No. 22-1257

IN THE 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; U.S. 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)

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ALISA B. KLEIN
SARAH J. CLARK
Attorneys, Appellate Staff
Civil Division, Room 7216
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8727

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INTRODUCTION AND SUMMARY OF ARGUMENT

Head Start is a federally funded program under which local public and private entities provide health, education, nutrition, and other services to low-income preschool children and their families. 42 U.S.C. § 9831. The Secretary of Health and Human Services (HHS) has express statutory authority to establish standards for Head Start programs, *id*. § 9836a(a)(1), and to require the correction of a deficiency that "threatens the health or safety of staff or program participants," *id.* § 9836a(e)(1)(B)(i). The regulations (unchallenged here) thus require Head Start programs to "ensure staff do not, because of communicable diseases, pose a significant risk to the health or safety of others in the program." 45 C.F.R. § 1302.93(a).

In the interim final rule (IFR) at issue here, the Secretary required Head Start grantees to ensure that personnel who interact with children are vaccinated against COVID-19 (subject to religious and medical exemptions). *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68,052 (Nov. 30, 2021). Non-exempt personnel were required to be fully vaccinated by January 31, 2022. *Id.*

Plaintiffs are two school districts that receive federal grants to operate Head Start programs in Michigan.[1] On January 24, 2022, just a week before the deadline for non-exempt staff to be fully vaccinated, plaintiffs moved for a preliminary injunction. Prelim. Inj. Mot., RE 5, Page ID # 122. The district court entered a limited temporary restraining order but, after further briefing and an evidentiary hearing, dissolved the temporary restraining order and denied a preliminary injunction. 3/4/2022 Order, RE 46, Page ID # 1154. The district court subsequently denied plaintiffs' motion for an injunction pending appeal. 4/8/2022 Order, RE 58, Page ID # 1298.

This Court likewise should deny plaintiffs' motion for an injunction pending appeal. The district court correctly concluded that plaintiffs' claims fail on the merits under the Supreme Court's reasoning in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), which upheld a similar IFR requiring federally funded healthcare facilities to ensure that their staff are vaccinated against COVID-19. As in that case, the Secretary has express statutory authority to protect the health and safety of participants in Head Start programs. As in that case, the Secretary had good cause to issue the IFR

[1] Two other school districts joined this action but their claims were voluntarily dismissed. 4/8/2022 Order, RE 58, Page ID # 1298 n.1.

without advance notice and comment. And as in that case, the Secretary reasonably determined that the IFR's benefits for program participants—many of whom are too young to be vaccinated—outweighed the risks, including the risk that some personnel would quit rather than be vaccinated.

Plaintiffs' motion also should be denied on the independent ground that they "failed to show that they would be irreparably harmed if an injunction does not issue" and that the remaining factors "tilt decisively in the Government's favor." 4/8/2022 Order, RE 58, Page ID # 1305. In declarations filed on February 24, plaintiffs predicted that their programs would be disrupted if personnel quit rather than be vaccinated, but plaintiffs failed to update those declarations or demonstrate good-faith efforts to comply with the IFR after the preliminary injunction was denied. *Id.*, Page ID # 1302-04, 1303 n.2. In any event, as the district court explained, the Secretary took the risk of program disruptions from staff departures into account and concluded that it was outweighed by the IFR's health benefits for the children and their families and the reduction in disruptions caused by COVID-19 infection and quarantine. Plaintiffs' disagreement with that determination is irrelevant because a court's role "is to 'simply ensur[e] that the agency has acted within a zone of reasonableness.'" *Missouri*, 142 S. Ct.

at 654 (alteration in original) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).[2]

STATEMENT

A. The Head Start Program

Head Start is a federal grant program that supports the provision of comprehensive health, education, parental involvement, nutritional, social, and other services to low-income children through age five and their families. 42 U.S.C. § 9831. Program funds go directly to local grantees, and do not pass through the state. *See id.* §§ 9834, 9835. Head Start grants are discretionary—no one is entitled to a Head Start grant or to attend a Head Start program. *See* HHS, *Grant Policy Statement*, at I-1, I-3-I-4 (Jan. 1, 2007), https://perma.cc/PME5-9724 (Grant Policy Statement); *see also* 42 U.S.C. § 9833. When an entity chooses to apply for and receives a Head Start grant, it agrees that it will meet all of the standards that HHS imposes. *See* Grant Policy Statement; 42 U.S.C. §§ 9836(d)(2)(F), 9836a(a)(1). If an entity

