UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS and LUBBOCK INDEPENDENT SCHOOL DISTRICT, *Plaintiffs*,	§	
v.	§	**CIVIL ACTION NO. 5:21-CV-300**
XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, *Defendants.*	§	

BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

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This case concerns the Vaccine Mandate and the Mask Mandate for all Head Start programs imposed by the Interim Final Rule promulgated by Defendants on November 30, 2021.[1] The parties have extensively briefed the issues in this case. *See* Plaintiffs' Complaint (Dkt. #1), Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction (Dkt. #6), Defendants' Response in Opposition thereto (Dkt. #26), Plaintiffs' Reply thereto (Dkt. #38), and Plaintiffs' Brief in Support of their Motion for Summary Judgment (Dkt. #54-1). The parties argued their positions at length to the Court on December 30. Appx. 6. The Court issued an order granting Plaintiff's' request for a preliminary injunction which extensively analyzed the issues in this case. *See* Order (Dkt. #42).

Defendants now file a Motion to Dismiss and a Motion for Summary Judgment with a Brief in Support. Dkt. #52. Defendants mostly argue the same points they have argued before. Consequently, Plaintiffs' Response mostly repeats the same points they have argued before. For the purpose of judicial economy, Plaintiffs incorporate by reference their Brief in Support of the Motion for Summary Judgment, Dkt. #54-1, which already answers many of Defendants' arguments.

RESPONSE TO DEFENDANTS' SUMMARY

Defendants begin with a Summary briefly stating their main themes. Plaintiffs will briefly respond.

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[1] Dkt. #27-1 (86 Fed. Reg. (Nov. 30, 2021) (entitled "Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs")). It amends 26 C.F.R. § 1302.47(b)(5)(VI) ("Mask Mandate"), .93(a)(1), (2) ("Vaccine Mandate" for staff and contractors), and .94(a) ("Vaccine Mandate" for volunteers).

Defendants begin by describing the COVID-19 public health crisis. Dkt. #52 at 1. But Defendants do not have the authority to regulate public health. They are like the defendants in *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022) ("*NFIB*"), who likewise have limited power—not the power to regulate public health. *Id.* at 665–66. Whether there is or is not a current public health crisis does not affect Defendants' statutory authority. "The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred on it." *Biden v. Missouri*, 141 S. Ct. at 647, 654 (2022).

Defendants then state, "And now, the Supreme Court has confirmed that the 'unprecedented circumstances' of the COVID-19 pandemic 'provide no grounds for limiting the exercise of authorities [the Department of Health and Human Services] has long been recognized to have,' and that such authorities may be used to impose vaccination requirements like the one challenged here. *See Biden v. Missouri*, 142 S. Ct. at 647, 654 (2022) (per curiam)." Dkt. #52 at 1 (brackets in original). But, as this Court stated in the first sentence of its order granting preliminary relief, the Vaccine Mandate and Mask Mandate are "unprecedented conditions on funding for Head Start programs," Dkt. #42 at 1, rather than powers that Head Start "has long been recognized to have." Moreover, the defendants in *Biden v. Missouri* are on the "Health" side of HHS, while Head Start is on the "Human Services" side. The fact that Head Start is under the same Cabinet Secretary as the department that runs Medicare is irrelevant. The programs are governed by separate, distinguishable authority. How the Secretary operates Medicare and Medicaid programs—health care programs for the indigent and elderly—has no bearing on how the Secretary operates Head Start programs—educational programs for children five years old and younger.

Defendants next acknowledge the Head Start is a federal grant program. Dkt. #52 at 1. But it is not a valid exercise of Spending Power. *See* Part II.G.

Defendants then state, "The COVID-19 pandemic has hit Head Start students and families particularly hard. Head Start students are five years old and younger, and thus most cannot be vaccinated." Dkt. #52 at 1. But in fact, of course, young children are the very least affected by COVID-19. *Compare* Dkt. #27-6 at 2 (Administrative Record)[2] to the daily incidence rate data pulled from the CDC's website and attached at Appx. 1–18.[3]

Next, they state, "Many of these students rely on the programs not just for educational purposes, but also for everyday needs, so program closures due to COVID-19 outbreaks have severe negative consequences beyond the classroom." Dkt. #52 at 1. But such arguments do not create statutory authority where there is none. "The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred on it." *Biden v. Missouri*, 141 S. Ct. at 654. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Relators v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2490 (2021).

