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
Case No. 2:22-cv-10127
Honorable Nancy G. Edmunds

MOTION FOR INJUNCTION PENDING APPEAL

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MOTION

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Appellants ask this Court to grant an injunction during the pendency of their appeal.

BACKGROUND

This case is an APA challenge to the vaccination mandate promulgated by the U.S. Department of Health & Human Services ("HHS") on all Head Start program staff, contractors, and volunteers who interact with Head Start students. 86 Fed. Reg. 68,052. The Appellants are two Head Start program providers, both public school entities, who believe the rule is an illegal invasion of their prerogatives to run their programs. They know from conversations with their employees that imposing this mandate will force them to terminate staff, which will result in the closure of Head Start classrooms and the disenrollment of the most marginalized students in their school districts. The mandate will also make it substantially harder to hire new staff, making it all but impossible for one plaintiff, Livingston Educational Service Agency, to reopen its closed classrooms during this school year. Finally, the mandate will require Livingston to isolate the Head Start students and

teachers from the other students and teachers in the same building, further marginalizing and disadvantaging these students.

Appellants filed their complaint on January 20, 2022. D. Ct. Dkt. 1. The district court initially issued then extended a temporary restraining order to prevent irreparable harm. D. Ct. Dkt. 20, 32. The court eventually decided the motion for a preliminary injunction against the Appellants, ruling that they would suffer irreparable harm but were unlikely to succeed on the merits, and finding the harm and public interest factors weighed against them. D. Ct. Dkt. 46. In doing so, it broke from two other federal district courts that found a likelihood of success on the merits of similar challenges. *Texas v. Becerra*, No. 5:21-CV-300-H, 2021 U.S. Dist. LEXIS 248309 (N.D. Tex. Dec. 31, 2021); *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 U.S. Dist. LEXIS 1333 (W.D. La. Jan. 1, 2022). Appellants filed a notice of appeal and a motion for an injunction pending appeal below, which was denied. D. Ct. Dkt. 58. This motion promptly follows.

STANDARD OF REVIEW

An injunction pending appeal relies on four familiar factors: (1) whether the applicant has made a strong showing that he is likely to

succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) an injunction would substantially injure other parties interested in the proceeding; and (4) where the public interest lies. *See Luxshare, Ltd. v. ZF Auto. US, Inc.*, 15 F.4th 780, 783 (6th Cir. 2021); *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991). This is a flexible, holistic analysis: a strong showing of irreparable harm can offset more murkiness as to the merits. *Id.* In this circuit, a movant need only demonstrate "serious questions going to the merits," especially where the irreparable harm is clear. *Id.*

ARGUMENT

I. The Appellants are likely to succeed on the merits.

This appeal from the denial of preliminary injunction involves two primary legal questions: whether the Defendants had good cause to steamroll over the Administrative Procedure Act's normal requirement of notice-and-comment rule-making, and whether the Defendants possess the statutory authority to issue this rule.[1] The Appellants are

[1] Appellants have other claims that they do not press at the preliminary injunction stage because they require factual development that is more suited to summary judgment.

likely to succeed on both points, or at least have raised serious questions on both.

A. The Appellants are likely to prove that HHS did not have good cause to skip notice-and-comment rule-making.

Notice-and-comment rule-making is the cornerstone of federal administrative procedure; it is how we rationalize the democratic basis for bureaucrats making law. Thus, the APA only permits agencies to skip notice-and-comment when they have "good cause." 5 U.S.C. § 553. The agency made a finding of "good cause" for this rule, 86 Fed. Reg. 68,058, asserting that good cause exists based on the COVID-19 Delta variant wave and data on effectiveness of vaccination. *Id.* at 68,058–059.

The "good cause" exception is one for which the government bears a heavy burden, and which is "narrowly construed and only reluctantly countenanced." *United States v. Cain*, 538 F.3d 408, 420 (6th Cir. 2009). "There is a high bar to invoke the exception." *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 767 (4th Cir. 2012). These are "rare circumstances" such as emergencies or other situations where serious harm would result from a delay. *N.C. Growers' Ass'n,* 702 F.3d at 767 (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012)).

