22-1257

United States Court of Appeals
for the Sixth Circuit

LIVINGSTON EDUCATIONAL SERVICE AGENCY
and WAYNE-WESTLAND COMMUNITY SCHOOLS,

Plaintiffs – Appellants,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JOOYEUN CHANG, in her official capacity as Assistant Secretary and Principal Deputy Assistant Secretary of the Administration for Children and Families; ADMINISTRATION FOR CHILDREN AND FAMILIES; and BERNADINE FUTRELL, in her official capacity as the director of the Office of Head Start,

Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 2:22-cv-10127, Hon. Nancy G. Edmunds

APPELLANTS' REPLY BRIEF

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1. The Rule exceeds the statutory authority of HHS.

The Government appears to think that *Missouri v. Biden* is the only U.S. Supreme Court case relevant to this case. 142 S. Ct. 647 (2022). No surprise: it is the only case it has won. The Government would have this Court forget *NFIB v. Biden*, 142 S. Ct. 661 (2022), the opinion issued the same day striking down the OSHA vaccine mandate, despite the OSH Act's incredibly clear statutory delegation for OSHA to regulate employee safety and health. As the Supreme Court held there, COVID-19 is not a risk particular to the workplace, but an everyday risk that all Americans face. *Id*. at 665-66. COVID-19 is similarly not a unique risk in Head Start classrooms. In hospitals and nursing homes, by contrast, the Supreme Court held that the unique risk COVID-19 poses to the sick, elderly, and disabled justified a vaccine mandate in those contexts. *Missouri*, 142 S. Ct. at 651.

The Government would also have this Court forget *Alabama Realtors Association*, decided a few months earlier, striking down the Centers for Disease Control and Prevention's (CDC) eviction moratorium, 141 S. Ct. 2485 (2021), and *West Virginia v. EPA*, decided just a few months ago (and subsequent to the motions panel decision), striking down the clean power rule. 142 S. Ct. 2587 (2022). The Government does not mention *West Virginia* even once in its brief, yet its effect on this case is stark: it lays out plainly that important national policy decisions like this one must be made by Congress. Each of these recent and relevant decisions is binding on this Court as it considers this case.

This Court's own cases are also illustrative. The *Livingston* motions panel, which the Government does not contend is binding on this merits panel, is but one recent opinion from this Court concerning such circumstances. This Court has also ruled against the federal contractor vaccine mandate, *Kentucky*, 23 F.4th 585 (6th Cir. 2022), and the eviction moratorium (decisions which were vindicated in *Alabama Realtors*), *Tiger Lily I* & *II*, 992 F.3d 518 & 5 F.4th 666 (6th Cir. 2021); and two opinions in the OSHA mandate case ultimately aligned with the Supreme Court. *Mass. Bldg. Trades Council v. DOL*, 21 F.4th 357 (6th Cir. 2021) (Larson, J., dissenting); 20 F.4th 264 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc).

Equally if not more important than all of these cases is the text of the Head Start Act itself. The cases above are only relevant as they provide guides or canons of construction to analyze the relevant statutory text, which is distinct from the statutes at issue in the other cases.

A. The Head Start mandate is not authorized by § 9836a(a)(1)(C) or (D).

Reading the plain meaning of, the Head Start Act, 42 U.S.C. § 9836a, this Court will quickly conclude that the vaccine mandate is not a "financial management" or "administrative" standard, nor a "condition and location of facilities" standard. An administrative standard (the Government has conceded it is not a financial management standard) would be, for instance, a requirement that programs have in place a sexual harassment policy. The Government boldly asserts that its mandate is a "quintessential 'administrative' standard" because it would keep the doors open

through the pandemic. Resp. 15. Of course, *Black's Law Dictionary* does not have even a tertiary definition of "administrative" that means "whatever it takes to stay open during a once-in-a-century pandemic." "Administrative" must be read alongside the term with which it travels, "financial management," and both refer to back-office operations. To render "administrative" as "keep the doors open" would be to render any other word in the statute meaningless, as anything could be justified as "keeping the doors open."

