

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

THE STATE OF LOUISIANA,
By and through its Attorney General, JEFF
LANDRY, et al.,

PLAINTIFFS,

v.

XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services; et
al.,

DEFENDANTS.

CIVIL ACTION NO. 3:21-cv-4370

MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff States respectfully move this Court for an order under Rule 65 of the Federal Rules of Civil Procedure granting a Temporary Restraining Order in their favor against the named Defendants in their official capacities. As explained in the attached Memorandum supporting this motion, as well as the Complaint, Dkt. 1, Motion for a Preliminary Injunction, Dkt. 2, and attached Memorandum, 2-1, Defendants' *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68052 (Nov. 30, 2021) was promulgated without statutory authority and contrary to law, in violation of the Administrative Procedure Act, in violation of the Congressional Review Act, in violation of the Treasury and General Government Appropriations Act of 1999, and in violation of the Constitution.

This Motion is made on the grounds specified in this Motion, the Complaint, Dkt. 1, Motion for a Preliminary Injunction and attached Memorandum and supporting Exhibits, Dkts. 2, 2-1 to 2-22, and attached Memorandum supporting this motion, all matters of which this Court

may take judicial notice, and on such other and further oral or documentary evidence as may be presented to the Court at or before a hearing on this Motion. Plaintiff States are substantially likely to prevail on the merits of their claims and preliminary injunctive relief is necessary to avoid imminent and substantial injuries to their sovereign, quasi-sovereign, and proprietary interests. And the public interest and balance of harms strongly favor a temporary restraining order.

Plaintiff States respectfully request a temporary restraining order preventing Defendants from implementing *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68052 (Nov. 30, 2021). Alternatively, Plaintiff States respectfully request an expedited briefing schedule on their Motion for a Preliminary Injunction, Dkt. 2, requiring Defendants to respond by December 29, 2021 and Plaintiffs to file a reply, if any, by December 30, 2021.

FED. R. CIV. P. 65(B) STATEMENT REGARDING NOTICE

Consistent with Fed. R. Civ. P. 65(b), undersigned counsel certifies that

(1) On December 21, 2021, Deputy Solicitor General Joseph S. St. John emailed a copy of Plaintiffs' Complaint (ECF 1) and Motion for Preliminary Injunction (ECF 2), together with their attachments, to Mr. Jerry Edwards, Civil Division Chief for the Office of the U.S. Attorney for the Western District of Louisiana.

(2) On December 22, 2021, undersigned counsel corresponded with Mr. Edwards via email regarding this motion. Mr. Edwards directed undersigned counsel to Mr. Christopher Edelman, USDOJ Federal Programs Branch, as the assigned attorney. Undersigned counsel also corresponded via email with Mr. Edelman regarding this motion.

Dated: December 23, 2021

Respectfully submitted,

By: /s/ Elizabeth B. Murrill

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CERTIFICATE OF SERVICE

I, Elizabeth B. Murrill, certify that

(1) I will cause a copy of the foregoing document and its attachments to be emailed to Mr. Jerry Edwards, Chief of Civil Division in the Office of the U.S. Attorney for the W.D. of Louisiana (jerry.edwards@usdoj.gov) and to Mr. Christopher Edelman (Christopher.edelman@usdoj.gov), Trial Attorney, U.S. Department of Justice Federal Programs Branch.

(2) I will cause a copy of the foregoing document and its attachments to be mailed via USPS Express Mail, postage prepaid, to the following addresses:

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This 23rd day of December 2021

/s/ Elizabeth B. Murrill

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THE STATE OF LOUISIANA,
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XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services; et
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DEFENDANTS.

CIVIL ACTION No. 3:21-cv-04370

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Because the Defendants’ unlawful Head Start Mandate will work its most devastating harm starting a week and a half from now—by January 3 or January 10, the two dates by which educators must submit to their first mRNA vaccine or lose their jobs—Plaintiff States respectfully request that this Court temporarily restrain Defendants from implementing it. Doing so will preserve the bodily autonomy and jobs of tens of thousands of educators and volunteers and will prevent even more low-income children from losing their preschool education. Alternatively, Plaintiff States request that this Court expedite the briefing schedule on their Motion for a Preliminary Injunction so that it may issue a ruling before those two critical dates arrive. As explained in this memorandum, and in more detail in their Memorandum in Support of a Preliminary Injunction, Dkt. 2-1, Plaintiff States present the prototypical case for immediate relief.

