UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS and LUBBOCK INDEPENDENT SCHOOL DISTRICT, *Plaintiffs*,	§	
v.	§	**CIVIL ACTION NO. 5:21-CV-300**
XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, *Defendants.*	§	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiffs hereby reply to the arguments in Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Dkt. #26) ("Response") to Plaintiffs' Brief in Support (Dkt. #8).[1]

I. Defendants have no history of enforcing vaccine and mask mandates.

Defendants would have the Court believe that they have required vaccinations for decades. They state they have "express statutory authority" to "to protect the health and safety of Head Start students and personnel," and that they have "exercised this authority for decades, including by promulgating regulations requiring Head Start participants to receive a slate of vaccinations, see, e.g., 45 C.F.R. § 1304.3-4(2) (1975), and requiring that staff undergo health examinations and screenings, *see*, *e.g.*, Head Start Program, 61 Fed. Reg. 57,186, 57,210, 57,223 (Nov. 5, 1996)." Response at 2. They also claim a "long history of [] sensible health precaution requirements at Head Start facilities, including vaccinations," *id*. at 19 n.4.

As Defendants acknowledge in their Response, past regulations are not authority for a new regulation. And any reference of Defendants' past regulations are merely for "background purposes" and should have no weight. Response at 38–40.

But more importantly, Defendants' claim is untrue.

A. The 1975 rules do not support the Vaccine Mandate or the Mask Mandate.

Contrary to Defendants' claims, response at 2, the 1975 rules do not demonstrate a history of "promulgating regulations requiring Head Start participants to receive a slate of vaccinations."

[1] In footnote 1 Defendants note that Plaintiffs misread Table 3. Response at 7. Plaintiffs defer to Defendants count of 864,289 children enrolled in Head Start but maintain that the arguments made in Plaintiffs' motion and complaint still stand.

In 1975, Head Start adopted its first program performance standards.[2] 40 Fed. Reg. 27,561 (Jun. 30, 1975) (Appx.0002). Contrary to Defendants' assertions, Response at 2, these program standards did not require children or staff to be vaccinated. The language of the regulations and rules shows the following: The regulations required each grantee to develop a plan for implementing each performance standard. 40 Fed. Reg. at 27,565 (§ 1304.1-4). The rules for "Health Services Objectives and Performance Standards" required the plan to "provide for treatment and follow-up services which include: Completion of all recommended immunizations—diphtheria, pertussis, tetanus (DPT), polio, measles, German measles," and, further,"[m]umps immunization shall be provided where appropriate." 40 Fed. Reg. at 27,565 (§ 1304.3-4(a)(2)).

But, critically, the regulation merely required Head Start programs to make immunizations *available* to children—and said nothing of staff or volunteers. Like all health services, immunizations would not be provided without parental consent. 40 Fed. Reg. at 27,565 (§ 1304.3-3).[3] Thus, the 1975 rule did not require that any child (let alone staff or volunteers) be immunized.[4]

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[2] Head Start Timeline, About Us, United States Department of Health & Human Services, https://eclkc.ohs.acf.hhs.gov/about-us/article/head-start-timeline (last accessed Dec. 27, 2021). This information is subject to judicial notice. *See* Hawk Aircargo, Inc. v. Chao., 418 F.3d 453, 457 (5th Cir. 2005) (taking judicial notice of information published on the National Mediation Board's website); Coleman v. Dretke, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (taking judicial notice of Texas agency's website).

[3] "The plan will provide also for advance parent or guardian authorization for all health services under this subpart."

[4] The 1975 rule is substantively the same as the "Child health stats and care" rule in effect today. *See* 45 C.F.R. § 1302.42(b)(1) (requiring Head Start programs to determine whether children in the program are up to date on immunizations and to assist parents with making arrangements to bring the child up-to-date as quickly as possible, with parental consent).

Thus, contrary to Defendants' claims, the 1975 rules do not demonstrate a history of "promulgating regulations requiring Head Start participants to receive a slate of vaccinations."

Further, state and local governments—not the federal government—have always been responsible for vaccine requirements at Head Start. "[S]tate and territorial laws determine vaccine and dosage requirements for child care and school attendance;"[5] *see also* Response at 16–17, 23–24 (recognizing that Texas regulates vaccinations at child care centers).

Moreover, Defendants' repeated references to and reliance on "health services" provided by Head Start does not advance their cause. For one thing, The rule does not define a "health service," but a "program performance standard." 86 Fed. Reg at 68,053. Moreover, Subsection (a)(1)(A) of 42 U.S.C. § 9836a gives Defendants authority to "modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs under this subchapter, including performance standards with respect to services required to be provided, **including health . . . services**." But Defendants do not contend that the Interim Final Rule is a modification of program performance standards related to health services under subsection (a)(1)(A). Defendants contend that the Interim Final Rule is an exercise of authority under subsections (a)(1)(C), (D), & (E). This is one of many reasons why the new version of 45 C.F.R. § 1302.47 (Mask Mandate) must be set aside. 45 C.F.R. § 1302.47 concerns health services and can only be modified under subsection (a)(1)(A), not subsections (a)(1)(C), (D), or (E). And the "health services" language upon which Defendants rely is not contained in *those* subsections.