Defendants' next assertion—that "Congress has assigned the Secretary a statutory responsibility to protect the health and safety of Head Start students and personnel," Dkt. #52 at

[2] "COVID-19 incidence among persons aged 0–4, 5–11, and 12–17 years during August 2020–August 2021 peaked in January 2021 at 21.2, 30.1, and 51.7 cases per 100,000 persons, respectively (Figure 1). Incidence declined in June 2021 to a low of 1.7, 1.9, and 2.9, respectively, across the three age groups; however, incidence in August 2021 among the three age groups reached 16.2, 28.5, and 32.7 per 100,000 persons, respectively."

[3] The total incidence rate (per 100,000) ranged from 304.78 to 527.79 in January 2021, to 24.41 to 35.34 in June 2021, and 179.23 to 340.62 in August 2021. https://covid.cdc.gov/covid-data-tracker/#trends_dailycases_7daycasesper100k (last visited May 4, 2022). Appx. 1-18.

1–2—is similarly flawed. Head Start has the duty to provide many services but may not mandate that any citizen receive particular health care or take particular health-related measures.

Defendants' reference to the Supreme Court's holding in *Biden v. Missouri*—that CMS could adopt its vaccine mandate for health care workers without going through notice and comment (Dkt. #52 at 2.)—is inapposite. *Biden v. Missouri* concerned longstanding powers and health care, not an agency's exercise of unprecedent powers and child care, as in this case.

Defendants next argue that Texas does not have standing. Dkt. #52 at 2. But as the Court has previously determined, Defendants are wrong. Dkt. #42 at 39–52.

Defendants then state, "The Secretary has express statutory authority to ensure that federal funds are used to protect the health and safety of Head Start students and personnel. He has exercised this authority for decades [citing 1975 and 1996 regulations]." Dkt. #52 at 2. In fact, Defendants have never attempted to exercise this kind of authority, and Defendants' contention to the contrary mischaracterizes history.

Finally, Defendants wrap up their Summary by noting that a court in Michigan recently declined to issue a preliminary injunction against the Interim Final Rule. Dkt. #52 at 3 (citing *Livingston Educ. Agency v. Becerra*, No. 22-cv-10127, 2022 WL 660793 (E.D. Mich. Mar. 4, 2022). The Michigan court held that "trying to 'keep the doors open' at Head Start" is justified as an "administrative" program performance standard under 42 U.S.C. § 9836a(a)(1)(C), that "[t]he Rule also falls within the Secretary's authority to regulate 'the condition and location of facilities'" under 42 U.S.C. § 9836a(a)(1) (D), that the Interim Final Rule "is authorized by the broad grant of authority given to the Secretary to promulgate regulations '[the Secretary] finds to be appropriate'" under 42 U.S.C. § 9836a(a)(1)(E), and that Head Start authority to issue

deficiencies to programs that violate rules justifies the Interim Final Rule. *Id.* at *4–5. But this opinion is unpersuasive. Defendants proffered the same arguments in that case as they have here—and this Court has rightly rejected them. *See* Dkt. #42.

RESPONSE TO ARGUMENT

I. Texas has standing to challenge the Interim Final Rule.

In Part I of their Argument, Defendants challenge the State of Texas's standing. Defendants do not challenge Lubbock Independent School District's ("LISD") standing. *See generally* Dkt. #52. While Defendants contend Texas fails to allege an injury in fact necessary to imbue it with standing, that argument fails. The State of Texas has standing for four reasons: (1) Texas has *parens patriae* standing in protecting the welfare of its citizens; (2) Texas has a sovereign interest in the ability to enforce its own laws; and (3) Texas' entities will be forced to lose funding or bear the compliance costs of the Interim Final Rule; and (4) Defendants' failure to conduct notice and comment denied Texas its procedural right to comment on the Rule. *See* Dkt. #8; Dkt. #42 at 44–50.