[2] Plaintiffs' motion relies heavily on the district court opinions in *Louisiana v. Becerra*, No. 3:21-CV-4370, 2022 WL 16571 (W.D. La. Jan. 1, 2022), and *Texas v. Becerra*, No. 5:21-CV-300-H, 2021 WL 6198109 (N.D. Tex. Dec. 31, 2021). However, those opinions predated the Supreme Court's *Missouri* decision and, as the government has explained in pending dispositive motions, the claims fail under the Supreme Court's reasoning.

determines that it can no longer maintain the standards set for Head Start programs, it may relinquish its grant and provide early childhood services through a non-Head Start program instead.

Congress authorized the HHS Secretary to impose and modify performance standards for Head Start programs. 42 U.S.C. § 9836a(a)(1). Those include "administrative and financial management standards," *id.* § 9836a(a)(1)(C), "standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate)," *id.* § 9836a(a)(1)(D), and "such other standards as the Secretary finds to be appropriate," *id.* § 9836a(a)(1)(E). Congress authorized the Secretary to identify and order the correction of a program "deficiency," *id.* § 9836a(e)(1), defined to include "a systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves—(i) a threat to the health, safety, or civil rights of children or staff," *id.* § 9832(2)(A).

Accordingly, the Secretary has addressed staff health and safety issues in standards that are unchallenged here. Head Start programs have a responsibility to "ensure staff do not, because of communicable diseases, pose a significant risk to the health or safety of others in the program." 45

C.F.R. § 1302.93(a). Moreover, Head Start personnel are required to have "an initial health examination and a periodic re-examination as recommended by their health care provider in accordance with state, tribal, or local requirements, that include screeners or tests for communicable diseases, as appropriate." *Id.* Current standards also include staff training on prevention and control of infectious diseases and establishing administrative procedures regarding protection from contagious diseases. *Id.* § 1302.47(b)(4)(i)(A), (b)(7)(iii).

Historically, the Secretary's standards for Head Start programs have evolved to respond to the most pressing health and medical threats of the times. In the 1990s, for example, the Secretary addressed the appropriate treatment of children with HIV. *See* 45 C.F.R. § 1308 app. (2015). In 1996, the Secretary required health examinations and tuberculosis screening for Head Start staff and regular volunteers. *See Head Start Program*, 61 Fed. Reg. 57,186, 57,210, 57,223 (Nov. 5, 1996). And in 2016, in response to public comments that it no longer made sense to single out tuberculosis, HHS revised its standards to include more general language about staff health and communicable diseases. *See Head Start Performance Standards*, 81 Fed. Reg. 61,294, 61,357, 61,433 (Sept. 6, 2016).

Other standards have likewise addressed health concerns. In 1975, just one year after Congress made Head Start a permanent program, Head Start grantees were required to assist program participants with the provision and completion of "all recommended immunizations," including diphtheria, pertussis, tetanus, polio, and measles. 45 C.F.R. § 1304.3-4(2) (1975), RE 39-3, Page ID # 830. Head Start facilities were also required to space infant cribs at least three feet apart and exclude children with contagious illnesses from the program so as not to "pose[ ] a significant risk to the health or safety of the child or anyone in contact with the child." 45 C.F.R. §§ 1304.22(b), 1304.22(e)(7) (2011).

B. The Interim Final Rule

"COVID-19 is a highly contagious, dangerous, and . . . deadly disease." *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam). Due to the virus, over 90 percent of Head Start programs closed all in-person operations for varying lengths of time beginning in spring 2020. 86 Fed. Reg. at 68,058. Once vaccines were widely available, HHS informed grantees that it expected Head Start programs to resume fully in-person services beginning in January 2022. *Id.* at 68,058, 68,062.