[5] Vaccination Coverage Among Children Enrolled in Head Start Programs and Licensed Child Care Centers and Entering School --- United States and Selected Reporting Areas, 1999--2000 School Year", https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5039a2.htm

B. The 1996 rules do not support the Vaccine Mandate or the Mask Mandate.

Defendants argue that the 1996 rules demonstrate a history of "requiring that staff undergo health examinations and screenings" as support the Vaccine Mandate and the Mask Mandate, which it does not. Response at 2. In fact, the 1996 rules only required that staff and volunteers comply with state and local law regarding tuberculosis. The 1996 rules did not require any vaccinations.

The 1996 rules (61 Fed. Reg. 57,185 (Nov. 6, 1996)) (Appx.0015) were "the first wide-ranging revision of the Program Performance Standards in over 20 years." 61 Fed. Reg. at 57,186. According to Defendants, they "require[ed] that staff undergo health examinations and screenings." Response at 2 (citing 61 Fed. Reg. at 57,210, 57,223)). Defendants appear to rely on the 1996 version of 45 C.F.R. § 1304.52(j)(1)[6] which required staff to have

> an initial health examination that includes screening for tuberculosis and a periodic re-examination (as recommended by their health care provider or as mandated by State, Tribal, or local laws) so as to assure that they do not, because of communicable diseases, pose a significant risk to the health or safety of others in the Early Head Start or Head Start program that cannot be eliminated or reduced by reasonable accommodation.

Defendants also appear to reference the 1996 version 45 C.F.R. § 1304.52(j)(2),[7] which required volunteers to be "screened for tuberculosis in accordance with State, Tribal or local laws." 61 Fed. Reg. at 57,223. The substance of these rules is still in the current regulations. 45 C.F.R. §§ 1302.93(a), .94(a). As can be seen from the substance, the Secretary has never had authority to mandate a "slate of vaccinations." Defendants' assertion otherwise is misleading at best.

[6] Located on page 57,223.
[7] Also located on page 57,223.

Further, like the 1975 rules, Defendants also do not address the fact that the 1996 rules defer, not to federal mandates, but to state and local law. *See* 45 C.F.R. § 1304.52(j)(1) (1996) ("(as recommended by their health care provider or as mandated by State, Tribal, or local laws)"); 45 C.F.R. § 1304.52(j)(2) (1996) ("in accordance with State, Tribal or local laws."). 61 Fed. Reg. at 57,223.

In fact, in 2016, Defendants revised the 1996 rules "to be consistent with state, tribal, and local laws, which will support collaborations" and removed other requirements to "provide[] local flexibility to respond to local health needs and meet applicable requirements." 81 Fed. Reg. 61,294, 61,357 (Sep. 6, 2016). Thus, as recently as 2016, Defendants recognized that local and state law—not federal law—governs staff and volunteer health care and immunizations. Defendants have never had authority to mandate vaccinations or other medical treatments in programs across the nation.

Defendants also illogically assert, "In light of this history, it is unsurprising that Congress did not expressly single out vaccination or masking requirements in its list of performance standards as it could have reasonably believed that such common health measures would fall within the Secretary's broad authority to issue health-related standards." Response at 24. This conclusion does not follow. Instead, as expressly acknowledged by Defendants' regulations, this authority belongs to local and state governments.

* * *

Defendants have no history—none—of requiring vaccinations or masks before November 30, 2021. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement

with a measure of skepticism. [Courts] expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324 (2014) (internal citation and quotation marks omitted); *Merck & Co. v. United States Dep't of Health & Hum. Servs.*, 962 F.3d 531, 540 (D.C. Cir. 2020). The over ten billion dollars that funds thousands of Head Start programs throughout the United States serving nearly one million children and their families has great economic significance. And whether the federal government has the power to require citizens to get vaccinated or wear masks is a question of great political significance. Defendants do not have and have never had this power.

II. Plaintiffs are likely to succeed on the merits.

A. Defendants fail to demonstrate statutory authority for the Interim Final Rule.

In the Interim Final Rule, Defendants claim, without explaining, that 42 U.S.C. § 9836a(a)(1)(C), (D), & (E) provides the statutory authority for the Interim Final Rule. Brief in Support at 18–19. Defendants try but fail to provide an explanation in their Response.

1. Defendants do not have broad rulemaking powers, and their interpretation of their statutory powers is not entitled to deference.