And an emergency or serious harm cannot be defined simply as stopping a bad thing sooner rather than later; otherwise most proposed rules would qualify, and the exception would overwhelm the rule. As Chief Judge Sutton said of the recent Occupational Safety and Health Administration ("OSHA") vaccine mandate, "'In case of emergency break glass' this is not—unless we wish to sideline the notice-and-comment process . . . with respect to every future medical innovation concerning COVID-19 for this federal agency and other ones too." *MCP No. 165,* No. 21-700, 2021 U.S. App. LEXIS 37024, at *39 (Sutton, J., dissenting from denial of initial hearing en banc). *Accord Florida v. Becerra*, 544 F. Supp. 3d 1241, 1296-97 (M.D. Fla. 2021) ("If the existence of a communicable disease alone permitted CDC to find 'good cause,' CDC would seldom, if ever, need to comply with the statutory requirement for 'good cause' to dispense with notice and comment."); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 498 (D. Md. 2020) ("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.").

No wonder, then, that numerous courts have rejected efforts to use COVID-19 as an excuse to skip notice-and-comment. *Florida*, 544 F. Supp. 3d 1241 (CDC rule on cruise ships); *Regeneron Pharmaceuticals, Inc. v. HHS*, 510 F. Supp. 3d, 29, 48 (S.D.N.Y. 2020) (CMS's rule on drug prices); *Chamber of Commerce v. DHS*, 504 F. Supp. 3d 1077, 1094 (N.D. Cal. 2020) (DHS rule for visa program); *Ass'n of Community Cancer Centers*, 509 F. Supp. 3d 482 (CMS rule on Medicare Part B). Defendants do not offer any justifications different from those rejected in these cases.

The one exception to this trend is admittedly from the most important court. In the Center for Medicaid & Medicare Services ("CMS") vaccine-mandate case, the Supreme Court acknowledged that it could not "say that in this instance the two months the agency took to prepare a 73-page rule constitutes 'delay' inconsistent with the Secretary's finding of good cause." *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022). The district court relied heavily on this line. D. Ct. Dkt. 46 at 18.

Here, the Head Start Rule was announced on September 9, but not published until November 30, almost a month after the CMS and OSHA mandates, even though it is only two-thirds the length of the CMS rule and one-third the length of the OSHA rule. And whereas the CMS rule

required a second shot by January 4, the Head Start Rule did not require a second shot until January 31. *Compare* 86 Fed. Reg. 61,555 *with* 86 Fed Reg. 68,052. In other words, HHS took longer to issue a shorter, less complicated, less pressing rule than the one the Supreme Court reluctantly countenanced in *Missouri*. No wonder the two other district courts to have considered the Head Start Rule rejected the good cause defense. *Texas*, 2021 U.S. Dist. LEXIS 248309, at *41 ("[T]his 82-day timeline, when paired with the 62-day vaccination-compliance period, disfavors finding this degree of federal involvement in pre-K programs to be an emergency that rendered notice and comment 'impracticable.'"); *Louisiana*, 2022 U.S. Dist. LEXIS 1333 at *37 (similar).

HHS's subsequent actions also make it hard to believe this Rule required immediate implementation. In twenty-five states, the Rule is preliminarily enjoined. *Texas*, No. 5:21-CV-300-H; *Louisiana*, No. 3:21-CV-04370. Those sweeping injunctions have thus been in force for over three months unchallenged and will remain in place for the duration of the district courts' proceedings in each case.

HHS's credibility on its good cause finding is severely compromised by its lack of alacrity in pursuing its interest in these cases. *See Church*

of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 547 (1993) ("A law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." (cleaned up)). "The government's actions undercut its representations of great urgency in implementation of the [Head Start] mandate." *Kentucky v. Biden,* No. 21-6147, 2022 U.S. App. LEXIS 267, at *51 (6th Cir. Jan. 5, 2022). The government may have moved promptly to implement and defend the CMS mandate; it did not do so here, and must live with the consequences of its choices.