On November 30, 2021, the Secretary issued the IFR at issue here, which requires that personnel who interact with Head Start students be vaccinated against COVID-19 unless they receive a religious or medical exemption. 86 Fed. Reg. at 68,061. The IFR set a January 31, 2022 deadline for individuals to either receive a single-shot vaccine, obtain the second shot of a two-dose vaccine, or request an exemption from their employer. *Id*. at 68,052. The IFR also required masking, effective immediately, *id*., but plaintiffs do not challenge that requirement.

The Secretary made detailed findings in support of the IFR. The Secretary found that it was "necessary and appropriate to set health and safety standards for the condition of Head Start facilities that ensure the reduction in transmission of [COVID-19] and to avoid severe illness, hospitalization, and death among program participants," 86 Fed. Reg. at 68,054. He found the efficacy of COVID-19 vaccinations had been demonstrated, that vaccines continued to be effective against the then-dominant Delta variant, and that emerging evidence suggested that infected vaccinated people had the potential to be less infectious than infected unvaccinated people, thus decreasing transmission risk. *Id.* at 68,052. The Secretary accordingly concluded that requiring vaccination among those

who are eligible is one of the best defenses against COVID-19, particularly because most Head Start students are too young to be vaccinated. *Id.* at 68,055.

In developing the IFR, the Secretary consulted with experts in child health and considered the disproportionate effect of COVID-19 on the low-income and minority communities Head Start serves, and observed there was potential for "devastating consequences" for children and families due to program closures and service interruptions caused by COVID-19 infections. 86 Fed. Reg. at 68,054, 68,056. The Secretary found good cause to issue the IFR without advance notice and comment, particularly in light of the potential winter surge in COVID-19 cases and the planned return to fully in-person services. *See id.* at 68,059.

C. District Court Proceedings

Nearly two months after the IFR was issued and less than two weeks before the deadline for personnel to be fully vaccinated, plaintiffs filed this action and moved for a preliminary injunction. Prelim. Inj. Mot., RE 5, Page ID # 122. The district court initially entered a limited temporary restraining order but, after further briefing and an evidentiary hearing, dissolved the temporary restraining order and denied a preliminary injunction. 3/4/2022

Order, RE 46, Page ID # 1154. Plaintiffs then moved for an injunction pending appeal, which district court denied. 4/8/2022 Order, RE 58, Page ID # 1298. The district court concluded that plaintiffs' claims fail on the merits under the Supreme Court's reasoning in *Missouri*, 142 S. Ct. 647. 3/4/2022 Order, RE 46, Page ID # 1160-74; 4/8/2022 Order, RE 58, Page ID # 1300-01. In addition, the district court concluded that plaintiffs "failed to show that they would be irreparably harmed if an injunction does not issue" and that the remaining factors "tilt decisively in the Government's favor." 4/8/2022 Order, RE 58, Page ID # 1305; *see id.*, Page ID # 1301-05.

ARGUMENT

An injunction pending appeal "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To justify that relief, the movant must show that it "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. As the district court correctly concluded, plaintiffs have not satisfied any of those requirements.

I. Plaintiffs Are Unlikely To Succeed On The Merits Of Their Claims.

Plaintiffs cannot establish that they are likely to succeed on the merits. Contrary to plaintiffs' contentions, Mot. 4, the Secretary had statutory authority to issue the IFR and had good cause to do so without advance notice and comment.

A. The Secretary Had Statutory Authority To Issue The IFR.

Like the IFR at issue in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), the IFR at issue here falls within the Secretary's express statutory authority. A central purpose of the federally funded Head Start program is to provide "health . . . services" to low-income preschool children and their families. 42 U.S.C. § 9831. Congress authorized the Secretary to establish and modify performance standards for Head Start programs, including "administrative . . . standards," *id.* § 9836a(a)(1)(C), "standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate)," *id.* § 9836a(a)(1)(D), and "such other standards as the Secretary finds to be appropriate," *id.* § 9836a(a)(1)(E). Furthermore, Congress authorized the Secretary to order the correction of a program "deficiency," *id.* § 9836a(e)(1), defined to include "a systemic or substantial material failure of an agency in an area of performance that the

Secretary determines involves—(i) a threat to the health, safety, or civil rights of children or staff," *id*. § 9832(2)(A).