Defendants first incorrectly assert, "The vaccination and masking requirements fall within the Secretary's broad rule-making powers." Response at 11. Wrong. Defendants do not have broad rulemaking powers. Broad rulemaking powers are characterized by language such as the power "to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act," to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [an agency] is charged under this chapter," or "to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this

chapter." *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 277 & n.28 (1969) (citing the then-current version of section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1302(a), and 15 U.S.C. § 717o). But there is no such broad rulemaking authority in the Head Start Act.[8]

And Defendants' asserted authority—42 U.S.C. § 9836a(a)(1)(C), (D), & (E)—is not a broad grant of authority. The subsections are specific grants of authority to modify certain kinds of program performance standards in certain ways.

Defendants next state that the claimed statutory authority is unambiguous. Response at 11. Plaintiffs agree. Assuming the Court also agrees, then *Chevron* "step two" deference does not apply, and the Court does not defer to Defendants' interpretation of statute.[9]

Confusingly, Defendants also argue that their "interpretation of the statute as including the authority to require masks and vaccinations is also likely to be given [*Chevron*] deference as reasonable because the statute does not clearly express otherwise." Response at 19. They cite *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) for the proposition that *Chevron* deference is warranted when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation claiming deference was promulgated in

[8] On page 14 of their Brief in Support, Plaintiffs stated, "'The Secretary's administrative authority is undoubtedly broad. But it is not boundless.' *Merck & Co.*, 962 F.3d at 537–38 (citations omitted) (discussing authority of CMS, a division of HHS)." Brief in Support at 14. Omitting the citation was a mistake. The *Merck* Court cited *Thorpe* and was discussing CMS's broad authority under 42 U.S.C. § 1302(a). In this case, Defendants do not have broad authority. Plaintiffs withdraw that mistaken paragraph.

[9] "*Chevron* established a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful. At the first step, we ask whether the statute's plain terms directly address the precise question at issue. If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is a reasonable policy choice for the agency to make." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 986 (2005).

the exercise of that authority. *Id.* But that case does not apply here because Defendants are not exercising broad, delegated authority generally to make rules, but are instead putatively exercising specific authority to modify certain kinds of program performance standards in certain ways.

Defendants also cite the district court's December 1, 2021 order[10] interpreting CMS's broad rulemaking authority under 42 U.S.C. § 1302(a) in *Florida v. Dep't of Health & Hum. Servs.* (a CMS vaccine mandate case) as support that the rule should be deferred to as reasonable. Response at 19. But that order is irrelevant. 42 U.S.C. § 1302 addresses authority to implement regulations necessary for the efficient administration of provisions under the Social Security Act. That statute is not at issue here. The logic of the district court's order in the Florida CMS case does not apply to Defendants' specific rulemaking authority in this case. See *Gonzales*, 546 U.S. at 258–59 ("In many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute," but that does not apply to "limited powers, to be exercised in specific ways").

Thus, Defendants' incorrect conclusion that the Vaccine Mandate and Mask Mandate are entitled to *Chevron* deference because "the statute does not clearly express otherwise" flows from their incorrect premise that they are exercising broad rulemaking authority. But they are not, and

[10] The quoted language is on page 15-16 of the district court's December 1, 2021 order (No. 3:21-cv-02722), which was appealed to the 11th Circuit, and is attached at Appx.0059. Defendants incorrectly state that they are citing the 11th Circuit. The 11th Circuit's opinion has similar language: "[A] broad grant of authority such as Congress has given the Secretary here—which plainly encompasses the Secretary's actions—does not require an indication that specific activities are permitted." *State of Florida v. Dep't of Health & Human Services*, 19 F.4th 1271 (11th Cir. 2021), 2021 WL 5768796 at *12. But, again, that case concerns a broad grant of authority, while this case does not.

Chevron does not apply. Defendants' interpretation of the unambiguous statute is entitled to no deference.

2. The specific statutory authority claimed by Defendants does not authorize the Vaccine Mandate or the Mask Mandate.

In their Brief in Support, Plaintiffs argued that neither the Vaccine Mandate nor the Mask Mandate are "program performance standards." Brief in Support at 15–17. But even if they were "program performance standards," they would not be the kind of "program performance standards" listed in 42 U.S.C. § 9836a(a)(1)(C), (D), or (E). Those subsections do not provide authority for the Vaccine Mandate and the Mask Mandate. *Cf. Texas v. Becerra*, no. 2:21-CV-229-Z, 2021 WL 5964687, at *5 (N.D. Tex. Dec. 15, 2021) (Kacsmaryk, J.) (determining that CMS lacked statutory authority to issue a vaccine mandate) ("Defendants rely upon sections that do not mention vaccines, let alone health or safety.")

a. 42 U.S.C. § 9836a(a)(1)(C) does not provide authority.

