ALAN WILSON
ATTORNEY GENERAL

March 9, 2022

VIA EMAIL
Ms. Khahilia Shaw (records@americanoversight.org)

RE: Freedom of Information Act ("FOIA") Request

Dear Ms. Shaw:

This Office received your FOIA request dated January 26, 2022, which seeks:

1. Records sufficient to identify the names and job titles of each Office of the Attorney General employee (a) temporarily or permanently assigned to cases concerning mask mandates or (b) temporarily or permanently working in support of those employees assigned to cases concerning mask mandates.

2. Records sufficient to identify the total number of pending cases concerning mask mandates.

3. Records sufficient to identify the total number of resolved cases (including, but not limited to, cases resulting in a finding of guilt or liability, cases resolved by plea or stipulation, or dismissed cases) concerning mask mandates.

4. Records sufficient to identify all costs and expenses incurred for cases concerning mask mandates, including but not limited to legal billing statements.

Please provide all responsive records for each month from July 2021 through January 2022. (i.e., July 2021, August 2021, September 2021, October 2021, November 2021, December 2021, and January 2022).

On February 10, 2022, in accordance with § 30-4-30(B), the Office determined there are public records responsive to your request.

All of the public records responsive to your request are being made available to you now.

The Office is/has been involved in cases listed in the following table, each of which includes a mask mandate component. The Office's initial filing in each case, which lists the attorneys involved, is attached. Additionally, where applicable, the dispositional order has also been attached. Further records regarding these cases are publicly available via the various courts' websites.[1]

Case Name	**Court**	**Case Number**
Creswick v. University of South Carolina and Alan Wilson	South Carolina Supreme Court	2021-000833
State of South Carolina ex rel Alan Wilson v. City of Columbia	South Carolina Supreme Court	2021-000889
Richland County School District 2 and Malika Stokes v. James Lucas, Harvey Peeler, Molly Spearman, and Curtis Loftis	South Carolina Supreme Court	2021-000892
Disability Rights South Carolina, et al. v. McMaster, et al.	United States District Court for the District of South Carolina	3:21-cv-02728-MGL
Louisiana, et al. v. Becerra, et al.	United States District Court Western District of Louisiana	3:21-cv-03970-TAD-KDM
Louisiana, et al. v. Becerra, et al.	United States District Court Western District of Louisiana	3:21-cv-04370-TAD-KDM
Georgia, et al. v. Biden, et al.	United States District Court Southern District of Georgia	1:21-cv-00163-RSB-BKE
Texas, et al. v. U.S. Department of Labor, et al.	United States Court of Appeals for the Fifth Circuit	21-60845

Because of the size of the files, we cannot attach and send them via email. Therefore, shortly after receiving this letter, you will receive an email with access to a Kiteworks folder. Kiteworks is the service our Office uses for secure file sharing. The

[1] South Carolina Circuit Court records are available via https://www.sccourts.org/. South Carolina appellate court records are available via https://ctrack.sccourts.org/public/caseSearch.do. Cases filed in any United States district court or court of appeals are available via https://pacer.login.uscourts.gov/csologin/login.jsf.

folder contains all the nonexempt public records responsive to your request. Please let me know if you have any trouble accessing the documents.

Sincerely yours,

L. David Leggett
Assistant Attorney General

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2021-000833

Richard J. Creswick,…… Petitioner,

v.

The University of South Carolina and
Alan Wilson in his official capacity as Attorney General…… Respondents.

RETURN OF ATTORNEY GENERAL ALAN WILSON

INTRODUCTION

We agree with this Court's acceptance of this case in its original jurisdiction and for expedited review. The will of the General Assembly in enacting Proviso 117.190 must be carried out. In our view, that will was to ban mask mandates at state-supported colleges and universities. The key phrase in the Proviso is "without being required to wear a facemask." The Legislature wanted to ensure that the student was not "required" to mask regardless of whether he or she was vaccinated. The principle of separation of powers should be the Court's guidepost in resolving this matter.

We readily acknowledge that there is a reasonable alternative interpretation of the Proviso, if read in isolation. However, it is very poorly written. As the Attorney General advised President Pastides, despite the confusing language, the intent of the General Assembly was to ban mask mandates at State-supported colleges and universities, consistent with the Legislature's prohibition of vaccination mandates at institutions of higher learning (Proviso

117.163) and its bar of mask mandates at public schools (Proviso 1.108). Thus, Proviso 117.190 should be interpreted in conjunction with these other Provisos rather than in isolation. Even if the Court thinks Proviso 117.190 is unambiguous, still, it must be read consistently with legislative intent. Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). As this Court has explained, the language of a statute must "be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Alternatively, we think the Court could and should dismiss this case as constituting a political question more appropriate for the General Assembly to resolve. Moreover, in our view there is no justiciable controversy here. The Petitioner seeks an advisory opinion as to the correctness of the Attorney General's advisory opinion. Thus, even if the Court accepts this case, it does not have to address the merits of the Proviso's meaning.

Proviso 117.190 and Its Interpretation

Proviso 117.190 is part of the 2021-22 state budget and states as follows:

> [a] public institution of higher learning, including a technical college, may not use any funds appropriated or authorized pursuant to this act to require that its students have received the COVID-19 vaccination to be present at the institution's facilities without being required to wear a facemask. This prohibition extends to the announcement or enforcement of any such policy.

Attachment 1 (emphasis added). As the Attorney General pointed out in his letter to President Pastides, it is reasonable to read the Proviso as merely prohibiting discrimination against the unvaccinated student by requiring those students to wear masks. The Attorney General stated in that letter, if so read, "a uniform mask requirement does not violate the Proviso." However, the problem with such an interpretation is that it requires reading the Proviso in isolation and disregarding the phrase "without being required to wear a mask." On the other hand, if

construed together with the other Provisos, as a uniform whole, such an interpretation is inconsistent with the Legislature's clear policy to allow personal choice to prevail regarding masks and vaccinations.

Proviso 117.163, as a condition of admission or presence at State-supported colleges and universities, bans proof of a COVID-19 vaccination. See Attachment 2. A third Proviso – 1.108 – also prohibits "school district or any of its schools "from requiring students or employees to "wear a facemask at any of its education facilities." Attachment 3.

As this Court has recognized repeatedly,

> . . . our primary function in interpreting a statute is to ascertain the intent of the legislature. Multi-Cinema Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The real purpose and intent of the lawmakers will prevail over the literal import of the words. S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984).

Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). (emphasis added). Thus, Proviso 117.190 must be construed in conjunction with Provisos 1.108 and 117.163 to ascertain "[t]he real purpose and intent of the lawmakers." In short, while it is generally correct that the words of a statute must be given their literal meaning, still, the statute must be read as a whole and "Sections of the same general statutory law must be construed together and each one given effect." CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal quotations omitted). In addition, the Court has explained that "[i]t is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words." Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 281-82, 42 S.E.2d 390, 393-94 (1947).

The question here is not whether the Proviso, even though poorly worded, is "ambiguous." Even if not, it still requires the ascertainment of legislative intent. Whether "a

statute's language is unambiguous and conveys a clear and definite meaning is not always an easy one." Ray Bell Const. Co., Inc. v. School Dist. Of Grnvlle Co., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998). In Ray Bell, this Court reversed the Court of Appeals for focusing on only one section of a statute, in concluding that that such section was unambiguous, and thus refusing "to resort to other rules of statutory construction." Id. Quoting Kirakides, supra, the Court concluded in part that "[h]owever plain the ordinary meaning of the words used in a statute may be, the court will reject that meaning when to accept it would lend to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Id. (emphasis added). Ray Bell thus concluded that the Court of Appeals' interpretation "would conflict with the overall purpose" of the statute.

So too here. Based upon Ray Bell, Proviso 117.190 cannot simply be read by itself, but must be interpreted in conjunction with the parallel Provisos. Reading the three Provisos together, it appears that the overarching purpose of the Legislature was to ban vaccination mandates at universities and colleges and mask mandates at public schools. The third Proviso, 117.190, is poorly worded, to be sure, but in conjunction with the other Provisos, should be read also to prohibit mask mandates at colleges and universities. Rather than construing Proviso 117.190 in isolation, it makes sense as in Ray Bell, to interpret it by ascertaining the overall legislative purpose. It makes little sense to think the Legislature would have banned mask mandates in the public schools and vaccination mandates at colleges and universities, yet authorized mask mandates at institutions of higher learning. If not absurd, certainly, such a conclusion is inconsistent with the legislative purpose.

Furthermore, it seems redundant to prohibit vaccinations altogether at universities and colleges in one Proviso (117.163) and, at the same time, to bar a college or university from requiring an unvaccinated person to wear a facemask. In other words, Proviso 117.163 gives a

student an unfettered right to be admitted, or be on campus without being vaccinated. The more limited right to be on campus unvaccinated without being discriminated against for not wearing a mask, as petitioner contends, seems superfluous. This Court has advised that "'[a] statute should be so construed that no word, clause, sentence, provisions or part shall be rendered surplusage, or superfluous. . . .'" In The Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (quoting 82 C.J.S. Statutes § 346).

We recognize that this Court has repeatedly stated that the views of individual legislators or drafters cannot be considered in interpreting a statute. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796, 799 (1928). However, such intent is relevant to demonstrate how the executive branch interpreted an amendment (or Proviso) after enactment. Kennedy v. S.C. Retirement System, 345 S.C. 339, 353, 549 S.E.2d 243, 251 (2001). Here, the Attorney General, the State's chief legal officer of the executive branch, State v. Sanders, 118 S.C. 498, 110 S.E. 808, 810 (1920), interpreted Proviso 117.190 after enactment, resting his advice upon his understanding of the intent of the General Assembly to impose a prohibition of a mask mandate. He based such determination of intent both upon the overarching legislative policy of the three Provisos, read as a whole, and in conjunction with one another, as well as upon Rep. Jones' opinion request, wherein he stated that as the Proviso's drafter, "the intent of Proviso 117.190 is to ensure that the choice of wearing a mask or getting a COVID vaccine is left to the student individually, and not required in order to be present." Attachment 4. While Rep. Jones' intent cannot be determinative, certainly, it is relevant with respect to the Attorney General's interpretation, and appears consistent with the legislative policy of the three Provisos, when read together. It is also consistent with the focus of the Proviso on "Masks at Higher Institution Facilities" (the title) and on the language "without being required to wear a facemask."

In short, an alternative reading of 117.190 requires focus upon the language "without being required to wear a facemask." (emphasis added). The Proviso could and should thus be read as prohibiting mask mandates, as the Attorney General advised. Vaccination mandates are forbidden by Proviso 117.163, and mask mandates are prohibited in the public schools by Proviso 1.108. Requiring the student to choose between a vaccination or a mask could have been thought by the Legislature to be compulsory either way. Thus, while confusingly worded, Proviso 117.190 could be seen as banning a student's being "required to wear a facemask" regardless of vaccination status. Pursuant to this interpretation, both masks and vaccinations would be the personal choice of the student, not the mandate of the University. Such an interpretation would be consistent with the General Assembly's overall policy of banning vaccination mandates (in Proviso 117.163) and mask mandates in the public schools (in Proviso 1.108). See letter of President Pro Tem Peeler and Speaker Lucas. Attachment 5 (expressing the General Assembly's policy in Proviso 1.108).

Finally, even if the intent of Proviso 117.190 was simply to bar discrimination against the unvaccinated students by requiring them to wear a mask, such does not mean that a mask mandate for all students was authorized by the Proviso. The Legislature simply did not speak to such authorization. One cannot assume that the Legislature intended to authorize a uniform mask mandate, particularly given the fact that another Proviso (1.108) bans such mandates in the public schools.

Political Question

In Dantzler v. Callison, 230 S.C. 75, 94, 94 S.E.2d 177, 187 (1956), citing Williamson v. Lee Optical, 348 U.S. 483 (1955), this Court noted that ". . . in matters of public health, the power of the legislature is exceedingly broad and it . . . [is] not for the Court but for the legislature to determine the need for such regulation as a protection of the public." The

Legislature must balance the protection of the public health against the liberty and freedom of the individual. Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905) ["'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of country essential to the safety, health, peace, good order, and morals of the community.'"]. As this Court has held in another context, the liberty interest from bodily restraint must be balanced against public safety by the Legislature in the first instance. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 141, 568 S.E.2d 338, 347 (2002). It appears that the General Assembly here has come down on the side of liberty.