Texas has *parens patriae* standing to bring suit, because it "has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (5th Cir. 1982). While it is not sufficient to allege a particularized injury to "an identifiable group of individual residents," when the State alleges an injury to the health and welfare of its citizens that the "State, if it could, would likely attempt to address through its sovereign lawmaking powers," it satisfies the requirements of *parens patriae* standing. *Snapp*, 458 U.S. at 607. Here, one need not wonder *if* Texas would attempt to address the injury to its citizens, because it already did. Executive Order GA-36, issued May 18, 2021, prohibits school districts any governmental official from "requir[ing] any person to wear a

face covering or to mandate that another person wear a face covering." Appx. 19-22.[4] Executive Orders GA-38, GA-39, and GA-40 prohibit state agencies, political subdivisions, and any public or private entity in Texas from requiring a person to receive a COVID-19 vaccine. These executive orders were all promulgated *before* Defendants issued the Interim Final Rule on November 30, 2021. *Compare* 86 Fed. Reg. at 68,052*, with* Exec. Order GA-36 Appx. 19–22. (issued May 18, 2021), Exec. Order GA-38 Appx. 23–28. (issued July 29, 2021), Exec. Order GA-39 Appx. 29–32. (issued Aug. 25, 2021), Exec. Order GA-40 Appx. 33–35. (issued Oct. 11, 2021)."[T]he police power of a state" includes, above all, the authority to adopt regulations seeking to "protect the public health," including the topic of mandatory vaccination. *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905). These matters "do not ordinarily concern the national government." *Id*. at 38. The Interim Final Rule interferes with the State's authority.

Additionally, the unrebutted evidence establishes that the Interim Final Rule's enforcement will lead to a decline in Head Start offerings, with some programs forced to close completely. Dkt. #1-3 at ¶¶8–9; Dkt. #8-1 at ¶6; Dkt.#36-2 at ¶¶7–9; Dkt. #36-2 at ¶9; Dkt. #46-2 at ¶6 ("If Muleshoe ISD were to lose its $230,000 in grants from Head Start, it would be forced to shut down the entire 3-year old and 4-year old pre-kindergarten program."). The Parties do not dispute that the closure of Head Start programs would adversely impact students and their families. *See* Dkt. #52 ("[T]he requirements will 'reduce closures of Head Start programs, which can cause hardship for families, and support the Administration's priority of sustained in-person early care and education that is safe for children—with all of its known benefits to children and families'") (quoting 86 Fed. Reg. at 68,053); *see also* Dkt. #42 at 49 (holding that the "Rule's

[4] Exec. Order No. GA-36, (May 18, 2021).

enforcement will . . . adversely impact[] students and their families."). As the Court held in its Order granting Plaintiffs' Motion for Preliminary Injunction, Texas has *parens patriae* standing to protect its citizens from this adverse impact of the Interim Final Rule. *See* Dkt. #42 at 49.

Moreover, the Hobson's choice Texas faces—either spending, at a minimum, hundreds of thousands of dollars, to absorb school districts' loss of federal funding or changing its laws—establishes that Texas has standing to bring these claims. *See Texas v. Biden*, 20 F.4th 928, 1002 (5th Cir. 2021).

Further, Texas has a sovereign interest in its "power to create and enforce a legal code." *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (internal quotation marks omitted). When a State is prohibited from enforcing its own laws, it "necessarily suffers the irreparable harm of denying the public interest." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). That Texas would be precluded from enforcing its own laws instills it with standing. *See E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021) (holding that the State suffers irreparable harm when it is precluded from enforcing executive orders issued by the Governor under his emergency authority). The harm to Texas school districts and Texas children described above would be prevented and foreclosed by the State's enforcement of its executive orders prohibiting mask and vaccine mandates. While the Interim Final Rule mandates Texas children to wear masks and requires teachers to be vaccinated, these requirements are expressly prohibited by state law.

