

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

<p>ELIZABETH ETHELTON,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>JOSEPH R. BIDEN, <i>in his official capacity as President of the United States</i>; OFFICE OF HEAD START; BERNADINE FUTRELL, PH.D., <i>in her official capacity as Director of the Office of Head Start</i>; ADMINISTRATION FOR CHILDREN & FAMILIES; JOOYEUN CHANG, <i>in her official capacity as Acting Assistant Secretary and Principal Deputy Assistant Secretary for the Administration for Children & Families</i>; DEPARTMENT OF HEALTH & HUMAN SERVICES; XAVIER BECCERA, <i>in his official capacity as Secretary of the Department of Health & Human Services</i>;</p> <p style="text-align: center;">Defendants.</p>	<p>No.</p> <p style="text-align: center;">Complaint for Declaratory and Injunctive Relief</p>
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Introduction

1. On September 9, 2021, President Biden unveiled a comprehensive plan to vaccinate as many Americans as possible against COVID-19. Included in that plan was a COVID-19 vaccine mandate on persons that Head Start providers employ.

2. The Office of Head Start, the Administration for Children & Families, and the Department of Health & Human Services published an interim final rule in the Federal Register on Monday, November 30, 2021, 86 Fed. Reg. 68,052, that provides

a COVID-19 vaccination mandate on all staff, student-facing contractors, and all volunteers to have received the second dose of the COVID-19 vaccine by January 31, 2022; a universal mask mandate on all Head Start participants over age two; and for immediate implementation without notice-and-comment (the “Rule” or “Head Start Rule”).

3. Two federal district courts have already recognized that the federal Head Start vaccination mandate is likely illegal and enjoined it. *Texas v. Becerra*, No. 5:21-CV-300-H, 2021 U.S. Dist. LEXIS 248309 (N.D. Tex. Dec. 31, 2021); *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 U.S. Dist. LEXIS 1333 (W.D. La. Jan. 1, 2022). A third has also done so based primarily on the irreparable harm factor. *Livingston Educ. Serv. Agency v. Becerra*, No. 22-cv-10127, 2022 U.S. Dist. LEXIS 17524, at *12 (E.D. Mich. Jan. 31, 2022); *Livingston Educ. Serv. Agency v. Becerra*, No. 22-cv-10127, 2022 U.S. Dist. LEXIS 26614, at *3 (E.D. Mich. Feb. 14, 2022). However, none of those injunctions cover Plaintiff in the Eastern District of Virginia.

4. Plaintiff is an employee of a Head Start provider, located in Fairfax, Virginia, who has not obtained the COVID-19 vaccine and does not wish to do so. In response to the Head Start Rule, Plaintiff’s employer will terminate her employment if she does not present proof of COVID-19 vaccination or an approved exemption by February 28, 2022.

5. Through this lawsuit, Plaintiff challenges the Head Start Rule as being published without notice and comment in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 553, and in excess of ACF’s statutory authority. She also brings

a constitutional challenge to the Head Start Rule under the nondelegation doctrine. Plaintiff asks that this Court enter declaratory judgment, and temporary and permanent relief enjoining Defendants' enforcement of the Head Start Rule.

Parties

6. Elizabeth Etherton is a veteran pre-kindergarten teacher employed by Fairfax County Public Schools at one of its elementary schools in Alexandria, Virginia. Etherton has not obtained the COVID-19 vaccine and does not wish to do so.

7. Defendants are officials of the United States government and United States governmental agencies responsible for implementing the Head Start Rule.

8. Defendant Joseph R. Biden is the President of the United States. President Biden is sued in his official capacity.

9. Defendant United States Office of Head Start ("OHS") is an office within the Administration for Children & Families ("ACF"), which is a division of the Department of Health & Human Services. OHS administers grant funding and oversight to 1,600 public and private nonprofit and for-profit agencies that provide Head Start services.

10. Defendant Bernadine Futrell, Ph.D., is the Director of the Office of Head Start. She is sued in her official capacity.

11. Defendant Administration for Children & Families is a division of the Department of Health & Human Services. ACF promotes the economic and social well-being of families, children, individuals, and communities.

12. Defendant JooYeun Chang is the Acting Assistant Secretary and Principal Deputy Assistant Secretary for ACF. She is sued in her official capacity.

13. Defendant Department of Health & Human Services (“HHS”) is an independent federal agency.

14. Defendant Xavier Beccera is Secretary of the Department of Health & Human Services. He is sued in his official capacity.

