IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ELIZABETH ETHERTON, Plaintiff, v. JOSEPH R. BIDEN et al., Defendants.	No. 1:22-cv-00195 **TRO REQUESTED BY 2PM, MONDAY, FEBRUARY 28** **Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order**

INTRODUCTION

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). This Court should similarly act expeditiously to grant a TRO to prevent irreparable harm while a motion for preliminary injunction is briefed.

BACKGROUND AND FACTS

On September 9, 2021, President Biden unveiled a comprehensive plan to force vaccination on as many Americans as possible.[1] Proclaiming he was fed up with the decisions of some Americans to not get vaccinated, he looked to agency emergency rulemaking and executive orders in an attempt to compel as many people as possible to vaccinate. Included in that plan, though less publicly prominent than other mandates, was a proposed mandate on the approximately 280,000 Americans[2] employed by Head Start agencies (local, largely non-profit or governmental providers who receive federal funding to provide Head Start services). The White House announcement promised a forthcoming rule from the Department of Health & Human Services ("HHS"), which administers Head Start programs. 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."[3]

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[1] https://www.whitehouse.gov/covidplan/#schools.

[2] HHS data, https://eclkc.ohs.acf.hhs.gov/about-us/article/head-start-program-facts-fiscal-year-2019#:~:text=Head%20Start%20programs%20employed%20and,parents%20of%20Head%20Start%20children ("Head Start programs employed and contracted with 273,000 staff" in 2019).

[3] https://eclkc.ohs.acf.hhs.gov/blog/vaccinating-head-start-staff-letter-director.

That rule was formally published in the Federal Register on Monday, November 30, 2021. 86 Fed. Reg. 68,052[4] (hereinafter "Head Start Rule"). The rule has three key components: (1) immediate implementation without notice-and-comment; (2) a vaccination mandate on all staff, student-facing contractors, and all volunteers to have received the second shot by January 31, 2022; and (3) a universal mask mandate on all Head Start participants over age two. The inclusion of all volunteers is a massive expansion of the order from the White House announcement, which only said it would cover staff. HHS data from 2019 indicate that approximately 1,061,000 adults volunteered in their local Head Start program, of whom approximately two-thirds were parents of program participant children.[5] Now, in order to serve a few hours a month as a reading tutor or room mom for their children's pre-K program, low-income parents will have to be vaccinated. Also, nothing in the White House's September 9 plan made any mention of masking.

Plaintiff Elizabeth Etherton is a pre-kindergarten teacher in Fairfax County Public Schools ("FCPS") pre-kindergarten program (Decl. ¶ 3). Initially, Ms. Etherton was subject to a vaccine-or-test mandate from FCPS.[6] However, on January 14, 2021, Ms. Etherton was advised by memorandum from her supervisor that "the Office of Head

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[4] *See also* a plain-language explanation from the Office of Head Start Director: https://www.acf.hhs.gov/blog/2021/11/new-requirement-head-start-staff-vaccination-and-universal-masking.

[5] https://eclkc.ohs.acf.hhs.gov/about-us/article/head-start-program-facts-fiscal-year-2019#:~:text=Head%20Start%20programs%20employed%20and,parents%20of%20Head%20Start%20children.

[6] *FCPS Adopts COVID-19 Vaccination Requirement for Staff*, FCPS (Aug. 20, 2021), https://www.fcps.edu/news/fcps-adopts-covid-19-vaccination-requirement-staff.

Start ("OHS") has mandated that all personnel who have contact with Head Start students be fully vaccinated for COVID-19 by January 31, 2022 and wear a mask." (Decl. Ex. A). The memorandum further stated that FCPS teachers had to upload proof of vaccination or receive a medical or religious exemption by February 28, 2022, or be terminated (Decl. Ex. A. and Decl. ¶ 5). Ms. Etherton requested a medical exemption on January 31, 2022, but was informed on February 7 and 8 that her request was refused pending further documentation (Decl. Ex. B and Decl. ¶ 7). Thus, without this Court's prompt action, she will be terminated after February 28, 2022.