Defendants' reliance on *Virginia ex rel. Cuccinelli v. Sebelius* is inapposite. Dkt. #52 at 13. In that case, the Fourth Circuit held that Virginia lacked standing to challenge the constitutionality of the individual mandate in the Patient Protection and Affordable Care Act ("the Affordable Care

Act" or "Act") when it enacted a law ostensibly immunizing Virginians from the requirements of the Affordable Care Act after the President had already signed the Act into law. *Va. ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267, 269 (4th Cir. 2011). The Court held that because the statute at issue had no enforcement mechanism, "regulate[d] nothing," and did not "provide[] for the administration of [any] state program," it did not reflect an exercise of Virginia's sovereign authority to "create and enforce and a legal code." *Id.* at 268, 270. Here, by contrast, GA-36, GA-38, GA-39, and GA-40 all precede the Interim Final Rule, and GA-40 includes an explicit enforcement provision stipulating that failure to comply with the order is punishable by the maximum fine allowed under the Texas Government Code. This case fails to rebut the many reasons Texas has standing.

Finally, Defendants' failure to comply with notice and comment rulemaking resulted in an injury to Texas. "A plaintiff can show a cognizable injury if it has been deprived of 'a procedural right to protect [its] concrete interests.'" *Texas v. Equal Employment Opportunity Comm'n*, 933 F.3d 433, 447 (5th Cir. 2019) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). Defendants' failure to conduct notice and comment is not excused by good cause. President Biden announced in September 2021 that Defendants needed a vaccine mandate.[5] Defendants' lengthy delay in promulgating these mandates on November 30, 2021 after President Biden announced the Mandates months earlier demonstrates they did not have good cause excusing them from the requirements of notice and comment. "Good cause cannot arise as a result of the agency's own

[5] *Compare* Remarks *by President Biden on Fighting the COVID-19 Pandemic*, THE WHITE HOUSE, (Sept. 9, 2021), *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/, *with* 86 Fed. Reg. 68,052 (issued Nov. 30, 2021).

delay, because otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait . . . raise up the 'good cause' banner and promulgate rules without following APA procedures." *Nat. Res. Def. Council v. NHTSA*, 894 F.3d 95, 114–15 (2nd Cir. 2018). Accordingly, Texas has standing to seek redress of its procedural rights.

II. Plaintiffs have stated a claim.

A. The Interim Final Rule is not authorized by statute.

1. The Interim Final Rule is contrary to the plain meaning of 42 U.S.C. § 9836a(a)(1)(C), (D), & (E).

Defendants assert that the Interim Final Rule is authorized under 42 U.S.C. § 9836a(a)(1)(C), (D), and (E).[6] Plaintiffs have already thoroughly addressed this issue and maintain that there is no statutory authorization for the Interim Final Rule and that the Interim Final Rule violates the Major Questions Doctrine. Dkt. #54-1 at 11–25. In Part II.A.1 of their Argument, Defendants try but fail to justify their assertion that statutory authority exists.

First, Defendants incorrectly assert that those statutes provide "broad" authority. Dkt. #52 at 14, 15. They are wrong. As the Court noted in its order granting preliminary injunctive relief:

> At the outset, Congress appears to have limited the scope of the Secretary's power. The Secretary may only "modify" program performance standards. [42 U.S.C. § 9836a.] This is not a broad grant of rulemaking power like defendants suggest. Rather, by enabling the Secretary to only "modify" program performance standards, Congress conferred modest authority. To "modify" means to "make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness . . . [t]o make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate." Modify, Black's Law Dictionary (11th ed. 2019); *see also MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion").

[6] 86 Fed. Reg. at 68,052.

> With the power to "modify," the Secretary may only make moderate changes to Head Start performance standards. Against this backdrop, the Court finds that enacting unprecedented mask and vaccine mandates are not moderate changes to the specific standards defendants try to leverage.

Dkt. #42 at 13.

Moreover, broad rulemaking powers are characterized by language such as the power "to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act," to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [an agency] is charged under this chapter," or "to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 277 & n.28 (1969) (citing the then-current version of section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1302(a), and 15 U.S.C. § 717o). But there is no such broad rulemaking authority in the Head Start Act.

Defendants' asserted authority—42 U.S.C. § 9836a(a)(1)(C), (D), & (E)—is not a broad grant of authority. The subsections are specific grants of authority to modify certain kinds of program performance standards in certain ways. At the hearing, Defendants' counsel agreed that subsection (E) ("such other standards as the Secretary finds to be appropriate") does not grant broad authority, but instead must be defined in relation to subsections (A) through (D).