Jurisdiction and Venue

15. The Court has jurisdiction under 5 U.S.C. §§ 702 and 703 and 28 U.S.C. §§ 1331, 1346, and 1361, under the United States Constitution, and pursuant to the Court’s equitable powers.

16. 5 U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 1361, 2201, and 2202 authorizes the Court to award the requested declaratory and injunctive relief.

17. Venue is appropriate under 28 U.S.C. § 1391(e)(1)(B) because Defendants are agencies or officers of the United States and “a substantial part of the events or omissions giving rise to the claim occurred” in this District. Venue is also appropriate under 28 U.S.C. § 1391(e)(1)(C) because the Plaintiff resides and works in this District, no real property is involved, and Defendants are agencies or officers of the United States.

Factual Allegations

18. On July 23, 2021, the White House acknowledged that imposing vaccine mandates is “not the role of the federal government; that is the role that institutions, private-sector entities, and others may take [W]e’re going to continue to work in

partnership to fight misinformation. And we're going to continue to advocate and work in partnership with local officials and—and trusted voices to get the word out.” Jen Psaki, White House Press Briefing (July 23, 2021).¹

19. Yet, on September 9, 2021, President Biden reversed course, announcing “a new plan to require more Americans to be vaccinated, to combat those blocking public health.” *Remarks by President Biden on Fighting the COVID-19 Pandemic*, White House (Sept. 9, 2021).² He stressed that: “we must increase vaccinations among the unvaccinated with new vaccination requirements.” *Id.* He noted: “The bottom line: We're going to protect vaccinated workers from unvaccinated co-workers.” *Id.*

20. The President indicated that he was “frustrated with the nearly 80 million Americans who are still not vaccinated” *id.*, claimed that unvaccinated persons “can cause a lot of damage—and they are” *id.*, and noted that he would not allow the unvaccinated, for whom his “patience is wearing thin,” *id.*, “to stand in the way of protecting the large majority of Americans who have done their part” *Id.*

21. The President announced that the federal government would issue five new COVID-19 vaccine mandates.

22. First, he announced an OSHA mandate requiring companies with 100 or more employees to either mandate vaccines or to have a policy that required employees to get tested weekly if they chose not to get vaccinated. OSHA issued its

¹ See <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/> (last visited Feb. 22, 2022).

² <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

Emergency Temporary Standard implementing the vaccine mandate on November 5, 2021. The United States Court of Appeals for the Fifth Circuit issued a nationwide stay of that mandate holding that it likely exceeded OSHA's statutory authority. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *27 (5th Cir. Nov. 12, 2021). Although the case was transferred to the Sixth Circuit, which dissolved that stay, the U.S. Supreme Court shortly thereafter granted its own stay of the OSHA mandate holding that OSHA likely lacked the statutory authority to promulgate the vaccine mandate. *NFIB v. OSHA*, 142 S. Ct. 661, 666-67 (2022).

23. Second, the President also announced a mandate requiring healthcare employees working at facilities that accept Medicare or Medicaid patients to get vaccinated.

24. Third, President Biden announced a mandate requiring all executive branch federal employees to get vaccinated. On September 9, 2021, the President issued Executive Order 14,043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees. *See* Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021). A federal district court recently entered a nationwide injunction against this federal employee mandate. *See Feds for Med. Freedom v. Biden*, No. 3:21-cv-356 (S.D. Tex. Jan. 21, 2022).

25. Fourth, President Biden announced a mandate requiring employees of federal contractors to get vaccinated. This mandate was also covered by Executive Order 14,043 issued by the President on September 9, 2021. On December 7, 2021, a federal district court in Georgia issued an order temporarily enjoining enforcement

of the federal contractor vaccine mandate nationwide. *Georgia v. Biden*, No. 1:21-cv-163, ECF No. 94, (S.D. Ga. Dec. 7, 2021). Another federal district court enjoined it in the plaintiff states. *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021).

26. Finally, President Biden announced that “we’ll require all of nearly 300,000 educators in the federal paid program, Head Start program, must be vaccinated.” *Remarks by President Biden*, *supra* note 2. The same day, the director of the Office of Head Start at HHS sent a letter to Head Start providers introducing, “a new requirement for Head Start programs. All Head Start employees must be vaccinated against COVID-19.” The letter promised “rulemaking to implement this policy.” This Head Start Rule is the subject of this lawsuit.