Thus, this matter is primarily one for the General Assembly to determine in the political arena. As the Attorney General wrote to Senator Harpootlian, in responding to his vitriolic letter, critical of his advice to President Pastides and Representative Jones,

> [t]here is, however, an easy fix to your concerns and one which avoids vitriolic attacks. As you know, no statute is written perfectly, particularly in the haste of adopting a state budget. You are an influential Senator and a persuasive advocate. If your view of legislative intent of Proviso 117.190 is correct, and the understanding of Representatives Jones and Wooten is incorrect, it should be a simple matter for you to propose and push through to enactment a clarifying amendment to reflect what you perceive as the true intent of the General Assembly. As we stated in our August 2 letter [to President Pastides] it is the Legislature [which] . . . sets state health policy in the final instance, not the University of South Carolina or the State Attorney General. This Office did not create the problem. Again, if you believe the intent of the Legislature was in accordance with your view, I strongly urge you to seek a clarifying amendment to Proviso 117.190 when the Legislature returns in September.

Attachment 6. The Attorney General further noted in that letter that "[a]s our Supreme Court has recognized, legislative intent may override the literal language where the statute is subject to more than one reading." Id. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ["courts are not confined to the literal meaning of a statute where the literal import contradicts

the real purpose and intent of the lawmakers."]. After the Attorney General' letter was sent to Senator Harpootlian, this lawsuit immediately followed, asking this Court to weigh in.

In Bailey v. S.C. Elec. Comm., 430 S.C. 268, 844 S.E.2d 390 (2020), the Court refused to answer the question in its original jurisdiction as to whether existing South Carolina law allowed all registered voters to vote by absentee ballot in the November general election "in the face of the COVID-19 pandemic." The Court, in doing so, relied upon the Legislature's apparent intent that the pandemic provided no exception to allow absentee balloting generally. 430 S.C. at 274, 844 S.E.2d at 393. Acknowledging that "[s]tatutory interpretation is certainly a judicial question," nevertheless, the Court refused to decide the issue, deeming it a "political question" for the General Assembly to determine when it returned. While there are factual differences between this case and Bailey, certainly, the legal principle here is the same. In this instance, it appears the legislative intent of Proviso 117.190 was likely to forbid any mask mandate; moreover, the Legislature can address the question upon its immediate return, should it see fit to do so. Accordingly, this is a political question for the General Assembly rather than this Court to tackle. See Callison, supra.

The Legislature will soon return in September. It may well clarify whether it intended to impose a ban on mask mandates at state-funded colleges and universities. It certainly did prohibit such mandates for schools and school districts in Proviso 1.108 (Attachment 3). And it certainly did bar any requirement of a COVID-19 vaccination for admission to or to be present at colleges and universities in Proviso 117.163 (Attachment 2). The likelihood, therefore, that the Legislature intended colleges and universities to impose mask mandates is thus small.

No Case or Controversy

The University accepted the Attorney General's advisory opinion that the Proviso was intended to prohibit mask mandates, even if the words did not clearly say so. It then rescinded

its earlier policy. However, Petitioner now seeks to have the Court declare the Attorney General's advice was incorrect. In short, Petitioner desires an advisory opinion concerning the Attorney General's advisory opinion. Thus, this case does not belong in this Court, but on the floor of the General Assembly. See Hitter v. McLeod, 274 S.C. 616, 618, 266 S.E.2d 418, 419-20 (1980). ["(W)hile respondent['s] dilemma is appreciable . . . it does not ipso facto confer jurisdiction on this Court . . . to render an advisory opinion, which we have repeatedly refused to do even on constitutional issues. . . ."].

As this Court has advised, "[t]he Declaratory Judgment Act is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use if the defendants or the applicant reach the occasion which might demand it. . . ." Orr v. Clyburn, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982). An adjudication which "would settle no rights of the parties," is "only advisory and therefore beyond the intended scope of a declaratory judgment." Power v. McNair, 255 S.C. 150, 154-55, 177 S.E.2d 551, 553 (1970). The ruling Petitioner seeks would resolve nothing except the satisfaction of knowing he has read the law correctly. Yet, the Attorney General readily acknowledged the alternative reading was reasonable. Still, the University is not required to take action even if the Court rules in Petitioner's favor.

As the Court has stressed, "[q]uestions of statutory interpretation, by themselves, do not rise to the level of actual controversy." Tourism Expenditure Review Comm. v. City of Myrtle Beach, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013) (quoting Entergy Nuclear Generation Co. v. Dept. of Envt'l. Protection, 944 N.E.2d 1027, 1034 (Mass. 2011) (internal quotations omitted). "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223 (1975).

It is also well-settled that "Attorney General opinions are persuasive but not binding authority." S.C. Pub. Int. Found. v. Greenville Cnty., 401 S.C. 377, 383, n. 3, 737 S.E.2d 502,

560-61, 713 S.E.2d 604, 609 (2011). Here, the Attorney General simply responded to an opinion request from Rep. Stewart Jones. He issued the contested guidance to President Pastides (with a copy of that letter to the Representative). Representative Jones' request letter (by email) had stated the following:

> I've heard that USC is saying they've got a work around in the language of 117.190 to still require masks on campus. As the author of the Proviso, I'd like to state that the intent of Proviso 117.190 is to ensure that the choice of wearing a mask or getting a covid vaccine is left to the students individually, and not required in order to be present. Please address this in your opinion.

Attachment 4 (Request of Rep. Jones).

Thus, contrary to Petitioner's inflammatory rhetoric, the Attorney General did not "intervene" against the University, but responded to an opinion request, as state law requires him to do. See § 1-7-90 [Attorney General to "give his opinion upon questions of law submitted to him by either branch" of the General Assembly or the Governor]. As stated above, the Attorney General advised Rep. Jones and President Pastides that, while Proviso 117.190 could reasonably be read as Petitioner interprets it, -- simply to preclude discrimination against the unvaccinated – the intent of the Legislature appears to have been contrary to that interpretation, and was to ban mask mandates at state colleges and universities. Regardless, such advice from the Attorney General was not "binding authority" and the discretion to impose a mask mandate remained with the University even if the law were deemed to permit such policy.