The Court should also reject the idea that preventing humans from exhaling a virus is a "condition of facilities" standard. People are not facilities. People are not buildings. Facilities house people and programming that serves people. Ensuring that fewer people exhale germs they bring in from outside the facility says nothing about the condition of the facility or building in which programming occurs. Ensuring that children do not encounter rusty nails on playgrounds is not proof that the Secretary has all-encompassing power to ensure health and safety in Head Start programs—it is a quintessential "condition of facilities" standard, and a stark contrast to a vaccine mandate for staff and volunteers. *See* Resp. 16.

The Government contends that the "condition of facilities" is a stronger argument than it would otherwise seem because the statute specifically authorizes "air quality assessment" as an example of a "condition of facilities" standard. The Government skips over assigning any meaning to "assessment," but of course this is a fatal part of the statutory phrase: if the government is authorized to mandate air quality assessments, it is not authorized to mandate air quality standards

themselves. Such a reading is further confirmed by a neighboring statute, 42 U.S.C. § 9843(f), wherein Congress authorizes the Department to provide technical assistance to improve air quality, recommending best practices and such, which again reinforces that it cannot actually require air quality standards. Plus, reducing an airborne virus through a vaccine is not an "air quality" standard in the first place. There's a large gap between mandating "air quality" through modern HVAC systems versus a vaccine mandate on every adult in a building.

B. The Head Start mandate is not authorized by § 9836a(e).

The Government relies heavily on the Department's mandate to address "deficiencies" that address "a threat to the health, safety, or civil rights of children or staff." Resp. 13-14. This argument fails on two fronts. First, the Department did not identify this language in its claim of statutory authority in the Rule itself. "ACF publishes this interim final rule under the authority granted to the Secretary by sections 641A(a)(1)(C), (D) and (E) of the Head Start Act." 86 Fed. Reg. 68,052. The Department does not get a "do over" in litigation to identify new provisions it did not believe supplied it with authority at the time of the rulemaking. *Michigan v. EPA*, 576 U.S. 743, 758 (2015) (noting "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action"). The Government repeats its argument from "deficiency" that it made to the motions panel but attempts no answer to the Schools' argument that the agency is limited to those statutory authorities cited in the Rule itself. Opening Br. 42.

Second, even if the Court were to address the argument on the merits, it fails simply by reading the language in its statutory context (which is perhaps why the Secretary chose not to cite it in the Rule). In subsection 9836a(a), the Secretary is given the authority to set performance standards in certain areas. In subsection 9836a(e), the Secretary is given the power to identify and correct those instances when a program is deficient in meeting those standards, and to do so immediately at the point where the deficiency is so bad that it threatens the health, safety, or civil rights of children and staff. For instance, if a Head Start program did not have an administrative standard that prohibited sexual harassment, that would be a deficiency that threatens safety and civil rights. The enforcement statute distinguishes between pedestrian deficiencies that do not require immediate correction, and those that threaten health, safety, and civil rights, which do require immediate correction. § 9836a(e)(1)(B)(i). That some deficiencies in the listed performance areas may threaten health and safety cannot be converted into new powers to set health and safety standards. Congress could have included in the initial list of authorized categories of performance standards the power to set performance standards for health, safety, and civil rights, but it did not. The Government cannot amend that initial list after the fact by smuggling enforcement-and-compliance language into the statute's standard-setting section.

C. The Head Start mandate is not authorized by § 9836a(a)(1)(E).

So the Government is left with its strongest argument, that the Rule is an "appropriate" standard. But to call the standard "appropriate" is simply to beg the

question: what counts as appropriate? Here we must refer to the statute overall and cases interpreting similar statutes. The Government tried last year to call the eviction moratorium "necessary," using 42 U.S.C. § 264(a). This Court and the Supreme Court both rejected that interpretation. *Tiger Lily I*, 992 F.3d 518 (6th Cir. 2021); *Tiger Lily II*, 5 F.4th 666 (6th Cir. 2021); *Alabama Realtors*, 141 S. Ct. 2485 (2021).

The *Missouri* decision does not demonstrate that mandatory vaccination in the Head Start context is "appropriate," as *Missouri* is not comparable to this case on a number of counts. *See* Opening Br. 31-32. To begin, the statute at issue in *Missouri* authorized rules "'in the interest of the health and safety of individuals who are furnished services' by facilities that receive Medicare or Medicaid funds." Resp. 14. Obviously "in the interest of the health and safety of individuals" is a far better statutory basis for a vaccine mandate than "appropriate."

The Government responds to the arguments made by the Schools in their opening brief, first by suggesting that in both *Missouri* and this case, "the Secretary had previously imposed infection-control requirements for federally funded facilities." Resp. 16. However, in Medicaid and Medicare, the Secretary had a number of prior infection-control measures he could point to. *See* Opening Br. 32. In Head Start, the Secretary can only point to routine physical screenings for staff and routine immunization records checks for children. Neither of these actions were focused on "infection control" within Head Start facilities, and both are different in kind from mandatory vaccination. The Secretary has never mandated, for instance,

that all Head Start teachers receive the flu vaccine, or even that they be current on all the standard childhood vaccines like Hepatitis B, chicken pox, or whooping cough.

The Government then argues against the three canons employed by the Schools to interpret "appropriate." First, the major questions canon. The Government minimizes the scope of the mandate, saying it only affects 273,000 Head Start program employees and "a share of the approximately 1 million volunteers who interact with children in certain in-person settings." Resp. 17. Such a comment makes one wonder how many Head Start volunteers do not interact with children.[1] Regardless, whether this Rule qualifies as a "major question" likely depends on whether it is seen standing alone or as part of the overall package of vaccine mandates announced by President Biden on September 9, 2021.

That question is best answered in the light of *West Virginia v. EPA,* decided subsequent to the motion panel's decision in this case. *West Virginia* tells us that in certain instances, "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."

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[1] Indeed, the Government's characterization that the Rule only applies to those Head Start staff who directly interact with children, Resp. 5 & 10, is an interpretive gloss not found in the Rule's text. The preamble of the Rule says: "The definition of *staff* in § 1305.2 is 'paid adults who have responsibilities related to children and their families who are enrolled in programs.' Consistent with that definition, 'all staff' as noted in this IFC, refers to all staff who work with enrolled Head Start children and families in any capacity regardless of funding source." 86 Fed. Reg. 68,060; *see also id*. at 68,068-69 (making clear Rule applies to all 273,000 Head Start staff).

142 S. Ct. at 2595. In such instances, courts must be mindful of "both separation of powers principles and a practical understanding of legislative intent." *Id*.

Given the context, this Rule was clearly part of a larger package of executive actions designed as an attempted "workaround" of Congress's authority in order to achieve nationwide policy on a major question, namely a broad-as-possible national vaccination mandate. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021). *See Kentucky*, 23 F.4th at 609, n.15. The problem the White House felt it faced was a "pandemic of the unvaccinated," and the solution was to "work across the waterfront" to avoid Congress by leveraging aggressive interpretations of executive authority in several agencies. Chief Justice Roberts, Transcript of Oral Argument at 79, *NFIB v. OSHA*.[2] "[I]t's a little hard to accept the idea that this is particularized to this thing, that it's an OSHA regulation, that it's a CMS regulation, that it's a federal contractor regulation," that it's a Head Start regulation. *Id*. That's because it was not particularized to any agency; it was an intentional effort to vaccinate as many people as possible via executive action—an action that is a major question appropriately decided by Congress.

The Government next asserts the federalism canon does not apply because "Head Start grants are discretionary," Resp. 17, but no health provider is required to take Medicaid or Medicare patients either (indeed, many do not[3]). When the Rule

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

[3] *Administrative Burdens Lead Some Doctors to Avoid Medicaid Patients*, Nat. Bureau of Econ. Research (Dec. 2021), www.nber.org/digest/202112/administrative-burdens-lead-some-doctors-avoid-medicaid-patients.

is seen as a constituent part of the September 9 package, as it should be, it is clearly an effort by the federal government to work around not only Congress, but also states' historic role as the primary regulators of public health. States can mandate COVID-19 vaccination of all teachers and childcare workers, but so far none have done so.[4]

The Government notes that the Schools raised the nondelegation canon, but makes no response to their argument. Resp. 17. Perhaps that is because no such response is possible, as the word "appropriate," standing alone, is hardly an intelligible principle.

The Government also makes no response to the Schools' argument from the Head Start Act itself. The Act directs that the Secretary should promulgate no performance standard which "result[s] in the elimination of or any reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services." 42 U.S.C. § 9836a(a)(2)(C)(ii). This Rule does result in such a reduction in the quality and scope of services. *See State v. Becerra*, 577 F. Supp. 3d 527, 556 (N.D. Tex. 2021) ("the National Head Start Association sent a letter to Secretary Becerra on December 15—after the Rule's promulgation—indicating that the Rule's enforcement 'could result in the closing of over 1,300 Head Start classrooms' and the loss of nearly '60,000 staff.'"). The Schools argue

[4] *Where Teachers Are Required to Get Vaccinated Against COVID-19*, Education Week (updated Dec. 7, 2021), www.edweek.org/policy-politics/where-teachers-are-required-to-get-vaccinated-against-covid-19/2021/08 (only the District of Columbia and Puerto Rico have ordered all teachers to get vaccinated; eight states require teachers to get vaccinated or undergo regular testing).

that a rule that runs directly contrary to the purposes of Congress cannot be "appropriate," Opening Br. 24-25; the Government has no answer.

Ultimately, this case is more like *Alabama Realtors* than *Missouri*. The Rule cites three statutory authorities, and the Government cited a fourth in litigation that comes too late and is irrelevant besides. Two of the authorities stretch the natural meaning of words beyond what the English language can bear. So the Government is left with "appropriate," but the canons of interpretation and analogous cases make clear this Rule is not "appropriate."

2. There was not good-cause to skip notice-and-comment rulemaking.

There is an inherent tension between promulgating a rule on an emergency basis, which necessarily suggests acting fast, potentially on the basis of limited information, and leaving the paperwork until later; and promulgating a good, thorough, well-justified rule, with a voluminous administrative record. Here, the Secretary chose to promulgate a well-footnoted rule, which "is 50 pages long and contains 144 cited sources." Resp. 20. The Administrative Record for the Rule runs to 22,817 pages long. *Etherton v. Biden*, 1:22-cv-00195-LMB-JFA [Dkt. Nos. 32-41] (E.D. Va. 2022). The White House and agency announced the start of rulemaking on September 9, 2021,[5] although it appears to have begun internally one week before. *Louisiana v. Becerra*, 3:21-cv-4370, Dkt. No. 97-1 & 97-2 (W.D. La. 2022). The

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

agency actually promulgated the Rule on November 30, 2021.[6] The Government has no good explanation why, in a ten-week rulemaking that reviewed 144 cited sources spanning 22,817 pages, the Government could not include 14 days for public comment. This lack of public engagement is especially disturbing when the governing statute specifically requires stakeholder consultation before rulemaking. 42 U.S.C. § 9836a(a)(2)(A). The Government also has no answer to the Schools' argument that its representations of an emergency are incompatible with its actions, which did not and do not display an alacrity to defend or enforce this Rule. Opening Br. 47. The Government cannot credibly declare it's acting in line with an emergency necessitating immediate action, then act methodically to promulgate the Rule, and adopt an apathetic attitude to defending and enforcing it.

3. The balance of harms and equities favor the Schools.

This Rule was first announced by President Biden more than a year ago. A lot has changed since then. The CDC no longer recommends quarantining individuals after potential exposure to COVID-19.[7] The EEOC has said that the burden is now on employers to justify mandatory COVID-19 testing, little less vaccination.[8] And the Safer Federal Workforce no longer permits federal agencies to target

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[6] 86 Fed. Reg. 68,052.

[7] Greta M. Massetti, et al., *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States*, August 2022, CDC Morbidity and Mortality Weekly Report (Aug. 11, 2022), www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm.

[8] www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

unvaccinated individuals for COVID-19 testing in order to access government facilities.[9]

As former U.S. Surgeon General Jerome Adams said recently, discussing these developments: "The virus has changed, our tools and immunity have changed, and our knowledge has changed. So too must our guidance. That's how science works."[10] Or as the CDC's Covid-19 Response Team said in a collective statement accompanying its new guidance, "[H]igh levels of vaccine- and infection-induced immunity and the availability of effective treatments and prevention tools have substantially reduced the risk for medically significant COVID-19 illness (severe acute illness and post–COVID-19 conditions) and associated hospitalization and death."[11] Or more succinctly, in the words of one CDC epidemiologist, "High levels of population immunity due to vaccination and previous infection, and the many tools that we have available to protect people from severe illness and death, have

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[9] *Initial Implementation Guidance for Federal Agencies on Updates to Federal Agency COVID-19 Workplace Safety Protocols*, Safer Federal Workforce Task Force (Aug. 17, 2022), www.saferfederalworkforce.gov/downloads/Initial%20Implementation%20Guidance_CDC%20Streamline_20220817.pdf.

[10] https://twitter.com/JeromeAdamsMD/status/1557844975173394432 (Aug. 11, 2022).

[11] Massetti GM et al., *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States*, Aug. 2022. MMWR Morb Mortal Wkly Rep 2022;71:1057-1064. DOI: http://dx.doi.org/10.15585/mmwr.mm7133e1.

put us in a different place."[12] Or most succinctly, President Biden's own recent declaration, "The pandemic is over."[13]

Yet the one place where pandemic policy has not changed is Head Start. When the Rule was issued, it repeatedly justified its vaccine mandate on the fact that children did not have access to vaccines *at this time*: "Given that children under age 5 years are too young to be vaccinated at this time, requiring masking and vaccination among everyone who is eligible are the best defenses against COVID-19." 86 Fed. Reg. 68,055. *Accord id.* ("Being fully vaccinated reduces risk of the transmission of SARS-COV-2 from staff to children who are not yet eligible for the vaccine and must be protected to minimize their exposure."); and *id.* 68,056 ("none of the children in the programs can be vaccinated . . . teachers and staff members might be protected from an unvaccinated staff, the concern remains the protection of children and families.").

That premise is no longer true. The Food & Drug Administration has now authorized children as young as six months for vaccination.[14] Even the Office of Head Start, in a recent press statement, said that the availability of child vaccines

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[12] Emily Anthes, *C.D.C. Eases Covid Guidelines, Noting Virus Is 'Here to Stay,'* N.Y. Times (Aug. 11, 2022), www.nytimes.com/2022/08/11/health/virus-cdc-guidelines.html.

[13] Biden: 'The pandemic is over', CNN.com (Sept. 18, 2022), www.cnn.com/2022/09/18/politics/biden-pandemic-60-minutes.

[14] *FDA Authorizes Moderna and Pfizer-BioNTech COVID-19 Vaccines for Children Down to 6 Months of Age*, FDA News Release (June 17, 2022), www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-moderna-and-pfizer-biontech-covid-19-vaccines-children.

is an important change for policy development moving forward.[15] The availability of vaccination for children substantially undermines the rationale to mandate vaccination on adults and force children to wear masks.

Similarly, vaccine uptake among adults has also gone up in the past year. The latest information available when the Rule was published indicated that "the overall COVID-19 vaccine uptake among child care providers was 78.2 percent, which was higher than the general U.S. adult population (65 percent)." 86 Fed. Reg. 68,056. Though no survey has been conducted again among the child care workforce, the overall percentage of American adults who are fully vaccinated now stands at 77 percent.[16] This twelve point increase among American adults must correlate to an increase as well among child care workers. When one considers natural immunity as well due to past infection, the CDC estimates 95 percent of American adults are protected from COVID.[17]

Plus, the Government already knew from a CDC study of Head Start programs in the *fall of 2020* that Head Start can operate safely in-person through the simple

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[15] Kara Arundel, *National Head Start Association says COVID-19 rule disruptive to programs*, K-12 Dive (Aug. 12, 2022), www.k12dive.com/news/covid-19-rule-disruptive-to-head-start-programs-advocates-say/629976/.

[16] https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-additional-dose-totalpop (as of Aug. 17, 2022).

[17] Laura Ramirez-Feldman, *Expert explains the CDC's new COVID guidance for schools*, Yahoo News (Aug. 24, 2022), https://news.yahoo.com/expert-explains-the-cd-cs-new-covid-guidance-for-schools-165908063.html (summarizing CDC epidemiologist's statement: "based on the latest data, around 95% of the population now has some level of immunity due to vaccination, previous infection or a combination of both.").

tools common across society now: good personal hygiene, social distancing, spending more time outdoors. Coronado, et al., *Implementing Mitigation Strategies in Early Care and Education Settings for Prevention of SARS-CoV-2 Transmission—Eight States, September–October 2020*, Morbidity and Mortality Weekly Report (Dec. 2020).[18] And the Government knew before it published the Rule that it was not expected to have any measurable health benefits for kids. *See* Opening Br. 27. Perhaps this knowledge is one reason the Government did not appeal the suspension of its Rule in half the country after losing the preliminary injunction motions in *Texas* and *Louisiana*.

Whatever the merits of the Government's position in the past—and the Schools do not concede the equities ever favored the Government—certainly the situation today is that "the pandemic is over," in President Biden's words, and over also is any compelling interest in the Rule's enforcement.

At the same time, there are other interests to weigh against the rule. One is the public interest, which includes individual citizens' "liberty interest in not being required to take a vaccine or be fired from their jobs." *Louisiana v. Becerra*, 2022 U.S. Dist. LEXIS 170714, *38 (W.D. La. Sept. 21, 2022). And from the Schools' perspective, "[s]erious resistance" from their workforce and the "serious [educational] disruption" that would follow from enforcing the mandate weigh in favor of a stay. *Kentucky*, 23 F.4th at 612. And that serious disruption has real

[18] www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6949e3-H.pdf (cited in Rule at 68,056 & n.50).

consequences, as students and families experience an altered educational environment. *See* Opening Br. 50-53. The Government makes no response to this or the other points raised by the Schools in their opening brief, including the difficulty of hiring new staff, the harm of disrupting student bonds with teachers, and the isolation of Head Start students from other students. Opening Br. 50-53.

CONCLUSION

We are all ready for this pandemic to be over, and perhaps no one more than the teachers and students who have been masked every day long after everyone else has been relieved of that obligation. *See At Head Start, Masks Remain On, Despite CDC Guidelines*, N.Y. Times (Sept. 9, 2022).[19] Indeed, HHS has said in public comments that it intends to issue a final rule to replace the interim rule soon, and that this final rule will not maintain the mask mandate (but, by implication, will maintain the vaccine mandate). *See Head Start Mask Announcement*, Office of Head Start (Sept. 19, 2022).[20]

The end of the pandemic means the end of any governmental interest in this Rule. But it does not mean this case is moot; as long as the Rule remains on the books, it harms children and families in the Schools' Head Start programs. And ultimately this Court must answer the legal question: was this Rule ever authorized by Congress? Because the Rule is not a financial management or administrative

[19] www.nytimes.com/2022/09/07/us/head-start-masks-toddlers.html.

[20] https://eclkc.ohs.acf.hhs.gov/physical-health/press-release/head-start-mask-announcement.

standard, or a condition of facilities standard, or an appropriate standard, the answer must be no.

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CERTIFICATE

Per FRCP 32(g), counsel certifies that this brief contains 4,150 words, as counted by Microsoft Word, in the body of the brief. /s/ Daniel R. Suhr, counsel of record