27. On Monday, November 30, 2021, OHS, ACF, and HHS published an interim final rule requiring a vaccination mandate on all staff, student-facing contractors, and all volunteers to have received the second shot by January 31, 2022, and a universal mask mandate on all Head Start participants over age two. The Rule stated it would be immediately implemented without notice-and-comment. 86 Fed. Reg. 68,052.

28. The Rule significantly departed from President Biden’s September 9, 2021, remarks in at least two major ways: First, President Biden said nothing about mandating vaccines for all Head Start volunteers—nearly 1.1 million people, approximately two-thirds of whom are parents of children who participate in the

program. Second, nothing in the White House’s September 9 plan made any mention of requiring program participants to wear masks.

29. The Head Start Act, 42 U.S.C. § 9801 et seq., provides the sole legislative authority for OHS, ACF, and HHS to act to implement the Head Start Program.

30. There is no explicit statutory basis for mandating vaccination under the Head Start Act.

31. The Rule cites 42 U.S.C. § 9836a(a)(1)(C)–(E) as the basis for Defendants’ authority to implement the mandate on staff, student-facing contractors, and all volunteers to obtain the COVID-19 vaccine.

32. 42 U.S.C. § 9836a(a)(1)(C) provides HHS the authority to set “administrative and financial management standards” for Head Start programs. 42 U.S.C. § 9836a(a)(1)(D) provides HHS the authority to set “standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate).” 42 U.S.C. § 9836a(a)(1)(E) provides HHS the authority to set “such other standards as the Secretary finds to be appropriate.”

33. As the Head Start Rule acknowledges, the Administrative Procedure Act (APA), 5 U.S.C. § 553, requires ACF to publish a notice of proposed rulemaking in the Federal Register and invite public comment on the proposed rule before the provisions of the rule take effect. *See* 86 Fed. Reg. 68,058. Section 553(b) requires the agency to publish a notice of the proposed rule in the Federal Register that includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues involved.

Section 553(c) requires the agency to give interested parties the opportunity to participate in the rulemaking through public comment before the provisions of the rule take effect.

34. However, Section 553(b)(B) of the APA authorizes the agency to waive these procedures, if it finds good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

35. The Rule asserts that “it would be impracticable and contrary to the public interest” for ACF to undertake normal notice and comment procedures because the outbreaks associated with the Delta variant of COVID-19 “have shown that current levels of COVID-19 vaccination coverage up until now have been inadequate to protect Head Start staff, children, and families.” 86 Fed. Reg. 68,058. The Rule further justifies failing to undertake normal notice and comment procedures because “failure to achieve sufficiently high levels of vaccination based on voluntary efforts and patchwork requirements, potential harm to children from unvaccinated staff, continuing strain on the health care system, and known efficacy and safety of available vaccines” justifies “a vaccine requirement for Head Start staff, certain contractors, and volunteers is an essential component of the nation’s COVID-19 response.” 86 Fed. Reg. 68,059.

36. The “good cause” exception in 5 U.S.C. § 553 is read narrowly in order to avoid providing agencies with an escape clause from the APA notice and comment requirements. *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011). Circumstances

justifying reliance on this exception are indeed rare. *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C.C. 1981). The good cause exception has been described as “meticulous and demanding,” “narrowly construed,” “reluctantly countenanced,” and evoked only in “emergency situations.” *Sorenson Communications, Inc. v. F.C.C.*, 755 F.3d 702 (D.C.C. 2014).

37. As early as August 2021, CDC Director Rochelle Walensky acknowledged that “what [the vaccines] can’t do anymore is prevent transmission.” Tim Hains, *CDC Director: Vaccines No Longer Prevent You From Spreading COVID*, RealClearPolitics (Aug. 6, 2021).³ In fact, the failure of the vaccines to prevent transmission is what led the CDC to do a sudden about-face on its mask standards last summer. In May 2021, it said that fully vaccinated individuals did not need to wear a mask indoors but then flip-flopped in July 2021 saying that even vaccinated individuals should wear one in areas of high community transmission, i.e., most of the U.S. Yasmeeen Abutaleb, *CDC urges vaccinated people in covid hot spots to resume wearing masks indoors*, Wash. Post (July 28, 2021);⁴ Mansas Mishra, *Most COVID-19 cases in Massachusetts outbreak among vaccinated, says CDC*, Reuters (July 30, 2021);⁵ *74 Percent of COVID-19 Cases From Massachusetts Outbreak Occurred in Fully Vaccinated People: Study*, NTD (July 30, 2021);⁶ Yasmeeen Abutaleb et al., *CDC: Fully Vaccinated People Don’t*

³ https://www.realclearpolitics.com/video/2021/08/06/cdc_director_vaccines_no_longer_prevent_you_from_spreading_covid.html#!.