STANDARD OF REVIEW

The standard for a temporary restraining order requires a movant to show (1) the substantial likelihood of success on the merits, (2) that he is likely to suffer irreparable harm in the absence of a preliminary injunction, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Here, a TRO is necessary to prevent irreparable harm while the parties promptly brief a preliminary injunction.

ARGUMENT

I. The Plaintiff is likely to succeed on the merits.[7]

A. The Plaintiff is likely to succeed on her procedural claim that HHS lacks "good cause" to skip notice-and-comment rulemaking.

The Head Start Rule entered into effect immediately, without normal notice-and-comment rulemaking, pursuant to a finding of good cause by the agency "that notice

[7] Plaintiff also has a constitutional claim, but in the interests of the Court's time on a TRO reserves argument on it for the merits and does not address it here.

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." Head Start Rule, 86 Fed. Reg. at 68,058. In this instance, HHS asserts that good cause exists 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. *Id*. at 68,058–059.

In both the *Texas* and *Louisiana* cases, the district court judges correctly determined that HHS lacked good cause to skip notice-and-comment. Good cause is the "exception," and courts must be vigilant to ensure it does not swallow the rule. *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 766 (4th Cir. 2012). Thus, courts "construe the good cause exception narrowly. . . . There is a high bar to invoke the exception . . ." *Id*. at 767. Put differently, "exceptions must be narrowly construed and only reluctantly countenanced." *United States v. Gould*, 568 F.3d 459, 478 (4th Cir. 2009) (cleaned up). HHS must show this is one of those "rare circumstances when ordinary procedures — generally presumed to serve the public interest — would in fact harm that interest." *N.C. Growers' Ass'n,* 702 F.3d at 767 (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012)). These rare circumstances are only emergencies or other situations where serious harm would result from a delay. *Id*. (cleaned up). And an emergency or serious harm cannot be defined simply as stopping a bad thing sooner rather than later, or else most proposed rules would qualify and the exception would overwhelm the rule. *MCP No. 165 v. United States DOL,* Nos. 21-700, 2021 U.S. App. LEXIS 37024, at *39 (6th Cir. Dec. 15, 2021) (Sutton, J.,

dissenting from denial of initial hearing en banc) ("'In case of emergency break glass' this is not—unless we wish to sideline the notice-and-comment process . . . with respect to every future medical innovation concerning COVID-19 for this federal agency and other ones too."); *Florida v. Becerra*, No. 8:21-cv-839-SDM-AAS, 2021 U.S. Dist. LEXIS 114297, at *126 (M.D. Fla. June 18, 2021) ("If the existence of a communicable disease alone permitted CDC to find 'good cause,' CDC would seldom, if ever, need to comply with the statutory requirement for 'good cause' to dispense with notice and comment."); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 498 (D. Md. 2020) ("[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.").

Admittedly, the U.S. Supreme Court found in the Center for Medicaid & Medicare Services ("CMS") case that "we cannot say that in this instance the two months the agency took to prepare a 73-page rule constitutes 'delay' inconsistent with the Secretary's finding of good cause." *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022). But the same day the Court knocked the Occupational Safety and Health Administration ("OSHA") for a "2-month delay" in issuing its Emergency Temporary Standard, which also avoided notice-and-comment (though under a separate statutory scheme). *Nat'l Fed'n of Indep. Bus. v. DOL*, 142 S. Ct. 661, 663 (2022).

Here, the mandate was announced on September 9, but not published until November 30, almost a month after the CMS and OSHA mandates, and it is only two-thirds the length of the CMS rule and one-third the length of the OSHA rule. And whereas the CMS Mandate required a second shot by January 4, the Head Start Rule did not require a second shot until January 31. In short, HHS took longer to issue a shorter, less complicated rule than that which the Supreme Court reluctantly countenanced in *Missouri*. No wonder both Judge Doughty and Judge Hendrix rejected the good cause defense for the Head Start Rule. *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *37; *Texas*, 2021 U.S. Dist. LEXIS 248309, at *41 ("this 82-day timeline, when paired with the 62-day vaccination-compliance period, disfavors finding this degree of federal involvement in pre-K programs to be an emergency that rendered notice and comment 'impracticable.'").