B. The Appellants are likely to succeed on their claim that HHS does not possess the statutory authority to issue this Rule.

"Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. DOL*, 142 S. Ct. 661, 665 (2022). That authority must be especially clear when an agency exercises great power. *Id*. "The question, then, is whether the Act plainly authorizes the Secretary's mandate." *Id*.

The Head Start Act does not "plainly authorize" a nationwide vaccine mandate for staff, contractors, and volunteers of program sites. The Rule cites "authority granted to the Secretary by sections

641A(a)(1)(C), (D) and (E) of the Head Start Act," 42 U.S.C. § 9836a(a)(1)(C)–(E)). 86 Fed. Reg. 68,052. Section 9836a(a)(1) empowers the Secretary to "modify" the "performance standards" for programs that receive Head Start funding. The statute then specifies several specific types of performance standards. Subsection (C) provides HHS the authority to set "administrative and financial management standards" for Head Start programs. Subsection (D) provides HHS the authority to set "standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate)." And Subsection (E) provides HHS the authority to set "such other standards as the Secretary finds to be appropriate." None of these provisions plainly authorizes a vaccine mandate.

1. This rule is not an administrative or financial management standard.

The plain meaning of the statutory term "administrative and financial management standard," 42 U.S.C. § 9836a(1)(C), covers things like bookkeeping and back-office compliance. For instance, HHS's Departmental Appeals Board upheld the termination of a Head Start grant for failure to observe "administrative and financial management standards" when it found misuse of funds, failure to pay employer-side

taxes, lack of internal recordkeeping, and lack of an employee code of conduct. *In re Babyland Family Services, Inc.*, HHS Dept. Appeals Bd., DAB No. 2109, 2007 HHSDAB Lexis 62 (Aug. 28, 2007). These are the sorts of things that count as "administrative and financial management standards."

In the *Texas* case, HHS conceded that the Rule is not a "financial management standard," but maintained it is an "administrative standard." 2021 U.S. Dist. LEXIS 248309, at *10-11. The *Texas* court correctly rejected this reading, concluding that "the scope of 'administrative standards' is informed by the term to which it is joined: 'financial management standards.'" 2021 U.S. Dist. LEXIS 248309, at *19. In both terms, the reference is to back-end operations, not regulation of employee or volunteer health. *See Georgia v. Biden*, No. 1:21-cv-163, 2021 U.S. Dist. LEXIS 234032, at *29 (S.D. Ga. Dec. 7, 2021) (the federal contractor mandate "goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting . . . "). Plus, if "administrative standards" can mean "vaccinate all staff," it can mean virtually anything.

The court below devoted one sentence to this claim: "the Secretary is trying to 'keep the doors open' at Head Start, and the Rule seeks to accomplish that goal after nearly two years of program closures and staff shortages due to COVID-19." D. Ct. Dkt. 46 at 8. Appellants share the goal of keeping the doors open—that is why they brought this lawsuit—but that goal does not transform this mandate into an "administrative standard."

2. This Rule does not set standards for the condition and location of facilities.

The statutory term "condition and location of facilities," 42 U.S.C. § 9836a(a)(1)(D), 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.'" *Lostrangio v. Laingford*, 544 S.E.2d 357, 359 (Va. 2001) (quoting Webster's Third New Int'l 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. It concerns fire codes, not which teachers a school hires or fires. *Texas*, 2021 U.S. Dist. LEXIS 248309, at *21.