> [Counsel for Defendants]: "[T]he other subcomponents of that section of the statute, (A) through (D), which give content to what (E) should relate to …."
>
> The Court: "I agree with you that we--I--must define (E) in relation to (A) through (D)."

Appx. 85–86 (PI hearing transcript 50:25–51:8). In its Order granting Plaintiffs' Motion for Preliminary Injunction, the Court reiterated: "The last subsection—'such other standards as the Secretary finds to be appropriate'—cannot support the mask and vaccine mandates. § 9836a(a)(1)(E). Though seemingly expansive, 'such other' standards fall under the banner of 'performance standards' and must be defined in relation to subsections (A)–(D)." Dkt. #42 at 16. Now, Defendants attempt to backtrack and argue that (E) gives them "broad authority." Dkt. #52 at 15–16. But they are still wrong.

Defendants also attempt to justify the Vaccine Mandate and the Mask Mandate by noting that "the Secretary is charged with issuing deficiencies when programs fail to follow 'program performance standards' [citing 42 U.S.C. § 9836a(e)(1)." Dkt. #52 at 17. They further note that "deficiency" includes "a systematic or substantial material failure of an agency in an area of performance that the Secretary determines involves—(i) a threat to the health, safety, or civil rights of children or staff; [or] (iii) a failure to comply with standards related to early childhood development and health services [citing 42 U.S.C. § 9832(2)(A)]." *Id.* Defendants conclude, "By [the Act's] plain language, then, the Secretary can certainly establish 'standards related to early childhood development and health services' and 'the health … of children or staff' because he can issue deficiencies on failures to follow standards that are a threat to health and safety [citing 42 U.S.C. § 9836a(e)(1)]." *Id.*

This argument fails for three reasons. First, Defendants did not cite those sections as statutory authority in the Interim Final Rule. Second, even if they had, the Secretary can only issue deficiencies on a case-by-case basis, "on the basis of a review pursuant to subsection (c), that a Head Start agency designated pursuant to this subchapter fails to meet the [program performance]

standards described in subsection (a)(1)." The Secretary may not simply issue deficiencies wholesale to LISD and every other Head Start program in the United States, and likewise may not issue a rule to "correct" these "deficiencies." Third, Defendants are relying on a basic definition for broad authority to mandate medical treatments. Defendants "construction of the statute would seem to give it unbridled power to promulgate any regulation . . . based on nothing more than" a definition. *Merck & Co., Inc. v. United States Dep't of Health & Human Servs.*, 962 F.3d 531, 540 (D.C. Cir. 2020).

2. The statute is unambiguous, so Defendants' interpretation has no weight.

Defendants agree with Plaintiffs that 42 U.S.C. § 9836a(a)(1)(C), (D), and (E) have plain and unambiguous meanings. Dkt. #52 at 15, 18, 25. But Defendants argue in the alternative that, if the statute is ambiguous, the Vaccine Mandate and the Mask Mandate "is based on a permissible reading of the statute." *Id.* at 18 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Under the *Chevron* two-step framework, a court must consider "whether Congress has directly spoken to the precise question as issue." *Chevron*, 467 U.S. at 842. If Congress has directly spoken on the precise issue, the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Plaintiffs agree with Defendants that the statutory-authority question as a *Chevron* Step One question. In Plaintiffs' view, the precise question at issue is whether the statute unambiguously grants the powers to impose the Vaccine Mandate and the Mask Mandate. Without a grant of power, there is no power. "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *NFIB*, 142 S. Ct. at 665. "The

challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred on it." *Biden v. Missouri*, 142 S. Ct. at 654. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2490 (2021). "[A]n agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

In its order granting preliminary relief, however, the Court approached the issue as a Step Two question. "Applying *Chevron*'s first step, Congress has not spoken to the precise question at issue. The statutory subsections on which defendants rely do not mention vaccination or masking." Dkt. #42 at 11. Plaintiffs respectfully disagree with this approach. It is true that *Chevron* says, "if the statute is **silent or ambiguous** with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (emphasis added). But a silent statute cannot be constructed; only an ambiguous statute can be constructed. *See Texas v. United States*, 497 F.3d 491, 502-03 (5th Cir. 2007) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well. It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority *sub silentio*.") (cleaned up). When a silence creates an ambiguity, the ambiguity can be constructed. An unambiguous statute cannot be constructed because it speaks for itself and does not need a judicial construction, even though all unambiguous statutes are silent about most things.