Defendants cannot rely on 42 U.S.C. § 9836a(a)(1)(C) for authority to issue the Mandates. That section states, "The Secretary shall modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs under this subchapter, including—administrative and financial management standards." In the Interim Final Rule, Defendants cited subsection (a)(1)(C) but did not give any explanation of how it might apply. In their Response, Defendants merely make the conclusory assertion: "By requiring vaccines and masking for certain Head Start personnel and participants under certain circumstances and subject to exemptions, the Secretary was imposing an 'administrative standard' that was 'necessary' for the safe management of Head Start programs, 42 U.S.C. § 9836a(a)(1)(C)." Response at 12.

But the Vaccine Mandate and the Mask Mandate are not "administrative standards." The term "administration" means "[t]he management or performance of the executive duties of a government, institution, or business; collectively, all the actions that are involved in managing the work of an organization." BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Merck & Co., Inc. v. United States Dep't of Health & Human Services*, 962 F.3d 531, 537 n.3 (D.C. Cir. 2020) (citing "Administration" defined in THE OXFORD ENGLISH DICTIONARY 163 (2d ed. 1989) (defs. 3, 4) (defining 'administration' as 'management' of either business or public affairs, relying on historical usage dating back to the Fourteenth Century)).

Subsection (a)(1)(C) thus allows Defendants to promulgate standards for "administering" or "managing" Head Start programs. The plain statutory text does not support the proposition that Defendants possess the far-reaching power to impose the Vaccine Mandate or the Mask Mandate. They are very far removed from administering or managing Head Start programs. If vaccine and mask mandates can be said to be "administrative standards," then any requirement Defendants impose on Head Start staff, contractors, volunteers, and children is an "administrative standard." That cannot be the case. Defendants' *ipse dixit* does not demonstrate that the Vaccine Mandate and the Mask Mandate are "administrative standards" under subsection (a)(1)(C).

b. 42 U.S.C. § 9836a(a)(1)(D) does not provide authority.

Defendants cannot rely on 42 U.S.C. § 9836a(a)(1)(D) to support their unprecedented exercise of agency authority. That section states, "The Secretary shall modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs under this subchapter, including—standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate). In their Response,

Defendants argue, "By requiring vaccines and masking for certain Head Start personnel and participants under certain circumstances and subject to exemptions, the Secretary was imposing … a standard 'relating to the condition … of facilities' to ensure they do not become places of viral contagion, *id.* § 9836a(a)(1)(D)." Response at 12.

Plaintiffs have already addressed how the Vaccine Mandate and the Mask Mandate are not a standard "relating to the condition … of facilities." Brief in Support at 18. As Judge Kacsmaryk ruled in the CMS Mandate case, "Mandating facility standards is drastically different from mandating who a healthcare provider hires or fires." *Texas v. Becerra*, 2021 WL 5964687, at *5. Likewise, mandating facility standards is drastically different from mandating vaccines and masks.

c. 42 U.S.C. § 9836a(a)(1)(E) does not provide authority.

Defendants cannot rely on 42 U.S.C. § 9836a(a)(1)(E) to support their unprecedented exercise of agency authority. That section states, "The Secretary shall modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs under this subchapter, including—such other standards as the Secretary finds to be appropriate." In the Interim Final Rule, Defendants cited subsection (a)(1)(E) but did not give any explanation of how it might apply. In their Response, Defendants merely make the conclusory assertion: "At a bare minimum, [the Secretary] was imposing a 'standard[]' he found to be 'appropriate' for the Head Start program [when he imposed the Vaccine Mandate and the Mask Mandate]. *Id.* § 9836a(a)(1)(E)." Response at 12.

Defendants claim that subsection (a)(1)(E) gives them broad rulemaking authority. *Id.* at 11–12. It does not. It does not grant Defendants the authority, for instance, "to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or

appropriate to carry out the provisions of this chapter." Instead, the rule of ejusdem generis limits general terms which follow specific ones to matters similar to those specified. *Gooch v. United States*, 297 U.S. 124, 128 (1936). Thus, "other such standards" in subsection (a)(1)(E) are limited to standards similar to those listed in subsections (a)(1)(A)–(D). It does not allow Defendants to promulgate any standard which they deem "appropriate."[11] Defendants never attempt to explain how the Vaccine Mandate or the Mask Mandate are standards similar to the standards listed in subsections (a)(1)(A)–(D). Thus, subsection (a)(1)(E) does not authorize the Vaccine Mandate and the Mask Mandate.