Several other courts have also rejected efforts to use COVID-19 as an excuse to skip notice-and-comment. *Florida*, 2021 U.S. Dist. LEXIS 114297, at *126 (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). Defendants do not offer any different justifications from those rejected by the courts in these cases.

B. Plaintiff is likely to succeed on her substantive legal claims.

"Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665. That authority must be especially clear when an agency exercises great power. *Id.* "The question, then, is whether the Act plainly authorizes the Secretary's mandate." *Id.*

The Head Start Act does not "plainly authorize" a nationwide vaccine mandate. The Head Start Rule claims Congress has provided "authority granted to the Secretary by sections 641A(a)(1)(C), (D) and (E) of the Head Start Act," 42 U.S.C. § 9836a(a)(1)(C)–(E)). 86 Fed. Reg. at 68,052. Section 9836a(a)(1) overall empowers the Secretary to "modify" the "performance standards" for programs that receive Head Start funding. Subsection (C) provides HHS the authority to set "administrative and financial management standards" for Head Start programs. Subsection (D) provides HHS the authority to set "standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate)." And Subsection (E) provides HHS the authority to set "such other standards as the Secretary finds to be appropriate." Nothing in the Head Start Act explicitly authorizes a vaccine mandate. Nor do any of the sections on which HHS relies plainly authorize a vaccine mandate: it is not an administrative and financial management standard (which obviously refers to things like bookkeeping for grant tracking purposes), it is not related to the condition or location of facilities, and it is not appropriate (and if it is appropriate, it represents a massive problem under the non-delegation doctrine). *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *5 ("The powers that

Congress afforded the Agency Defendants within the statute above do not include, or imply, the power to impose vaccine and/or mask mandates.").

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

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. For instance, HHS's Departmental Appeals Board upheld the termination of a Head Start grant for failure to observe "administrative and financial management standards" when it found misuse of funds, failure to pay employer-side taxes, lack of internal recordkeeping, and lack of an employee code of conduct. *In re Babyland Family Services, Inc.*, HHS Dept. Appeals Bd., DAB No. 2109, 2007 HHSDAB Lexis 62 (Aug. 28, 2007). These are the sorts of things that count as "administrative and financial management standards."

In the *Texas* case, HHS conceded that the mandate is not a "financial management standard," but maintained it is an "administrative standard." 2021 U.S. Dist. LEXIS 248309, at *10-11. The *Texas* Court correctly rejected this reading, concluding that "the scope of 'administrative standards' is informed by the term to which it is joined: 'financial management standards.'" 2021 U.S. Dist. LEXIS 248309, at *19. In both terms, the reference is to back-end operations, not regulation of employee or volunteer health. Plus, if "administrative standards" can mean "vaccinate all staff," it can mean literally anything.

This is similar to the analysis conducted by two other district courts considering the federal contractor mandate, which the Federal Property and Administrative

Services Act supposedly authorizes. Under precedent, the president has power over "administrative and management issues" in federal procurement systems. *Georgia v. Biden*, No. 1:21-cv-163, 2021 U.S. Dist. LEXIS 234032, at *29 (S.D. Ga. Dec. 7, 2021) (quoting *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979)). As the judge in *Georgia* rightly concluded, "EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health, which is not clearly authorized under the Procurement Act." *Id.* at *30. *See Kentucky v. Biden,* No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316, at *20-21 (E.D. Ky. Nov. 30, 2021) ("it strains credulity that Congress intended the FPASA, a procurement statute, to be the basis for promulgating a public health measure such as mandatory vaccination."). If it strains credulity to use a procurement statute to impose mandatory vaccination, then it strains credulity to use "administrative and financial management" to impose mandatory vaccination.