A silence that takes the analysis to Step Two must be the kind of silence that gives an agency some discretion. *Id.* at 503 ("Courts recognize an implicit delegation of rulemaking authority only when Congress has not spoken directly to the extent of such authority, or has intentionally left competing policy interests to be resolved by the agency charged with administration of the statute.") (cleaned up). For instance, the statute is silent about whether Head Start can regulate professional sports, but that does not mean that there is an ambiguity about whether Head Start can regulate professional sports. Such silence does not mean that whether Head Start has the authority is a Step Two question. Instead, Head Start simply cannot regulate professional sports under Step One because it unambiguously lacks that power. So too with the power to impose the Vaccine Mandate and the Mask Mandate.

"[I]f Congress wishes to deny an agency a given power, it need not expressly restrict the agency; it is enough for Congress simply to decline to delegate power…. In order for there to be an ambiguous grant of power, there must be a grant of power in the first instance." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000). "[I]i is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*." *Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993); *see also Colorado River Indian Tribes v. National Gaming Commission*, 466 F.3d 134, 135–37 (D.C. Cir. 2006) (holding that the National Indian Gaming Commission could issue regulations for Class II gaming, as expressly permitted by the Indian Gaming Regulatory Act, but not Class III gaming, as to which the statute was silent and granted no explicit authority.).

In his casebook on administrative law, Professor Wurman comments:

> If there is no law on the question, that doesn't make all the other laws on the statute books "ambiguous" as to that question. Suppose the only law in existence is a law prohibiting

> vehicles in the park. The law is ambiguous (or vague) on many questions—does it include tanks, bicycles, motorized wheelchairs—but surely it is not "ambiguous" on the question of whether someone is entitled to overtime compensation or social security benefits, or is prohibited from shouting "fire" in a theater. The law in question simply doesn't speak to any of those issues.

Ilan Wurman, Administrative Law: Theory and Fundamentals (2021) at 437. Similarly, the fact that subsection (C), (D), & (E) do not mention vaccinations or masking does not mean it is ambiguous or silent about whether Defendants may impose the Mandates. There is no statutory basis in the Head Start Act that empowers Defendants to impose the Vaccine Mandate or the Mask Mandate. Therefore, the statute speaks clearly to that issue.

The Court stated that it "must decide, under step two of the Chevron framework, whether 'the agency's [interpretation] is based on a permissible construction of the statute.' 467 U.S. at 843. The plain language of defendants' cited authority, the statutory context, and the existing regulations all confirm that the Secretary's interpretation of 'performance standards' is not a permissible construction of the statute." Dkt. #42 at 12. Plaintiffs respectfully submit that whether an agency has made a "permissible construction" at Step Two can only be predicated on a finding at Step One that there is more than one "permissible construction" *after* considering "the plain language of defendants' cited authority, the statutory context, and the existing regulations." Because Defendants unambiguously lack the authority to impose the Vaccine Mandate and the Mask Mandate, asking whether they have made a "permissible construction" of that non-existent authority makes no sense.

In any event, the Court's analysis of "[t]he plain language of defendants' cited authority, the statutory context, and the existing regulations," under Step Two leads to the same result as an

analysis of those same things under Step One: Defendants lack the statutory authority to impose the Vaccine Mandate and the Mask Mandate.

But even were the Court to consider them, Defendants' alternative Step Two arguments all fail. They first argue that they have always exercised authority similar to the Vaccine Mandate and the Mask Mandate, Dkt. #52 at 15–23, and that *Biden v. Missouri* supports the idea "the federal government may exercise longstanding powers in new ways when faced with new challenges," *id.* at 23–24. But in fact, the Mandates are "unprecedented," as the Court characterized them in the first sentence of its order granting preliminary relief. Dkt. #42 at 1. Defendants already fully answered this argument. Dkt. #54-1 at 25–31.