Thus, at bottom, the question of whether the University of South Carolina, may compel masks is one of its own discretion even it has a legal right to do so. Clemson, for example, has not imposed a mask mandate, nor has the College of Charleston. As the Court has explained, "[a]s a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate government agency." Griggs v. Hodge, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956). Therefore, we cannot see how this case is anything more than a

request for an advisory opinion. Petitioner merely seeks a ruling that his view of the law is correct. But what good that does him in light of the fact that any decision remains discretionary with the University is beyond us. In short, the fact that the University may have the authority to impose a mask mandate, certainly does not mean it will do so. A ruling from this Court does not compel action by the University for exercising a discretionary act. There is no case or controversy here.

CONCLUSION

The principle of separation of powers should guide the Court. We believe that in enacting Proviso 117.190, the Legislature intended to ban mask mandates at state-supported colleges and universities, consistent with its policy of prohibiting a mandate of vaccinations at colleges and universities (117.163) and barring a mandate of wearing of masks at public schools (1.108). Alternatively, we believe this is a political question more properly addressed by the General Assembly. Finally, this case lacks a justiciable controversy.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

s/ J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680; (803)734-3677 (Fax)
esmith@scag.gov

ATTORNEYS FOR THE
ATTORNEY GENERAL

August 11, 2021

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard J. Creswick, Petitioner,

v.

The University of South Carolina and Alan Wilson in his official capacity as Attorney General, Respondents.

Appellate Case No. 2021-000833

ORIGINAL JURISDICTION

Opinion No. 28053
Submitted August 11, 2021 – Filed August 17, 2021

JUDGMENT DECLARED

Richard A. Harpootlian and Christopher Phillip Kenney, of Richard A. Harpootlian, PA, of Columbia, for Petitioner.

Vordman Carlisle Traywick III and Robert E. Stepp, of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Respondent University of South Carolina.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Respondent Attorney General Alan Wilson.

PER CURIAM: Petitioner, a professor at the University of South Carolina (the

University), seeks a declaration in this Court's original jurisdiction that Proviso 117.190 of the 2021-2022 Appropriations Act[1] does not prohibit a universal mask mandate at the University and asks the Court for expedited consideration of this matter. Both the University[2] and the Attorney General agree with the requests for this Court's acceptance of this case in its original jurisdiction and expedited review. Because this matter involves a question of significant public interest that must be decided before classes resume this week, we accept the matter in our original jurisdiction and expedite its consideration. *See* Rule 245(a), SCACR (explaining this Court may hear matters in its original jurisdiction if the public interest is involved, or if special grounds of emergency or other good reasons exist); *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (holding only if an extraordinary reason, such as a question of significant public interest or an emergency, exists will this Court determine a matter in its original jurisdiction). We dispense with further briefing, find oral argument would not be helpful, and declare Proviso 117.190 does not prohibit a universal mask mandate.

On July 30, 2021, Dr. Harris Pastides, Interim President of the University, announced that face coverings would be required for all students, faculty, and staff at all times inside all University buildings except a student's own dorm room, a private office, and when eating inside campus dining facilities. On August 2, 2021, the Attorney General sent a letter to Dr. Pastides opining that the University's universal facemask mandate violated Proviso 117.190. Accordingly, Dr. Pastides issued a statement on August 3, 2021, indicating that in light of the Attorney General's opinion, the University would not require facemasks except in the University's health care facilities and campus public transportation. However, the statement strongly encouraged the use of facemasks indoors unless in a student's own dorm room, in a private office, or eating inside campus dining facilities.

Proviso 117.190 provides:

> (GP: Masks at Higher Education Facilities) A public institution of higher learning, including a technical college, may not use any funds appropriated or authorized pursuant to this act to require that its students have received the COVID-19 vaccination in order to be present at the institution's facilities without being required to wear a

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[1] https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm#s117.

[2] Although the University is named as a defendant in this lawsuit, it is not actually adverse to any of the parties and, in its return, states that it defers to this Courts' interpretation of Proviso 117.190.

> facemask. This prohibition extends to the announcement or enforcement of any such policy.

In his letter to Dr. Pastides, the Attorney General stated,

> With respect to masks, Proviso 117.190 is ambiguous, to be sure. One reasonable interpretation is to prohibit discrimination by requiring masks for the unvaccinated. Under this interpretation, a uniform mask requirement does not violate the proviso. Based upon this reading, we understand the University has now imposed a mask requirement "inside all campus buildings" with certain exceptions.
>
> Such a policy, however, is likely not consistent with the intent of the Legislature. It is our understanding that Proviso 117.190, while inartfully worded, was intended to prohibit the mandatory wearing of masks, as reflected in its use of the language "without being required to wear a facemask." Our state Supreme Court has advised that "courts are not confined to the literal meaning of a statute where the literal import contradicts the real purpose and intent of the lawmakers." *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002). Given the legislative intent, we are constrained to construe Proviso 117.190 as prohibiting a mask mandate such as the University has imposed.

In his return, the Attorney General asserts this matter does not present a justiciable controversy. We reject this assertion. There is no question that the University withdrew its mask mandate based on the letter from the Attorney General, and the University has now clearly indicated it will defer to our interpretation of the proviso in question. Under these circumstances, this controversy is clearly justiciable.

Contrary to the Attorney General's position that this matter presents a political question, we hold this action involves solely a question of statutory interpretation. The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 497, 854 S.E.2d 836, 838 (2021); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The first question to be asked when interpreting a statute is whether the statute's meaning is clear on its face. *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001). If a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court must apply the statute

according to its literal meaning. *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). Under the plain meaning rule, this Court has no right to search for or impose another meaning or resort to subtle or forced construction to change the scope of a clear and unambiguous statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010); *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 29–30, 661 S.E.2d 349, 351–52 (2008). Only where the language of an act gives rise to doubt or uncertainty as to legislative intent may this Court search for that intent beyond the borders of the act itself. *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017). The best evidence of legislative intent is the text of the statute. *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002); *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

The language of Proviso 117.190 is not ambiguous as to the point in question—whether the proviso prohibits a universal mask mandate. Nothing in the proviso manifests the General Assembly's intent to prohibit all mask mandates at public institutions of higher learning. Instead, the proviso clearly prevents state-supported institutions of higher education from using funds from the 2021-2022 appropriations to fund efforts requiring only unvaccinated individuals to wear facemasks. Nothing in the title or text of the proviso prohibits a universal mask mandate at a public institution of higher learning that applies to all students, faculty, and staff equally, whether vaccinated or unvaccinated. In fact, the proviso implicitly contemplates there could be a universal mask mandate, but its terms prohibit only discrimination against unvaccinated individuals by requiring them to wear masks when vaccinated individuals are exempt from that requirement. Despite the fact that the proviso is, as stated by the Attorney General, "inartfully worded" and "very poorly written," the proviso clearly does not not prohibit a universal mask mandate.