The Secretary has already promulgated rules that apply this authority, requiring that "premises are . . . kept free of undesirable and hazardous materials and conditions" and that "each facility's space, light, ventilation, heat, and other physical arrangements are consistent with the health, safety and developmental needs of children." 45 C.F.R. § 1304.53(10). The rule applies to circumstances such as a playground with the "presence of vines with berries, cluttered trash and leaves, and a play structure with splinters and rusty nails." *In re Camden Cty. Council on Econ. Opportunity*, HHS Dept. Appeals Bd., DAB No. 2116, 2007 HHSDAB Lexis 79 (Sept. 25, 2007). *See Camden Cty. Council on Econ. Opportunity v. HHS*, 586 F.3d 992, 995 (D.C. Cir. 2009) (Kavanaugh, J.).

The court below found that "Congress included concerns regarding 'indoor air quality' among those related to 'the condition and location of [Head Start] facilities.'" D. Ct. Dkt. 46 at 8. Because COVID-19 is an airborne pathogen, the court reasoned "indoor air quality . . . would be improved" if people were vaccinated against COVID-19 and thus not spreading it through the air. *Id.* at 8-9. It is more than a stretch to say a vaccine mandate against an airborne pathogen is an air quality standard, and no other court has accepted such a strained interpretation.

Louisiana, 2022 U.S. Dist. LEXIS 1333, at *24; *Texas*, 2021 U.S. Dist. LEXIS 248309, at *21. By comparison, OSHA has explicit power to regulate against air contaminants, 36 Fed. Reg. 10,466, but that never justified its vaccine mandate, and indeed Chief Judge Sutton twice distinguished air pollution from communicable diseases when considering the OSHA rule. *See MCP No. 165 v. United States DOL*, No. 21-7000, 2021 U.S. App. LEXIS 37024, at *8 & *25 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc).

3. The Rule is not "appropriate."

Finally, the Head Start Rule is not an "appropriate" exercise of the Secretary's power, for three reasons. First, the statute itself defines the scope of what is "appropriate," providing that no rule can undermine access to Head Start services for indigent children: "[T]he Secretary shall . . . ensure that any such revisions in the standards will not result 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). And this makes sense: Congress wanted to ensure maximum access to a program to serve vulnerable kids, and didn't want bureaucratic decisions or red tape restricting access. This rule

violates that fundamental principle: as the district court found, the natural result of this rule is that teachers will be fired, classrooms will close, and students will be unenrolled. D. Ct. Dkt. 46 at 23. Indeed, in the rule itself HHS predicted a laundry list of just such outcomes if classrooms closed even on a temporary basis. 86 Fed Reg. 68,057-58. And the National Head Start Association predicted in a letter that the Rule "could result in the closing of over 1,300 Head Start classrooms." D. Ct. Dkt. 30-3. Perhaps HHS believes it is acceptable to close classrooms to fight the pandemic. Congress made a different choice when it defined what counts as "appropriate"—no rule can undermine the ultimate statutory purpose of serving vulnerable students by reducing the quality or scope of services available.

Second, the Rule is not "appropriate" because it was not developed in line with the statutory requirement that any standards come only after HHS "consult[s] with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head

Start programs." 42 U.S.C. § 9836a(a)(2)(A). The Rule says HHS "consulted with experts in child health, including pediatricians, a pediatric infectious disease specialist, and the recommendations of the CDC and FDA." 86 Fed. Reg. 68,054. But the Rule makes no claim to have consulted experts in the administration and operation of Head Start programs, even as the agency claims this is an administrative and facilities standard.

Third, "canons of interpretation still would likely foreclose construing [any] ambiguity in the government's favor." *Kentucky*, 2022 U.S. App. LEXIS 267, at *43-44. These canons and principles are numerous.

To begin with, the measure is unprecedented. "[T]his is the first time that Head Start has ever mandated a medical procedure as a precondition to new or ongoing employment." *Texas*, 2021 U.S. Dist. LEXIS 248309, at *11. *See also Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *31 ("[T]he statute upon which Agency Defendants base their authority has never been used to impose a mandatory specific medical treatment upon individuals."). Though HHS has required routine health screenings for employees, that is not the same as mandating a medical

procedure (like the flu vaccine). *Contra* D. Ct. Dkt. 46 at 3. In both the OSHA and federal contractor cases, "[t]his 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666; *Kentucky*, 2022 U.S. App. LEXIS 267, at *47 ("The dearth of analogous historical examples is strong evidence that § 101 does not contain such a power."). *See MCP No. 165*, No. 21-7000, 2021 U.S. App. LEXIS 37024, at *14 (Sutton, C.J., dissenting from denial of initial hearing en banc) ("A 'lack of historical precedent' tends to be the most 'telling indication' that no authority exists.'" (quoting *Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))).

