

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH R. BIDEN, JR.,	)
PRESIDENT OF THE UNITED STATES,	)
ET AL.,	)
Applicants,	)
v.	) No. 21A240
MISSOURI, ET AL.,	)
Respondents.	)
and	)
XAVIER BECERRA, SECRETARY OF	)
HEALTH AND HUMAN SERVICES, ET AL.,	)
Applicants,	)
v.	) No. 21A241
LOUISIANA, ET AL.,	)
Respondents.	)

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Pages: 1 through 94

Place: Washington, D.C.

Date: January 7, 2022

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## HERITAGE REPORTING CORPORATION

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P R O C E E D I N G S

(12:12 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 21A240, Biden, President of the United States, versus Missouri, and the consolidated case.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER  
ON BEHALF OF THE APPLICANTS

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

Hospitals, nursing homes, and other Medicare and Medicaid providers serve patients who are especially vulnerable to COVID-19 in settings that are especially conducive to the spread of the virus.

The Secretary required those providers to make sure that their staff are vaccinated, subject to medical and religious exemptions, because he found that vaccination is the best way to prevent workers from infecting their patients with a potentially deadly disease. He also found that any delay in implementing that requirement would cause preventable deaths and severe illnesses.

1           The preliminary injunctions in these  
2 cases are delaying that urgently needed  
3 protection for Medicaid and Medicare patients  
4 in half the country. This Court should stay  
5 those injunctions for two reasons.

6           First, requiring medical staff  
7 vaccination during a pandemic falls squarely  
8 within the Secretary's statutory authority to  
9 protect the health and safety of Medicare and  
10 Medicaid patients. Vaccination requirements  
11 are a traditional and common way to curb the  
12 spread of infectious disease. Many healthcare  
13 workers are already required to be vaccinated  
14 against diseases like hepatitis, measles, and  
15 the flu. And the medical community  
16 overwhelmingly supports COVID-19 vaccination  
17 requirements, which have been adopted by  
18 providers around the country. Those  
19 requirements are, in short, the paradigmatic  
20 example of a health and safety measure.

21           Second, the Secretary's decision was  
22 thoroughly explained and supported by the  
23 record. The states do not seriously deny that  
24 requiring vaccination will save lives.  
25 Instead, they predict that it will cause

1 staffing shortages, especially in some rural  
2 areas.

3           But the Secretary carefully considered  
4 that concern. He explained that experience  
5 from around the country shows that most workers  
6 actually will choose to be vaccinated rather  
7 than to leave their jobs in response to  
8 vaccination requirements. And he concluded  
9 that the risk of some temporary staffing  
10 shortages is outweighed by the urgent need to  
11 protect all Medicare and Medicaid patients  
12 during a deadly pandemic.

13           Congress assigned those quintessential  
14 predictive and policy judgments to the  
15 Secretary, and the states have identified no  
16 basis to disturb his conclusions.

17           I welcome the Court's questions.

18           JUSTICE THOMAS: Counsel, are you  
19 relying on 1302(a)?

20           MR. FLETCHER: The -- the Secretary  
21 invoked -- that's the Secretary's general  
22 rulemaking authority under the Social Security  
23 Act, and he invoked that general rulemaking  
24 authority as he typically does when he makes  
25 rules under the Act.

1           But we're not relying primarily or --  
2           on that. We're instead relying on specific  
3           authorities as to each category of covered  
4           providers that allow the Secretary to set  
5           standards that set the requirements for their  
6           participation in Medicare and Medicaid.

7           JUSTICE THOMAS: I don't understand  
8           what you just said.

9           MR. FLETCHER: I'm sorry. The answer  
10          is yes, but not only on 1302. We also have  
11          specific statutes that speak to each of the  
12          covered providers here.

13          JUSTICE THOMAS: So, if I look at the  
14          language in 1302, which says that you -- that  
15          the Secretary shall make and publish such rules  
16          and regulations as may be necessary to the  
17          efficient administration of the functions with  
18          which each is charged under this chapter, you  
19          say there is more than that authorizing the  
20          Secretary?

21          MR. FLETCHER: Correct, yes.

22          JUSTICE THOMAS: What is that more?

23          MR. FLETCHER: So the more is set  
24          forth -- it's different as to each category of  
25          providers. So take hospitals. There, the



1 additional authority is in section 1395x(e)(9),  
2 which authorizes the Secretary to set such  
3 requirements as he finds necessary in the  
4 interest of the health and safety of patients  
5 in Medicare and Medicaid.

6 The Secretary cited other similar  
7 requirements that authorize him to set  
8 conditions of participation for each of the  
9 categories of providers, for nursing homes, for  
10 ambulatory surgical centers. All of those  
11 categories of providers are subject to similar  
12 requirements that say the Secretary gets to  
13 determine the requirements for their  
14 participation in Medicare and Medicaid. The  
15 Secretary has long relied on those specific  
16 statutory authorities to set forth detailed  
17 conditions of participation that are in the  
18 Code of Federal Regulations.

19 And what he did here was say, I'm  
20 going to add an additional condition of  
21 participation pursuant to those specific  
22 authorities for each category of provider,  
23 requiring vaccination against COVID-19.

24 JUSTICE THOMAS: Has that been used in  
25 the past -- the argument for the authority that

1 you just set out, has that been used to require  
2 vaccinations in the past?

3 MR. FLETCHER: It has not, no. But  
4 the Secretary explained why not. He explained  
5 that this is a unique pandemic where we have  
6 unique access to effective vaccines. So he  
7 explained that, in other settings, healthcare  
8 workers are typically vaccinated against  
9 communicable diseases because they got them  
10 during childhood when all of us did or because  
11 state authorities have required vaccinations.

12 But this is a uniquely deadly pandemic  
13 that because it is so new, those requirements  
14 haven't caught up and ensured the level of  
15 staff vaccination that you see in the context  
16 of other diseases. And that's why he found it  
17 necessary to step in with this requirement.

18 JUSTICE THOMAS: One last -- just a  
19 question. Don't you think it's a bit curious  
20 that you're placing significant reliance on a  
21 provision that speaks about necessary to the  
22 efficient administration to administer a  
23 vaccine that has -- could have significant  
24 health consequences?

25 MR. FLETCHER: Justice Thomas, I

1 don't. So, first of all, I just want to be  
2 clear, again, I'm not claiming that that  
3 general authority alone would authorize the  
4 vaccination requirement. We're resting on the  
5 conditions specific to each category of  
6 provider, the vast majority of which, the ones  
7 covering 97 percent of the workers affected by  
8 this rule, specifically reference conditions  
9 aimed at health and safety.

10 JUSTICE THOMAS: Thank you.

11 MR. FLETCHER: I think, when you look  
12 at it in that context, it's clear that this is  
13 a paradigmatic health and safety requirement.

14 CHIEF JUSTICE ROBERTS: Counsel, in  
15 which case is the relationship between the  
16 agency closer to the COVID-19 danger, in this  
17 CMS case that you're arguing before us now or  
18 in the OSHA case that your boss just finished  
19 arguing?

20 MR. FLETCHER: I think they're both --  
21 they're different cases. I think it's hard to  
22 say which one is closer. In the OSHA case, the  
23 OSH Act gives the Secretary of Labor  
24 responsibility for workplace safety, and you  
25 just heard why the COVID-19 pandemic is a grave

1 threat in the workplace.

2 CMS has authority to protect the  
3 health and safety of patients in Medicare and  
4 Medicaid and explained at length why the  
5 COVID-19 pandemic is an acute danger to  
6 patients in that setting. So I -- I think  
7 they're both very close and directly related to  
8 this.

9 CHIEF JUSTICE ROBERTS: Well, maybe  
10 I'll expand it. Which is a more acute danger,  
11 OSHA, CMS, or the federal contractor vaccine  
12 mandate?

13 MR. FLETCHER: Well, I think all of  
14 them. I think this gets to the question you  
15 asked my boss earlier, which is, you know, the  
16 government is doing a lot of things in response  
17 to the pandemic, and I don't think that's a  
18 surprise. This is an unprecedented pandemic  
19 that touches virtually every aspect of American  
20 life, and so it does affect the authorities of  
21 lots of different federal agencies.

22 CHIEF JUSTICE ROBERTS: Do you think  
23 the -- the -- that the government has picked  
24 the three most pressing areas to address and  
25 that they're doing it in order, or why -- why

1 OSHA, why CMS, why federal contractors? Why  
2 not any host of other areas --

3 MR. FLETCHER: Well --

4 CHIEF JUSTICE ROBERTS: -- that are  
5 also -- you know, where COVID-19 is also a  
6 serious problem?

7 MR. FLETCHER: Well, because the  
8 federal government is, as some of the questions  
9 earlier had suggested, a government with  
10 limited powers. The federal agencies have the  
11 authorities that Congress has given them.

12 Congress has made OSHA responsible for  
13 workplace safety. Congress has made CMS  
14 responsible for Medicaid and Medicare patient  
15 safety, and those agencies have determined and  
16 explained their conclusions why those  
17 authorities are called upon here by the sort of  
18 unique threat that the COVID-19 pandemic poses  
19 in both contexts.

20 CHIEF JUSTICE ROBERTS: I thought you  
21 might have said, and it may have been  
22 uncomfortable, but I thought you might have  
23 said we're dealing here in this case with  
24 healthcare, with Medicare and Medicaid.

25 And what could be closer to addressing

1 the COVID-19 problem to health than healthcare?  
2 I mean, people already get sick when they go to  
3 the hospital. But, if they -- they go and face  
4 COVID-19 concerns, well, that's -- that's much  
5 worse. On the other hand, OSHA, it's work --  
6 it's workplace, yes, COVID is a problem in the  
7 workplace, and in some situations, it may be a  
8 more serious problem, but it seems to me that  
9 if any of the three that I've been talking  
10 about anyway present a close connection, it  
11 would surely be between a -- be between a health  
12 threat like COVID-19 and the government's  
13 healthcare.

14 MR. FLETCHER: Mr. Chief Justice, I  
15 certainly don't want to disagree with that at  
16 all. I think there is an acute threat that  
17 COVID-19 poses in healthcare settings. We've  
18 seen that throughout the pandemic, especially  
19 in nursing homes and other congregate care  
20 settings, which are within the scope of this  
21 rule.

22 I absolutely agree that Americans  
23 shouldn't be forced to choose between getting  
24 medical care and exposing themselves  
25 unnecessarily to a virus. And as we explained,

1 healthcare workers have long been expected to  
2 take extra precautions, including vaccinations,  
3 in order to prevent them from infecting their  
4 patients.

5           So I don't disagree with any of that,  
6 but in making all of those points, I don't want  
7 to undersell also everything you heard about in  
8 the first case about the grave danger that the  
9 pandemic poses for workers as well in a way  
10 that implicates OSHA's authority too.

11           JUSTICE SOTOMAYOR: Counsel, there is  
12 another significant difference that you haven't  
13 talked about. This is a spending clause case  
14 and not a general powers case.

15           And I always thought that when you're  
16 talking about the spending clause, that the  
17 government has more power to define where it  
18 wants to spend its money, correct?

19           MR. FLETCHER: Absolutely.

20           JUSTICE SOTOMAYOR: And to that  
21 extent, one of the major arguments raised by  
22 the other side here that I want you to address  
23 is the -- what they describe as the enormous  
24 cost that this will affect on hospitals and the  
25 fact that it's affecting so many healthcare

1 providers, et cetera.

2           Could you please tell me whether this  
3 is unprecedented in terms of what CMS generally  
4 does?

5           MR. FLETCHER: I can. And, first, if  
6 I could, I'd like to put it in context with the  
7 cost. I think the Secretary's cost estimate  
8 was on the order of \$1.3 billion, much of which  
9 will be borne by the federal government, which  
10 covers the cost of vaccinations.

11           He put that in context by emphasizing  
12 that healthcare spending in this country is \$4  
13 trillion and that the costs in this case amount  
14 to about \$125 per employee. So I don't think  
15 the costs of this rule when viewed in context  
16 are particularly great.

17           And I think the -- it is not at all  
18 unprecedented for the Secretary to exercise the  
19 same authorities that I was discussing with  
20 Justice Thomas here: the authority to set  
21 conditions of participation for hospitals and  
22 other providers in Medicare and Medicaid, to  
23 impose very detailed, very prescriptive  
24 requirements that would have very high  
25 compliance costs.



1           This is not a place where it's  
2 unfamiliar to have the Secretary involved in  
3 the details of the management of healthcare  
4 organizations.

5           JUSTICE ALITO: Did the states have  
6 clear notice that by accepting Medicaid funds  
7 they would be subject to vaccination  
8 requirements for staff at their state-run  
9 facilities?

10           MR. FLETCHER: So the facilities --  
11 and this applies to all facilities in Medicaid  
12 and Medicare, not to the states as the  
13 administrators of -- of their own Medicaid  
14 programs, but I acknowledge states do have  
15 state-run facilities.

16           All of them are notice that they're  
17 subject to the health and safety requirements  
18 that the Secretary may adopt from time to time.  
19 Obviously, they didn't have specific notice in  
20 the vaccination requirement because it didn't  
21 exist until the pandemic came about, but the  
22 way that the program operates is that all  
23 providers are on notice that they have to  
24 comply with the Secretary's regulations which  
25 could change.

1 JUSTICE ALITO: So, if they read the  
2 statutes that you are now relying on primarily,  
3 that would provide them clear notice that they  
4 might be subject to something like this  
5 vaccination requirement?

6 MR. FLETCHER: It would put them on  
7 clear notice that they are subject to such  
8 requirements as the Secretary finds necessary  
9 in the interest of patient health and safety,  
10 which have long included infection control. In  
11 the past, that's been general. It's been  
12 requiring infection control plans that meet  
13 national guidelines, fire preparedness,  
14 emergency safety, things of that nature.

15 So they've long been on notice that  
16 they are subject to requirements by the  
17 Secretary in the interest of patient health and  
18 safety, and I think this is a sort of heartland  
19 case of a measure to protect patient health and  
20 safety in the midst of a pandemic.

21 JUSTICE ALITO: I -- I don't have  
22 before me the particular statutory provision  
23 that you spoke of earlier, but is it the case  
24 that some -- some of many, if not all, of these  
25 additional statutory provisions on which you

1 are now placing your principal reliance are  
2 definitional provisions rather than provisions  
3 that expressly authorize the Secretary to  
4 promulgate regulations?

5 Is that correct or incorrect?

6 MR. FLETCHER: They are both. So they  
7 are definitions. The provision I quoted  
8 earlier, 1395x(e), is the definition of a  
9 hospital for purposes of the statute.

10 JUSTICE ALITO: Right. Right.

11 MR. FLETCHER: But, in that  
12 definition, it says a hospital, and what that  
13 -- it means to be a hospital is to eligible for  
14 Medicare reimbursement.

15 What it means to be a hospital is to  
16 meet the following specified requirements,  
17 including such other requirements as the  
18 Secretary finds necessary. So --

19 JUSTICE ALITO: Right. But it  
20 isn't -- it doesn't say the Secretary is  
21 authorized to promulgate any regulations that  
22 protect the health and welfare of people in a  
23 hospital or in any of these other facilities.

24 It says that the definition of a  
25 hospital and the definitions of these other

1 facilities, by definition, they -- they are  
2 facilities that are required to comply with  
3 regulations.

4 MR. FLETCHER: As the Secretary finds  
5 necessary in the interest of patient health and  
6 safety, yes.

7 JUSTICE ALITO: Is there any limit to  
8 that power? What could the Secretary -- what,  
9 if anything, could the Secretary not do if the  
10 Secretary finds that something is necessary to  
11 protect the health and safety of people in  
12 those facilities?

13 MR. FLETCHER: Well, I think the  
14 Secretary -- the major limit is the one in the  
15 text of the statute itself. The Secretary has  
16 to find that it's a requirement that's in the  
17 interest of patient health and safety, as the  
18 Secretary did here.

19 I think the other constraints on that  
20 authority are the types of health and safety  
21 measures that you see in healthcare providers.  
22 So the way you know that this provision is  
23 within the Secretary's authority is that you  
24 see providers adopting it on their own. You  
25 see medical societies like the American

1 Hospital Association, the AMA, the American  
2 Nurses Association recommending this policy.

3 You see some states adopting this  
4 policy. I think all of those things are  
5 powerful confirmations that this is a routine,  
6 common, effective measure for protecting  
7 patient health and safety.

8 JUSTICE ALITO: One of the arguments  
9 on the other side is that you were required by  
10 statute to consult with the states before you  
11 did this. What is your response to that?

12 MR. FLETCHER: There is a provision of  
13 the statute that says that when the Secretary  
14 sets conditions of participation for some of  
15 the providers at issue here, in carrying out  
16 that function, he shall consult with the  
17 states.

18 The statute doesn't say that that  
19 consultation has to happen before a rulemaking.  
20 And the way that the Secretary has long  
21 understood that to function is to require  
22 consultation in conjunction with the notice-and  
23 comment-process.

24 JUSTICE ALITO: I mean, isn't that --  
25 isn't that an odd understanding of -- of the

1 consultation requirement? We're -- we're going  
2 to tell you to do something and then, after  
3 we've told you to do it, we're going to consult  
4 with you about what we've already said you have  
5 to do?

6 MR. FLETCHER: I don't think so,  
7 Justice Alito, in the context of the provisions  
8 of the statute that also contemplate, as the  
9 APA does, that in some circumstances the  
10 Secretary will have good cause to act without  
11 notice and comment.

12 So, in the ordinary case, there's  
13 going to be notice and public comment which has  
14 the benefits that Justice Barrett referred to  
15 earlier. When that happens, you should also be  
16 sure you consult with the states and with  
17 accrediting boards. But, when there's good  
18 cause to skip that, the agency has long  
19 interpreted that to mean that it can defer  
20 consultation with the states to the parallel  
21 public comment response.

22 JUSTICE ALITO: Is there -- is there a  
23 good cause exception in the provision that  
24 requires consultation?

25 MR. FLETCHER: There isn't, but

1 there's no temporal requirement at all. So  
2 it's actually the other side that's asking you  
3 to read into that a requirement that it happen  
4 before rulemaking and to make that requirement  
5 apply even when the good cause exception is  
6 satisfied. And we don't think there's any  
7 basis to do that, certainly not in the  
8 Secretary's past practice.

9 This has long been the way that the  
10 Secretary has interpreted this provision in  
11 conjunction with the good cause exception --

12 JUSTICE BARRETT: Mister --

13 MR. FLETCHER: -- to notice and  
14 comment.

15 JUSTICE BARRETT: -- Mr. Fletcher, can  
16 I follow up on the questions that Justice  
17 Thomas and Justice Alito have been asking you  
18 about, the facility-specific statutes.

19 MR. FLETCHER: Yes.

20 JUSTICE BARRETT: I think it was wise  
21 to shift your focus to those because of their  
22 references to health and safety, but I find it  
23 difficult because the language of each of those  
24 statutes is different, and not all of them  
25 reference health or safety.

1 MR. FLETCHER: That's right.

2 JUSTICE BARRETT: So, for example, I  
3 think the one on long-term care facilities is  
4 your best because that's the one that also  
5 refers to or requires skilled nursing  
6 facilities to establish and maintain an  
7 infection control program.

8 That one, I think, gives you a  
9 stronger case than the ones that don't mention  
10 health and safety at all, or, for example, for  
11 ambulatory surgical centers, you know, the  
12 provision on which you rely describes the  
13 benefits provided to an individual, and then it  
14 lists the kind of services that would be  
15 covered, right, and then parenthetically it  
16 says "performed at an ambulatory surgical  
17 center (that meets health and safety and other  
18 standards specified by the Secretary)," it  
19 seems to me a heavier lift to say that that  
20 kind of aside in a parenthetical is a grant of  
21 authority to CMS to impose this kind of  
22 vaccination requirement on those who work at  
23 the ambulatory surgical centers.

24 So I guess my question is this: One,  
25 you know, the government here is seeking the



1 stay of the injunction and has the burden of  
2 showing likelihood of success on the merits,  
3 and -- and I understand because of space limits  
4 and the number of statutes on which you're now  
5 relying, it would be hard to make the specific  
6 case for each of these provisions, but what if  
7 I think some of the provisions might support  
8 you and others don't?

9 This was an omnibus rule, and even  
10 though the Secretary, in a chart, identified  
11 all these, you know, specific provisions, we  
12 don't really have before us the structural and  
13 textual arguments directed at each of these  
14 provisions. So what if I think some do and  
15 some don't? In an omnibus rule, what am I  
16 supposed to do?

17 MR. FLETCHER: Well, so we agree  
18 entirely that the focus ought to be on the  
19 statutory text, and one of our complaints with  
20 the district court decisions in these cases is  
21 that they blew past all of those distinctions  
22 and didn't focus on the text at all. So we  
23 absolutely agree the text of these provisions  
24 should be the Court's focus.

25 In terms of how to think about them, I

1 understand it's unwieldy. There are 15  
2 different provisions. I would group them into  
3 two categories. There are 11 or so that we  
4 cite at pages 5 to 6 of our reply brief that  
5 include the health -- that specific health and  
6 safety language, in different formulations, but  
7 all of them specifically referring to  
8 requirements in the interest of patient health  
9 and safety.

10           And as we've explained, we think that  
11 this is the paradigmatic health and safety  
12 regulation, and that's reinforced by the  
13 consensus of the medical community, by other  
14 regulators, by practices of providers.

15           Now there are a few statutes that we  
16 cite at page 9 of our reply brief that don't  
17 include that specific language. Those statutes  
18 are the ones applicable to providers that  
19 employ about 3 percent of all of the workers  
20 covered by the rule.

21           Now our view is that those -- all of  
22 those statutes still give the Secretary the  
23 authority to set standards or requirements for  
24 participating providers. And if you look at  
25 those provisions, what you find is that

1 Congress was a little bit less detailed. In  
2 the hospital provision, the 1395x(e)(9), the  
3 preceding eight sections all detail relatively  
4 nuanced, very specific requirements for  
5 hospitals. And then the (e)(9) adds "and such  
6 other requirements as may be necessary to  
7 patient health and safety."

8 JUSTICE BARRETT: But what if I  
9 disagree? So I understand that your position  
10 is that all of these granted the Secretary  
11 authority, but what if I disagree? What if I  
12 say, for example -- you suggested in a footnote  
13 in your reply brief that because such a small  
14 percentage of employees are covered by the  
15 statutes that don't reference health and  
16 safety, that we should just allow the  
17 injunction to remain in place only as to those.

18 And let's say that I disagree with you  
19 that every single one of the statutes that  
20 references health and safety could be  
21 interpreted as a grant of rulemaking authority  
22 for the reason I suggested with ambulatory  
23 surgical centers.

24 The rule is an omnibus rule. You  
25 know, it wasn't adopted on a

1 facility-by-facility basis. So, if I assume  
2 the premise that I disagree with you that every  
3 single statute grants this authority, why  
4 shouldn't then we just leave the Fifth  
5 Circuit's injunction in place?

6 MR. FLETCHER: Well, because I think,  
7 to the extent you're looking at likelihood of  
8 success, that's the factor that this would be  
9 relevant to, I think that does depend, as you  
10 say, on the authorities as to each category of  
11 providers, and the Secretary included -- in  
12 some sense, it's an omnibus regulation, he did  
13 it all at once, but he included specific  
14 severability language that we cite in that  
15 footnote at page 61,608, and said if any of  
16 these provisions are no good, then the rest  
17 ought to stand.

18 And so I think, if you disagree with  
19 us on either the provisions that lack health  
20 and safety language or if you disagree with us  
21 on the ones that have it, although I want to  
22 talk about both of those things to hopefully  
23 persuade you otherwise, I think the result  
24 would be we don't have a likelihood of success  
25 at obtaining -- prevailing on those provisions.

1           But that wouldn't justify allowing the  
2           injunctions to remain in place as to all of the  
3           other provisions, you know, especially those  
4           that cover the vast majority of workers. So I  
5           think that's the approach we'd suggest if  
6           that's where you find yourself.

7           JUSTICE SOTOMAYOR: Mr. Fletcher, I --  
8           I -- I'm not -- I do understand that we could  
9           go provision by provision, but I thought in  
10          reading your brief that the general authority  
11          to pass regulations to -- with respect to the  
12          Secretary's functions, that all that you were  
13          saying is that generalized authority is well  
14          documented by the fact that in the vast  
15          majority of these at least 11, if not 12, of  
16          these specific rules, they referenced health  
17          and safety directly.

18                 Isn't that your point?

19          MR. FLETCHER: That's our point. And,  
20          in addition, that even as to the ones that  
21          don't reference health and safety, so the  
22          end-stage renal disease providers or the  
23          psychiatric residential treatment facilities,  
24          those categories, Justice Barrett and Justice  
25          Sotomayor, they still give the Secretary even

1 broader authority to set conditions for  
2 participation.

3 And our view is that when the  
4 Secretary is authorized to set conditions for  
5 participation in Medicare and Medicaid, that  
6 has to include the authority to set patient  
7 health and safety requirements. And, in fact,  
8 that's the way the Secretary has long  
9 interpreted them.

10 If you look at the regulations that  
11 are being amended by the provisions addressing  
12 those categories of providers, there are  
13 existing bodies of patient health and safety  
14 measures, in many cases addressing infection  
15 control already, in other cases, addressing  
16 other matters directed at patient health and  
17 safety.

18 So the Secretary has long interpreted  
19 those more general grants of authority to  
20 include the authority to impose patient health  
21 and safety conditions, and we think that's the  
22 right way to read them in the context of the  
23 statute.

24 JUSTICE SOTOMAYOR: I dare say that I  
25 looked at some of the regulations at issue

1 here, not the ones you passed with respect to  
2 COVID but other regulations. Is it fair to say  
3 that the vast majority of the regulations  
4 across all facilities relate to health and  
5 safety?

6 MR. FLETCHER: I think that's fair,  
7 yes. That's certainly consistent with my  
8 reading of the regulations applicable to the  
9 facility providers at issue here.

10 JUSTICE SOTOMAYOR: It does seem that  
11 since it's a program to serve ill people,  
12 people with conditions like renal failure,  
13 psychiatric conditions, other conditions, that  
14 that would be the primary focus of contracting  
15 with places that are safe for those people,  
16 correct?

17 MR. FLETCHER: Absolutely. And that's  
18 the way the Secretary has always understood  
19 those more general authorities.

20 JUSTICE SOTOMAYOR: Thank you.

21 MR. FLETCHER: If I -- I could say  
22 just a word about the other argument that the  
23 other side has pressed heavily in this case,  
24 and that's the concern about staffing  
25 shortages, that is a concern that the Secretary

1 acknowledged and considered in the regulation,  
2 and he explained nonetheless that he was  
3 adopting a vaccination requirement for several  
4 reasons.

5           First, he explained that experience  
6 from around the country has shown that even  
7 workers who express hesitancy or even strong  
8 objections to becoming vaccinated don't  
9 actually end up leaving their jobs in those  
10 large numbers when vaccination requirements are  
11 imposed when their employers can help  
12 facilitate vaccination, can counsel them, that  
13 across the economy, including in the healthcare  
14 sector, including in rural areas, including  
15 healthcare systems in North Carolina and  
16 Indiana, the Secretary found that vaccination  
17 requirements achieved very high levels of  
18 compliance.

19           He sought comment on the issue, and he  
20 welcomed input from stakeholders about the  
21 particular challenges faced by rural hospitals,  
22 but he also explained that any temporary  
23 staffing shortages are likely to be relatively  
24 minor in the context of this industry, which  
25 already faces enormous staff turnover every



1 year. He said the rate of staff turnover in  
2 the healthcare industry generally is about  
3 25 percent in normal conditions and that in  
4 those circumstances, any marginal additional  
5 turnover attributable to the vaccination  
6 requirement does not outweigh the need to  
7 impose this health and safety measure that,  
8 again, is supported by the medical community  
9 and has already been adopted by providers  
10 around the country.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas?

14 Justice Breyer, anything further?

15 Justice Alito?

16 Justice Kagan?

17 JUSTICE KAGAN: Mr. Fletcher, the  
18 states talk quite a bit about the time that it  
19 took the administration to get out the good  
20 cause rule and suggest that, in that amount of  
21 time, it could have done a full  
22 notice-and-comment proceeding.

23 I guess I would like you to comment on  
24 that. Is that true?

25 MR. FLETCHER: It's not for a number

1 of reasons. I think the clearest is the  
2 provision governing notice-and-comment  
3 regulations that applies when good cause isn't  
4 found for the Secretary. 1395hh says that the  
5 Secretary has to allow a 60-day comment period.  
6 So that right there is more than two months.

7 In addition to that, the Secretary has  
8 to write the rule, which involves not just  
9 developing the regulation and fitting it into  
10 the existing conditions of participation for 15  
11 different categories of providers but also  
12 writing a sort of detailed cost benefit  
13 analysis and Paperwork Reduction Act analysis  
14 that are required by statutes and executive  
15 orders and that occupy dozens of pages at the  
16 back end of the rule.

17 So I think the suggestion that in two  
18 months the agency could have completed  
19 notice-and-comment rulemaking is inconsistent  
20 with both the applicable legal requirements and  
21 just experience with regulatory process more  
22 generally.

23 JUSTICE KAGAN: Yeah. I guess, sort  
24 of for an ordinary person, an ordinary person  
25 might say, well, if it's really important, why

1 don't you just work faster?

2 MR. FLETCHER: I -- I understand that.  
3 I mean, that doesn't get you around the 60-day  
4 time limit. And what I can tell you is that  
5 the Secretary did work extremely fast and  
6 produced a 73-page rule in two months and  
7 explained why the rule was necessary, satisfied  
8 all of the legal requirements. And I think --  
9 you know, I don't want to fault my friends on  
10 the other side, but I think, if the Secretary  
11 had rushed something out with a less thorough  
12 explanation, I think we'd be hearing legal  
13 challenges that he hadn't adequately explained  
14 things or considered things or calculated out  
15 the cost benefits.

16 I think agencies that are trying to  
17 make policies that will stick have to make sure  
18 that they engage in the kind of robust analysis  
19 and document that analysis in the way that the  
20 Secretary did here.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor, anything further?

23 Justice Gorsuch.

24 JUSTICE GORSUCH: This statute, unlike  
25 the -- the OSHA statute, actually contains an

1 express limitation on the Secretary's authority  
2 that we haven't yet discussed and that I know  
3 you're familiar with. Among other things, it  
4 says, you know, the Secretary shall not control  
5 the tenure of -- of employees at covered  
6 healthcare facilities or their compensation or  
7 their selection.

8           And -- and this regulation, arguably,  
9 the other side will say -- I'm sure we're going  
10 to hear it, so I didn't want you to not have a  
11 chance -- is going to say this effectively  
12 controls the employment of individuals at these  
13 healthcare facilities in a way that Congress  
14 specifically prohibited.

15           As I understand your response, it is  
16 we're just providing money or not providing  
17 money, and by withholding money, we're not  
18 controlling who you hire.

19           And I might understand that in some  
20 circumstances, but in a statute where  
21 everything is about spending, it's a spending  
22 clause statute, I would have thought that  
23 Congress would have understood and we should  
24 interpret this language in that light, that you  
25 cannot use the money as a weapon to control

1 these things.

2 And, in fact, of course, as you know,  
3 the Court has some anti-commandeering law.  
4 That's doctrinal speak for you can't always use  
5 money without -- and claim you're not  
6 controlling what's going on.

7 And I wonder whether we should take  
8 particular cognizance of that here given that  
9 these statutes sometimes constitute, we're  
10 told, 10 percent of all the funding that state  
11 governments receive. This regulation affects,  
12 we're told, 10 million healthcare workers and  
13 will cost over a billion dollars for employers  
14 to comply with.

15 So what's your reaction to that? Why  
16 isn't this a regulation that effectively  
17 controls the employment and tenure of -- of --  
18 of healthcare workers at hospitals, an issue  
19 Congress said the agency didn't have the  
20 authority, that should be left to states to  
21 regulate?

22 MR. FLETCHER: So, Justice Gorsuch,  
23 you're talking about Section 1395, and that  
24 says that nothing in the Medicaid Act shall  
25 be -- or Medicare Act shall be interpreted to

1 authorize any federal official to control, as  
2 you say, tenure, staffing, the practice of  
3 medicine, or the administration of entities.

4 We read, as the Secretary has long  
5 read, that to mean that he can't dictate  
6 particular decisions, hire this person, don't  
7 hire that person, you know, treat this patient  
8 this way, not that way, that that's what  
9 control and supervision means and that the --

10 JUSTICE GORSUCH: Can it mean, though,  
11 could it mean, should it mean, have we in other  
12 cases interpreted similar language to mean you  
13 can't use money in a way that commandeers a  
14 state or private entity?

15 MR. FLETCHER: So I -- I think the  
16 most direct answer is that that's not -- it  
17 can't mean that in this context because you  
18 have to read --

19 JUSTICE GORSUCH: Could -- could it  
20 mean it and do you agree that it means that in  
21 other contexts?

22 MR. FLETCHER: I -- I -- control and  
23 supervision can mean different things in  
24 different contexts, but I just -- I do want to  
25 get out that they have to mean something that's

1 within --

2 JUSTICE GORSUCH: Fine. I'll let you  
3 do it, I promise. But you'd agree that in some  
4 contexts, in some circumstances, that's a  
5 possible meaning?

6 MR. FLETCHER: I think it may be a  
7 possible meaning. I don't think it's the most  
8 natural reading.

9 JUSTICE GORSUCH: All right. And now  
10 you get to go ahead. Got it.

11 MR. FLETCHER: Thank you. I  
12 appreciate it. So the reason why it can't mean  
13 that here is that succeeding provisions of the  
14 Medicare statute authorize the Secretary to do  
15 or actually do directly by Congress exactly  
16 that sort of standard-setting that the  
17 Secretary is engaged in here.

18 So just take the hospital statute that  
19 we've talked about a bunch, 1396x(e), there's a  
20 provision before we talked about, (e)(9), which  
21 was health and safety. The preceding  
22 provisions say things like you have to be  
23 staffed by doctors and the doctors have to have  
24 particular licenses. You have to have a  
25 certified nurse on duty 24 hours a day. You

1 have to have a budget plan that meets the  
2 requirements of another subsection that I gave.

3 JUSTICE GORSUCH: Okay. So that  
4 doesn't control. But somewhere along the line  
5 you move from general regulations that outline  
6 things you -- you, the hospital, have to do to  
7 somewhere more directly where you are  
8 controlling or supervising. We agree?

9 MR. FLETCHER: Yes.

10 JUSTICE GORSUCH: There's a sliding  
11 scale in there.

12 MR. FLETCHER: I -- I'm not sure about  
13 sliding scale. I would say standard-setting,  
14 we can tell from that context.

15 JUSTICE GORSUCH: There's a range.  
16 Can we agree on that?

17 MR. FLETCHER: Sure.

18 JUSTICE GORSUCH: Okay. Where is the  
19 line?

20 MR. FLETCHER: I think that as is  
21 often the case with ranges, the line may be  
22 hard to draw when you get out towards the more  
23 granular controls.

24 I think what I can be confident about  
25 is that this standard is on the right side of



1 the line because it's consistent with standards  
2 in the statute itself that say you have to hire  
3 physicians and nurses that meet these  
4 qualifications or with other provisions that  
5 say you have to train -- your staff must be  
6 trained in this way.

7 JUSTICE GORSUCH: I understand -- I  
8 understand that. What do we do about the fact  
9 that Congress has never before -- sorry, that  
10 CMS, not Congress, we don't have Congress here,  
11 CMS has never before said among its standards a  
12 vaccination requirement or any other health  
13 standard with respect to employees and actions  
14 they must take outside the work environment?

15 So, for example, could Congress --  
16 sorry, CMS, also implement regulations about  
17 exercise regimes, sleep habits, medicines and  
18 supplements that must be ingested by hospital  
19 employees in the name of health and safety and  
20 would -- would the government argue that does  
21 not control the tenure of those employees?

22 MR. FLETCHER: You know, I'm not sure  
23 that there would be a problem with those  
24 requirements. I don't think it would be the  
25 Section 1395 control. I think it would be that

1 it's very hard to characterize those as  
2 requirements for the health and safety of  
3 patients.

4 JUSTICE GORSUCH: But, in your  
5 argument -- in your view, that would not  
6 control the tenure of employees?

7 MR. FLETCHER: I think that does  
8 not -- setting standards, even if they're  
9 outlandish standards that we think couldn't be  
10 set for other reasons wouldn't be controlling  
11 in the standard.

12 JUSTICE GORSUCH: Still doesn't  
13 control, doesn't control, even though they have  
14 to take these medications, they have to get  
15 this much sleep, they have to do this much  
16 exercise every day?

17 MR. FLETCHER: In any more -- again, I  
18 want to be clear, I'm not suggesting the  
19 Secretary can do any of those things. I'm just  
20 suggesting that the reason he can't is not  
21 1395.

22 JUSTICE GORSUCH: Is that because it  
23 doesn't constitute control of an employee's  
24 tenure or compensation?

25 MR. FLETCHER: Correct.

1 JUSTICE GORSUCH: Thank you.

2 MR. FLETCHER: Because setting  
3 standards for employees does not exercise  
4 control.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Kavanaugh.

7 JUSTICE KAVANAUGH: You -- you  
8 mentioned at the beginning that over a billion  
9 dollar in costs would be borne mostly by the  
10 federal government, I think you said.

11 Can you explain that?

12 MR. FLETCHER: Sure. I think in large  
13 part by the federal government. So the  
14 Secretary, in estimating the costs, said a big  
15 driver of the cost was going to be the cost of  
16 the vaccinations themselves, the shots, and the  
17 cost of administering the shots.

18 The Secretary explained that he was  
19 including that in the cost/benefit analysis to  
20 be comprehensive about the effects of the rule,  
21 even though the federal government covers the  
22 costs of vaccines for most employees and would  
23 cover them here.

24 JUSTICE KAVANAUGH: Okay. And then,  
25 on the question to follow up on Justice

1 Gorsuch's question, what is the story as you  
2 understand it for why CMS has not previously  
3 required flu shots for healthcare workers or  
4 some of the other vaccines that, as you pointed  
5 out, the states still insist upon for  
6 healthcare workers? Is there a story there or  
7 explanation there for why CMS has not  
8 previously done that?

9 MR. FLETCHER: I think the Secretary  
10 laid this out and sort of identified different  
11 reasons as to different categories of vaccines.

12 So, as to some, where state  
13 vaccination requirements mean that everyone is  
14 basically vaccinated against those diseases  
15 already, there was no need for the Secretary to  
16 do that.

17 The Secretary also hasn't acted with  
18 respect to flu vaccines. Some states have done  
19 that. Not every state has done that. But the  
20 Secretary explained that this is a pandemic  
21 that is a much graver threat than the seasonal  
22 flu is and also that these are uniquely  
23 effective vaccines and explained that it's that  
24 combination, the sort of unique pandemic  
25 situation that we haven't seen before and the

1 uniquely effective vaccines, that led him to  
2 choose to adopt that here.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett?

6 JUSTICE BARRETT: Are you arguing with  
7 respect to the facility-specific grants -- and  
8 this goes to the questions that Justice  
9 Sotomayor asked you after we last talked -- are  
10 you arguing that those facility-specific grants  
11 informed the general grants in 1302(a) and  
12 1395hh such that we should interpret the  
13 general grants as encompassing the authority to  
14 impose health and safety measures, or are you  
15 arguing that even if we pretend that these two  
16 general grants don't exist, that the  
17 facility-specific grants would nonetheless  
18 equip the Secretary with this authority?

19 MR. FLETCHER: I think the latter. I  
20 think I'd be making the same argument even if  
21 we didn't have the general grant. I think the  
22 general grant, you know, reinforces the idea  
23 that when the Secretary sets standards, he has  
24 the power to do that through regulations. But  
25 we're relying primarily on the specific grants,

1 and I think those would be sufficient even if  
2 you set aside 1302.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Osete.

7 ORAL ARGUMENT OF JESUS A. OSETE  
8 ON BEHALF OF THE RESPONDENTS IN NO. 21A240

9 MR. OSETE: Mr. Chief Justice, and may  
10 it please the Court:

11 In early 2020, while millions stayed  
12 at home, millions of healthcare workers  
13 heroically stayed at work. These same workers  
14 are now forced to choose between losing their  
15 jobs and complying with the government's  
16 vaccine mandate.

17 The Secretary claim -- the Secretary's  
18 claim of authority to impose this mandate is  
19 expansive, unprecedented, and unlawful for two  
20 principal reasons.

21 First, the Secretary believes a series  
22 of vague catch-all provisions scattered  
23 throughout the Social Security Act authorize  
24 this sweeping mandate, but the relevant text,  
25 structure, and context say otherwise.

1           For example, the Secretary ignores  
2 eight provisions that precede the catch-all  
3 provision he primarily invokes, all of which  
4 are materially unlike a permanent medical  
5 procedure that cannot be undone after a shift  
6 is over. Exceedingly clear language is  
7 required here because the mandate regulates  
8 matters that have traditionally been within the  
9 province of the states.

10           Second, the rule is arbitrary and  
11 capricious under the APA.

12           The Secretary impermissibly  
13 extrapolated evidence for one category of  
14 facilities to justify regulating all 15 and  
15 failed to adequately explain his sudden shift  
16 from encouraging vaccination to mandating it.

17           But, more fundamentally, the Secretary  
18 overlooked the critical perspective of rural  
19 healthcare facilities in the states and the  
20 devastating consequences the mandate will have  
21 on rural Americans' access to healthcare.  
22 Categorically excluding an entire class from  
23 employment will mean that patients in rural  
24 Nebraska will have to seek primary and  
25 emergency care two to three hours away and

1 cannot undergo surgery.

2           This represents vast stretches of this  
3 country where healthcare is not provided by  
4 massive institutional providers with tens of  
5 thousands of employees but by smaller  
6 healthcare facilities run by local communities.  
7 While a 1 percent loss of staff may be  
8 insignificant to the former, it is fatal to the  
9 latter.

10           Without the injunction, rural America  
11 will face an imminent crisis. The government's  
12 stay application should be denied. And I  
13 welcome the Court's questions.

14           JUSTICE THOMAS: Counsel, would you  
15 discuss the preemption issue just briefly?

16           MR. OSETE: Yes, Your Honor. This  
17 regulation -- the Secretary says in this  
18 regulation that it is intended to preempt  
19 arguably any inconsistent state laws with  
20 respect to vaccination requirements.

21           And, for example, in this case, the  
22 most direct example I can point to, Your Honor,  
23 is at 20-7-134 of the Arkansas Code, that  
24 prohibits as a condition of employment any sort  
25 of vaccination requirement.



1           JUSTICE THOMAS: But that's somewhat  
2     ironic since he -- the government relies on --  
3     on those other vaccinations to argue for this  
4     vaccination. But are all of the party states  
5     in the same position with respect to  
6     preemption?

7           MR. OSETE: Your Honor, certainly, the  
8     district court in this case at the very least  
9     cited that Arkansas, Wyoming, and Missouri are  
10    similarly situated with that respect, and,  
11    certainly, there are other states in our -- in  
12    the Missouri-led coalition that also have laws  
13    that are going to be preempted by this  
14    regulation.

15           The key point here, Your Honor, just  
16    like in *Mass v. EPA*, is so long as one of us  
17    has one of these laws that would affect our  
18    duly enacted legislation through an unlawful  
19    mandate, we are -- it is -- it does present an  
20    issue on preemption.

21           Now that's independent, obviously,  
22    from other interests that the states have in  
23    this case, which is the states are the  
24    administrator. It's our providers with respect  
25    to Medicaid, with Medicare. We're being asked

1 to facilitate this program for the federal  
2 government. We have compliance costs. We have  
3 surveyors that have to go out and enforce this  
4 rule. All of that are -- are the states'  
5 interests, Your Honor.

6 JUSTICE THOMAS: Well, the one final  
7 point has to go to standing. You seem to rely  
8 on *parens patriae* a bit. And would you discuss  
9 that standing and why we should apply that?

10 MR. OSETE: Well, sure, Your Honor.  
11 And just to be clear, we -- we do have various  
12 capacities here. We mention sovereign  
13 interests, we mention proprietary -- a whole  
14 plethora of them, and, certainly, we did invoke  
15 also a quasi-sovereign interest in the health  
16 and well-being of our citizens. For example,  
17 this mandate will close the doors of many of  
18 these rural facilities. That will effectively  
19 deprive our citizens of healthcare. And we  
20 also are asserting rights under federal law  
21 with respect to the APA on many of these  
22 claims.

23 That -- that is -- but that is not the  
24 only basis that we're seeking standing in this  
25 case. We have various other capacities that

1 we're suing under, just like the ones I  
2 mentioned, Your Honor.

3 JUSTICE THOMAS: Is that true of all  
4 of the parties?

5 MR. OSETE: I -- I -- I believe so,  
6 Your Honor, yes.

7 JUSTICE THOMAS: Thank you.

8 MR. OSETE: There was a -- there was a  
9 question -- sorry, Chief.

10 CHIEF JUSTICE ROBERTS: No, I was just  
11 going to ask you about the -- the spending  
12 clause context. In other words, we're not just  
13 dealing with federal law in the abstract; we're  
14 dealing with a provision that says Congress  
15 authorized it -- well, the Secretary to ensure  
16 compliance with requirements that the Secretary  
17 finds necessary in the interest of the health  
18 and safety of patients.

19 That's very broad, and I think --  
20 well, you agree that you -- they have broader  
21 authority because it's in a spending clause  
22 provision? I mean, you signed -- you signed  
23 the contract.

24 MR. OSETE: Well, sure. And even in  
25 the spending clause context -- I would say two

1 responses to that, Your Honor. First, even in  
2 the spending clause context, as Justice Alito  
3 mentioned earlier, the states are entitled to  
4 clear notice. So there is -- whatever  
5 conditions the Secretary does state, they have  
6 to derive from unambiguous grants of statutory  
7 authority.

8 In this case, Your Honor, we -- we  
9 respectfully disagree with my friend, Mr.  
10 Fletcher, because he only cites certain parts  
11 of these provisions. For example, with respect  
12 to the hospital in this application, he ignores  
13 the "such other requirements" language that  
14 precedes the Secretary's authority to regulate  
15 health and safety.

16 And many of those provisions, for  
17 example, (e)(1) through (8), none of those talk  
18 about immunization. They talk about  
19 recordkeeping. They talk about discharge  
20 procedures. They talk about many --

21 JUSTICE KAGAN: Mr. Osete, really? Do  
22 you think that the CMS head and that the  
23 Secretary of HHS are bookkeepers with respect  
24 to this statute? Do you think that they don't  
25 have responsibility to protect the safety of

1 these two incredibly vulnerable patient  
2 populations? Isn't that their principal  
3 responsibility in these laws? Isn't that the  
4 most important thing that both of them do?

5 MR. OSETE: Your Honor, certainly, the  
6 Secretary does have authority to set  
7 requirements in the interest of health and  
8 safety. All I'm saying is you have to look at  
9 the statute in context. I'm not saying that  
10 HHS is somehow just this recordkeeping  
11 function. I mean, certainly, it is important  
12 for these facilities to have adequate  
13 recordkeeping. You're dealing with vital  
14 records, health records, other things. The  
15 context here --

16 JUSTICE KAGAN: Well, I wasn't saying  
17 that they don't have to concern -- be concerned  
18 about records either. I'm just saying, in  
19 addition to being concerned about records, this  
20 statute clearly gives them, by reference to the  
21 health and safety delegations, by reference  
22 even to the idea of administering efficiently  
23 programs like this, their principal job is to  
24 look after the health and safety of Medicare  
25 and Medicaid recipients.

1           And -- and with the understanding that  
2           those two groups of patients are pretty much  
3           the most vulnerable patients there are, either  
4           elderly patients or the -- in the -- in the  
5           case of Medicaid, unfortunately, poverty has a  
6           great deal to do with medical outcomes.

7           So, you know, with respect to these  
8           two vulnerable populations and especially  
9           vulnerable when it comes to COVID, how can it  
10          not be the principal, prime responsibility of  
11          the CMS head and the Secretary of HHS to look  
12          out for their health and safety?

13          MR. OSETE: Because that  
14          responsibility that falls in (e)(9) with  
15          respect to the hospitals, which is what the  
16          Secretary has before it in this application,  
17          that authority is informed -- the grant of  
18          authority in that section is informed by the  
19          other provisions in that statute.

20          Doubly so here, Your Honor, where you  
21          have a situation where this Court has said that  
22          ordinarily compulsory vaccination is not  
23          something that ordinarily concerns the federal  
24          government. That was in Jacobson at page 38.

25          Doubly so here, Your Honor, because,

1 when you're going to alter, significantly  
2 alter, the balance between state and federal  
3 powers, something that has traditionally been  
4 in the province of the states, you have to do  
5 so with exceedingly clear language. The Court  
6 said that in Alabama Realtors recently. The  
7 Court said that also in U.S. Forest in 2020.  
8 That is the kind of language we're asking here.  
9 It's not that the Secretary --

10 JUSTICE KAGAN: Do you think that the  
11 Secretary can require the adoption of various  
12 infection prevention and control measures? You  
13 know, can they say to hospitals, you have to  
14 sterilize your instruments, you have to wash  
15 your hands in a certain way? One of the things  
16 we understand about settings like this one is  
17 the way that infections spread.

18 MR. OSETE: Sure.

19 JUSTICE KAGAN: And you have to do a  
20 variety of things to make sure that you prevent  
21 the spread of infection. Can they do that?

22 MR. OSETE: Your Honor, absolutely,  
23 because --

24 JUSTICE KAGAN: Because that's their  
25 job, right?

1           MR. OSETE: Your Honor, certainly,  
2 with respect to 1395i-3(d)(3), which goes to  
3 skilled nursing facilities, there's express  
4 language that the Secretary can adopt infection  
5 control measures to prevent the spread of  
6 diseases and --

7           JUSTICE KAGAN: Yeah. Well, whether  
8 there's express language of that kind or not,  
9 the responsibility to look after the health and  
10 safety of vulnerable populations includes  
11 requiring infection prevention measures, isn't  
12 that right?

13           MR. OSETE: Well, certainly, Your  
14 Honor. If -- if Congress -- Congress decided  
15 to write statutes in very express terms with  
16 respect to skilled nursing facilities, and I  
17 will submit --

18           JUSTICE KAGAN: I think you're  
19 ignoring the question. Put that aside.  
20 Suppose there was -- it didn't say infection at  
21 all, but it says you have to look after the  
22 health and safety of your patients. Does that  
23 include infection prevention?

24           MR. OSETE: It -- it may very well  
25 include infection prevention. I guess all I'm



1 saying is that, in this case, Your Honor, where  
2 there is express language that talks about  
3 that, Congress knows how to do that and chose  
4 not to regulate with such specificity.

5 JUSTICE KAGAN: I -- I --

6 JUSTICE BREYER: Your view is that --  
7 what you're saying is they don't have authority  
8 under this? Is that what -- in response to  
9 Justice Kagan?

10 MR. OSETE: Your Honor --

11 JUSTICE BREYER: They can't say wash  
12 your hands. Can they say, if there's a  
13 diphtheria -- we don't want anybody with  
14 diphtheria walking into the hospital because  
15 everybody will get it. You're saying they  
16 can't say that, is that right?

17 MR. OSETE: Your Honor, there are  
18 various -- there are various measures that --

19 JUSTICE BREYER: Are you saying that  
20 or not? Take the example --

21 MR. OSETE: I'm saying they can --

22 JUSTICE BREYER: -- that Justice Kagan  
23 gave of the washing hands or -- or sterilizing  
24 instruments or the one I just gave you of  
25 diphtheria. Can they say it or not?

1           MR. OSETE: Yes, they can regulate all  
2 kinds of --

3           JUSTICE BREYER: All right. If they  
4 can say that, then why can't they say in the  
5 same breath, and, by the way, we don't want you  
6 walking in here in crowds that will spread  
7 COVID and this is how you stop it?

8           MR. OSETE: Because --

9           JUSTICE BREYER: Why can they say the  
10 one and not the other?

11          MR. OSETE: Because gloves -- taking  
12 off gloves and masks, a vaccine cannot --

13          JUSTICE BREYER: I didn't say that. I  
14 said diphtheria.

15          MR. OSETE: Your Honor, the Secretary  
16 certainly has authority to implement all kinds  
17 of infection control measures at these  
18 facilities. I -- I'm not disputing that, Your  
19 Honor. All we're saying --

20          JUSTICE KAGAN: Well, all the  
21 Secretary is doing here is to say to providers,  
22 you know what, like basically the one thing you  
23 can't do is to kill your patients. So you have  
24 to get -- you have to get vaccinated so that  
25 you're not transmitting the disease that can

1 kill elderly Medicare patients, that can kill  
2 sick Medicaid patients.

3 I mean, that seems like a pretty basic  
4 infection prevention measure. You can't be the  
5 carrier of disease.

6 MR. OSETE: But, Your Honor, here  
7 you're -- we're dealing specifically with a  
8 vaccine requirement that, again, has  
9 historically been in the state's province. And  
10 if Congress wants to give that authority to  
11 CMS, the federal agency here, it has to do so  
12 in exceedingly clear language.

13 JUSTICE BREYER: But what do I do with  
14 this? Perhaps you can tell me I am way off  
15 base, and I don't mind if you do, but, I mean,  
16 here we are, ask for a stay, okay?

17 And in the one case, either this will  
18 go ahead or it won't. In the case earlier, it  
19 will go ahead or it won't. And to what extent  
20 can we take account of what I think would be  
21 relevant with stays or not stays or how we act  
22 in the interim and dah-dah, dah-dah, dah, okay,  
23 but there are 750,000 people got this  
24 yesterday, but the hospitals are full to  
25 overflowing, that -- there is a problem, worse

1 than diphtheria.

2           People all over the world are getting  
3 this, and they are here, too, and they are  
4 dying, that's what we're trying to ask you, or  
5 they're filling up hospital beds and others are  
6 dying because they can't get in. Okay. Now,  
7 public interest call it. Call it something  
8 else. Call it what you might.

9           But it seems to me, it's hard for me  
10 to believe, it seems to me that every minute  
11 that these things are not in effect, thousands  
12 of more people are getting this disease. Okay?

13           And we have some discretionary power.  
14 And, therefore, well, you tell me I can't take  
15 that into account. To me that's fairly  
16 unbelievable, but I want to hear it.

17           MR. OSETE: Your Honor, the public  
18 interest is flexible. And you can take all  
19 that into account. All I'm saying is the two  
20 statutes, the provisions that the Secretary has  
21 put forward in this case, we do not believe  
22 that they have met their burden of showing a  
23 likelihood of success that on the merits those  
24 were lawful exercises of authority.

25           Even in situations where the Secretary

1 desires to prevent the spread of COVID, it  
2 cannot act unlawfully. Doubly so here, again,  
3 because this is exactly the kind of requirement  
4 that historically has been in the province of  
5 the states.

6           And if Congress wants to take that  
7 away and give it to CMS or give it to a federal  
8 agency, it has to do so in exceeding clarity.  
9 And I will point out, too, in the public  
10 interest, Your Honor, keeping -- doing away  
11 with the injunction as we said so is going to  
12 be devastating to vulnerable patients in rural  
13 America, in rural Nebraska.

14           No surgeries. The only  
15 anesthesiologist in a rural Nebraska hospital,  
16 he is not going to be able to go to work. That  
17 means no surgeries. Emergency C-sections.

18           JUSTICE BREYER: On that one I have a  
19 question, too. I take what you say is correct.  
20 All right. I don't know if it is correct, but  
21 I'll assume it.

22           Well, if these states, if we act in  
23 such a way that over the next two weeks or the  
24 next week these rules go ahead as planned and  
25 people do get inoculated because they have to,

1 or -- now, if the bad thing that you are  
2 talking about then occurs, we'll know it,  
3 because what they are saying at the moment on  
4 the other side is there is another bad thing,  
5 which is the bad thing that I mentioned at the  
6 beginning, that hundreds of thousands of people  
7 more get this disease.

8           And we know what happens from  
9 Massachusetts and in New York in the old  
10 people's homes. Okay? So they're saying there  
11 are two bad things. You are saying the one and  
12 the agency, the other, is the more predominant.

13           So suppose you are faced with that  
14 division. We let it go ahead. Then if you are  
15 right, everybody will know it, and we can draw  
16 back. That's not perfect for you, but that's  
17 at least something, and it helps protect the  
18 people who might otherwise get very sick.

19           MR. OSETE: And -- and unfortunately,  
20 Your Honor, it's going to introduce --

21           CHIEF JUSTICE ROBERTS: Please.

22           MR. OSETE: Unfortunately, Your Honor,  
23 in this case it's going to devastate local  
24 economies. It's going to decimate these local  
25 towns that don't draw their pool of applicants

1 from the coast, Your Honor. These are local  
2 communities. They run these hospitals.

3 And that is the problem, Your Honor,  
4 is those kind of interests, that perspective  
5 was not heard in this context. And that is  
6 going to be devastating, Your Honor.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Thomas, anything further? No?

9 Justice Alito?

10 Justice Kagan?

11 JUSTICE KAGAN: Mr. Osete, this rural  
12 hospital question, you have presented some  
13 declarations that suggest that there would be  
14 labor disruptions, the Secretary took that into  
15 account specifically, basically has a different  
16 view of the size of the disruptions, based on  
17 the data that he had. And then, in addition to  
18 that, said that there are countervailing  
19 things, there are countervailing things with  
20 respect to the labor force, and the -- and the  
21 Secretary said some people might come back  
22 because they won't have to deal with  
23 unvaccinated colleagues.

24 Some people -- you know, that there  
25 will -- there will be savings in terms of fewer

1 people out sick and so forth. And then the  
2 Secretary has an important job to do. And  
3 that's to balance, whatever disruptions there  
4 are, the Secretary says they're much less than  
5 you say they are, but then to balance those  
6 disruptions against the safety of the Medicare  
7 and Medicaid recipients, whom he is statutorily  
8 obligated to protect.

9           And -- and, you know, it just seems  
10 pretty basic to me, as I said, that the first  
11 thing that that means in the context of this  
12 pandemic is that providers can't be carriers of  
13 the disease itself. And then, in addition,  
14 there are other health benefits, you know,  
15 people are not showing up to hospitals because  
16 they're afraid of getting COVID from staff.

17           And so they're not coming for their  
18 mammograms and they're not coming for their  
19 colonoscopies and so forth. So he has to  
20 balance all those health benefits against what  
21 you say are these labor disruptions.

22           And the question is, I mean, you might  
23 have a point, I don't know, I don't know very  
24 much about the rural market, the -- you know,  
25 but the Secretary, that's his job.



1           Should it be that we decide, you know,  
2           as against what the Secretary has decided, in  
3           performing his important function of evaluating  
4           these potential disruptions and weighing those  
5           disruptions against the health benefits that he  
6           sees in that rule? Should we say we think that  
7           the -- that the disruptions are more, greater  
8           than the Secretary thought and we further would  
9           weigh them differently against the health  
10          benefits of the rural? Is that for courts to  
11          decide?

12                 MR. OSETE: Your Honor, there is a lot  
13           there. And I -- I think the -- the -- the  
14           simplest way I can answer that directly is in  
15           this case it's this critical perspective of  
16           these tiny communities that, again, he did cite  
17           to one example in North Carolina with 35,000, I  
18           think it was Novant Health, 35,000 employees as  
19           this is going to be insignificant to them.

20                 But I think that critical perspective  
21           of these tiny hospitals and, again, are 100 or  
22           less, these numerous facilities that are going  
23           to be devastated by this, that sort of relevant  
24           factor, that important aspect of the problem,  
25           we don't see how the Secretary could have

1 properly weighed everything properly when that  
2 sort of critical perspective was ignored, and  
3 these folks did not have a chance to be heard.

4           And in this case it's almost as if the  
5 Secretary put a rock on one side of the scale  
6 and a feather on the other. What -- what may  
7 work in Detroit and Houston may actually be  
8 counterproductive in Memphis, Missouri, or, for  
9 that matter, in El Dorado, Arkansas.

10           All of those places have different  
11 considerations, which is why this historically  
12 has been a local and state matter and the  
13 states, again, are free to require it or not  
14 require it --

15           JUSTICE SOTOMAYOR: So, why is this --

16           MR. OSETE: According to the local  
17 government.

18           JUSTICE SOTOMAYOR: -- an issue for  
19 the states to require or not require? I mean,  
20 this is the federal government paying for  
21 services. And why doesn't it have a right as  
22 the payer for services to specify what services  
23 it wants to pay for?

24           I mean, that's -- now, in terms of  
25 clear rules, I'm -- I'm having a very hard

1 time understanding how you can say, yes, they  
2 could pass a rule that requires people to wear  
3 gloves or they can pass a rule that requires  
4 them to isolate individuals who are -- are  
5 infected by something, but they can't pass this  
6 rule. And you say because it wasn't clear?

7 If it's clear enough that they can  
8 consider safety and health regulations, why is  
9 this particular rule subject to us saying no?

10 MR. OSETE: Because, Your Honor, this  
11 Court in Jacobson and various cases has drawn  
12 the line at compulsory vaccination being  
13 something that the states do. And when  
14 Congress --

15 JUSTICE SOTOMAYOR: But wait a minute.  
16 That's what they do with respect to other  
17 issues, but this is with respect to if you want  
18 my money, your facility has to do this.

19 MR. OSETE: Sure.

20 JUSTICE SOTOMAYOR: It has to have --  
21 it has to serve certain food. It has to serve  
22 certain meals a day. It has to give snacks.

23 These are all state issues usually,  
24 but under the Spending Clause, we're the buyer.  
25 The federal government says what it wants to

1 spend its money on. This is not a -- an issue  
2 of power between the states and federal  
3 government. This is an issue of what do --  
4 what does the federal -- what right has the  
5 federal government to dictate what it wants to  
6 buy.

7 MR. OSETE: Your Honor, it is a  
8 vaccine requirement -- requirement masquerading  
9 as a condition of participation. And if  
10 Congress intended that, this Court has made it  
11 very clear that something like compulsory  
12 vaccination, even in the Spending Clause  
13 context, which itself demands Congress speak  
14 with a clear voice, it requires --

15 JUSTICE SOTOMAYOR: How much clearer  
16 do you need for Congress to say than pass  
17 regulations that protect the health and welfare  
18 of ill people?

19 MR. OSETE: Perhaps the -- the one  
20 example I can think of right away, Your Honor,  
21 is in (e)(7) of 1395x(e), where Congress  
22 acknowledged or spoke with a very clear voice  
23 that when it comes to licensing at the state  
24 level, that is something that the states do.  
25 And that's exactly -- I mean, Congress knows

1       how to directly speak to issues that invade  
2       into the state -- into state areas --

3               JUSTICE SOTOMAYOR:  And it hasn't --

4               MR. OSETE:  -- like --

5               JUSTICE SOTOMAYOR:  -- done it with  
6       health and safety.  It has given that right to  
7       the Commission.  Thank you, counsel.

8               CHIEF JUSTICE ROBERTS:  Justice  
9       Gorsuch?

10              Justice Kavanaugh?

11              JUSTICE KAVANAUGH:  Couple questions.  
12       First, this is an unusual administrative law  
13       situation, from my experience, because the  
14       people who are regulated are not here  
15       complaining about the regulation, the -- the  
16       hospitals and healthcare organizations.  A very  
17       unusual situation.

18              They, in fact, overwhelmingly appear  
19       to support the Secretary's -- the CMS  
20       regulation.  So I want -- and the government  
21       makes something of that.  What -- what are we  
22       to make of that?

23              MR. OSETE:  Your Honor, certainly  
24       there are large institutional providers that  
25       may have no problem with this.  Obviously,

1 there are smaller ones, very small community  
2 hospitals, that do have a problem with that.

3 But -- but here the states have their  
4 facilities. They --

5 JUSTICE KAVANAUGH: The states have a  
6 very small percentage of the facilities. Most  
7 of the facilities are private-run facilities,  
8 right? This picks up on Justice Thomas's  
9 question. Like where -- where are the  
10 regulated parties complaining about the  
11 regulation? That's how we usually have -- the  
12 last case is a good example.

13 MR. OSETE: Sure.

14 JUSTICE KAVANAUGH: Obviously, there's  
15 a -- there's a missing element here.

16 MR. OSETE: Well, they're not --  
17 they're not -- certainly they -- these sort of  
18 entities that would be subject to this rule,  
19 like small private facilities that receive  
20 Medicaid funding, certainly are not plaintiffs  
21 per se, but the states do represent the  
22 citizens of our -- our constituencies, like  
23 these places that run these facilities, small  
24 community hospitals. We speak on their  
25 behalves.

1           And all I would say here is we have --  
2     we have made a value judgment through our  
3     policies to not require vaccination because a  
4     one-size-fits-all requirement does not help.  
5     And that kind of policy judgment, as expressed  
6     through our laws, our duly enacted laws, that  
7     would be applicable both to state-run  
8     facilities and private facilities, that is what  
9     is being preempted here, Your Honor, by this  
10    unlawful mandate.

11           And that's how we're -- we're speaking  
12    in that capacity, Your Honor, is the folks  
13    whose voices were ignored throughout this  
14    entire process and shouldn't have been ignored,  
15    especially with these devastating consequences.

16           JUSTICE KAVANAUGH: And then, second,  
17    just -- I think you've alluded to this, but how  
18    is a vaccine different in kind, from your  
19    perspective, from, say, the requirement to wear  
20    gloves or the requirement to wash your hands or  
21    the other kinds of requirements? Because I  
22    think if you acknowledge that the -- there's  
23    authority to require the latter, then you need  
24    to explain why the -- the vaccine is different.

25           MR. OSETE: I don't think I could say

1 it any better than Chief Justice Sutton did at  
2 page 12 of the dissent in the OSHA case, which  
3 is masks can come off, gloves can come off, the  
4 vaccine requirement, taking a vaccine is a  
5 permanent medical procedure that cannot come  
6 off after work is over. That is, there are --  
7 there are materially different conditions,  
8 materially different procedures at stake.

9 And when you look at the context, for  
10 example, in the hospital requirement, 1395x(e),  
11 nothing in that statute comes close to  
12 authorizing this precise mandate in this case,  
13 which is going to have devastating consequences  
14 for vast swaths of this country, Your Honor.

15 JUSTICE KAVANAUGH: Thank you very  
16 much.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Barrett.

19 JUSTICE BARRETT: No questions.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 General Murrill, are you still on the  
23 line?

24 MS. MURRILL: I am, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: You may



1 proceed.

2 ORAL ARGUMENT OF ELIZABETH MURRILL  
3 ON BEHALF OF THE RESPONDENTS IN NO. 21A241

4 MS. MURRILL: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 This case is not about whether  
7 vaccines are effective, useful, or a good idea.  
8 It's about whether this federal executive  
9 branch agency has the power to force millions  
10 of people working for or with a Medicare or  
11 Medicaid provider to undergo an invasive,  
12 irrevocable, forced medical treatment, a COVID  
13 shot. It's a bureaucratic power move that is  
14 unprecedented.

15 If it can do that, the question still  
16 remains as to whether it properly exercised  
17 that power here. The district court answered  
18 no to both questions at the preliminary  
19 injunction stage, and the court below supported  
20 its ruling with a number of well-reasoned  
21 conclusions.

22 Now, without even addressing all the  
23 underlying bases for the ruling, the government  
24 asks this Court to jump ahead of the Fifth  
25 Circuit and dissolve the injunction,

1     irrevocably changing the status quo in a way  
2     that will effectively give the federal  
3     government all the relief it seeks. This will  
4     create chaos in state provider networks, limit  
5     access to care for the poor and needy, and  
6     eviscerate informed consent for millions of  
7     people.

8             The Court should reject the  
9     government's request and maintain the status  
10    quo because the district Court's holdings were  
11    correct on all counts.

12            I'm happy to take questions or speak  
13    to some of the questions that have already been  
14    asked all -- by the Court.

15            JUSTICE THOMAS: Just briefly,  
16    counsel.

17            The -- I'd like you to address whether  
18    or not or at least to what extent this rule  
19    preempts rules of your state.

20            MS. MURRILL: Justice Thomas, it does  
21    preempt rules of some of the states in our  
22    coalition. I don't know that it preempts rules  
23    in every state, but it affects Alabama,  
24    Louisiana, and Montana in different ways,  
25    different laws.

1           JUSTICE THOMAS: Could you address as  
2 I asked earlier the *parens patriae* standing. I  
3 think that is going to be an important matter,  
4 and I'd like you to address it.

5           MS. MURRILL: So I think we have  
6 *parens patriae* standing to protect the  
7 interests of our citizens, but that is not the  
8 sole basis on which we appear in these cases.  
9 And there has been, you know, some questions  
10 about Medicare and Medicaid. I think the  
11 government has conflated those two programs in  
12 -- in an enormous way because just in Louisiana  
13 alone, I can tell you that 41 percent of our  
14 budget is Medicaid funding.

15           So we have -- we have enormous,  
16 enormous interests in the way these programs  
17 operate, and that's one of the reasons why  
18 there are express consultation requirements  
19 built into the statute.

20           JUSTICE THOMAS: Thank you.

21           CHIEF JUSTICE ROBERTS: General, do  
22 you agree with the district court's statement  
23 that COVID -- this is a quote -- "COVID no  
24 longer poses the dire emergency it once did"?

25           MS. MURRILL: Your Honor, I -- I think

1 that that is a shifting -- those are shifting  
2 sands. Obviously, COVID conditions can change  
3 at any given time. And they have.

4 JUSTICE BREYER: What is your other  
5 basis for standing?

6 MS. MURRILL: Our basis for standing  
7 is that we are being regulated directly by this  
8 rule. We have to implement it, and it affects  
9 our provider networks. It directly affects  
10 Medicaid funding, and that is a program that is  
11 implemented entirely by the state.

12 I don't think I could underestimate  
13 enough the impact on the states and their  
14 provider networks. That's precisely what the  
15 -- the -- the declarations that we submitted  
16 and I think many that were submitted in the  
17 Missouri case also go to, is the effect on our  
18 ability to actually provide access to care,  
19 which is the actual primary goal of this  
20 program.

21 CHIEF JUSTICE ROBERTS: I'd like to  
22 touch on the Spending Clause issue just a bit.  
23 It was a broad provision that you agreed to,  
24 which authorized the Secretary to impose  
25 requirements that are -- that the Secretary

1 finds are necessary in the interest of the  
2 health and safety of -- of patients.

3 Why did that not give you adequate  
4 notice that something like this could be  
5 enacted?

6 MS. MURRILL: I don't think that gave  
7 us any more notice that that could be enacted  
8 than -- I mean, no one even expected COVID, so  
9 how could we possibly have expected to have the  
10 federal government, through a spending  
11 condition imposed upon us years after this  
12 program was created, co-opt a quintessential  
13 police -- state police power for deciding  
14 whether the -- its citizens should be  
15 vaccinated or not?

16 That's just not something that we  
17 could have reasonably anticipated given the  
18 general broad language that is put into the  
19 statute. And -- and, again, I don't think that  
20 the primary role is to -- is to actually  
21 provide directly for the health and safety of  
22 the people. It is to provide funding to the  
23 state to implement these programs, or through  
24 Medicare to reimburse for healthcare to  
25 individuals.

1           I -- I could -- I mean, I would also  
2 point just to the secondary aspect of any  
3 spending clause argument, also turns on the  
4 voluntarily and knowingly accepting the terms.  
5 And so I think that goes straight to your  
6 question, that that -- respecting that  
7 limitation is absolutely critical to respecting  
8 the balance of the state's sovereignty in this  
9 program.

10           CHIEF JUSTICE ROBERTS: Well, it's --

11           JUSTICE SOTOMAYOR: How does that --

12           CHIEF JUSTICE ROBERTS: Determination  
13 is what the Secretary finds and it's what the  
14 Secretary finds necessary. So I'm not saying  
15 there's not some limit there, but I don't know  
16 why a provision addressing a -- an infectious  
17 disease of this scope is beyond the Secretary's  
18 determination that mandated issue here is -- is  
19 necessary.

20           MS. MURRILL: Well, we've never taken  
21 the position that the Secretary has no  
22 authority to address it in any given -- in any  
23 -- at all. We're saying that the -- that they  
24 can't do this. And they've never, ever, ever  
25 done anything like this, which they

1 acknowledge.

2           And -- and the solicitor general in  
3 the argument that preceded this one also  
4 pointed and conceded that where there are other  
5 textual and structural cues in a statute, that  
6 may be inconsistent with the -- with the  
7 agency's jurisdiction, that you should be  
8 looking at that in terms of the discretion  
9 that -- that you give and whether -- when you  
10 evaluate, whether this is a question or an  
11 issue that falls within the general discretion  
12 and scope that was granted earlier by Congress.

13           And -- and here there are multiple  
14 cues that conflict directly with the broad,  
15 broad scope and grant of authority that they're  
16 claiming here.

17           JUSTICE ALITO: Do you think we need  
18 to find that you have *parens patriae* standing  
19 in order to take into account the interests of  
20 employees within your state who do not want to  
21 be vaccinated? Is that a standing question or  
22 is it a question that can be taken into account  
23 in the context of determining what the statute  
24 means and whether it satisfies whatever  
25 requirements there may be under the spending

1 clause?

2 MS. MURRILL: I -- I think it's both.  
3 I mean, I -- I certainly believe that you can  
4 take it into account as part of our standing.  
5 We have independent grounds for standing. When  
6 you get past that question, I think it also  
7 relates to the -- the -- the question  
8 of whether it's actually controlling the tenure  
9 of -- of employees.

10 I think it directly conflicts with  
11 that. I mean, Justice Alito, there's --  
12 there's really no question I think in our mind  
13 that this was a -- a pretext that the entire --  
14 as the Chief Justice alluded to, that this was  
15 a work-around.

16 This was an intent -- that the  
17 government intended to tether all of these  
18 restrictions together, all of these -- these  
19 mandates together to vaccinate as many -- as  
20 much of the American public as they could  
21 touch.

22 And in this particular rule, at the --  
23 the Federal Register 61607, the government even  
24 acknowledged that the most important inducement  
25 here was the fear of job loss.



1           This is targeted at people. It's not  
2 targeted at facilities. And they've never done  
3 anything like this before, precisely because  
4 there are structural prohibitions against it in  
5 the statute. And where we are in this  
6 procedure is -- is extraordinary.

7           They want a -- to -- you to dissolve  
8 an injunction, parts of which have not even  
9 been contested, so that they can up-end the  
10 status quo which will disturb enormously our  
11 provider network.

12           JUSTICE BREYER: Well, all that's  
13 true, but I'd like to get your response -- I  
14 mean, there's some truth to what you say, but  
15 there -- I'd like to get your response to what  
16 I asked previously twice already.

17           We sit in both these cases something,  
18 as the inheritor of a court of equity and we do  
19 that particularly in respect to stays, whether  
20 you call them administrative or not. And it  
21 may be, both sides, and in the other case, you  
22 know, as -- that's why I say there's a side in  
23 each case, that is predicting harm if the  
24 agency rule goes into effect.

25           And the other side predicts serious

1 harm, if the agency rule does not go into  
2 effect. And as you heard the OSHA case at the  
3 last minute, on the one hand, if they have to  
4 start complying with this, they have to get  
5 plans and the employers are hurt.

6 On the other hand, if they don't start  
7 to get those plans ready, people might -- well,  
8 it looks like a lot of people will get sick and  
9 take up hospital beds or worse.

10 So in weighing those equities, why  
11 don't we have to take and put quite a lot of  
12 weight on avoiding even by a minute or a  
13 second, because if you divide 750,000 by the  
14 number of seconds in a day, you get a lot of  
15 people.

16 And why do we not have to take those  
17 things into account, see how the government  
18 would balance them, see if that is reasonable,  
19 and be very weary at the least of interfering  
20 with rules that will, in fact, save people's  
21 lives or hospital beds or from getting the  
22 disease?

23 Do you see what I'm --

24 MS. MURRILL: Justice --

25 JUSTICE BREYER: -- saying? I'm

1 asking -- I'm putting a burden on you to say,  
2 yeah, that's what I mean.

3 MS. MURRILL: I -- I do.

4 JUSTICE BREYER: And I want to  
5 know.

6 MS. MURRILL: I understand the  
7 question.

8 JUSTICE BREYER: Yeah.

9 MS. MURRILL: I think -- I -- I think,  
10 first of all, these aren't just plans. But  
11 here this rule is different. There -- there's  
12 no test-and-mask exception. There's this is a  
13 vaccinate, and it's a short, short shot clock.

14 And -- and so they do not have a  
15 choice. They have to be fired or they cannot  
16 be hired and so it handcuffs our providers in a  
17 way that is -- that is extraordinary and  
18 immediate. And that, the status quo right now  
19 is that they still comply with all the other  
20 rules of Medicaid and Medicare, which means  
21 they have infectious disease control measures  
22 in place, they are doing the very best job that  
23 they can, they need all the boots on the ground  
24 that they can get, and this rule will actually  
25 change that.

1           That will -- it will immediately  
2 change that. So I think it is extraordinarily  
3 different and it also comes up in a different  
4 context. It comes up in the context of a  
5 preliminary injunction, multiple injunctions,  
6 but specifically in ours where they did not  
7 even contest certain aspects of it, so they --  
8 they present to you a request for a stay that  
9 does not even contest certain aspects of an  
10 injunction that they want you to overturn.

11           JUSTICE BREYER: Thank you.

12           JUSTICE SOTOMAYOR: Counsel, I -- I'm  
13 having a very hard time trying to do the state  
14 power argument with respect to a spending  
15 clause program that doesn't affect the states  
16 directly, except this proprietors because, as  
17 proprietors of state-run facilities, those are  
18 the ones affected by this rule. The private  
19 facilities are, and, as one of my colleagues  
20 noted, Justice Kavanaugh, we don't have many  
21 amici of them complaining.

22           But putting that aside, I am having a  
23 hard time understanding how and why a rule like  
24 this is so substantially different than  
25 the volumes of rules that CMS has with respect

1 to so many issues involving health and welfare.  
2 They tell you how high the bed has to be. They  
3 tell you how close hand sanitizers have to be.  
4 This is before COVID.

5           They have so many different rules that  
6 one could arguably say belonged within the  
7 state's rights that -- that give me a working  
8 principle that says to the federal agency  
9 charged with the health and safety of -- of  
10 patients who believes that the only way to  
11 protect these vulnerable patients is by this  
12 one tactic, by this one step, why that should  
13 tie their hands.

14           You may argue otherwise, that the  
15 other ways of doing it are effective, but  
16 they've decided in this particular context,  
17 with the vulnerability of this -- of these  
18 particular populations, that the other steps  
19 are inadequate.

20           MS. MURRILL: Your Honor, there --  
21 there's two aspects to your question, and I'd  
22 like to speak to both of them.

23           One is the issue of whether we're just  
24 proprietors. We are not just proprietors. And  
25 I think the Court effectively discussed that in

1 NFIB versus Sebelius. Medicaid is an enormous  
2 program where states are contracted with the  
3 federal government, not providers. The  
4 providers are contracted with the states. So  
5 it is -- it is important, I think, to keep that  
6 distinction between these two programs.

7 But, to -- to your question about the  
8 -- the dividing line, the dividing line here is  
9 -- is precisely why we are in a question of --  
10 major questions doctrine land, because they  
11 have never done this for at least since the  
12 Jacobson case.

13 And -- and -- and, before that,  
14 predominantly, this has been a question --  
15 protecting the health and safety of individuals  
16 and exercising this kind of -- of -- of power  
17 to force the individual to submit to a medical  
18 treatment has never ever been something that  
19 has been authorized by Congress or done by an  
20 agency on an emergency basis without  
21 consulting --

22 JUSTICE SOTOMAYOR: Counsel, I don't  
23 mean to interrupt you, but we've never had a  
24 situation like this one before.

25 MS. MURRILL: We haven't.

1 JUSTICE SOTOMAYOR: It's  
2 unprecedented.

3 MS. MURRILL: But I don't think in  
4 this case that justifies them co-opting a  
5 quintessential state police power. In fact,  
6 the opposite is true. It only points up the  
7 need to evaluate this in the larger context of  
8 whether Congress -- I mean, Congress didn't do  
9 this, by the way.

10 I mean, the Congress just as recently  
11 as last summer changed some of the discrete  
12 statutes specifically related to skilled  
13 nursing and nursing homes and authorized  
14 certain measures for strike teams to augment  
15 staff in those facilities due to COVID  
16 outbreaks, but they didn't authorize vaccines,  
17 so -- for staff.

18 I think there are cues. There are  
19 cues in the statute. There are cues in the --  
20 in the -- the -- the history and structure and  
21 the precedents of this Court that -- that  
22 support waiting and maintaining the status quo,  
23 as the district court below did and the Fifth  
24 Circuit did.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything further?

2 JUSTICE THOMAS: Nothing further,  
3 Chief.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Breyer?

6 Justice Alito?

7 Anything further, Justice Sotomayor?

8 JUSTICE SOTOMAYOR: I just want to say  
9 the Sixth Circuit didn't, correct?

10 MS. MURRILL: The Sixth Circuit in the  
11 OSHA case --

12 JUSTICE SOTOMAYOR: I'm sorry, I  
13 confused --

14 MS. MURRILL: -- operated differently.

15 JUSTICE SOTOMAYOR: Yes.

16 MS. MURRILL: Yes.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?  
18 Justice Gorsuch?

19 Justice Barrett?

20 Thank you, counsel.

21 Rebuttal, Mr. Fletcher.

22 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

23 ON BEHALF OF THE APPLICANTS

24 MR. FLETCHER: Thank you, Mr. Chief  
25 Justice. Just three quick points.



1           I'd like to start with the  
2           interpretation of the statutes before you that  
3           the other side is offering because I don't hear  
4           them to contest that the Secretary's authority  
5           to set conditions for participating in the  
6           federal Medicare and Medicaid programs includes  
7           the authority to protect patient health and  
8           safety, even in the statutes that don't include  
9           that language.

10           I don't hear them to be disputing that  
11           the Secretary can adopt infection control  
12           mechanisms or require people to wear gloves or  
13           do other things of that nature. Instead, their  
14           submission seems to be that vaccines are  
15           different. And I think the problem with that  
16           is that they haven't really given you a basis  
17           to ground that in the statute.

18           The first thing that they've said is  
19           vaccination is typically a prerogative of the  
20           states. And, of course, that's true in some  
21           sense, but we're talking here about a federal  
22           spending program.

23           And the regulation of medicine is  
24           typically the prerogative of the states.  
25           Usually it's the states who require hospitals

1 to make sure their employees wear gloves or  
2 they follow the Fire Code or they have  
3 sprinklers, things like that.

4 But no one disputes that Congress has  
5 given the Secretary the authority to make sure  
6 that providers who are providing care under the  
7 aegis of the federal Medicare and Medicaid  
8 program live up to standards set by the  
9 Secretary. That's what the Secretary has done  
10 here.

11 The other thing that I've heard them  
12 say about why vaccines are different is that  
13 you can't take them off, that vaccines are  
14 somehow different than gloves or other safety  
15 measures and so some special specific  
16 authorization ought to be required. And I just  
17 don't think that can be squared with the  
18 context of the healthcare industry.

19 Vaccination requirements are common  
20 throughout our society. They're particularly  
21 common for healthcare workers. They've been  
22 adopted voluntarily by providers around the  
23 country. You have virtually the uniform view  
24 of the medical community telling you that this  
25 is the best way to protect patient health and

1 safety.

2           If anything, I think it would be  
3 bizarre to say that the Secretary's authority  
4 to protect the health and safety of Medicare  
5 and Medicaid patients does not include the  
6 authority to adopt a measure that you see other  
7 regulators adopting, the medical community  
8 urging, and other providers adopting  
9 voluntarily.

10           The whole point of the statute is to  
11 let the Secretary make sure that the standards  
12 of care for Medicare and Medicaid patients meet  
13 best practices, and that's what he has done  
14 here.

15           The second point I want to make,  
16 Justice Barrett, goes back to the colloquy that  
17 you and I had earlier about some of the  
18 different statutes. I hope we've persuaded you  
19 that we're right about all of them, but in case  
20 we have not, I just want to make the case that  
21 it actually is worth the candle in the stay  
22 posture to go provision by provision.

23           So, as we explained, 97 percent of the  
24 employees affected by this regulation are  
25 covered by statutes that include the express

1 health and safety language.

2           Even if you just narrow it down beyond  
3 that, three categories, the largest three  
4 categories of providers, hospitals, home health  
5 agencies, and long-term care facilities,  
6 account for more than 90 percent of the covered  
7 workers. This is shown at the table at page  
8 61603.

9           All of those provisions have express  
10 health and safety language of the sort that  
11 we've been discussing, and two of them,  
12 long-term care facilities or nursing homes and  
13 home health providers, actually include the  
14 extra provisions that we cite at page 6 of our  
15 reply that says the Secretary has not just the  
16 authority to ensure health and safety but also  
17 the duty to do so. And I think, at an absolute  
18 minimum, it's worth letting the rule go into  
19 effect as to them.

20           And, finally, Justice Breyer, I want  
21 to come back to a point that you have raised a  
22 few times about the equities because we are  
23 here on a stay. And I think a couple of  
24 observations to make about the equities.

25           The first is a point that Justice

1 Kavanaugh raised. You don't have providers  
2 before you here. You don't have workers before  
3 you here. Instead, providers and workers  
4 overwhelmingly support the vaccination  
5 requirement.

6           Instead, you have before you states  
7 who do operate some facilities covered by the  
8 rule but only a tiny fraction of them.

9           The second thing I'd say is that even  
10 as to the providers and the workers who are  
11 covered by the regulation, some of my friend's  
12 presentation has suggested that if the stays  
13 are lifted or if the preliminary injunctions  
14 are stayed and the rule goes into effect, that  
15 means that tomorrow people are going to be out  
16 of a job, and that is not true.

17           The Secretary has put out guidance  
18 after the Fifth Circuit narrowed the previously  
19 nationwide injunction to cover only the  
20 plaintiff states here, put out guidance giving  
21 regulated entities 30 days to come into  
22 compliance as to the first shot, 60 days to  
23 come into compliance as to the second shot, and  
24 making clear that even if a regulated entity  
25 has not met full compliance by that 60-day

1 deadline, if the entity is at 90 percent  
2 compliance and has a plan to come into full  
3 compliance within 30 days, the Secretary won't  
4 take enforcement action.

5           Even if that isn't met, even if at the  
6 end of 90 days there is still not full  
7 compliance, the Secretary has always exercised  
8 enforcement discretion before terminating a  
9 provider from the program, and one of the  
10 things the Secretary has considered is access  
11 to care issues of the sort that the other side  
12 has raised. So there are ways to address some  
13 of the problems that my friends have relied on  
14 even if the rule goes into effect.

15           On the other side of the ledger, and  
16 this is where I'll close, if the preliminary  
17 injunctions remain stayed, then we know what  
18 the consequence is. We know that this urgently  
19 needed measure is not going to be in effect to  
20 protect Medicare and Medicaid patients in half  
21 of the country during a pandemic.

22           And I think the Secretary found, and I  
23 don't think anyone seriously disputes, that any  
24 delay in the operation of the rule will cost  
25 lives and cause unnecessary serious illnesses.

1                   We'd ask that the preliminary  
2 injunctions be stayed.

3                   CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel. The applications are submitted.

5                   (Whereupon, at 1:38 p.m., the  
6 applications were submitted.)

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