Further, the Attorney General's contention that construing Proviso 117.190 along with other provisos concerning COVID-19 vaccinations and facemasks somehow evidences the legislative intent for Proviso 117.190 to prohibit universal mask mandates at state-funded colleges and universities is specious. We note Proviso 1.108 demonstrates the General Assembly is capable of drafting a provision prohibiting all mask mandates by stating:

> (SDE: *Mask Mandate Prohibition*) No school district, or any of its schools may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the

announcement or enforcement of any such policy.[3]

(emphasis added). In contrast to Proviso 117.190, Proviso 1.108 clearly evinces the General Assembly's intent to prohibit the use of state funds to require any mask mandate in public K-12 schools. The fact that Proviso 117.190 uses different language than Proviso 1.108 leaves little doubt that Proviso 117.190 was not intended to prohibit all mask mandates at public institutions of higher education, but only, as its terms specifically provide, mask mandates for the unvaccinated.

As to the Attorney General's insistence that subsequent statements by individual legislators evidence the legislative intent to ban all masks mandates, this Court has held the Court may not look to the opinions of legislators or others concerned in the enactment of the law—expressed subsequent to enactment—to ascertain the intent of the legislature. *Kennedy*, 345 S.C. at 353–54, 549 S.E.2d at 250 (quoting *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1942)); *Bowaters Carolina Corp. v. Smith*, 257 S.C. 563, 572, 186 S.E.2d 761, 764 (1972) (holding the testimony of members of the legislative delegation who authored the statute as to its meaning was inadmissible). It is well established that courts will disregard the subsequently expressed opinions of individual legislators as to the intent of the legislature as a whole when construing a statute. *See, e.g.*, *Bread Pol. Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) ("*[P]ost hoc* observations by a single member of Congress carry little if any weight." (quoting *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978))); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) (noting statements of Appropriations Committee members "represent only the personal views of these legislators," and, "however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage" (alteration in original) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974))); 419 U.S. at 132 (holding post-passage remarks of legislators cannot serve to change the legislative intent of Congress expressed before the Act's passage as those statements represent only the personal views of the legislators); *Pa. Dep't of Pub. Welfare v. United States*, 781 F.2d 334, 341 n.10 (3d Cir. 1986) ("[A] post hoc statement of a single legislator, even of the bill's author, is not entitled to probative weight in the determination of legislative intent." (citations omitted)); *Cummings v. Mickelson*, 495 N.W.2d 493, 499 n.7 (S.D. 1993) (holding the views of individuals involved with the legislative process as to intent is of no assistance in construing statutory provisions because:

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[3] https://www.scstatehouse.gov/query.php?search=DOC&searchtext=mask&category=BUDGET&year=2021&version_id=7&return_page=&version_title=Appropriation%20Act&conid=36818960&result_pos=0&keyval=46115&numrows=10

(1) it is the intent of the legislature that is sought, not the intent of the individual members; and (2) it is "universally held" that "evidence of a . . . draftsman of a statute is not a competent aid to a court in construing a statute" (quoting *Coop. Wool Growers of S.D. v. Bushfield*, 8 N.W.2d 1, 3 (1943))); *Cogan v. City of Wheeling*, 274 S.E.2d 516, 518 (W. Va. 1981) (holding a court cannot consider the individual views of members of the legislature offered to prove the intent and meaning of a statute after its passage and after litigation has arisen over its meaning and intent). *See generally* Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 48.16 (7th ed. 2014) (citing cases in numerous jurisdictions holding courts should not consider testimony about legislative intent by members of the legislature that enacted a statute). Accordingly, even if the proviso were ambiguous, we would not consider any post-passage statements by individual legislators or groups of legislators as to the intent of the proviso.

Because the language of the proviso is clear and unambiguous as to whether the proviso prohibits a universal mask mandate, we need not resort to rules of statutory construction to determine legislative intent. *See Smith*, 419 S.C. at 556, 799 S.E.2d at 483 (holding only where the language of a statute gives rise to doubt or uncertainty as to legislative intent may this Court search for that intent beyond the borders of the act itself); *Miller*, 364 S.C. at 307, 613 S.E.2d at 366 (holding where a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court must apply the statute according to its literal meaning). We declare the terms of Proviso 117.190 clearly and unambiguously prohibit a state-supported institution of higher education from discriminating against unvaccinated students, faculty, and staff by requiring them to wear masks. The proviso does not prohibit a universal mask mandate.[4]

JUDGMENT DECLARED.

BEATTY, C.J., KITTREDGE, HEARN, FEW, and JAMES, JJ., concur.

[4] In reaching this conclusion, we are simply construing the proviso as it is written. Our holding is not an approval or disapproval of a mandate, nor is it an approval or disapproval of an attempt by the General Assembly to prohibit a mandate.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

State of South Carolina, ex rel Alan Wilson, Attorney General. . . . . Petitioner,

v.

City of Columbia. . . . . Respondent.

PETITION FOR ORIGINAL JURISDICTION AND EXPEDITED CONSIDERATION

The State of South Carolina ex rel Attorney General Alan Wilson (State) respectfully requests that the South Carolina Supreme Court authorize the bringing of the attached suit within its original jurisdiction pursuant to Rule 245, SCACR, S.C. Code Ann §14-3-310 and S.C. Const. art. V §5. A proposed complaint is attached along with other exhibits. The Petition and proposed complaint assert that the City of Columbia has ordinances imposing mask requirements on schools that are prohibited by a proviso adopted by the General Assembly in the annual Appropriations Act and otherwise exceed the authority of the City. The State respectfully requests that this Court take jurisdiction of this case, direct a response to the proposed complaint, and give this matter expedited consideration.