Next, they argue that the statute does not clearly foreclose them from imposing the Mandates. Dkt. #52 at 24–27. That gets things backwards. The question is not whether the statute prohibits the Mandates, but whether it allows Mandates. "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *NFIB*, 142 S. Ct. at 665. "The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred on it." *Biden v. Missouri*, 142 S. Ct. at 654. The statute does not prohibit Head Start from regulating professional sports either, but it cannot because the statue does not give that authority.

Defendants' discussion of the statute's failure to prohibit the Vaccine Mandate and the Mask Mandate includes an out-of-place argument that the Major Questions Doctrine does not apply to this case. Dkt. #52 at 24–25. Plaintiffs have already addressed that tissue. Dkt. #54-1 at 12–14.

Defendants then argue that the statutory authority does not violate the non-delegation doctrine. Dkt. #52 at 27–28. In Plaintiffs' Brief in Support of their Motion for a Temporary Restraining Order and a Preliminary Injunction, Plaintiffs argued that subsection (a)(1)(E) violates the non-delegation doctrine. Dkt. #8 at 19. Plaintiffs failed to take ejusdem generis into account when they made that argument. The rule of ejusdem generis limits general terms which follow specific ones to matters similar to those specified. *Gooch v. United States*, 297 U.S. 124, 128 (1936). Thus, "other such standards" in subsection (a)(1)(E) are limited to standards similar to those listed in subsections (a)(1)(A)–(D). It does not allow Defendants to promulgate any standard which they deem "appropriate." Plaintiffs withdrew their non-delegation argument in their Reply in Support of their Motion for a Temporary Restraining Order and a Preliminary Injunction. Dkt. #38 at 11–12. Thus, Plaintiffs now agree that, properly construed, subsection (E) does not violate the Non-Delegation Doctrine.

* * *

Defendants lack statutory authority to impose the Vaccine Mandate and the Mask Mandate.

B. The Interim Final Rule is arbitrary and capricious.

Defendants argue that the Interim Final Rule is not arbitrary and capricious. Dkt. #52 at 28–41. Plaintiffs disagree and stand by their argument that it is arbitrary and capricious. Dkt. #54-1 at 40–42.

Defendants also take issue with Plaintiffs' argument that an additional demonstration that the Vaccine Mandate and Mack Mandate are arbitrary and capricious is that there is no Vaccine Mandate or Mask Mandate for K-12 schools. Dkt. #52 at 29. They note that they do not have authority over K-12 schools, but that is beside the point. The fact that there is no Vaccine Mandate

or Mask Mandate for K-12 calls into serious question their decision to have a Vaccine Mandate and Mask Mandate in every single Head Start program in the country. Defendants cannot defend the logical coherence of imposing the Vaccine Mandate and the Mask Mandate in every single Head Start program in the country while many or most K-12 programs do not. The Court can only uphold the Mandate if, among other things, "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But the new policy is not permissible under the statute (among other problems), and there cannot be "good reasons" for a uniform, no-exceptions Vaccine Mandate and Mask Mandate in Head Start because there are no such mandates in K-12.

Plaintiffs also argue that the fact that there is no end date for the Mandates, *see generally* 86 Fed. Reg. 68,052–68,101, and the fact that Defendants opportunistically defer to the Centers for Disease Control when there is no legal requirement to do so, 86 Fed. Reg. 68,055 n.32, also make the Mandates arbitrary and capricious. Defendants disagree. Dkt. #52 at 28. But events since the adoption of the Interim Final Rule have shown that Plaintiffs were correct. The record as it existed on November 30, 2021, did not support a permanent rule, since, as acknowledged in the Interim Final Rule itself, the COVID-19 situation can and does change rapidly. For instance, as of February 28, 2022, the CDC no longer recommends masks indoors in nearly the entire country—yet Head Start continues to permanently require masking. It was foreseeable on November 30 that the CDC would eventually change its recommendations, yet the Interim Final Rule does not allow for that possibility.