Additionally, the Secretary's assertion of authority lacks a limiting principle. *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *24; *Texas*, 2021 U.S. Dist. LEXIS 248309, at *23. Put differently, it violates the non-delegation doctrine for the Secretary to wield such tremendous power with no greater guide than "appropriate." In *Kentucky*, this Court noted: "If the government's interpretation were correct—that the President can do essentially whatever he wants so long as he determines it necessary

to make federal contractors more 'economical and efficient'—then that *certainly* would present non-delegation concerns." 2022 U.S. App. LEXIS 267, at *45 n.14 (emphasis original). This Court expressed similar non-delegation concern about "near-dictatorial power for the duration of the pandemic" if the CDC director could deem anything to be an "other measure" authorized by the CDC statute. *Tiger Lily, LLC v. United States HUD*, No. 21-5256, 2021 U.S. App. LEXIS 21906, at *10 (6th Cir. July 23, 2021). Yet here the government asserts even broader power than in *Kentucky*. At least "economical and efficient" is arguably an intelligible principle. "Appropriate," much like "as in his judgment are necessary," is a blank check.

Next, it violates the major questions doctrine for the Secretary rather than Congress to make such a substantial decision as a vaccination mandate, especially one imposed nationwide through the piecemeal actions of various agencies. *Texas*, 2021 U.S. Dist. LEXIS 248309, at *32; *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *26 & n.18. *See also Kentucky*, 2022 U.S. App. LEXIS 267, at *44-45; *Tiger Lily*, 2021 U.S. App. LEXIS 21906, at *7. This is especially true when the Head Start Rule is seen in the broader context of the President's September 9,

2021, package of newly imposed federal vaccine mandates. *See Kentucky*, 2022 U.S. App. LEXIS 267, at *51 n.15.

In a similar vein, the Court should be skeptical when an education program for children becomes a public health program for adults. "[I]mposing a vaccine mandate on [1] million Americans in response to a worldwide pandemic is simply not 'part of what the agency was built for.'" *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665; *Kentucky*, 2022 U.S. App. LEXIS 267, at *51 n.15 (saying the mandates in the President's September 9 package were "simply a pretext to increase vaccination"). The Office of Head Start exists to run pre-K programs, not to drive down the number of unvaccinated Americans in society. This Court is "not required to exhibit a naiveté" about the true goal, however admirable, and should insist on high standards of specific authority when faced with an attempted "workaround" of the Constitution and Congress. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *28, n.13 (5th Cir. Nov. 12, 2021) (quoting Twitter feed of White House Chief of Staff Ron Klain).

Similarly, it violates the federalism canon for the Secretary to implement a vaccination mandate when that power is properly reserved

to the states as the primary public health authorities. *Kentucky*, 2022 U.S. App. LEXIS 267, at *49-50. *See Tiger Lily*, 2021 U.S. App. LEXIS 21906, at *7. *See also BST Holdings, L.L.C.*, 2021 U.S. App. LEXIS 33698, at *21. *Accord Texas*, 2021 U.S. Dist. LEXIS 239608, at *15; *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *38. "[A]gencies cannot skirt the federalism implications of their actions by pretending that 'decades-old statute[s]' somehow 'indirectly' grant them novel powers to intrude into 'particular domain[s] of state law.'" *Kentucky*, 2022 U.S. App. LEXIS 267, at *52 n.17 (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486, 2488-89).