These grants of authority provide ample basis for the IFR. The IFR addressed the condition of Head Start facilities, including indoor air quality, because the virus that causes COVID-19 is an airborne pathogen. 3/4/2022 Order, RE 46, Page ID # 1161-62; 86 Fed. Reg. at 68,052, 68,053. The IFR addressed the administration of Head Start programs because the virus caused more than 90 percent of Head Start programs to close in-person operations for varying lengths of time. 3/4/2022 Order, RE 46, Page ID # 1162; 86 Fed. Reg. at 68,058. The IFR was an appropriate standard for the same reason: it was designed to prevent significant disruptions to Head Start programs—and by extension, Head Start participants and their families—by minimizing the risk of COVID-19 outbreaks in classrooms. "Program closures, the unavailability of in-person programming, and staff shortages due to COVID-19 infection or exposure prevent Head Start participants from" receiving the services that the federally funded programs are meant to provide. 3/4/2022 Order, RE 46, Page ID # 1162.

Plaintiffs' suggestion that the Secretary's authority is confined to protecting against dangers such as "splinters and rusty nails," Mot. 13

(quotation marks omitted), has no basis in the statute's text and is irreconcilable with the Secretary's longstanding practice of imposing standards designed to prevent the spread of communicable disease in Head Start programs. As explained above, Head Start programs are required to "ensure staff do not, because of communicable diseases, pose a significant risk to the health or safety of others in the program." 45 C.F.R. § 1302.93(a). Head Start personnel are required to have "an initial health examination" and "tests for communicable diseases." *Id.* Head Start programs also required to provide staff training on prevention and control of infectious diseases and establish administrative procedures regarding protection from contagious diseases. *Id.* § 1302.47(b)(4)(i)(A), (b)(7)(iii).

As the district court explained, like the IFR upheld by the Supreme Court, the IFR at issue here was targeted at a danger arising from particular features of the federally funded program: the risk of COVID-19 infection to low-income children—many of whom are too young to be vaccinated—and their families. It aimed to limit the disruption in services provided to a vulnerable population. And it reduced the risk that the children and their

families would decline to use Head Start services out of fear of exposure to COVID-19. *See* 3/4/2022 Order, RE 46, Page ID # 1166-67.[3]

Plaintiffs' observation that the Secretary has not previously imposed a vaccination requirement for Head Start personnel, Mot. 16, echoes the argument that the plaintiffs made unsuccessfully to the Supreme Court in *Missouri*. "Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control." *Missouri*, 142 S. Ct. at 653. "But he has never had to address an infection problem of this scale and scope before." *Id*. The Secretary has long issued Head Start standards that addressed the most pressing health threats of the times, including HIV and tuberculosis. *See supra* p. 6-7. As the Supreme Court emphasized, the "unprecedented circumstances" posed by a pandemic "provide no grounds for limiting the exercise of authorities the agency has long been recognized to have." *Missouri*, 142 S. Ct. at 654.

[3] Plaintiffs' observation that a standard should not result in a "reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services," Mot. 14 (quoting 42 U.S.C. § 9836a(a)(2)(C)(ii)), is irrelevant because the IFR was designed to limit the reduction in services caused by COVID-19. *See* 86 Fed. Reg. at 68,053, 68,057.

As in *Missouri*, plaintiffs' reliance on the so-called "major questions doctrine" and federalism principles is misplaced. For reasons already discussed, the IFR at issue here was not an "enormous and transformative expansion" of an agency's "regulatory authority." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014). The IFR established a condition on federal grants, and it affected just 273,000 Head Start workers, 86 Fed. Reg. at 68,077—a small fraction of the millions of workers affected by the IFR upheld in *Missouri*, *see* 142 S. Ct. at 655 (Thomas, J., dissenting).[4] Moreover, the Head Start IFR, which addressed programs that are funded by the federal government, did not "intrude on state police powers" any more than do "the longstanding rules conditioning federal funds on requiring that Head Start personnel do not 'pose a significant risk' 'of communicable disease.'" 3/4/2022 Order, RE 46, Page ID # 1173 (quoting 45 C.F.R. § 1302.93(a)).

[4] The vaccination requirement in the Head Start IFR was expected to affect approximately 273,000 staff and a share of the approximately 1 million volunteers who interact with children in certain in-person settings. *See* 86 Fed. Reg. at 68,068. The vaccination requirement in the IFR upheld in *Missouri* was expected to affect approximately 10.4 million staff at healthcare facilities. *See Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61,555, 61,605 (Nov. 5, 2021).

B. The Secretary Had Good Cause To Issue The IFR Without Advance Notice And Comment.

Plaintiffs' procedural challenge to the IFR is equally meritless. As with the IFR upheld in *Missouri*, the Secretary properly determined that there was good cause to issue the Head Start IFR without advance notice and comment.

An agency may issue a rule without advance notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). In *Missouri*, the Supreme Court held that "the Secretary's finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID-19 infections, hospitalizations, and deaths" constituted the "something specific" that is "required to forgo notice and comment." 142 S. Ct. at 654.

The Secretary found good cause here for similar reasons. Recognizing the "potential for the rapid and unexpected development and spread of additional new and more transmissible variants," 86 Fed. Reg. at 68,053, the Secretary found that any delay in issuing the IFR would "endanger the health and safety of staff, children and families, and be contrary to the public

interest," *id.* at 68,059. Most children in Head Start programs are too young to be vaccinated, and the 27% of Head Start personnel who were estimated to be unvaccinated at the time the IFR was issued "could result in roughly 250,000 children . . . in the care of an unvaccinated adult." *Id.* at 68,055-56. The emergence of the highly transmissible Delta variant, which had already "resulted in greater rates of cases and hospitalizations among children," heightened the urgency of the IFR, as did the prospect of flu season and of returning to fully in-person programs in January 2022. *Id.* at 68,053-55. Given these circumstances, the Secretary properly concluded that further delay would be contrary to the public interest.

Plaintiffs' argument that the Secretary did not engage in adequate consultation with "experts in the administration and operation of Head Start programs" before it issued the IFR, Mot. 15-16, mirrors the argument that the Supreme Court rejected. *See Missouri*, 142 S. Ct. at 654 (explaining that "consultation during the deferred notice-and-comment period is permissible"). And as in *Missouri*, there is no merit to plaintiffs' assertion that the Secretary's good-cause finding was undermined by a delay in issuing the rule. The Head Start IFR is fifty pages long and contains 144 cited sources. The Secretary's care in crafting a reasoned policy determination

hardly means that the circumstances were not urgent enough to justify issuing a rule without advance notice and comment. *See id.* (explaining that "the two months the agency took to prepare a 73-page rule" did not constitute delay inconsistent with the Secretary's finding of good cause). Moreover, the Secretary's good-cause finding ensured that the masking requirement (which plaintiffs do not challenge) could take effect immediately on November 30, 2022.

II. The Balance Of Equities And Public Interest Independently Preclude An Injunction Pending Appeal.

The district court acted well within its discretion in finding that plaintiffs "failed to show that they would be irreparably harmed if an injunction does not issue" and that the remaining factors "tilt decisively in the Government's favor." 4/8/2022 Order, RE 58, Page ID # 1305.

A. Plaintiffs Failed To Show That An Injunction Pending Appeal Is Necessary To Prevent Irreparable Harm.

To support their original preliminary-injunction motion, plaintiffs relied on declarations filed on February 24, 2022, that predicted that some personnel in their Head Start programs would quit rather than be vaccinated if the IFR were not enjoined. *See, e.g.*, Hubert Decl., RE 42-8, Page ID # 1040-51. For example, plaintiff Livingston Educational Service Agency's

superintendent predicted that, absent a preliminary injunction, many personnel would quit and the district would be required to close up to 9 of its 11 Head Start classrooms. *See id*. ¶ 32, RE 42-8, Page ID # 1047.

The district court denied plaintiffs' motion for a preliminary injunction on March 4. And as the court later explained when it denied plaintiffs' motion for an injunction pending appeal, plaintiffs submitted no new evidence demonstrating that they had made good faith efforts to comply with the IFR or to avert their alleged injuries in the weeks that followed. *See* 4/8/2022 Order, RE 58, Page ID # 1302-04, 1303 n.2. In particular, plaintiffs provided little, if any, evidence of efforts to secure replacements for staff members who are unwilling to be vaccinated. *See* 4/8/2022 Order, RE 58, Page ID #1302-03. Nor did plaintiffs submit any evidence that their predicted harms had come to pass. *Cf*. Megan Messerly, *Rural Hospitals Stave Off Mass Exodus of Workers to Vaccine Mandate*, Politico (Feb. 22, 2022), https://perma.cc/BKS6-8T8W (reporting, based on interviews with "[n]early two dozen rural hospital officials and state hospital association leaders," that predictions that the CMS vaccination mandate "would lead to a workforce crisis and limit care, particularly in rural areas, have not been borne out").

The record before the district court showed "only self-imposed injury for which other corrective relief is available." 4/8/2022 Order, RE 58, Page ID # 1304 (quotation marks omitted). Under those circumstances, the district court "no longer" found that plaintiffs' "arguments regarding loss of staff and associated classroom closures amount to 'irreparable harm." *Id.*, RE 58, Page ID # 1303-04. The court also rejected, as "speculative," plaintiffs' reliance on "the potential for stigmatization of Head Start students" if they are kept apart from unvaccinated teachers in non-Head Start programs. *Id.*, RE 58, Page ID # 1304. And the court concluded that plaintiffs failed to demonstrate an imminent risk of loss of funding, explaining that "the statutory scheme provides for a number of steps that must occur before the program can be considered to have a 'deficiency' that would threaten its funding." *Id.* For those reasons, the district court concluded that plaintiffs "failed to show that they would be irreparably harmed if an injunction does not issue." *Id.*, RE 58, Page ID # 1305.

In their motion filed in this Court, plaintiffs did not even acknowledge—and made no attempt to rebut—the district court's adverse ruling on the issue of irreparable harm. *See* Mot. 23-27. Thus, plaintiffs forfeited the opportunity to present argument on that issue.

B. Plaintiffs Ignore The Harms That An Injunction Would Cause.

Furthermore, plaintiffs ignore the substantial harm that an injunction would cause for third parties and the public interest. "Vaccines remain the 'safest and most effective way to protect individuals and the people with whom they live and work from infection and from severe illness and hospitalization if they contract the virus.'" 4/8/2022 Order, RE 58, Page ID # 1305 (quoting 86 Fed. Reg. at 68,054-55). The requirement that Head Start personnel be vaccinated (subject to exemptions) thus protects the health and safety of the children—many of whom are too young to be vaccinated—as well as their families and other Head Start personnel. 3/4/2022 Order, RE 46, Page ID # 1177.

Moreover, COVID-19 infections "also close classrooms and cause interruptions in the services provided to Head Start families." 3/4/2022 Order, RE 46, Page ID # 1176-77 (citing 86 Fed. Reg. at 68,055 (noting that when a staff member or child tests positive for COVID-19 "classrooms or entire programs close for a period of days or weeks to allow for test results and quarantining")). The Secretary concluded that "these infection-related closures" are especially disruptive because they are "unpredictable and

often occur at the last minute leaving parents to struggle to find suitable last-minute childcare." *Id.*, RE 46, Page ID # 1177 (citing 86 Fed. Reg. at 68,076).

The Secretary acted well within his discretion in concluding that those harms outweighed the risk of disruptions arising from staff departures. Plaintiffs' disagreement with the Secretary's determination is not a basis to enjoin the IFR. As the Supreme Court emphasized, the role of a court "is to 'simply ensur[e] that the agency has acted within a zone of reasonableness.'" *Missouri*, 142 S. Ct. at 654 (alteration in original) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).[5]

[5] Although the Supreme Court was discussing the role of courts in reviewing arbitrary and capricious challenges, plaintiffs cannot avoid this deferential standard of review by reframing their arbitrary and capricious claim in balance-of-equities terms. *See* Prelim. Inj. Mot., RE 5, Page ID # 157-65.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for an injunction pending appeal.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ALISA B. KLEIN

/s/ Sarah J. Clark
SARAH J. CLARK
Attorneys, Appellate Staff
Civil Division, Room 7216
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8727
sarah.clark@usdoj.gov

APRIL 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27 because it contains 4,492 words. This response complies with the typeface and the type-style requirements of Federal Rules of Appellate Procedure 27 and 32 because it has been prepared in a proportionally spaced typeface using Word 14-point Book Antiqua typeface.

/s/ Sarah J. Clark
Sarah J. Clark

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system.

/s/ Sarah J. Clark
Sarah J. Clark