An analogy. The Necessary and Proper Clause does not allow Congress to pass *any* law it deems necessary and proper. *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 247 (1960). Instead, it is "but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers [in the Constitution]." *Id.* The alternative reading would give virtually unlimited authority to Congress, untethered to the specific powers delegated to the United States by the Constitution. *Contra* U.S. CONST. amend. X. So too here. The grant of authority to the Secretary to impose "standards as the Secretary finds to be appropriate" does not mean the Secretary can pass *any* standard he deems appropriate. Instead, it is but a caveat that he possesses authority to issue standards found appropriate in furtherance of his specifically granted statutory

[11] In their Brief in Support, Plaintiffs argued that subsection (a)(1)(E) violates the non-delegation doctrine. Brief in Support at 19. Plaintiffs failed to take ejusdem generis into account, and hereby withdraw that argument. If, however, the Court thinks subsection (a)(1)(E) does allow Defendants to adopt any rule they want, then subsection (a)(1)(E) cannot support the Vaccine Mandate and the Mask Mandate because it violates the non-delegation doctrine and the major-questions doctrine. See Part II.C., *infra*.

authority. The alternative reading would give virtually unlimited authority to the Secretary, untethered to the specific powers delegated to him by statute.

d. The purpose of the statute does not provide authority.

Defendants also cite the purpose of the statute under 42 U.S.C. § 9831(2) to justify the Vaccine Mandate and the Mask Mandate. Response at 13. This fails for two reasons. First, that statute was not cited as statutory authority in the Interim Final Rule. "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Sec. & Exch. Comm'n v. Chenery Corp.*, (*Chenery I*) 332 U.S. 194, 196 (1947). "An agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020). "[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Defendants did not cite § 9831(2) in adopting the Interim Final Rule, so they may not cite it now.

Second, even if Defendants had cited § 9831(2) in adopting the Interim Final Rule, a prefatory statement is not a grant of authority. *D.C. v. Heller*, 554 U.S. 570, 578 (2008) ("[A]part from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause"); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 n.9 (D.C. Cir. 1995) ("[T]he agency may

not simply disregard the specific scheme Congress has created … in order to follow a broad purpose statement.").

e. The authority to issue deficiencies does not provide authority.

Defendants also attempt to justify the Vaccine Mandate and the Mask Mandate by noting that "the Secretary is charged with issuing deficiencies when programs fail to follow 'program performance standards' [citing 42 U.S.C. § 9836a(e)(1)." Response at 13. They further note that "deficiency" includes "a systematic or substantial material failure of an agency in an area of performance that the Secretary determines involves—(i) a threat to the health, safety, or civil rights of children or staff; [or] (iii) a failure to comply with standards related to early childhood development and health services [citing 42 U.S.C. § 9832(2)(A)]." *Id.* at 13–14. Defendants conclude, "By [the Act's] plain language, then, the Secretary can certainly establish 'standards related to early childhood development and health services' and 'the health … of children or staff' because he can issue deficiencies on failures to follow standards that are a threat to health and safety [citing 42 U.S.C. § 9836a(e)(1)]." *Id.* at 14.

This argument fails for three reasons. First, it fails the *Chenery I*/*State Farm*/*Regents* test because Defendants did not cite those sections as statutory authority in the Interim Final Rule. Second, even if they had, the Secretary can only issue deficiencies on a case-by-case basis, "on the basis of a review pursuant to subsection (c), that a Head Start agency designated pursuant to this subchapter fails to meet the [program performance] standards described in subsection (a)(1)." The Secretary may not simply issue deficiencies wholesale to LISD and every other Head Start program in the United States, and likewise may not issue a rule to "correct" these "deficiencies." Third, Defendants are relying on a basic definition for broad authority to mandate medical treatments.

Defendants "construction of the statute would seem to give it unbridled power to promulgate any regulation **…** based on nothing more than" a definition. *Merck & Co.*, 962 F.3d at 540.

f. Other statutes not cited in the Interim Final Rule do not provide authority.

Defendants cite several other statutes not mentioned in the Interim Final Rule to support the Vaccine Mandate and the Mack Mandate. Response at 14–15. Under *Chenery I*/*State Farm*/*Regents*, the Court may not consider those arguments.

3. To the extent that the statutory authority is ambiguous, the major-questions doctrine applies.

As mentioned, the parties agree that the statutes Defendants claim provide the statutory authority are unambiguous. But to the extent there is any question about that, the sheer scope of Defendants' claimed authority would counsel against Defendants' broad view of their own authority to issue the Vaccine Mandate and the Mask Mandate. *See* Brief in Support at 21–22 (citing *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2489 (2021) (also known as the major-questions doctrine)). Defendants argue that the major-questions doctrine does not apply for two reasons.

First, they argue that considerations of economic and political significance are relevant only if the text is ambiguous, but that no such ambiguity or incompatibility exists in this case. Response at 21. Defendants agree. But, as previously discussed, Plaintiffs nevertheless claim that the Court somehow owes *Chevron* deference to their interpretation of their statutory authority, *id.* at 19, even though *Chevron* deference does not apply unless the statute is ambiguous. Defendants need to pick a lane. Either the statutory is unambiguous, or it is ambiguous—in which case the major-questions doctrine applies.