Here, the State of Michigan has promulgated various requirements for public schools throughout this pandemic to keep students and staff safe. *See* Whitmer Exec. Order 2020-65 (April 30, 2020).[2] At no point has it mandated vaccination for all public school employees; indeed, it has left that decision up to local school boards, most of which have chosen to leave the decision to their teachers.[3] It is an invasion of Michigan's

[2] See generally https://www.michigan.gov/mde/resources/coronavirus/mde-covid-19-education-information-and-resources.
[3] Koby Levin, *Few Michigan districts require staff vaccines amid COVID spike*, Chalkbeat (Jan. 13, 2022), https://detroit.chalkbeat.org/2022/1/13/22882761/covid-michigan-district-staff-vaccine-test-mandate.

sovereign public-health policy choices for the federal government to override them as to some teachers within Appellants' employ.

The problem with relying on "appropriate" can also be seen by juxtaposing Head Start's statute with two other statutes recently reviewed by the Supreme Court: the CMS statute and the CDC statute. The text and historical interpretation of the CMS statute were the basis for the Supreme Court's decision upholding the CMS mandate. "Congress ha[d] authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" *Missouri*, 142 S. Ct. at 652 (quoting 42 U. S. C. §1395x(e)(9)). "Necessary in the interest of the health and safety" of Medicaid/Medicare enrollees, for a program focused on providing healthcare, is a far plainer authority for a vaccine mandate than the Head Start Act's "appropriate." The CMS rule "fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession . . ." *Missouri*, 142 S. Ct. at 652. The Secretary in *Missouri* could also point to similar infection control measure mandates

by CMS in other contexts, whereas Head Start has never asserted such broad authority over employees' and volunteers' health decisions as it does here. This is the same analysis that led the District of Arizona to conclude that the Supreme Court's holding as to CMS was distinguishable from the mandate on federal contractors under the Procurement Act. *Brnovich v. Biden*, No. CV-21-01568-PHX-MTL, 2022 U.S. Dist. LEXIS 15137, at *60-62 (D. Ariz. Jan. 27, 2022).

The *Texas* court points to a different Supreme Court decision that is a better guide than *Missouri*, namely *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021). There, as here, HHS tried to rely on "a catch-all provision, similar to the one in this case—'other measures, as in [the Secretary's] judgment may be necessary.'" *Texas*, 2021 U.S. Dist. LEXIS 248309, at *24 (quoting 42 U.S.C. § 264). "But the [Supreme] Court explained that 'the sheer scope of the CDC's claimed authority . . . would counsel against' the CDC's interpretation, because it was 'hard to see what measures [it] would place outside the CDC's reach.'" *Id.* (quoting *Alabama Realtors*, 141 S. Ct. at 2487). Judge Hendrix concluded that, "[a]lthough, this case, of course, deals with different statutory language, the agency's similar claim to expansive authority based on generalized

and catch-all language undermines its position." *Id*. This Court reached a similar conclusion in *Tiger Lily*: "other measures, as in his judgment may be necessary" did not give the Secretary of HHS unbounded authority over all things everywhere in the pursuit of public health. 2021 U.S. App. LEXIS 21906, at *7.

A staff and volunteer vaccination mandate is plainly neither an administrative management standard nor a facility standard. And it cannot fit within the broad catch-all provision of "appropriate" standards either without raising serious constitutional concerns. The Supreme Court's decision in *Missouri* is an inapposite guide, because unlike in that case, here there is no specific statutory hook for the rule. Instead, this case is closer to the broad, catch-all authorities rejected in *Alabama Realtors*, *Tiger Lily*, and *Kentucky*. Those precedents dictate the same outcome here.

II. The other factors favor granting an injunction pending appeal.

In addition to raising at least a strong question as to the merits, Plaintiffs have conclusively demonstrated irreparable harm. The District Court initially issued a temporary restraining order to prevent

irreparable harm, and then extended it. D. Ct. Dkt. 20, 32. Ruling on the preliminary injunction, the court concluded that they were irreparably harmed by immediate imposition of the Rule. D. Ct. Dkt. 46 at 23. The district court was especially mindful of the impact of the staffing crisis for students. *Id*. ("Students' loss of in-person learning time and related hardships on students' families and Plaintiffs constitute 'irreparable harm.'").

"The children and families served by Head Start are largely comprised of individuals who experience economic hardship and have been historically underserved and marginalized." "Head Start programs provide critical services to meet the health, nutrition, and early learning needs of these children and families." "[P]rogram closures . . . create instability and stress for children and families. They disrupt children's opportunities for learning, socialization, nutrition, and continuity and routine." Moreover, "[p]rogram closures impede Head Start families from participating in the workforce, impos[ing] financial hardship on low wage workers who may not have paid time off to care for children . . . "

These conclusions as to the harms of Head Start program closure are taken directly from the Rule's justification. 86 Fed. Reg. 68,057.

There, the Rule is referencing instances when program staff who test positive for COVID-19 force short-term classroom closures. But those same harms will occur, and be far greater and permanent, if the Rule is not enjoined and the Appellants are forced to make long-term or permanent classroom closures. Head Start has strict student-teacher ratio requirements, so students cannot simply be shifted into another setting. Classrooms will close and students will be unenrolled in the middle of the school year if the Appellants are forced to fire their teachers.

The Appellants' showing of irreparable harm is even stronger when weighed against the Government's lackadaisical attitude toward its supposedly compelling interest in this rule. Again, HHS did not move for interlocutory appellate review after losing in two other district courts, such that the Head Start Rule is not effective in twenty-five states. *Texas*, No. 5:21-CV-300-H; *Louisiana*, No. 3:21-CV-04370. It is difficult for HHS to now claim it cannot wait mere weeks enforce its mandate against two additional Head Start providers, given its lack of urgency in pursuing its interest elsewhere.

Finally, though HHS is rightly concerned about the impact of COVID-19 spread on Head Start program participants and the general public, the government is not entitled to automatically prevail in every request for injunctive relief against a measure aimed at combatting the pandemic. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666 ("The equities do not justify withholding interim relief."). As this Court has recognized, "[s]erious resistance" from a workforce and consequent "serious [educational] disruption" weigh in favor of a stay. *Kentucky*, 2022 U.S. App. LEXIS 267, at *52. And here the "harm to others" includes the "significant encroachment into the lives—and health—of a vast number" of Plaintiffs' employees and volunteer who do not wish to become vaccinated. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

Two ultimate equitable principles hold sway here. First, it is "the responsibility of those chosen by the people through democratic processes" to "weigh such tradeoffs" between public health and other interests. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666. Here, the school boards of the Appellants have found that the goal of vaccination does not justify mass layoffs across its teacher workforce in the middle of the school year. Certainly their judgment as to the health and safety of their

students and staff is entitled to consideration as an accurate reflection of the public interest in their community. Second, "the public's true interest lies in the correct application of the law." *Kentucky*, 2022 U.S. App. LEXIS 267, at *56. Because the Appellants are likely to succeed on the law, the public interest weighs in their favor.[4]

CONCLUSION

This Court should grant an injunction pending appeal to prevent irreparable harm while the Appellants promptly pursue their appeal.

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Respectfully submitted,

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[4] Because the Government does not stand to incur any monetary loss, no security should be required. *Kentuckians v. U.S. Army Corps of Eng'rs*, No. 3:12-CV-00682-TBR, 2013 U.S. Dist. LEXIS 133339, at *14 (W.D. Ky. Sep. 18, 2013); *Planned Parenthood of Greater Wash. & N. Idaho v. United States HHS*, 328 F. Supp. 3d 1133, 1153 (E.D. Wash. 2018). *See* F.R.A.P. 8(a)(2)(E).

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Century Schoolbook font, size 14, double-spaced, and is 5,131 words, which is under the limit of 5,200 words for such a motion. *See* Fed. R. App. P. 27(d). /s/ Amy E. Murphy