⁴ <https://www.washingtonpost.com/health/2021/07/27/cdc-masks-guidance-indoors/>.

⁵ <https://www.reuters.com/world/us/majority-covid-19-cases-large-public-events-were-among-vaccinated-us-cdc-study-2021-07-30/>.

⁶ https://www.ntd.com/74-percent-of-covid-19-cases-from-massachusetts-outbreak-occurred-in-fully-vaccinated-people-study_652044.html.

Have to Wear Masks Inside, The Epoch Times (May 13, 2021).⁷ These statements and actions by the CDC dealt with the Delta variant.

38. This is even more true for Omicron. Subsequent to the Rule's publication, Omicron has replaced Delta as the dominant COVID-19 variant in the United States. It accounted for over 98 percent of new cases for the week ending January 8, 2022.⁸ The CDC predicts that "anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms." *Omicron Variant: What You Need to Know*, CDC (Dec. 20, 2021).⁹ Pfizer's CEO recently stated that the Pfizer vaccine (without a booster) is "not enough for omicron." Spencer Kimball, *Pfizer CEO says two COVID vaccine doses aren't 'enough for omicron'*, CNBC (Jan. 10, 2022).¹⁰ Not only are the vaccines ineffective at slowing Omicron's spread, data from Israel suggests that even a fourth shot (second booster) "does little to stave off infection from the omicron variant." *Israeli Hospital: 4th Vaccination Does Not Prevent Spread of Omicron*, Voice of Am. (Jan. 17, 2022).¹¹

39. Not only that, governors and public health officials in New Jersey, Connecticut, Delaware, Oregon, New York, and Massachusetts have announced plans to lift mask mandates this month or in March in response to declining infection rates

⁷ https://www.theepochtimes.com/cdc-fully-vaccinated-people-dont-have-to-wear-masks-inside_3814539.html.

⁸ <https://covid.cdc.gov/covid-data-tracker/#variant-proportions>.

⁹ <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>.

¹⁰ <https://www.cnbc.com/2022/01/10/pfizer-ceo-says-two-covid-vaccine-doses-arent-enough-for-omicron.html>.

¹¹ <https://www.voanews.com/a/israeli-hospital-4th-vaccination-does-not-prevent-spread-of-omicron-/6401247.html>.

and rising hospital capacity. Rachel Tresiman, *New York Lifts Indoor Mask Mandate, with California and N.J. Mandates Also Set to End*, NPR (Feb. 9, 2022).¹² Several jurisdictions (Washington D.C. and Chicago) that had enacted vaccine requirements to dine at a restaurant or patronize businesses have recently repealed them or announced plans to do so soon. Michael Brice-Saddler & Karina Elwood, *D.C. to drop coronavirus vaccination requirement to enter businesses*, Wash. Post (Feb. 14, 2022);¹³ Fran Spielman & Nader Issa, *Chicago lifting mask and vaccine mandates on Feb. 28, will keep masks in schools for now*, Chicago Sun-Times (Feb. 22, 2022).¹⁴

40. Indeed, Omicron is “in retreat” and is less severe than previous variants. David Leonhardt, *Omicron is in Retreat*, N.Y. Times (Jan. 19, 2022);¹⁵ Karen Brooks Harper et al., *“Light at the end of the tunnel”: Texas COVID-19 hospitalizations down as omicron wave appears to crest*, The Texas Tribune (Feb. 2, 2022).¹⁶

41. Nevertheless, subsequent to the Head Start Rule’s publication, and only because of the Rule, Plaintiff’s employing Head Start agency informed her that she must either submit proof of vaccination by January 28, 2022, or receive a religious or medical exemption by February 28, 2022. Her employer also warned that if she failed

¹² <https://www.npr.org/2022/02/09/1079555193/new-york-new-jersey-end-mask-mandate-ending>.

¹³ <https://www.washingtonpost.com/dc-md-va/2022/02/14/dc-covid-restrictions-lifted/>.