Second, they argue that the major-doctrine does not apply because "[t]he Secretary is simply exercising long-recognized and common sense power to adopt health and safety conditions for federally-funded programs for youth that are already subject to extensive conditions of participation." Response at 22. But as explained in Part I, that is untrue. The Vaccine Mandate and Mask Mandate are "discover[ies] in a long-extant statute [of] an unheralded power to regulate" which would "bring about an enormous and transformative expansion in [Defendants'] regulatory authority without clear congressional authorization." *Util. Air Regulatory Group*, 573 U.S. at 324 (internal citation and quotation marks omitted).

* * *

There is no statutory authority for either the Vaccine Mandate or the Mask Mandate.

B. The Interim Final Rule is arbitrary and capricious

Plaintiffs listed many reasons why the Interim Final Rule is arbitrary and capricious, Brief in Support at 28–37, and Defendant responded, Response at 24–37. Plaintiffs will reply to three obvious points.

First, the rule is arbitrary and capricious because Defendants failed to consider that children in families who do not want to wear masks will withdraw from Head Start. The public comments received on the rule, which were near universal in their opposition, show that many parents will withdraw their children from Head Start due to the mask mandates. Appx.0081. Defendants claim they considered this possibility at 86 Fed. Reg. at 68,091, Response at 26, but the discussion on that page only considers staff withdrawals from Head Start, not child withdrawals. Defendants acted arbitrarily and capricious by utterly failing to consider an important part of the problem.

Second, Defendants acted arbitrarily and capriciously by failing to consider natural immunity as an alternative to vaccination. Defendants claim that they did consider natural immunity, but rejected it in favor of vaccinations, citing to the studies cites in footnotes 31–36 to the Interim Final Rule. Response at 28. But those studies have nothing to do with natural immunity. Instead, the studies consider outcomes for vaccinated versus unvaccinated individuals, without accounting for or considering natural immunity. The lack of discussion about natural immunity shows that Defendants acted arbitrarily and capriciously by failing to consider this important part of the problem.

Third, Defendants acted arbitrarily and capriciously by failing entirely to consider information discussing the potential adverse effects that could result from the rule. Although Defendants claim they considered adverse information, such as the WHO/UNICEF recommendations against masking children under five, they decided to rely on the CDC recommendations. Response at 33. Yet, nowhere in the Interim Final Rule is there any substantive discussion, consideration, or even a citation, to any adverse information. Defendants' failure to consider adverse information was arbitrary and capricious.

It is not enough for Defendants to simply to make conclusory statements that they considered a particular fact. They must actually consider it. *State v. Biden*, 10 F.4th 538, 555–56 (5th Cir. 2021); *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("Stating that a factor was considered... is not a substitute for considering it."); *cf. Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("And stating that a factor was considered—or found—is not a substitute for considering or finding it." (quotation omitted)); *Gresham v. Azar*, 950 F.3d 93, 103

(D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking.").

C. Defendants were required to comply with Notice and Comment

Defendants note that 5 U.S.C. § 553(a)(2) exempts grants and benefits programs from the notice-and-comment requirement. They also note that, in 1971, they provided by regulation that they will nevertheless comply with the notice-and-comment requirement. Response at 41 (citing 36 Fed. Reg. 2531, 2532 (Feb. 5, 1971) (Appx.0079)); *see also Nat'l Wildlife Fed'n v. Snow*, 561 F.2d 227, 231 (D.C. Cir. 1976) (concluding that the exception for grant programs "create[s] a serious gap in the procedural protections the APA was enacted to provide" because "spending money always involves public choices, often significant public choices that could benefit from the ventilation of views that public participation entails," and noting that "[a] number of agencies apparently exempt from rulemaking under subsection (a)(2) have recognized these benefits and have provided by regulation for notice and comment procedures prior to adoption of policy regulations for grant or benefit programs.").

Defendants agree that the notice-and-comment requirement applies to the Interim Final Rule unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). But Defendants contend that because the notice-and-comment requirement is self-imposed, the usual rule that the "good cause" exception applies extremely narrowly should not apply. Response at 41 (citing *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)). But *Alcaraz* is inapposite. In that case, the department that self-imposed the notice-and-comment requirement stated that the good-cause exception

would be used "sparingly, that is, only when there is a substantial basis therefor." *Alcaraz*, 746 F.2d at 612. In this case, Defendants take a much more limited view of its ability to invoke the good-cause exception:

> The public benefit from such participation [in notice-and-comment] should outweigh any administrative inconvenience or delay which may result from use of the APA procedures in the five exempt categories [including grants].
>
> Effective Immediately, all agencies and offices of the Department which issue rules and regulations relating to public property, loans, grants, benefits, or contracts are directed to utilize the public participation procedures of the APA, 5 U.S.C. 553. Although the APA permits exceptions from these procedures when an agency for good cause finds that such procedures would be impracticable. unnecessary or contrary to the public interest, such exceptions should be used sparingly, as for example in emergences [*sic*] and in instances where public participation would be useless or wasteful because proposed amendments to regulations cover minor technical matters.

Appx.0080. Thus, unlike the Department in *Alcaraz*, Defendants in this case have self-imposed a very strong version of the good-cause exception. The usual rule that the good-cause exception should apply.

Plaintiff's Brief in Support already sufficiently replies to the rest of Defendants' arguments that the good-cause exception applies, and will not be repeated here.

D. Defendants were required to comply with the Congressional Review Act and the and General Government Appropriations Act of 1999.

5 U.S.C. § 706 "permit[s] review of the issue in this case: whether HHS's action was 'in accordance with law,' i.e., with the Head Start Act [42 U.S.C. § 9836a(a)(2)]." *Navajo Nation v. Azar*, 302 F. Supp. 3d 429, 436 (D.D.C. 2018). Likewise, 5 U.S.C. § 706 permits review of whether Defendants' action was in accordance with the Congressional Review Act and the Treasury and General Government Appropriations Act of 1999. Defendants argue that those acts contain language that makes them not judicially enforceable. Response at 43, 46. But Defendants are not asked the Court to enforce those acts. Defendants are asking the Court to enforce 5 U.S.C. § 706.

E. The Interim Final Rule violates the Spending Clause.

Conditions under the Spending Clause must be unambiguous. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). When LISD and other Head Start programs accepted grants for current funding, there was no Vaccine and Mask Mandate. The "spending power … does not include surprising participating States with post-acceptance … conditions." *Nat'l Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519, 584 (2012); *see also Sch. Dist. of City of Pontiac v. Sec. of U.S. Dep't of Educ.*, 584 F.3d 253, 260–61 (6th Cir. 2009) (holding that school districts have standing to challenge conditions on receipt of federal funds under the Spending Clause). LISD could have known that Defendants would claim for themselves a police power that allowed them to force employees, volunteers, staff, and children to undergo medical treatment and wear masks as a condition of the grant. Accordingly, the attempt to do so here is unconstitutional.

III. Plaintiffs will suffer irreparable harm absent an injunction.

Plaintiffs have been and are being irreparably injured in a number of ways. *See* Brief in Support at 51–55. Federal agencies are using the Interim Final Rule to threaten the termination of staff in Head Start programs, and in their Response, Defendants make no representation that they will not terminate grants with Texas or any of its school districts if they fail to enforce the Interim Final Rule. *See* Dkt. #8-1 at 172 (Declaration of Eric Bentley). In fiscal year 2021 alone, HHS awarded a total of $842,280,184 in grants to Texas Head Start programs; over $840 million is at stake in this litigation. *See* Dkt. #8-1 at 52–86. Texas has "alleged a concrete threatened injury in the form of millions of dollars of losses," *Texas v. United States*, 809 F.3d 134,at 186 (5th Cir. 2015), which is sufficient to demonstrate irreparable harm. *See*, *e.g.*, *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (holding that a likely loss of federal grant funds is

sufficient to demonstrate standing). Moreover, by Defendants' own estimates, the Head Start Vaccine Mandates will cost up to $71.42 million in turnover costs alone. 86 Fed. Reg.at 68,092. Texas's turnover costs are part of this estimate.

For example, if LISD enforces the Head Start mandate, it will lose staff at a time when it is already having difficulty filling vacancies and retaining employees. *See* Dkt. #8-1 at 88 (Declaration of Kathy Rollo); Dkt. #8-1 at 144 (Declaration of Kathy Pearson). The Interim Final Rule itself contemplates that "filling … vacancies" as a result of the implementation of the Mandates "could take longer than two weeks," because "education providers are currently experiencing significant challenges in recruiting and retaining staff." *See* 86 Fed. Reg. at 68,092; Dkt. #8-1 at 8 (Declaration of Kathy Rollo); *see also* Dkt. #8-1 at 142 (Declaration of David Gray). In addition to losing staff, LISD also faces the withdrawal of students currently enrolled in its prekindergarten programs who do not qualify for Head Start grants—and as a result, the district will lose either state or tuition-based funding tied to the non-Head Start students. *See* Dkt. #8-1 at 140 (Declaration of Allison Swafford); *see also* Declaration of Jimmy Burns (Appx.0135). When a pre-K child unenrolls, the district loses funding—be it federal, state, or tuition based. *See* Tex. Educ. Code § 42.101; *Morath v. The Texas Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826, 837 (Tex. 2016).

These costs are not limited to LISD. LISD is an example of what will happen in schools across the State. *See* Declaration of Jimmy Burns (Appx.0132); Declaration of Karen Saunders (Appx.0137); Declaration of R.L. Richards (Appx.0141). Loss of staff and students whose parents unenroll them from Pre-K programs is a "predictable effect of Government action on the decisions" made by Defendants. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019); *Texas v. Biden*, No. 21-10806, slip op. at 60 (5th Cir. Dec. 21, 2021).

And Defendants themselves anticipate "costs associated with Head Start staff vacancies associated with quitters that are attributable to this interim final rule." 68 Fed. Reg. at 68,091. They also anticipate over 175,000 Head Start volunteers will stop volunteering in the classroom. *Id*. at 68,093. Defendants anticipate Head Start program providers across the country will bear the "cost of training the replacement Head Start Staff." *Id*. Defendants have not represented that the federal government will provide Head Start programs in the State with additional funds to make up for these losses. And Defendants cannot dispute that some school districts will be forced to shutter their Pre-Kindergarten programs altogether if they cannot recover funds to replace grant money received through Head Start. *See* Declaration of Jimmy Burns (Appx.0132); Declaration of R.L. Richards (Appx.0142).

Indeed, on December 15, 2021, after Plaintiffs filed their Complaint and Motion for Temporary Restraining Order and Preliminary Injunction, the National Head Start Association sent a letter to Defendant Becerra warning of "potential devastating effects the new rule on vaccines and masking will have on the children and families [Head Start] serves." Appx.0145. The National Head Start Association surveyed Head Start programs and found that over one-fourth of Head Start programs anticipate losing more than 30% of their staff and 50% of respondents anticipate closing classrooms altogether. Appx.0147.

The State of Texas stands to lose over $840 million in funds that support education. "Education of our children is an essential Texas value," and Texas is faced with a multi-million dollar loss in funding to Pre-K programs. *See San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996). Defendants offer Texas no safe harbor from this threat. Accordingly, the State may seek redress of this inevitable harm.

Finally, Defendants are inflicting irreparable, non-economic injuries on the State's sovereign interests. The Interim Final Rule constitutes an injury to the State because it prevents the State from enforcing its own laws. The Fifth Circuit has made clear that when a state is blocked from implementing its own laws, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 734 F.3d 406, 419 (5th Cir. 2013). Every day this Mandate is in effect, Plaintiff the State of Texas suffers an irreparable injury. *See*, *e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted [statute] clearly inflicts irreparable harm on the State."). The Interim Final Rule injures Texas's sovereign interest in exercising its police power in an area where the traditional authority of the State is paramount and the federal Government possesses no enumerated power. See, *e.g.*, *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021) (holding that mandating "a person receive a vaccine or undergo testing falls squarely within the States' police power" and States are irreparably harmed by federal overreach into their "constitutionally reserved police power over public health").

The State of Texas and LISD both face a Hobson's choice. The State of Texas can enforce state law but be faced with school districts that are potentially millions of dollars short on federal funding or change state law. *See* Exec. Ord. GA-40 (Oct. 11, 2021). Similarly, LISD is faced with either complying with the Interim Final Rule, violating state law, and losing students and staff or complying with state law, not enforcing the Head Start Mandate, and losing federal funding. Combined with the constant threat of enforcement and attendant withdrawal of funding, these injuries are sufficient to demonstrate irreparable harm. *See Texas v. Biden*, slip op. at 113.

IV. Plaintiffs are entitled to a nationwide injunction.

Plaintiffs seek a nationwide injunction. Defendants note that the Fifth Circuit recently vacated a district court's nationwide injunction and instead limited the injunction to the fourteen states that brought the suit. *Louisiana v. Becerra*, 20 F.4th 260 at *3 (5th Cir. 2021). But that opinion also says, "The question posed is whether one district court should make a binding judgment for the entire country. At times, we have answered the question affirmatively." *Id.* at *2. One of those other times was *Texas v. Biden*, 21-10806, slip op. at *31, where the court held that unlike a court's decision to hold a statute unconstitutional, 5 U.S.C. § 706 "empowers and commands courts to 'set aside' unlawful agency actions." The Court should likewise "set aside" the Interim Final Rule and enter a nationwide injunction because such a ruling has nationwide effect. Courts "should not be loathe to issue injunctions of general applicability." *Hodgson v. First Federal Sav. & Loan Ass'n of Broward Cnty., Fla.*, 455 F.2d 818, 826 (5th Cir. 1972). "The injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a public policy judges too must carry out." *Id.* at 826. For these reasons, Plaintiffs respectfully request the Court issue an order declaring the Rule unlawful and unenforceable.

V. Conclusion

For the foregoing reasons, the Court should grant Plaintiffs' motion for a temporary restraining order to preserve the status quo until the Court has had an opportunity to rule on Plaintiffs' motion for preliminary injunction, and grant Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on December 28, 2021.

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