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

The plain meaning of the statutory term "condition and location of facilities" is limited to the physical places that Head Start happens. "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.'" *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. *Texas*, 2021 U.S. Dist. LEXIS 239608, at *14 ("Mandating facility standards is drastically different from mandating who a healthcare provider hires or fires.").

The Secretary has already promulgated rules in the Code of Federal Regulations that apply this statutory authority, requiring that "premises are . . . kept free of undesirable and hazardous materials and conditions" and that "each facility's space, light, ventilation, heat, and other physical arrangements are consistent with the health, safety and developmental needs of children." 45 C.F.R. § 1304.53(10). *See Camden Cty. Council on Econ. Opportunity v. United States HHS*, 586 F.3d 992, 995 (D.C. Cir. 2009) (Kavanaugh, J.) (upholding HHS decision to revoke designation after multiple warnings to an agency about an unsafe playground area with nails and trash present). Again, the HHS Departmental Appeals Board illustrates when the rule applies, such as a playground with the "presence of vines with berries, cluttered trash and leaves, and a play structure with splinters and rusty nails." *In re Camden Cty. Council on Econ. Opportunity*, HHS Dept. Appeals Bd., DAB No. 2116, 2007 HHSDAB Lexis 79 (Sept. 25, 2007).

It is simply an abuse of language to say that the ability to regulate HVAC systems in Head Start buildings means that HHS can regulate vaccination status in Head Start employees. *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *24 ("If what the Agency Defendants argue is correct, (C) and (D) could be used to apply to almost any regulation the Agency Defendants wanted to make. They would have 'superpowers' to implement almost any Head Start standard."); *Texas*, 2021 U.S. Dist. LEXIS

248309, at *21 ("Mandating facility standards is a far cry from mandating a medical procedure for all staff under the threat of termination.").

3. This mandate is not appropriate.

Finally, the Head Start Rule is not an "appropriate" exercise of the Secretary's power, for three reasons. First, "imposing a vaccine mandate on [1] million Americans in response to a worldwide pandemic is simply not 'part of what the agency was built for.'" *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665. The Office of Head Start exists to run pre-K health and education programs, not to drive down the number of unvaccinated Americans in society.

Second, Head Start "has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the [educational] workplace. This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666 (2022). *See Texas*, 2021 U.S. Dist. LEXIS 248309, at *11 ("[T]his is the first time that Head Start has ever mandated a medical procedure as a precondition to new or ongoing employment."); *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *31 ("[T]he statute upon which Agency Defendants base their authority has never been used to impose a mandatory specific medical treatment upon individuals.").

Third, the lack of a limiting principle is problematic. "If the Secretary can actually modify any standard 'the Secretary finds to be appropriate,' that would be very concerning. The Agency Defendants would have unlimited power." *Louisiana*, 2022

U.S. Dist. LEXIS 1333, at *24. "If such other performance standards could include mask and vaccine mandates, there would be no genuine limiting principle to the Secretary's authority to regulate in the name of 'health and safety standards.'" *Texas*, 2021 U.S. Dist. LEXIS 248309, at *23.

The problem can also be seen by juxtaposing Head Start's statute with two other statutes the Supreme Court recently reviewed: the CMS statute and the CDC statute. The text and historical interpretation of the CMS statute was the basis for the Supreme Court's upholding the CMS mandate in *Missouri*. There, "Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" *Missouri*, 142 S. Ct. at 652 (quoting 42 U. S. C. §1395x(e)(9)). "Necessary in the interest of the health and safety" of Medicaid/Medicare enrollees, for a program focused on providing healthcare, is a far plainer authority for a vaccine mandate than "appropriate." In the CMS context, "The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle. . ." *Missouri*, 142 S. Ct. at 652. The Secretary in CMS could also point to similar infection control measure mandates by CMS in other contexts, whereas Head Start has never asserted such broad authority over funded program employees' and volunteers' health decisions as it does here. This is the same analysis that led the District of Arizona to conclude that the Supreme Court's holding as to CMS was distinguishable from the mandate on federal

contractors under the Procurement Act. *Brnovich v. Biden*, No. CV-21-01568-PHX-MTL, 2022 U.S. Dist. LEXIS 15137, at *60-62 (D. Ariz. Jan. 27, 2022).

The *Texas* Court points to another recent U.S. Supreme Court decision that is a better guide than *Missouri*, namely *Alabama Realtors*. There, as here, HHS tried to rely on "a catch-all provision, similar to the one in this case—'other measures, as in [the Secretary's] judgment may be necessary.'" *Texas*, 2021 U.S. Dist. LEXIS 248309, at *24 (quoting 42 U.S.C. § 264). "But the [Supreme] Court explained that 'the sheer scope of the CDC's claimed authority . . . would counsel against' the CDC's interpretation, because it was 'hard to see what measures [it] would place outside the CDC's reach.'" *Id.* (quoting *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021)). Judge Hendrix concluded that, "[a]lthough, this case, of course, deals with different statutory language, the agency's similar claim to expansive authority based on generalized and catch-all language undermines its position." *Id.*

Fourth, other canons of construction also counsel rejecting an expansive reading for "appropriate." For instance, it violates the major questions doctrine for the Secretary rather than Congress to make such a substantial decision as a vaccination mandate, especially one imposed nationwide through the piecemeal actions of various agencies. *Texas*, 2021 U.S. Dist. LEXIS 248309, at *32; *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *26 & n.18.

Similarly, it violates the federalism canon 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, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *21 (5th Cir. Nov. 12, 2021) ("[T]o mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power"). *Accord Texas*, 2021 U.S. Dist. LEXIS 239608, at *15 ("[P][ublic health and safety regulation beyond facility standards is emphatically the province of the States through their police powers."); *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *38.

And finally, it violates the non-delegation doctrine for the Secretary to wield such tremendous power with no greater guide than "appropriate." *Kentucky*, 2021 U.S. Dist. LEXIS 228316, at *26-27 ("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 BST Holdings, L.L.C.,* 2021 U.S. App. LEXIS 33698, at *8.

In sum, then, Subsection (C), dealing with "administrative and financial management standards," and Subsection (D), dealing with "facilities," do not permit the Secretary this authority. And it would violate numerous principles of statutory interpretation and run afoul of *Alabama Realtors* to read Subsection (E) to authorize this unprecedented vaccination mandate.

II. Plaintiff is likely to suffer irreparable harm without an injunction.

Immediate relief is necessary because Ms. Etherton cannot simply get her job back if this Court rules in her favor a year from now on summary judgment. For one thing,

her actual employer, Fairfax County Public Schools, is not a defendant, because FCPS has done nothing beyond implement this illegal mandate; HHS is the problem.[8]

Second, Ms. Etherton cannot be made whole in a year with monetary damages because the federal government enjoys sovereign immunity. Though many courts have rejected preliminary injunction requests to enjoin terminations by private employers over vaccine mandates, because the loss of a job is a monetary harm that can be calculated,[9] this case is different because the defendant is the federal government. The federal government has sovereign immunity, such that the loss of a job and its income and benefits is not reparable in the same way. The Fourth Circuit has said that in cases against a governmental agency, "the showing necessary to meet the irreparable harm requirement for a preliminary injunction should be less strict than in other instances where future monetary remedies are available." *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 362 (4th Cir. 1991). Following *Rum Creek Coal Sales*, two district courts of this circuit have joined the consensus view that a government's sovereign immunity transforms calculable monetary losses into irreparable harm. *Synagro-Wwt, Inc. v. Louisa Cty.*, No. 3:01CV00060, 2001 U.S.

[8] If this Court grants the TRO, stating that HHS may not enforce its mandate by cutting off funding or otherwise punishing FCPS for Ms. Etherton's non-compliance, then Ms. Etherton will be subject to her employer's previous policy, as she has been since August 2021, which is vaccinate or test weekly.

[9] *Compare Together Emples. v. Mass Gen. Brigham Inc.*, Civil Action No. 21-11686-FDS, 2021 U.S. Dist. LEXIS 217386, at *54 (D. Mass. Nov. 10, 2021) (collecting cases) *with Sambrano v. United Airlines, Inc.*, No. 21-11159, 2021 U.S. App. LEXIS 36679, at *2 (5th Cir. Dec. 13, 2021) (Ho, J., dissenting) *and Sambrano v. United Airlines*, Inc., No. 21-11159, 2022 U.S. App. LEXIS 4347, at *19 (5th Cir. Feb. 17, 2022).

Dist. LEXIS 10987, at *11 (W.D. Va. July 18, 2001); *O'Brien v. Appomattox Cty.*, 213 F. Supp. 2d 627, 632 (W.D. Va. 2002).[10]

Plus, numerous courts have recognized that a federal vaccination mandate is "a significant encroachment into the lives—and health—of . . . employees." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665. This encroachment is an invasion of the individual liberty interests protected by the Constitution. *BST Holdings, L.L.C.,* 2021 U.S. App. LEXIS 33698, at *8 ("[T]he Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)."); *Louisiana*, 2022 U.S. Dist. LEXIS 1333, at *40 ("[C]itizens will suffer irreparable injury by having a substantial burden placed on their liberty interests because they will have to choose between losing their jobs or taking the vaccine.").

Finally, "[b]eing deprived of a procedural right to protect its concrete interests (by violation of the APA's notice and comment requirements) is irreparable injury." *Louisiana,* 2022 U.S. Dist. LEXIS 1333, at *41 (citing *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019)); *accord Texas*, 2021 U.S. Dist. LEXIS 248309, at *66 ("Texas suffers another form of irreparable injury by being denied its procedural right to comment on the Rule.").

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[10] *See also N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388 (3rd Cir. 2012); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996); *Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *Kansas v. SourceAmerica*, 874 F.3d 1226, 1251 (10th Cir. 2017); *Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013). *See also Wages & White Lion Invs., L.L.C. v. United States FDA*, No. 21-60766, 2021 U.S. App. LEXIS 32112, at *22 (5th Cir. Oct. 26, 2021); *Ky., Educ. & Workforce Dev. Cabinet, Office for the Blind v. United States*, 759 F.3d 588, 600 (6th Cir. 2014).

Plaintiff is clearly in the same position. Without a preliminary injunction, Ms. Etherton will suffer irreparable injury by being forced to choose between losing her job and taking a vaccine that she does not want and believes is not medically appropriate for her. Furthermore, Defendants violated her procedural interests when they avoided going through notice-and-comment rulemaking, thereby denying her the right to weigh in and explain why she believes the rule is unfair.

III. The balance of the equities and public interest favor the Plaintiff.

If there were any question about the balance of the equities and public interest in the middle of a pandemic, they have assuredly been answered by the U.S. Supreme Court by this time, as the Court has granted emergency relief against likely illegal state or federal administrative actions numerous times. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666 ("The equities do not justify withholding interim relief."); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) ("It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends."); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021); *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020) ("even in a pandemic, the Constitution cannot be put away and forgotten."). In all four of those cases, the equities and public interest were no bar to interim relief, however much the government warned about the terrible consequences of pandemic spread.

As the Fifth Circuit has said: "The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make

intensely personal decisions according to their own convictions—even, or perhaps particularly, when those decisions frustrate government officials." *BST Holdings, L.L.C.,* 2021 U.S. App. LEXIS 33698, at *26.

Finally, this Court should bear in mind the pre-COVID principle of law that there is "no public interest in the perpetuation of unlawful agency action. To the contrary, there is substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees with the Plaintiff on the merits, then it should also agree on these other considerations.

CONCLUSION

Though not controlled by the holdings of the *Texas* or *Louisiana* courts, both of those opinions make a clear case to conclude the Head Start Rule is likely illegal. Not only did HHS lack good cause for its decision to skip notice-and-comment, but the agency lacks the plain statement of authority in statute necessary to issue such a sweeping and invasive rule. This Court should issue the requested TRO to protect Ms. Etherton from irreparable harm from an illegal rule.

February 23, 2022

Respectfully Submitted,

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