¹⁴ <https://chicago.suntimes.com/city-hall/2022/2/22/22946054/chicago-coronavirus-mask-mandates-covid-restrictions-vaccine-proof-bars-restaurants-gyms-lightfoot>.

¹⁵ <https://www.nytimes.com/2022/01/19/briefing/omicron-variant-cases.html>.

¹⁶ <https://www.texastribune.org/2022/02/02/TEXAS-OMICRON-HOSPITALIZATIONS/>.

to meet either the vaccination requirement or receive an exemption, that she would be terminated.

42. On January 31, 2022, Plaintiff requested a medical exemption and submitted supporting documentation to her employer, Fairfax County Public Schools.

43. But on February 7, 2022, the Head Start agency informed Plaintiff that she needed to submit further documentation in order to obtain a medical exemption. It also stated that she needed to do this by February 28, 2022. The extra documentation asks highly intrusive questions about Plaintiff's medical history and she does not wish to disclose more information about her personal medical information to the Head Start agency beyond what she has already revealed. As a result, pursuant to the Head Start Rule, she faces termination after February 28, 2022.

44. Ms. Etherton has served preschool students for over fifteen years. She is recommended for reappointment. She has also worked tirelessly in her position and accrued 643 hours of leave given that she rarely takes time off of work, all of which will be lost with her termination. When the Head Start agency switched to virtual learning during the 2020-21 school year in response to COVID-19, she embraced the challenge. She rearranged her home so that it had the space needed to teach children virtually, learned new technology platforms, researched ways to bring best educational practices to the virtual classroom, revamped curriculum so it could be taught virtually, and even held after-hours intervention and reading groups.

45. When Fairfax County Public Schools resumed in-person learning in the 2021-22 school year, Plaintiff again recalibrated her curriculum. She also dealt with

having to face more demanding educational benchmarks with less teaching time due to having to wait with the preschoolers outside during bus driver shortages. She has also stayed after-hours to clean, prepare, and sanitize her classroom to mitigate preschoolers' possible exposure to COVID-19. She has also worked weekends to put together lesson plans.

Count I

The Rule was published without notice and comment in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 553 et seq.

46. The allegations in all preceding paragraphs are incorporated herein by reference.

47. The APA provides that the court must “hold unlawful and set aside agency action” that is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

48. “Notice and comment are not mere formalities. They are basic to our system of administrative law.” *NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018).

49. ACF does not dispute that it issued the Rule as an interim final rule without notice and comment. Rather, the Rule itself invokes Section 553(b)(B) of the APA, and asserts that “it would be impracticable and contrary to the public interest” to undertake notice and comment because the Delta variant wave and data on effectiveness of vaccination both provide good cause to believe the public interest is served by immediate implementation. 86 Fed. Reg. 68,058–059.

50. However, it is well established that the “good cause” exception to notice-and-comment should be read narrowly in order to avoid providing agencies with an escape clause from the requirements Congress prescribed. *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011). The good cause exception should not be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them. *Id.* at 929.

51. “[A]n agency may not dispense with notice and comment procedures merely because it wishes to implement what it sees as a beneficial regulation immediately. Agencies presumably always believe their regulations will benefit the public. If an urgent desire to promulgate beneficial regulations could always satisfy the requirements of the good cause exception, the exception would swallow the rule and render notice and comment a dead letter.” *Ass’n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 498 (D. Md. 2020).

52. Instead, the exception is to be “narrowly construed” and only “reluctantly countenanced.” *United States v. Ross*, 848 F.3d 1129, 1132 (D.C. Cir. 2017) (quotation marks omitted). “[C]ircumstances justifying reliance on this exception are ‘indeed rare’ and will be accepted only after the court has ‘examine[d] closely proffered rationales justifying the elimination of public procedures.’” *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (citation omitted). Courts therefore generally restrict agencies’ use of the “good cause” exception “to emergency situations,” *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012), such as where a “delay would imminently threaten life or physical property” or risk

fiscal calamity.” *Sorenson Communications, Inc. v. FCC*, 755 F.3d 702, 706–07 (D.C. Cir. 2014). And courts must rely only on the basis articulated by the agency itself for invoking the exception at the time of the rulemaking. *Johnson*, 632 F.3d at 929.

53. Defendants’ attempt to justify “good cause” for not implementing notice-and-comment procedures cannot meet this exacting standard.

54. Although the Rule asserts that immediate implementation is justified because of the harmfulness of the Delta variant and data on effectiveness of vaccination, the Defendants ignore the fact that President Biden proposed this Rule on September 9, 2021, yet the ACF did not actually publish the rule until November 30, 2021, nearly three months after the President proposed it. Further, the Rule itself gives staff, student-facing contractors, and all volunteers, until January 31, 2022, to receive the vaccine doses. It then takes an additional two weeks from receipt of the second dose to receive full immunity.¹⁷ That is 156 days from the time the President issued a statement that the Rule would be issued and the time the Rule reached full effectiveness: over five months. ACF’s finding that immediate implementation was necessary and therefore it had good cause to skip notice-and-comment is completely undermined by Defendants’ delay in adopting it and putting it into effect. Although vaccines have been available for nearly a year, Defendants did not impose a mandate until nearly three months after the President instructed it to do so as part of his plan

¹⁷ “When You Are Fully Vaccinated,” CDC.gov, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/second-shot.html>.

to federalize public-health policy because he did not like the fact that some individual Americans citizens were not obtaining the COVID-19 vaccine.

55. The Fifth Circuit reached a similar conclusion on the OSHA Mandate: “OSHA issued the Mandate nearly two months later, on November 5, 2021, and the Mandate itself prominently features yet another two-month delay. One could query how an ‘emergency’ could prompt such a ‘deliberate’ response.” *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *28 n.11 (5th Cir. Nov. 12, 2021).

56. Several other courts have also rejected efforts to use COVID as an excuse to skip notice-and-comment. *State v. Becerra*, 2021 WL 2514138, at 35-36 (M.D. Fla., June 18, 2021) (CDC rule on cruise ships); *Regeneron Pharmaceuticals, Inc. v. United States Dept. of Health and Human Resources*, 510 F. Supp. 3d, 29, 48 (S.D.N.Y. Dec. 30, 2020) (CMS’s rule on drug prices); *Chamber of Commerce of the United States v. United States Dept. of Homeland Security*, 504 F. Supp. 3d 1077, 1094 (N.D. Cal. Dec. 1, 2020) (DHS rule for visa program); *Association of Community Cancer Centers v. Azar*, 509 F. Supp. 3d 482, 496 (D. Md. Dec. 23, 2020) (CMS rule on Medicare Part B).

57. Not only that, the Delta wave of COVID-19 has all but disappeared and Omicron has replaced it. Omicron is less severe than previous variants, including the Delta variant. New cases and hospitalizations have been on a steady decline throughout the country since January 2022. As a result, jurisdictions throughout the United States are lifting mask mandates and vaccine mandates.

58. Further, COVID-19 is not a sufficient excuse for avoiding notice-and-comment, effectively insulating Defendants from public input and limiting the agencies' transparency, considering that public debate over mandatory vaccination has been brewing in this country since even before the first vaccines were available.

59. The failure of Defendants to comply with the APA's notice-and-comment requirements provides an independent basis to enjoin the entire Head Start Rule. *United States v. Cain*, 583 F.3d 408, 424 (6th Cir. 2009).

Count II

The Rule exceeds ACF's statutory authority.

60. The allegations in all preceding paragraphs are incorporated herein by reference.

61. Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or is "in excess of statutory . . . authority[] or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

62. The Rule is in excess of ACF's statutory authority because the Head Start Act does not clearly authorize ACF, OHS, or HHS to impose a vaccine or mask mandate.

63. ACF has never relied upon the Head Start Act to mandate that staff, contractors, or volunteers take a vaccine. Nor is there anything in the Head Start Act that explicitly provides ACF the authority to mandate vaccinations or masks among staff, contractors, or volunteers.

64. Rather, the Rule cites 42 U.S.C. § 9836a(a)(1)(C)–(E) as the basis for Defendants’ authority to implement the mandate on staff, student-facing contractors, and all volunteers to obtain the COVID-19 vaccine and wear masks.

65. Section 9836a(a)(1)(C) provides HHS the authority to set “administrative and financial management standards” for Head Start programs. Section 9836a(a)(1)(D) provides HHS the authority to set “standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate).” Section 9836a(a)(1)(E) provides HHS the authority to set “such other standards as the Secretary finds to be appropriate.” None of these sections in the Head Start Act provide sufficient authority to ACF, OHS, or HHS to mandate vaccines or masks among staff, contractors, or volunteers.

66. This mandate is not an administrative or financial management standard.

67. The plain meaning of the statutory term “administrative and financial management standard,” 42 U.S.C. § 9836a(1)(C), covers things like bookkeeping and compliance. This mandate goes far beyond setting financial and administrative management standards for Head Start programs and veers into the regulation of public health.

68. This mandate does not set standards for the condition and location of facilities.

69. The plain meaning of the statutory term “condition and location of facilities” is limited to the physical places that Head Start services are provided. “The plain meaning of ‘facility,’ as that word is used [here], is something ‘that is built,

constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.” See *Lostrangio v. Laingford*, 261 Va. 495, 499, 544 S.E.2d 357, 359 (2001) (quoting Webster’s Third New International Dictionary 812–13 (1993)). This provision gives HHS the power to regulate the safety of buildings and their surrounding spaces, not the quality or health consciousness of employees inside the buildings.

70. Nor does the mandate fall under Section 9836a(a)(1)(E) providing the agency the authority to set “such other standards as the Secretary finds to be appropriate.” Defendants’ interpretation that a mandate is an “appropriate” use of the Secretary’s authority raises significant constitutional questions.

71. First, stretching Section 9836a(a)(1)(E) to provide the Secretary the authority to issue a vaccine mandate for every staff member, contractor, and volunteer in every Head Start program as an “appropriate” exercise of the Secretary’s authority violates the major questions doctrine because such a substantial decision is the role of Congress. *BST Holdings*, 2021 U.S. App. LEXIS 33698 at *23 (“the major questions doctrine confirms that the Mandate exceeds the bounds of OSHA’s statutory authority”).

72. Second, it violates the federalism doctrine for the Secretary to implement a vaccination mandate when that power is properly reserved to the states as the primary public health authorities. *BST Holdings*, at *21 (“to mandate that a person receive a vaccine or undergo testing falls squarely within the States’ police power”).

73. Third, it violates the non-delegation doctrine for the Secretary to wield such tremendous power with no greater guide than “appropriate.” *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316, at *26–27 (E.D. Ky. Nov. 30, 2021) (“If OSHA promulgating a vaccine mandate runs afoul of the nondelegation doctrine, the Court has serious concerns about the FPASA, which is a procurement statute, being used to promulgate a vaccine mandate for all federal contractors and subcontractors”); *see also BST Holdings*, 2021 U.S. App. LEXIS 33698 at *8.

74. Because the Head Start Rule mandating staff, student-facing contractors, and all volunteers of Head Start programs obtain the COVID-19 vaccine and wear masks is a federal action involving issues of major economic, social, and political significance, and the Head Start Act does not authorize it by a clear statement, it is beyond Defendants’ statutory authority. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

Count III

The Rule violates the U.S. Constitution’s legislative power clause.

75. The allegations in all preceding paragraphs are incorporated herein by reference.

76. The Supreme Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

77. Compulsory vaccination is a power “of vast economic and political significance.”

78. The Head Start Act does not contain a provision allowing OSHA, HHS, or the ACF to mandate vaccinations.

79. The Head Start Act does not contain a sufficient principle guiding administrative discretion and therefore violates the non-delegation doctrine, which requires Congress to make major policy decisions and to give agencies sufficient guidance as to the exercise of their implementation.

80. The Rule is therefore beyond Defendants' authority.

Request for Relief

Plaintiff respectfully requests and prays for the following relief:

A. Enter a declaratory judgment that the Head Start Rule was published without notice and comment in violation of the Administrative Procedure Act;

B. Enter a declaratory judgment that the Head Start Rule mandating that staff, student-facing contractors, and all volunteers obtain the COVID-19 vaccine and mandating that all Head Start participants over age two wear masks exceeds the statutory authority of OHS, ACF, and HHS;

C. In the alternative, enter a declaratory judgment that the Head Start Rule violates the nondelegation doctrine of Article I of the U.S. Constitution.

C. Enter a temporary and/or preliminary relief, enjoining Defendants from implementing the Rule during the pendency of this case;

D. Enter a permanent injunction preventing Defendants from implementing the Rule;

E. Award any further relief to which Plaintiff may be entitled, including attorneys' fees and costs; and

F. Award such other relief as the Court deems equitable and just.

Dated: February 23, 2022

Respectfully Submitted,

/s/ Jeffrey D. Jennings

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**Application for admission Pro Hac
Vice forthcoming*