C. The Interim Final Rule is not merely an extension of preexisting regulations.

Section A.2.1 of Defendants' Brief in Support is entitled, "The History of Past Head Start Regulations Confirms that HHS Has the Authority to Regulate Health and Safety Within Head Start Programs." Dkt. #52 at 18. But Section C is entitled, "The Rule Does Not Improperly Rely on Existing Regulations." Dkt. #52 at 41. Defendants seem to be of two minds as to whether past regulations do (or do not) justify the Interim Final Rule. But either way, the Mandates are "unprecedented," as the Court agreed (Dkt. #42 at 1), and Plaintiffs reassert their arguments that the Mandates are unprecedented and not merely extensions of past regulations. Dkt. #54-1 at 25–31.

D. Defendants should have gone through notice and comment and should have complied with the Congressional Review Act.

In its order granting preliminary relief, the Court agreed with Plaintiffs that they had a substantial likelihood of success on their argument that Defendants should have gone through notice and comment before promulgating the Interim Final Rule. Dkt. #42 at 26–33. The Court did not address the Congressional Review Act. Plaintiffs maintain that notice and comment were required, Dkt. #54-1 at 34–37, and that compliance with the Congressional Review Act was required, *id*. at 37–38.

Defendants argue that they did not have to go through notice and comment or comply with the Congressional Review Act essentially because the *Biden v. Missouri* court found good cause for CMS to dispense with notice and comment for the vaccine mandate in that case. Dkt. #52 at 45. That argument fails because Defendants, unlike the defendants in *Biden v. Missouri*, have never before attempted to exercise power over citizen's health care and has no responsibilities over public health.

E. The Interim Final Rule does not comply with 42 U.S.C. § 9836a(a)(2).

Defendants argue that they complied with 42 U.S.C. § 9836a(a)(2). Dkt. # 50-1 at 47–49. Plaintiffs disagree as already discussed at length. Dkt. #54-1 at 31–34.

F. The Interim Final Rule does not comply with the Treasury and General Government Appropriations Act of 1999.

Defendants argue that they were not required to comply with the Treasury and General Appropriations Act of 1999. Dkt. # 50-1 at 50-51. Plaintiffs disagree as already discussed at length. Dkt. #54-1 at 38–40.

G. The Interim Final Rule is an unconstitutional exercise of Spending Power, and violates the Tenth Amendment and Anti-Commandeering Doctrine.

Head Start is a grant program. It is an exercise of the Spending Power. That means only that "Congress may offer funds to the States, and may condition those offers on compliance with specified conditions." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012). The conditions must be unambiguous so States can exercise their choice knowingly. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But there is no such condition—unambiguous or otherwise—in the Head Start statute. Thus, the Interim Final Rule is not a valid exercise of the Spending Power. To the extent it purports to nevertheless to override State law and require state employees to implement federal law, it violates the Tenth Amendment and the Anti-Commandeering Doctrine.

Additionally, a valid exercise of the Spending Power—which the Interim Final Rule is not—can only induce *States* to *change* their own laws. It does not preempt State law, and the Interim Final Rule's statement to the contrary[7] is wrong. Non-States, such as local governments

[7] Dkt. #27-1 (86 Fed. Reg. at 68,063).

and private entities, cannot change State law, and cannot violate State law just by accepting federal funds with conditions that require them to violate State law. For instance, if a condition of Head Start required vaccination or masking in violation of Texas law, LISD would have a choice of (1) not taking the funds or (2) taking the funds, requiring vaccination or masking, and violating State law (potentially subjecting them to an *ultra vires* suit by the State; *see State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020), and other lawsuits and penalties), or (3) taking the funds and *not* requiring vaccination or masking, potentially subjecting them to a lawsuit by the federal government to recover the funds and other lawsuits and penalties. It is not true that LISD can take the funds and violate State law without consequence.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss and Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 4, 2022.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS and LUBBOCK INDEPENDENT SCHOOL DISTRICT, *Plaintiffs*,	§	
	§	**CIVIL ACTION NO. 5:21-CV-300**
v.	§	
XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, *Defendants.*	§	

[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

On this day came to be considered Defendants' Motion to Dismiss and Motion for Summary Judgment (the "Motions") [Dkt. #48 & 49]. After considering the motions and the pleadings of the parties filed herein, the Court is of the opinion that the following order should be issued:

It is hereby **ORDERED** that Plaintiffs' Motions are **DENIED**.

SO ORDERED.

DATE: _____, 2022.

_____
JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE