

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION**

<p>SANDY BRICK, JESSICA TRENN,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>JOSEPH R. BIDEN, <i>in his official capacity as President of the United States</i>; OFFICE OF HEAD START; BERNADINE FUTRELL, PH.D., <i>in her official capacity as Director of the Office of Head Start</i>; ADMINISTRATION FOR CHILDREN AND FAMILIES; JOOYEUN CHANG, <i>in her official capacity as Principal Deputy Assistant Secretary for the Administration for Children and Families</i>; DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECCERA, <i>in his official capacity as Secretary of the Department of Health and Human Services</i>;</p> <p style="text-align: center;">Defendants.</p>	<p>No.</p> <p style="text-align: center;">Complaint for Declaratory and Injunctive Relief</p>
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Introduction

1. On September 9, 2021, President Biden unveiled a comprehensive plan to vaccinate as many Americans as possible against COVID-19. Included in that plan was a COVID-19 vaccine mandate on persons employed by Head Start providers.

2. The Office of Head Start, Administration for Children and Families, and Department of Health and Human Services published an interim final rule in the Federal Register on Monday, November 30, 2021, 86 Fed. Reg. 68,052, that provides

a COVID-19 vaccination mandate on all staff, student-facing contractors, and all volunteers to have received the second dose of the COVID-19 vaccine by January 31, 2022; a universal mask mandate on all Head Start participants over age two; and for immediate implementation without notice-and-comment (the “Rule” or “Head Start Rule”).

3. Plaintiffs are employees of Head Start providers, located in Kinder, Louisiana, and Ashtabula, Ohio, who have not obtained the COVID-19 vaccine and do not wish to do so. Under the Head Start Rule, Plaintiffs will have their employment terminated if they do not obtain the first dose of the COVID-19 vaccine by January 3, 2022, and the second dose of the COVID-19 vaccine by January 31, 2022.

4. Through this lawsuit, Plaintiffs challenge the Head Start Rule as being published without notice and comment in violation of the Administrative Procedure Act (APA), 5 U.S.C. 553, and in excess of ACF’s statutory authority. Plaintiffs seek that this Court enter declaratory judgment, and temporary and permanent relief enjoining Defendants’ enforcement of the Head Start Rule.

Parties

5. Sandy Brick is a teacher at Allen Action Agency Inc.’s Head Start Center in Kinder, Louisiana. Ms. Brick has not obtained the COVID-19 vaccine and does not wish to do so.

6. Jessica Trenn is a co-teacher at Ashtabula County Head Start, which is run by Ashtabula County Community Action Agency in Ashtabula, Ohio. Ms. Trenn has not obtained the COVID-19 vaccine and does not wish to do so.

7. Defendants are officials of the United States government and United States governmental agencies responsible for implementing the Head Start interim final rule.

8. Defendant Joseph R. Biden is the President of the United States. President Biden is sued in his official capacity.

9. Defendant United States Office of Head Start (“OHS”) is an office within the Administration for Children & Families (“ACF”), which is a division of the Department of Health & Human Services. OHS administers grant funding and oversight to 1,600 public and private nonprofit and for-profit agencies that provide Head Start services.

10. Defendant Bernadine Futrell, Ph.D., is the Director of the Office of Head Start. She is sued in her official capacity.

11. Defendant Administration for Children & Families is a division of the Department of Health & Human Services. ACF promotes the economic and social well-being of families, children, individuals and communities.

12. Defendant JooYeun Chang is Principal Deputy Assistant Secretary for ACF. She is sued in her official capacity.

13. Defendant Department of Health & Human Services (“HHS”) is an independent federal agency.

14. Defendant Xavier Beccera is Secretary of the Department of Health and Human Services. He is sued in his official capacity.

Jurisdiction and Venue

15. The Court has jurisdiction under 5 U.S.C. §§ 702 and 703 and 28 U.S.C. §§ 1331, 1346, and 1361, under the United States Constitution, and pursuant to the Court's equitable powers.

16. 5 U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 1361, 2201, and 2202 authorizes the Court to award the requested declaratory and injunctive relief.

17. Venue is appropriate under 28 U.S.C. § 1391(e)(1)(B) because Defendants are agencies or officers of the United States and "a substantial part of the events or omissions giving rise to the claim occurred" in this District. Venue is also appropriate under 28 U.S.C. § 1391(e)(1)(C) because [REDACTED] of the plaintiffs reside or work in this District at [REDACTED], no real property is involved, and Defendants are agencies or officers of the United States.

Factual Allegations

18. On July 23, 2021, the White House acknowledged that imposing vaccine mandates is "not the role of the federal government; that is the role that institutions, private-sector entities, and others may take [W]e're going to continue to work in partnership to fight misinformation. And we're going to

continue to advocate and work in partnership with local officials and—and trusted voices to get the word out.” Jen Psaki, White House Press Briefing (July 23, 2021).¹

19. Yet, on September 9, 2021, President Biden reversed course, announcing “a new plan to require more Americans to be vaccinated, to combat those blocking public health.” *Remarks by President Biden on Fighting the COVID-19 Pandemic*, White House (Sept. 9, 2021).² He stressed that: “we must increase vaccinations among the unvaccinated with new vaccination requirements.” *Id.* He noted: “The bottom line: We’re going to protect vaccinated workers from unvaccinated co-workers.” *Id.*

20. The President indicated that he was “frustrated with the nearly 80 million Americans who are still not vaccinated” *id.*, claimed that unvaccinated persons “can cause a lot of damage—and they are” *id.*, and noted that he would not allow the unvaccinated, for whom his “patience is wearing thin,” *id.*, “to stand in the way of protecting the large majority of Americans who have done their part,” *id.*

21. However, the President undermined his assertion that the vaccinated need to be protected from the unvaccinated by saying that “as the science makes clear, if you’re fully vaccinated, you’re highly protected from severe illness, even if you get COVID-19.” *Id.* He then noted: “In fact, recent data indicates there is only one confirmed positive case per 5,000 fully vaccinated Americans per day.” *Id.*

¹ See <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/> (last visited Oct. 27, 2021).

² <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

22. The President announced that the federal government would issue five new COVID-19 vaccine mandates.

23. First, he announced an OSHA mandate requiring companies with 100 employees or more to either mandate vaccines or to have a policy that required employees to get tested weekly if they chose not to get vaccinated. OSHA issued its Emergency Temporary Standard implementing the vaccine mandate on November 5, 2021. The United States Court of Appeals for the Fifth Circuit issued a nationwide stay of that mandate holding that it likely exceeded OSHA's statutory authority. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *27 (5th Cir. Nov. 12, 2021).³

24. Second, the President also announced a mandate requiring healthcare employees working at facilities that accept Medicare or Medicaid patients to get vaccinated. On November 5, 2021, the federal Centers for Medicaid & Medicare Services (CMS) issued a rule requiring vaccination of employees of facilities that accept Medicare or Medicaid patients. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,583 (Nov. 5, 2021). On Tuesday, November 30, 2021, the U.S. District Court for the Western District of Louisiana issued a nationwide preliminary injunction against the CMS Rule. *Louisiana v. Becerra*, 3:21-CV-03970, ECF No. 28 (Nov. 30, 2021). That

³ The judicial panel on multidistrict litigation entered a consolidated order and assigned the *BST Holdings* case, along with other petitions challenging the OSHA ETS filed in all circuit courts throughout the country, in the Sixth Circuit Court of Appeals. *See In re OSHA, et al*, Case MCP 165 (J.P.M.L. Nov. 16, 2021).

injunction was upheld by the Fifth Circuit Court of Appeals, although the Fifth Circuit panel limited the injunction to apply only in the 14 states that were plaintiffs, rather than nationwide. *Louisiana v. Becerra*, No. 21-30734, (Dec. 15, 2021). The U.S. District Court for the Eastern District of Missouri also concluded the CMS Rule was likely illegal. *Missouri v. Biden*, 4:21-cv-01329, ECF No. 28 (Nov. 29, 2021). *But see, Florida v. Dept. of Health and Human Services*, 21-14098, ECF No. 11 (11th Cir., Dec. 6, 2021) (denying relief pending appeal).

25. Third, President Biden announced a mandate requiring all executive branch federal employees to get vaccinated. On September 9, 2021, the President issued Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees. *See* Exec. Order 14043, 86 Fed. Reg. 50,989 (Sept. 9, 2021).

26. Fourth, President Biden announced a mandate requiring employees of federal contractors to get vaccinated. This mandate was also covered by Executive Order 14043 issued by the President on September 9, 2021. On December 7, 2021, a federal district court in Georgia issued an order temporarily enjoining enforcement of the federal contractor vaccine mandate nationwide. *Georgia, et al. v. Biden, et al.*, No. 1:21-cv-163, ECF No. 94, (Dist. GA, Dec. 7, 2021). Another federal district court enjoined it in the plaintiff states. *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021).

27. Finally, President Biden announced that “we’ll require all of nearly 300,000 educators in the federal paid program, Head Start program, must be vaccinated.” *Remarks by President Biden, supra* note 2. The same day, the director

of the Office of Head Start at HHS sent a letter to Head Start providers introducing, “a new requirement for Head Start programs. All Head Start employees must be vaccinated against COVID-19.” The letter promised “rulemaking to implement this policy.”

28. On Monday, November 30, 2021, OHS, ACF, and HHS published an interim final rule requiring a vaccination mandate on all staff, student-facing contractors, and all volunteers to have received the second shot by January 31, 2022, and a universal mask mandate on all Head Start participants over age two. The Rule stated it would be immediately implemented without notice-and-comment. 86 Fed. Reg. 68,052.

29. The Rule significantly departed from President Biden’s September 9, 2021, remarks in at least two major ways: First, President Biden said nothing about mandating vaccines for all Head Start volunteers—nearly 1.1 million people, approximately two-thirds of whom are parents of children who participate in the program. Second, nothing in the White House’s September 9 plan made any mention of requiring program participants to wear masks.

30. The Head Start Act, 42 USC 9801 et seq., provides the sole legislative authority for OHS, ACF, and HHS to act to implement the Head Start Program.

31. There is no explicit statutory basis for mandating vaccination under the Head Start Act.

32. The Rule cites 42 U.S.C. § 9836a(a)(1)(C)–(E) as the basis for Defendants’ authority to implement the mandate on staff, student-facing contractors, and all volunteers to obtain the COVID-19 vaccine.

33. 42 U.S.C. § 9836a(a)(1)(C) provides HHS the authority to set “administrative and financial management standards” for Head Start programs. 42 U.S.C. § 9836a(a)(1)(D) provides HHS the authority to set “standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate).” 42 U.S.C. § 9836a(a)(1)(E) provides HHS the authority to set “such other standards as the Secretary finds to be appropriate.”

34. As the Head Start Rule acknowledges, the Administrative Procedure Act (APA), 5 U.S.C. 553, requires ACF to publish a notice of proposed rulemaking in the Federal Register and invite public comment on the proposed rule before the provisions of the rule take effect. *See* 86 Fed. Reg. 68,058. Section 553(b) requires the agency to publish a notice of the proposed rule in the Federal Register that includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues involved. Section 553(c) requires the agency to give interested parties the opportunity to participate in the rulemaking through public comment before the provisions of the rule take effect.

35. However, Section 553(b)(B) of the APA authorizes the agency to waive these procedures, if it finds good cause that notice and comment procedures are

impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

36. The Rule asserts that “it would be impracticable and contrary to the public interest” for ACF to undertake normal notice and comment procedures because the outbreaks associated with the Delta variant of COVID-19 “have shown that current levels of COVID-19 vaccination coverage up until now have been inadequate to protect Head Start staff, children, and families.” 86 Fed. Reg. 68,058. The Rule further justifies failing to undertake normal notice and comment procedures because “failure to achieve sufficiently high levels of vaccination based on voluntary efforts and patchwork requirements, potential harm to children from unvaccinated staff, continuing strain on the health care system, and known efficacy and safety of available vaccines” justifies “a vaccine requirement for Head Start staff, certain contractors, and volunteers is an essential component of the nation’s COVID-19 response.” 86 Fed. Reg. 68,059.

37. The “good cause” exception in 5 U.S.C. 553 is read narrowly in order to avoid providing agencies with an escape clause from the APA notice and comment requirements. *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011). Circumstances justifying reliance on this exception are indeed rare. *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C.C. 1981). The good cause exception has been described as “meticulous and demanding,” “narrowly construed,” “reluctantly countenanced,” and evoked only in “emergency situations.” *Sorenson Communications, Inc. v. F.C.C.*, 755 F.3d 702 (D.C.C. 2014).

38. Subsequent to the Rule’s publication, and only because of the Rule, Plaintiffs’ employing Head Start agencies have informed them that they must receive the first dose of a two-dose vaccine series by January 3, 2022, and that they must receive the second dose of a two-dose series, or the first dose of a one-dose vaccine, by January 31, 2022. Pursuant to the ACF mandate, failure to do so will result in their immediate termination.

Count I

The Rule was published without notice and comment in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 553, et seq.

39. The allegations in all preceding paragraphs are incorporated herein by reference.

40. The APA provides that the court must “hold unlawful and set aside agency action” that is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

41. “Notice and comment are not mere formalities. They are basic to our system of administrative law.” *NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018).

42. AFC does not dispute that it issued the Rule as an interim final rule without notice and comment. Rather, the Rule itself invokes Section 553(b)(B) of the APA, and asserts that “it would be impracticable and contrary to the public interest” because the Delta variant wave and data on effectiveness of vaccination both provide good cause to believe the public interest is served by immediate implementation. 86 Fed. Reg. 68,058–059.

43. However, it is well established that the “good cause” exception to notice-and-comment should be read narrowly in order to avoid providing agencies with an escape clause from the requirements Congress prescribed. *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011). The good cause exception should not be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them. *Id.* at 929.

44. “[A]n agency may not dispense with notice and comment procedures merely because it wishes to implement what it sees as a beneficial regulation immediately. Agencies presumably always believe their regulations will benefit the public. If an urgent desire to promulgate beneficial regulations could always satisfy the requirements of the good cause exception, the exception would swallow the rule and render notice and comment a dead letter.” *Ass’n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 498 (D. Md. 2020).

45. Instead, the exception is to be “narrowly construed” and only “reluctantly countenanced.” *United States v. Ross*, 848 F.3d 1129, 1132 (D.C. Cir. 2017) (quotation marks omitted). “[C]ircumstances justifying reliance on this exception are ‘indeed rare’ and will be accepted only after the court has ‘examine[d] closely proffered rationales justifying the elimination of public procedures.’” *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (citation omitted). Courts therefore generally restrict agencies’ use of the “good cause” exception “to emergency situations,” *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012), such as where a “delay would imminently threaten life or physical

property” or risk fiscal calamity,” *Sorenson Communications, Inc. v. FCC*, 755 F.3d 702, 706–07 (D.C. Cir. 2014). And courts must rely only on the basis articulated by the agency itself for invoking the exception at the time of the rulemaking. *Johnson*, 632 F.3d at 929.

46. Defendants’ attempt to justify “good cause” for not implementing notice-and-comment procedures cannot meet this exacting standard.

47. Although the Rule asserts that immediate implementation is justified because of the harmfulness of Delta variant and data on effectiveness of vaccination, the Defendants ignore the fact that President Biden proposed this Rule on September 9, 2021, yet the AFC did not actually publish the rule until November 30, 2021, nearly three months after the President proposed it. Further, the Rule itself gives staff, student-facing contractors, and all volunteers, until January 31, 2022, to receive the vaccine doses (not even to become fully vaccinated, which will take another several weeks after receiving the doses). That 142 days from the time the President issued a statement that the Rule would be issued and the time the Rule required full compliance. AFC’s finding that immediate implementation was necessary and therefore it had good cause to skip notice-and-comment is completely undermined by Defendants’ delay in adopting it and putting it into effect. Although vaccines have been available for nearly a year, Defendants did not impose a mandate until nearly three months after the President instructed it to do so as part of his plan to federalize public-health policy because he did not like the fact that some individual Americans citizens were not obtaining the COVID-19 vaccine.

48. As Judge Doughty, from this Court, held recently when granting a preliminary injunction to a challenge to the CMS vaccine mandate: “It took CMS almost two months, from September 9, 2021 to November 5, 2021, to prepare the interim final rule at issue. Evidently, the situation was not so urgent. . .” *Louisiana v. Becerra*, 3:21-CV-03970, ECF No. 28, at *24 (Nov. 30, 2021). In this case, it took almost *three* months. The fact that Defendants in this case took even longer to public the interim final rule is clearly not a basis to depart from Judge Doughty’s reasoning.

49. The Fifth Circuit reached a similar conclusion on the OSHA Mandate: “OSHA issued the Mandate nearly two months later, on November 5, 2021, and the Mandate itself prominently features yet another two-month delay. One could query how an ‘emergency’ could prompt such a ‘deliberate’ response.” *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *28 n.11 (5th Cir. Nov. 12, 2021).

50. Several other courts have also rejected efforts to use COVID as an excuse to skip notice-and-comment. *State v. Becerra*, 2021 WL 2514138, at 35-36 (M.D. Florida, June 18, 2021) (CDC rule on cruise ships); *Regeneron Pharmaceuticals, Inc. v. United States Dept. of Health and Human Resources*, 510 F.Supp. 3d, 29, 48 (S.D. NY. December 30, 2020) (CMS’s rule on drug prices); *Chamber of Commerce of the United States v. United States Dept. of Homeland Security*, 504 F. Supp. 3d 1077, 1094 (N.D. Cal., December 1, 2020) (DHS rule for visa program); *Association of*

Community Cancer Centers v. Azar, 509 F. Supp. 3d 482, 496 (D. Maryland, December 23, 2020) (CMS rule on Medicare Part B).

51. Further, the COVID-19 pandemic is not a sufficient excuse for avoiding notice-and-comment, effectively insulating Defendants from public input and limiting the agencies' transparency, considering that public debate over mandatory vaccination has been brewing in this country since even before the first vaccines were available.

52. The failure of Defendants to comply with the APA's notice-and-comment requirements provides an independent basis to enjoin the entire AFC interim final rule. *United States v. Cain*, 583 F.3d 408, 424 (6th Cir. 2009).

Count II

The Rule is in excess of ACF's statutory authority.

53. The allegations in all preceding paragraphs are incorporated herein by reference.

54. Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or is "in excess of statutory . . . authority[] or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

55. The AFC Rule is in excess of AFC's statutory authority because the Head Start Act does not clearly authorize AFC, OHS, or HHS to impose a vaccine or mask mandate.

56. AFC has never relied upon the Head Start Act to mandate staff, contractors, or volunteer vaccinations. Nor is there anything in the Head Start Act

that explicitly provides AFC the authority to mandate vaccinations or masks among staff, contractors, or volunteers.

57. Rather, the Rule cites 42 U.S.C. § 9836a(a)(1)(C)–(E) as the basis for Defendants’ authority to implement the mandate on staff, student-facing contractors, and all volunteers to obtain the COVID-19 vaccine and wear masks.

58. Section 9836a(a)(1)(C) provides HHS the authority to set “administrative and financial management standards” for Head Start programs. Section 9836a(a)(1)(D) provides HHS the authority to set “standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate).” Section 9836a(a)(1)(E) provides HHS the authority to set “such other standards as the Secretary finds to be appropriate.” None of these sections in the Head Start Act provide sufficient authority to AFC, OHS, or HHS to mandate vaccines or masks among staff, contractors, or volunteers.

59. This mandate is not an administrative or financial management standard.

60. The plain meaning of the statutory term “administrative and financial management standard,” 42 U.S.C. 9836a(1)(C) covers things like bookkeeping and compliance. This mandate goes far beyond setting financial and administrative management standards for Head Start programs and veers into the regulation of public health.

61. This mandate does not set standards for the condition and location of facilities.

62. The plain meaning of the statutory term “condition and location of facilities” is limited to the physical places that Head Start happens. “The plain meaning of ‘facility,’ as that word is used [here], is something ‘that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.’” *See Lostrangio v. Laingford*, 261 Va. 495, 499, 544 S.E.2d 357, 359 (2001) (quoting Webster’s Third New International Dictionary 812–13 (1993)). This provision gives HHS the power to regulate the safety of buildings and their surrounding spaces, not the quality or health consciousness of employees inside the buildings.

63. Nor does the mandate fall under Section 9836a(a)(1)(E) providing the agency the authority to set “such other standards as the Secretary finds to be appropriate.” Defendants’ interpretation that a mandate is an “appropriate” use of the Secretary’s authority raises significant constitutional questions.

64. First, stretching Section 9836a(a)(1)(E) to provide the Secretary the authority to issue a vaccine mandate for every staff members, contractor, and volunteer in every Head Start program as an “appropriate” exercise of the Secretary’s authority violates the major questions doctrine because such a substantial decision is the role of Congress. *BST Holdings*, at *23 (“the major questions doctrine confirms that the Mandate exceeds the bounds of OSHA’s statutory authority”); *Louisiana*, at *27.

65. Second, it violates the federalism doctrine for the Secretary to implement a vaccination mandate when that power is properly reserved to the states as the

primary public health authorities. *BST Holdings*, at *21 (“to mandate that a person receive a vaccine or undergo testing falls squarely within the States’ police power”).

66. Third, it violates the non-delegation doctrine for the Secretary to wield such tremendous power with no greater guide than “appropriate.” *Louisiana*, at *40 (“If CMS has the authority by a general authorization statute to mandate vaccines, they have authority to do almost anything they believe necessary, holding the hammer of termination of the Medicare/Medicaid Provider Agreement over healthcare facilities and suppliers.”); *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316, at *26–27 (E.D. Ky. Nov. 30, 2021) (“If OSHA promulgating a vaccine mandate runs afoul of the nondelegation doctrine, the Court has serious concerns about the FPASA, which is a procurement statute, being used to promulgate a vaccine mandate for all federal contractors and subcontractors”). *See BST Holdings*, at *8.

67. Because the AFC interim final rule mandating staff, student-facing contractors, and all volunteers of Head Start programs obtain the COVID-19 vaccine and wear masks is a federal action involving issues of major economic, social, and political significance, and is not authorized by a clear statement in the Head Start Act, it is beyond Defendants’ statutory authority. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

Count III

The Rule violates the U.S. Constitution’s Commerce Clause.

68. The allegations in all preceding paragraphs are incorporated herein by reference.

69. Federal agencies do not have the authority to enact a sweeping vaccine mandate. *See BST Holdings*, 2021 U.S. App. LEXIS 33698 at *27-28 (Duncan, J., concurring).

70. “Such claimed authority runs contrary to the text and structure of the Constitution” because “[t]he regulation of health and safety through compulsory vaccination is a traditional prerogative of the states – not the domain of Congress and certainly not fodder for the diktat of a federal administrative agency.” *MCP No. 165 v. United States DOL*, 2021 U.S. App. LEXIS 37024, *56 (6th Cir. December 15, 2021) (Bush, J., dissenting from denial of initial hearing en banc).

71. Although the Supreme Court has at times read the Commerce Clause broadly, it “has *never* crossed the Rubicon of declaring a federal police power.” *Id.* at *61; *see also United States v. Lopez*, 514 U.S. 549, 566 (1995) (Commerce Clause authority, “though broad, does not include the authority to regulate each and every aspect of local schools”); *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012) (Commerce Clause authority “must be read carefully to avoid creating a general federal authority akin to the police power”).

72. The authority to enact a vaccine mandate is part of the States’ police power. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905).

73. The authority to enact a vaccine mandate is an authority compelling a commerce in violation of the activity principle laid down in *NFIB v. Sebelius*.

74. The interim final rule is therefore beyond Defendants’ statutory authority.

Count IV

The Rule violates the U.S. Constitution’s legislative power clause.

75. The allegations in all preceding paragraphs are incorporated herein by reference.

76. The Supreme Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

77. Compulsory vaccination is a power “of vast economic and political significance.”

78. The Head Start Act does not contain a provision allowing OSHA, HHS, or the AFC to mandate vaccinations.

79. The Head Start Act does not contain a sufficient principle guiding administrative discretion and therefore violates the non-delegation doctrine, which requires Congress to make major policy decisions and to give agencies sufficient guidance as to the exercise of their implementation.

80. The interim final rule is therefore beyond Defendants’ authority.

Count V

The Rule violates the U.S. Constitution’s Tenth Amendment.

81. The allegations in all preceding paragraphs are incorporated herein by reference.

82. “The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively.” U.S. Const. Amend. X.

83. The police power is one such power. *See NFIB*, 567 U.S. at 536; *see also* Count III, *supra*.

84. Because the Head Start Rule mandating staff, student-facing contractors, and all volunteers of Head Start programs obtain the COVID-19 vaccine and wear masks is a federal action involving issues of major economic, social, and political significance, and is an exercise of police power granted to the States under the Tenth Amendment, it is beyond Defendants' authority.

Request for Relief

Plaintiffs respectfully request and pray for the following relief:

- A. Enter a declaratory judgment that the Head Start Rule was published without notice and comment in violation of the Administrative Procedure Act;
- B. Enter a declaratory judgment that the Head Start Rule mandating that staff, student-facing contractors, and all volunteers obtain the COVID-19 vaccine and mandating that all Head Start participants over age two wear masks exceeds the statutory authority of OHS, ACF, and HHS;
- C. Enter a temporary and/or preliminary relief, enjoining Defendants from implementing the Rule during the pendency of this case;
- D. Enter a permanent injunction preventing Defendants from implementing the Rule;
- E. Award any further relief to which Plaintiffs may be entitled, including attorneys' fees and costs; and
- F. Award such other relief as the Court deems equitable and just.

Dated: December 20, 2021

Respectfully Submitted,

/s/ Sarah Harbison

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Sandra Brick and Jessica Trenn
(b) County of Residence of First Listed Plaintiff Allen Parish, Louisiana
(c) Attorneys (Firm Name, Address, and Telephone Number)
Sarah Harbison, Pelican Institute, 400 Poydras St., Suite 900, New Orleans, LA 70130

DEFENDANTS
Joseph R. Biden, President, et al.
County of Residence of First Listed Defendant Washington, D.C.
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)
U.S. Attorney, Western District of Louisiana

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question
4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, INTELLECTUAL PROPERTY RIGHTS, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Administrative Procedure Act & 42 U.S.C. 1982
Brief description of cause:
APA and constitutional challenge to HHS Head Start vaccine mandate.

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE Dec. 21, 2021 SIGNATURE OF ATTORNEY OF RECORD /s/ Sarah Harbison

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.