STANDARD

Plaintiff States seek a temporary restraining order for the purpose of “preserving the status quo and preventing [the] irreparable harm” that will occur if Defendants are allowed to enforce the Head Start Mandate. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974). To merit such relief, Plaintiff States, as the moving parties, must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury to the moving party; (3) that the threatened injury outweighs any damages the injunction may cause defendant; and (4) that the injunction is in the public interest. *See Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014). Fed. R. Civ. P. 65(b). Notably, “the same criteria govern the issuance of preliminary injunctions and temporary restraining orders.” 42 Am. Jur. 2d

Injunctions §8. Ultimately, whether to grant a request for a temporary restraining order “is left to the sound discretion” of the Court. *Nianga v. Wolfe*, 435 F. Supp. 3d 739, 743 (N.D. Tex. 2020).

ARGUMENT

Plaintiff States incorporate by reference their Memorandum in Support of their Motion for a Preliminary Injunction, Dkt. 2-1, and supporting Exhibits, Dkts. 2-1 to 2-22, and emphasize the following most pressing points.

I. The States Are Likely To Win On The Merits.

Plaintiff States present ten independent reasons why they will prevail on the merits of their lawsuit. *See* Dkt. 2-1 at 6-22. Most straightforwardly, the Plaintiffs will prevail because HHS relies on statutory authority even weaker than the statutory authority that this Court rejected for the purposes of a materially similar mandate in *Louisiana v. Becerra*, 2021 WL 5609846 (W.D. La. Nov. 30, 2021), and that the Fifth Circuit agreed was likely insufficient when refusing to stay that decision in *Louisiana v. Becerra*, No. 21-30734, 2021 WL 5913302 (5th Cir. Dec. 15, 2021).

In those decisions, this Court and the Fifth Circuit held that the Government could not enact a vaccine mandate on employees of healthcare providers based on general language authorizing it to “make and publish such rules and regulations ... as may be necessary to the efficient administration of [its] functions.” 42 U.S.C. §1302. *See Louisiana*, 2021 WL 5609846, at *11; *Louisiana*, No. 21-30734, 2021 WL 5913302, at *1.¹

This case is easier. HHS relies exclusively a statutory provision authorizing it to “modify” certain “standards” as “necessary.” 42 U.S.C. §9836a(a)(1). But the Supreme Court

¹ The Fifth Circuit similarly held in *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021), that 29 U.S.C. §655’s authorization to enact certain emergency standards did not authorize OSHA to enact a vaccine mandate on 100-plus-employee companies.

has held in materially indistinguishable circumstances that “‘modify’ ... connotes moderate change,” and that “‘to modify’ means to change moderately or in a minor fashion.” *MCI Telecomms. Corp. v. Am. Telephone & Telegr. Co.*, 512 U.S. 218, 228, 225 (1994). It follows that the term “modify” in the Head Start Act does not empower HHS to enact sweeping and unprecedented mandates governing the bodily autonomy of hundreds of thousands of people and effectively exiling a substantial number of educators and children from Head Start until they kowtow to the President’s wishes. And in any event, the “standards” that HHS may modify cannot be fairly read to encompass the Mandate. *See* 42 U.S.C. §9836(a)(1)(C)-(E).

Similarly, the Plaintiffs will prevail because HHS bypassed notice and comment for reasons similar to those that this Court rejected in *Louisiana*. *See* 2021 WL 5609846, at *9–10. As this Court explained, “[i]t took CMS almost two months, from September 9, 2021 to November 5, 2021, to prepare the interim final rule at issue,” a period during which it could have conducted notice and comment, so “Plaintiff States are likely to succeed on the merits of this claim.” *Id.*; *see also BST Holdings*, 17 F.4th at 611-12 (“The Mandate’s stated impetus—a purported ‘emergency’ that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to—is unavailing as well.”).

Again, this case is easier because HHS invoked the same purported emergency to justify bypassing notice and comment but in this case waited an *additional* 25 days to promulgate its Mandate. *See* 86 Fed. Reg. 68052 (Nov. 30, 2021). In other words, it took HHS almost *three* months, from September 9, 2021 to November 30, 2021, to prepare this interim final rule, a period during which it could have conducted notice and comment, so Plaintiff States are likely to succeed on the merits of this claim.

II. A Temporary Restraining Order Will Prevent Irreparable Harm.

Most crucially, a temporary restraining order must be issued to prevent devastating and irreparable harm. As detailed in the pleadings, the Defendants made their Head Start Mandate enforceable immediately. 86 Fed. Reg. at 68052. They will begin enforcing the vaccination component of the Mandate on January 31, 2022. *Id.* Because a person is considered fully vaccinated after a primary vaccination series, which takes several weeks to complete, the Office of Head Start is advising that all educators and volunteers must submit to their first Moderna shot by January 3 or their first Pfizer shot by January 10. *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs* at 15, Office of Head Start (Dec. 2, 2021), <https://bit.ly/3Gw4Sp8>. Although educators and volunteers may submit to a Johnson & Johnson vaccine at a later date, the CDC recently recommended, due to concerning side effects of the Johnson & Johnson vaccine, that people instead take either the Pfizer or Moderna vaccines. *See* Michael Erman, *CDC recommends Moderna, Pfizer COVID-19 vaccines over J&J's*, Reuters (Dec. 16, 2021), <https://reut.rs/3mNzFqn>. The CDC has particularly singled out “women between 18 and 49 years old,” as more at risk. *Johnson & Johnson's Janssen COVID-19 Vaccine Overview and Safety*, CDC, <https://bit.ly/3eg1we3>.

Furthermore, because of the time needed to complete the new hiring process and the return of preschool for many during the first week in January, many educators will have to decide within less than two weeks whether to submit to vaccination against their wills or lose their livelihoods. Indeed, some Head Start programs are already firing teachers who will not get vaccinated based on the Mandate. PI Exs. L at 1; M at 1; N at 1. As a result, many Head Start programs will close or reduce capacity after January 3 and the consequences for young childhood education in the Plaintiff States will be disastrous. PI Ex. P.

As detailed in Plaintiffs' Memorandum in Support of their Motion for a Preliminary Injunction, the Mandate will cause them irreparable harm in the form of immediate monetary loss; injuries to their *parens patriae* interests in their citizens' health, welfare, and participation in the benefits of the federal system; injuries to their sovereign interests through the preemption of their laws; and the deprivation of their statutorily guaranteed rights. *See* Dkt. 2-1 at 22-25. Because of the critical importance of the January 3 and 10 deadlines, each of these irreparable harms will materialize in full if the Mandate is not enjoined before those dates.

III. The Threatened Injury Outweighs Any Damage to the Defendant and the Injunction Is in the Public Interest.

The "public interest is in having governmental agencies abide by the federal laws that govern their existence and operations." *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021). "And there is generally no public interest in the perpetuation of unlawful agency action." *Id.* (cleaned up). Furthermore, "the maintenance of the *status quo* is an important consideration in granting a stay." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quotation marks omitted). Accordingly, the public interest and balance of harms weigh heavily in Plaintiff States' favor.

IV. Alternatively, This Court Should Expedite Briefing On Plaintiffs' Motion For A Preliminary Injunction.

Alternatively, this Court could re-set and expedite its briefing schedule on Plaintiffs' Motion for a Preliminary Injunction in a way that will allow this Court to decide that motion by the first mRNA vaccine deadline, January 3, 2022. The Court could order Defendants to submit their opposition brief no later than December 29, 2022, and Plaintiffs to submit their reply, if any, by December 30, 2022. Plaintiffs note that Defendants will have completed and submitted a response by tomorrow to a motion for a temporary restraining order in a parallel case concerning

the identical Mandate. *See Texas v. Becerra*, Dkt. 15. 5:21-cv-00300 (N.D. Tex.) (“The Court orders the defendants to file a responsive brief due by 12/23/2021.”).

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff States’ Motion for a Temporary Restraining Order.

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

THE STATE OF LOUISIANA,
By and through its Attorney General, JEFF
LANDRY, et al.,

PLAINTIFFS,

v.

XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services; et
al.,

DEFENDANTS.

CIVIL ACTION No. 3:21-4370

[PROPOSED] ORDER

Pending before the Court is Plaintiffs States' Emergency Application for a Temporary Restraining Order filed on December 23, 2021. After carefully considering the briefing, the applicable law, and all matters properly before the Court, the Court finds that the States have clearly shown that immediate and irreparable injury, loss, or damage will result to them if Defendants' acts are not immediately restrained.

Further, the Court finds that the States have made a proper showing of (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the TRO will result in irreparable injury to the moving party; (3) the threatened injury outweighs any damages the injunction may cause Defendants; and (4) the injunction is in the public interest. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014).

As to factor (2), the Court finds that the States have made a clear showing of irreparable harm on four independent bases. The Mandate, which is effective immediately and requires many educators to submit to an initial vaccination dose or risk losing their jobs by January 3 or

10, will cause Plaintiff States irreparable harm in the form of immediate monetary loss; injuries to their *parens patriae* interests in their citizens' health, welfare, and participation in the benefits of the federal system; injuries to their sovereign interests through the preemption of their laws; and the deprivation of their statutorily guaranteed rights.

Accordingly, Plaintiff States' Motion for a Temporary Restraining Order is GRANTED. Defendants are RESTRAINED from implementing or treating as binding *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68052 (Nov. 30, 2021), and the regulations promulgated thereunder. This Temporary Restraining Order will expire on the ____ day of _____, 2022, at ____ a.m./p.m. unless, within that time, the Order is extended for good cause shown or Defendants consent to an extension.

Plaintiffs' Motion for Preliminary Injunction will be heard by this Court on the ____ day of _____, 2022 at ____ a.m./p.m.. Plaintiffs are not required to post bond or other security as a condition for obtaining this order.

It is SO ORDERED. SIGNED this _____, 20__ at __:__.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF LOUISIANA