenging a military vaccination requirement that had been rescinded before the public health emergency and national emergency ended. *See U.S. Navy SEALs 1-26*, 2023 WL 4362355, at *3-6. Other courts of appeals likewise found challenges to pandemic-control mandates to be moot even though the measures had been terminated before the end of the public health emergency and national emergency. *See, e.g.*, *Resurrection School v. Hertel*, 35 F.4th 524, 528-30 (6th Cir. 2022) (en banc) (involving a Michigan agency's defunct mask mandate), *cert. denied*, 143 S. Ct. 372 (2022); *Brach v. Newsom*, 38 F.4th 6, 11-15 (9th Cir. 2022) (en banc) (involving defunct orders

of California officials restricting in-person school operations), *cert. denied*, 143 S. Ct. 854 (2023); *County of Butler v. Governor of Pennsylvania*, 8 F.4th 226, 230-31 (3d Cir. 2021) (involving various defunct orders issued by Pennsylvania officials to curb the spread of COVID-19), *cert. denied*, 142 S. Ct. 772 (2022).

Likewise, after the COVID-19 public health emergency and national emergency ended, courts—including the Supreme Court and this Court—have found challenges to defunct pandemic-control mandates to be moot. The Sixth Circuit recently vacated prior orders in a case challenging the same Head Start IFR that is at issue here and remanded to the district court with instructions to dismiss the case as moot. *Livingston Educational Service Agency v. Becerra*, 2023 WL 4249469, No. 22-1257 (6th Cir. June 29, 2023). Similarly, the Eleventh Circuit recently vacated the district court's final judgment in a case challenging the CDC's expired transportation mask mandate and ordered that the case be dismissed as moot. *Health Freedom Def. Fund v. President of the United States*, -- F.4th --, No. 22-11287, 2023 WL 4115990 (11th Cir. June 22, 2023). The Supreme Court likewise dismissed as moot a motion by a collection of States to intervene in a case involving the CDC's expired "Title 42 orders"—emergency immigration decrees

designed to prevent the spread of COVID-19—and, as the Eleventh Circuit noted, Justice Gorsuch's separate statement indicated that the Court's decision was based on the end of the public health emergency underlying the Title 42 orders. *See id.* at *4 (discussing *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023)). And this Court vacated a preliminary injunction and remanded to the district court with instructions to dismiss as moot challenges to the same Title 42 orders. Order, *Louisiana v. CDC*, No. 22-30303 (5th Cir. June 13, 2023) (per curiam).

As in those cases, no mootness exception applies here because the challenged mandate was ended in response to changed conditions related to COVID-19. For example, in *Resurrection School*, the Sixth Circuit rejected reliance on mootness exceptions because "the State rescinded the mask mandate not in response to this lawsuit, but eight months later, along with several other pandemic-related orders," and "[i]n doing so the State cited high vaccination rates, low case counts, new treatment options, and warmer weather." 35 F.4th at 529. Likewise, the Secretary removed the challenged Head Start vaccination requirement in response to changed conditions including the end of the COVID-19 public health emergency and national emergency. *See* 88 Fed. Reg. at 41,328 (noting that COVID-19

deaths have declined by 97% and hospitalizations have declined by nearly 81% since the IFR was issued in November 2021).[1] Moreover, the Secretary noted that children under age five—who had not been eligible for the COVID-19 vaccine when the IFR was issued—are now eligible for the COVID-19 vaccine, which is included in the CDC's schedules for childhood immunizations. *See id*. at 41,328-29. And with respect to the masking requirement, the Secretary concluded that the change in pandemic conditions reflected in the termination of the national emergency and public health emergency likewise would make it appropriate to rescind that requirement if it were still in effect. *See id.* at 41,329.

Under these circumstances, there is no "reasonable expectation" that the challenged Head Start vaccination or masking requirement will be reinstated if this case is dismissed as moot. *Spell*, 962 F.3d at 180 (quoting *Kingdomware Techs.*, 579 U.S. at 170). Indeed, the final rule made the

[1] The expiration of the public health emergency had many consequences unrelated to the IFR at issue here. *See, e.g.*, HHS, *Fact Sheet: COVID-19 Public Health Emergency Transition Roadmap* (Feb. 9, 2023), https://perma.cc/CDL8-QCQR; Lisa M. Gomez, *What Does the End of the COVID-19 Public Health Emergency Mean for Health Benefits?,* U.S. Dep't of Labor (Mar. 29, 2023), https://perma.cc/FYC7-CR36.

removal of the vaccination requirement effective immediately to allow Head Start programs to recruit and hire staff for the upcoming program year without uncertainty as to the continued presence of a vaccination requirement. *See* 88 Fed. Reg. at 41,327. That "the government continues to defend the legality of" the Head Start IFR "has little, if anything to do . . . with the voluntary-cessation analysis"; "[t]he question is simply whether there is a reasonable basis to expect the challenged conduct to 'start up again' if this case is declared moot." *Health Freedom*, 2023 WL 4115990, at *3 (first quoting *Keohane v. Florida Dep't of Corrections Secretary*, 952 F.3d 1257, 1269 (11th Cir. 2020), and then quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Given the fundamental change in the conditions related to COVID-19, there is no reasonable basis to expect that the challenged Head Start vaccination and masking requirements will be reinstated after the permanent injunction is vacated and the case is dismissed as moot.

B. Alternatively, The Permanent Injunction Should Be Vacated On The Merits Or, At A Minimum, Vacated In Substantial Part For Lack Of Standing.

As noted above, we do not yet know why plaintiffs oppose vacatur of the permanent injunction as moot, and we will address plaintiffs'

arguments in our reply in support of this motion. If this Court concludes that this case is not moot, the Court should vacate the permanent injunction on the merits for the reasons set out in our briefs.

If the Court does not vacate the permanent injunction in its entirety, recent decisions of the Supreme Court require that the permanent injunction be vacated in substantial part for lack of standing. Specifically, the permanent injunction must be vacated except insofar as it grants relief to Sandy Brick (who, as discussed in our briefs, demonstrated standing only with respect to the vaccination requirement) and to those Head Start grantees that are instrumentalities of a plaintiff State and were subject to the IFR's requirements.

As our briefs explained, States generally do not receive Head Start grants, nor did Congress give States a role in funding or administering Head Start programs. The record suggests, however, that at least one Head Start grantee—operated by Southern Utah University—is an instrumentality of a plaintiff State. *See* ROA.23959-23960. In *Biden v. Nebraska*, 600 U.S. --, No. 22-506, 2023 WL 4277210, at *8 (June 30, 2023), the Supreme Court held that the State of Missouri had standing to sue to remedy the harm that the challenged federal policy directly imposed on an

instrumentality of the State. Likewise, if plaintiffs here confirm that Southern Utah University is a state instrumentality and that it was subject to the IFR's requirements, the State of Utah would have standing to defend the permanent injunction insofar as it bars enforcement of the IFR against Southern Utah University (assuming *arguendo* that mootness is not an independent barrier).[2]

However, Utah's standing to sue to remedy harm to Southern Utah University would not provide a basis to uphold relief involving other Head Start grantees. On the contrary, the Supreme Court's recent decisions confirm that the permanent injunction must be vacated to the extent that it rested on *parens patriae* standing—that is, attempts by a plaintiff State to represent the interests of Head Start grantees or individuals located within the State that are not state instrumentalities. Although States may bring *parens patraie* actions against private entities, the Supreme Court in *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023), reaffirmed that "[a] State does not have standing as *parens patriae* to bring an action against the Federal

[2] The record indicates a dispute as to whether federal grants received by the Georgia Department of Early Care and Learning made that state agency subject to the IFR's requirements. *See* ROA.23960-23961. The district court did not address that issue.

Government." *Id.* at 1640 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982)). The Supreme Court rejected a State's "attempt to circumvent the limits on *parens patriae* standing." *Id*. at 1640 n.11.

Furthermore, in *United States v. Texas*, 599 U.S. --, No. 22-58, 2023 WL 4139000 (June 23, 2023), the Supreme Court cautioned against finding state standing on the basis of the indirect effects of a challenged federal policy. The Supreme Court observed that "federal policies frequently generate indirect effects on state revenues or state spending" and that, "when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated." *Id.* at *6 n.3. For the reasons set out in our briefs, the theories of standing on which the district court relied were both highly attenuated and unsubstantiated by record evidence.

More generally, the Supreme Court admonished that "[t]he principle of Article III standing is 'built on a single basic idea—the idea of separation of powers.'" *Texas*, 2023 WL 4139000, at *3 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). "Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system." *Id.* "By

ensuring that a plaintiff has standing to sue, federal courts 'prevent the judicial process from being used to usurp the powers of the political branches.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)). In issuing the sweeping permanent injunction at issue here—which bars the IFR's enforcement against any Head Start grantee located within any of the 24 plaintiff States—the district court failed to heed the limits that Article III placed on its authority.

CONCLUSION

This Court should vacate the district court's permanent injunction and remand with instructions to dismiss this case as moot. If this Court concludes that this case is not moot, the Court should vacate the permanent injunction on the merits or, at a minimum, vacate it on standing grounds except insofar as it grants relief to Sandy Brick and to those Head Start grantees that are instrumentalities of a plaintiff State and were subject to the requirements of the IFR.

Respectfully submitted,

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JULY 2023

CERTIFICATE OF SERVICE

I hereby certify that, on July 10, 2023, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Alisa B. Klein
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Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Book Antiqua, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 3,495 words according to the count of Microsoft Word.

/s/ Alisa B. Klein
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