I

INTRODUCTION AND SUMMARY

We understand and respect the concerns that citizens and governments have about the spread of Covid 19 and its variants. This case is not about what policies are best for dealing with the virus. We bring this Petition not to choose sides in debates over health precautions. Instead, we ask this Court to resolve a dispute over the controlling effect of a legislative proviso regarding mask requirements so that all jurisdictions will be informed about what law governs. Act No. 94, Part 1B, §1.108, 2021 S.C. Acts. In bringing this action, we agree with the words of the Court in the recent *Creswick* opinion, that appropriation provisos must be construed "as . . . written." *Creswick* v. *University of South Carolina and Wilson*, Op. No. 28053 (Adv. Sh. No. 28 at 32, 38 n. 4 (August 17, 2021)). Like this Court's holding, our bringing this action "is not an approval or disapproval of a mandate, nor is it an approval or disapproval of an attempt by the General Assembly to prohibit a mandate." *Creswick*, n. 4. The rule of law must prevail.

This Court has observed that "[w]ithout a legislature and the exercise of the power to appropriate funds . . . anarchy and chaos would pervade society. There would not be a republican form of government." *Segars v. Parrott*, 54 S.C. 1, 31 S.E. 677, 699 (1898). Thus, the legislative power is sacrosanct and must be preserved. The fundamental question in this case is whether political subdivisions, such as the City of Columbia, as well as various school districts, must abide by the will of the General Assembly – the supreme legislative power in this State – when it places conditions upon

its appropriations that mask mandates may not be imposed in schools as required by Proviso 1.108.

Under the Constitution and laws of this State, "the General Assembly is the sole entity, with the power to appropriate funds including federal funds." By example, as to this sweeping appropriations power, when the Legislature mandated in 2009, as part of its appropriations authority, that the Governor must apply for federal funds, and he failed to comply, this Court ordered that he must do so by issuing a mandamus against him. *Edwards v. State*, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009). Therefore, as this Court has emphasized, [t]he power of the Legislature over matters of appropriations is plenary. . . ." *Cox v. Bates*, 237 S.C. 198, 214, 116 S.E.2d 828, 834 (1960).

So too here. In this case, it is not the Governor who refuses to abide by a legislative mandate in the Appropriations Act, but various political subdivisions of the State, such as the City of Columbia. When the General Assembly attaches conditions to its appropriations to school districts, forbidding mask mandates, neither the city, nor a county, nor the school districts themselves, no more than the Governor, may commandeer the power of the General Assembly by disregarding the appropriations proviso in question. A legislative directive, such as Proviso 1.108, which is "reasonably and inherently" related to spending revenue appropriated by the General Assembly, must be followed and cannot be circumvented. Thus, this Court's relief is required here.

This Petition presents simple legal questions about the failure of the City of Columbia to adhere to a clear legislative directive about mask usage. Contrary to the

terms of the Appropriations Act proviso set forth below prohibiting schools and school districts from imposing mask mandates and otherwise exceeding its municipal powers, the City of Columbia has passed ordinances imposing mask requirements on public schools in the City. Exhibits, pp. 1 & 3. These ordinances have already been followed by a similarly invalid Richland County ordinance (Exhibits, p. 5 (description from website)) and even a school district, Richland One, has violated the mask proviso by requiring that students and staff wear masks (Exhibits, p. 7). Similar requirements are likely to follow from other jurisdictions absent a ruling from this Court.

Although local governments certainly have an interest in community safety, their ordinances must conform to State law in doing so. These ordinances and directives do not. While cities, such as Columbia, have strong Home Rule powers – and we respect those powers – this case is not about Home Rule. The Legislature is the ultimate lawmaker. Its laws must be followed.

Proviso 1.108 of the provisos for the South Carolina Department of Education directs as follows:

> (SDE: Mask Mandate Prohibition) No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.

Despite the clear language of this Proviso, the City proceeded to adopt contrary ordinances. City of Columbia Ordinance 2021-069 (attached Exhibits, p. 1), ratifies the Mayor's Declaration of Emergency by Ordinance 2021-068 (Exhibits, p. 3) and provides in part, as follows.

> facial coverings shall be required by all faculty, staff, children over the age of two (2), and visitors, in all buildings at public and private schools or daycares whose purpose is to educate and/or care for children between the ages of two (2) and fourteen (14) to slow the spread of the novel Coronavirus and the disease COVID- 19 within the City limits.

The General Assembly took note of the City's violation of the proviso. On August 6, 2021, the Honorable Harvey Peeler, Jr., President of the Senate, and the Honorable Jay Lucas, Speaker of the House, wrote the Attorney General on August 6, 2021, stating, in part, as follows:

> We believe Proviso 1.108 is clear and unambiguous. It prohibits face-covering mandates in public schools no matter where in the state they are located. Further, there is nothing about this proviso that indicates local government has authority to amend, augment or even ignore the policy set forth by the State. We also believe that any directive properly enacted by the General Assembly serves as the general law of the State of South Carolina.
>
> The actions taken by Columbia City Council at the request and direction of Mayor Benjamin are in clear and deliberate violation of the plain meaning of the proviso.
>
> We would respectfully request that your office review the action of the City of Columbia and if you believe it necessary, take appropriate action on behalf of the State of South Carolina and the statewide policy adopted by Proviso 1.108.

Exhibits, p. 8.

11. The Attorney General wrote the Honorable Stephen K. Benjamin, Mayor of Columbia, and City Council members on August 11 stating, in part, as follows:

> It is the opinion of my office that these ordinances [2021-068 and 2021-069] arc in conflict with state law and should either be rescinded or amended. Otherwise, the city will be subject to appropriate legal actions to enjoin their enforcement. Encouragement of facemask wearing by city officials and even requirements for facemasks in city buildings and other facilities would not be in violation or the proviso. Also, parents, students, and school employees may

choose to wear facemasks anywhere at any time.

> My office has previously opined that budget provisos have the full force and effect of state law throughout the fiscal year for which a budget is adopted. . .
>
> While the proviso [1.108] does not mention municipalities. it is clear from both a plain reading of its language and from the intent expressed by legislative leaders that the General Assembly does not believe that school students or employees should be subject to facemasks mandates. While we appreciate the efforts of city leaders around the state to protect their populace from the spread of the COVID-19 virus and variants of it, these efforts must conform to state law.

Exhibits p. 9.

The City responded to the Attorney General on August 11, 2021 stating, in part, as follows:

> In the matter at hand, the issue is whether a Proviso that acts as a "Mask Mandate Prohibition" for schools and school districts, is germane to fiscal issues, raising and spending taxes, which is the sole purpose of the appropriations act? The clear answer, using the sound logic of our Supreme Court is that it is not. A mask mandate prohibition is clearly not a matter that is germane to fiscal issues which is the only issue allowed to be taken up in the general appropriations act and therefore it is unconstitutional and unenforceable.

Exhibits, p. 11.

Although we recognize that the City is acting out of genuine concern about the spread of the Covid-19 virus and its variants, it cannot do so contrary to the law of this State. The Proviso is quite clear that masks are not to be mandated by government for the schools of this State. As this Court has advised, "where an ordinance permits that which a statute prohibits, the ordinance is void." *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818, 831 (1965). Here, the City's Ordinances are precluded by the Proviso and respectfully, must be declared invalid for this reason and the others discussed below.

Therefore, we respectfully request that this Court grant original jurisdiction so that controlling State law may be upheld and that other governmental bodies will be informed that the Proviso is controlling.

II

AUTHORITY OF THE COURT TO ASSUME ORIGINAL JURISDICTION

Under Rule 245, SCACR, the Court may assume original jurisdiction "if the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised...." *See also* S.C. Const. art. V, §§ 5 and 20 and §14-3-310 (1976); *Key v. Currie*, 305 S.C. 115, 406 S.E. 2d 356, 357 (1991). Certainly, the public interest is involved here when, as discussed above, the City of Columbia has adopted an ordinance squarely contrary to State law.

This Court has exercised its authority in the original jurisdiction in several recent cases involving challenges to local ordinances or actions. *Adams v. McMaster*, 432 S.C. 225, 231, 851 S.E.2d 703, 706 (2020) (declaratory judgment action challenging the constitutionality of Governor's allocation of federal emergency education funding); *Mitchell v. City of Greenville*, 411 S.C. 632, 633, 770 S.E.2d 391, 391 (2015) (challenge to municipal election ordinance); *State v. Cty. of Florence*, 406 S.C. 169, 171, 749 S.E.2d 516, 517 (2013) (challenge to proposed county tax referendum.); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 694 S.E.2d 213 (2010) (challenge to helmet ordinance); *O'Brien v. S.C. ORBIT*, 380 S.C. 38, 46, 668 S.E.2d 396, 400 (2008) (challenge to City decision to

invest in equity securities). This Court has also granted original jurisdiction to challenges to State legislation. *See, eg, Doe v. State*, 421 S.C. 490, 808 S.E.2d 807 (2017) (challenge to definitions of "household member" in the Domestic Violence Reform Act and the Protection from Domestic Abuse Act); *S.C. Pub. Interest Found. v. Lucas*, 416 S.C. 269, 270, 786 S.E.2d 124, 125 (2016) (challenge to Appropriations Act proviso); *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013) (challenge to exemptions and caps placed on the state's sales tax).

This case falls squarely within the Court's authority to take original jurisdiction when the public interest is involved. Local ordinances are challenged because they are in conflict with State legislation. Adherence to the rule of law is clearly and profoundly in the public interest. This Court should grant this Petition for these reasons and the others discussed below.

III

REASONS FOR TAKING ORIGINAL JURISDICTION IN THIS CASE

As discussed below, this case involves a simple, but significant question of the City's authority to adopt an ordinance that is directly contrary to a legislative proviso and will have an immediate impact on thousands of school children and personnel. This case may be concluded by rulings on legal issues without the necessity of this Court's making factual findings. Considering the fact that the Supreme Court is likely to decide ultimately the merits of this case, the exigencies of time, judicial economy and fairness warrant the

Court's taking original jurisdiction of this case rather than allowing the case to proceed first in the Circuit Court. Moreover, an Opinion of this Court will be informative to all governmental bodies that have adopted or are considering adopting mask requirements for the schools.

IV

GROUNDS FOR JUDGMENT FOR THE STATE

A

The Ordinances Violate Proviso 1.108

As set forth above, the Proviso prohibits school districts from using any funds "appropriated or authorized by the Appropriations Act to require that its students and/or employees wear a facemask at any of its education facilities [and] [t]his prohibition extends to the announcement or enforcement of any such policy." In its Opinion this week in *Creswick* this Court stated that "Proviso 1.108 clearly evinces the General Assembly's intent to prohibit the use of state funds to require any mask mandate in public K-12 schools." *Id.* at 36. This statement by the Court is strong evidence of the proviso's meaning and the General Assembly's intent underlying it.

Although the City ordinances state that the City will provide the masks, the enforcement responsibilities will fall on the districts and their State funded personnel which will necessarily involve use of appropriated funds. School personnel will have to monitor and enforce mask compliance including dealing with students and staff who are

resistant to wearing masks. Therefore, the ordinances essentially direct the school districts to violate State law by making them use State funded resources to enforce a City mask requirement contrary to Proviso 1.108. In short, the City's funding the masks cannot circumvent the Legislature's clear intent. Proviso 1.108 and the Ordinances are therefore in conflict, and Proviso 1.108 preempts them and prevails. Well-settled authority supports this conclusion. As this Court has written,

> The government of a municipality is created by the laws of the State of South Carolina, and the creature cannot be greater than its creator, and the laws of a municipality to be good must not be inconsistent with the laws of the State."

McAbee v. S. Ry. Co., 166 S.C. 166, 164 S.E. 444, 444 (1932)

> Local governments derive their police powers from the state. S.C.Const. art. VIII, §§ 7, 9. The state has granted local governments broad powers to enact ordinances "respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities." S.C. Code Ann. § 5-7-30 (1976). This is in recognition that more stringent regulation often is needed in cities than in the state as a whole. *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943). However, the grant of power is given to local governments with the proviso that the local law not conflict with state law. *City of Charleston v. Jenkins*, 243 S.C. 205, 133 S.E.2d 242 (1963). A city ordinance conflicts with state law when its conditions, *157 express or implied, are inconsistent or irreconcilable with the state law. *Town of Hilton Head v. Fine Liquors, Ltd.*, 302 S.C. 550, 553-54, 397 S.E.2d 662, 664 (1990) (quoting *McAbee v. Southern Rwy. Co.*, 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)). Where there is a conflict between a state statute and a city ordinance, the ordinance is void. *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965).

City of N. Charleston v. Harper, 306 S.C. 153, 156–57, 410 S.E.2d 569, 571 (1991)

> Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible. *See Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 530, 476 S.E.2d 477, 480 (1996) ("To determine whether the ordinance has been preempted by Federal or State law, we must determine whether there is a conflict between the ordinance and the statutes and whether the

> ordinance creates any obstacle to the fulfillment of Federal or State objectives."); *192 Coin–Operated Video Game Machines*, 338 S.C. at 186, 525 S.E.2d at 877 (describing federal law conflict preemption); 56 Am.Jur.2d Municipal Corporations 392 ("[i]mplied conflict preemption occurs when an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute"); 5 McQuillin Municipal Corporations § 15.18.

S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 400–01, 629 S.E.2d 624, 630 (2006).

The conflict here is express and the Proviso preempts the ordinances because "compliance with both is impossible." *Ports Authority, supra.* The Ordinances cannot "make legal that which the State statute declared unlawful." *State v. Solomon*, 245 S.C. 550, 574–75, 141 S.E.2d 818, 831 (1965). Even if the conflict were not deemed to be express, the ordinances frustrate the purposes of the Proviso, and are therefore, preempted. 5 *McQuillin Mun. Corp*. § 15:19 (3d ed.)("even when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose.").

Moreover, in our view, the City through its Ordinances, seeks to "encroach upon the Legislature's power to appropriate funds. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002). The City cannot commandeer the General Assembly's appropriations power. As this Court underscored in *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-14, 295 S.E.2d 633, 637 (1982), "[t]he General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent." (emphasis added). Here, it has specified those conditions by prohibiting mask mandates in the schools. That is a policy decision which the legislative branch must make, and the executive branch, via the Attorney

General, must enforce. Thus, while the City may "make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking [by the City or a school district] is an intrusion upon the legislative power." *Hampton v. Haley*, 403 S.C. 395, 403-04, 743 S.E.2d 258, 262 (2013). Such intrusion is clear in this case.

B

The City Lacks Authority to Side-Step the Ordinance Under S.C. Const. art. XVII, §17

As noted above, the City contends that it does not have to comply with the Proviso alleging that it violates the "one subject" clause of the Appropriations Act. S.C. Const. art. III, §17. The Proviso does not violate the Constitution, but the City is not a judicial body to determine whether State legislation is constitutional. It must comply with the Proviso unless a Court declares it invalid. *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014)("'all statutes are presumed constitutional and, if possible, will be construed to render them valid.'). '[A] legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt.'").

Proviso 1.108 does not violate art. III, §17 as "it reasonably and inherently relates to the raising and spending of tax monies." *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 35, 484 S.E.2d 104, 107 (1997). It is among the Department of Education's budget provisos and is expressly tied to funding ("no school district . . . may use any funds

appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask.) Fact finding is unnecessary for this Court to take judicial notice that expenditure of public funds will necessarily be involved in a school district's enforcement of the City Ordinances. *See, Caldwell v. McMillan*, 224 S.C. 150, 77 S.E.2d 798 (1953) (statute allowing highway department to lease space in its administrative offices for a restaurant sufficient under Article III, § 17 since it "increases the efficiency of the State's business" by making meals available to state employees), quoted in *Keyserling v. Beasley*, 322 S.C. 83, 86–89, 470 S.E.2d 100, 102–03 (1996). *Keyserling* held that provisions creating a new "Low–Level Radioactive Waste Compact Negotiating Committee" and repealing the Southeastern Compact were germane to the Appropriations Act because they would impact revenue. Similarly, enforcement of a mask mandate in schools within the City of Columbia will necessarily impact the expenditure of State funds even if the City provides the masks. Although the Court is to apply a liberal construction "so as to uphold the Act if practicable" and "[d]oubtful or close cases are to be resolved in favor of upholding an Act's validity" (*Keyserling*), such construction is not necessary as to Proviso 1.108. The terms of the Proviso are quite clear, as this Court recognized in *Creswick*, and overwhelmingly demonstrate the legislature's intent that schools funded with State appropriations must not impose or implement mask mandates. Proviso 1.108 is germane to the Appropriations Act. This Court has, time after time, upheld the General Assembly's power to appropriate funds and attach strings to those appropriations. However, in this case the City of Columbia has taken scissors to those strings and cut

them to pieces.

C

The City Ordinances Otherwise Exceed Municipal Powers

Apart from Proviso 1.108, the above ordinances exceed the authority of the City of Columbia under State law and conflict with the authority of school districts as well as the General Assembly. *See, eg.*, S.C. Code Ann. §59-19-90 (general powers and duties of school trustees); *Moye v. Caughman*, 265 S.C. 140, 143, 217 S.E.2d 36, 37 (1975)("public education is not the duty of the counties, but of the General Assembly."); The recitations in the whereas clauses in the City's ordinances give it no authority to impose mask requirements on the schools within its boundaries. *See also*, *Sandlands C & D, LLC v. Cty. of Horry*, 394 S.C. 451, 461, 716 S.E.2d 280, 285 (2011).[1]

REQUEST FOR EXPEDITED CONSIDERATION

Because of the need for clarity as to conflicting mask provisions as schools are reopening, we respectfully request that this Court expedite consideration of this case. Discovery should not be necessary, and the case may be decided based upon filings by the parties and any briefing requested by the Court.

CONCLUSION

Again, we bring this action, not to assume policy positions, or to take sides in

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1"We note that the mere mention of police power rhetoric as part of the preamble to an ordinance does not guarantee that a local governmental action is a valid exercise of such powers. *See, e.g., Henderson v. City of Greenwood*, 172 S.C. 16, 24, 172 S.E. 689, 691 (S.C.1934) ("The mere statement in the preamble of an ordinance that is passed under the police power does not give a municipality carte blanche to pass an unreasonable ordinance or one opposed to the Constitution or laws of the state.") (citations omitted)." *Id.*

debates over health measures. We instead ask that this Court resolve which law controls in this State, the legislative proviso or local ordinances to the contrary. As this Court has noted, in *Condon v. Hodges, supra,* it is the Attorney General's role to bring to the Court's attention violations of the Constitution and the rule of law. 349 S.C. at 241, 562 S.E.2d at 628. Accordingly, the State of South Carolina respectfully requests that this Court order the following relief:

1. Grant this Petition and expedite consideration of this case.

2. Grant the relief requested in the Complaint which is to declare the referenced Ordinances void.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

s/ J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680; (803)734-3677 (Fax)
esmith@scag.gov

ATTORNEYS FOR THE
STATE EX REL WILSON

August 19, 2021

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alan Wilson, Attorney General, ex rel. State of South Carolina, Petitioner,

v.

City of Columbia, Respondent.

Appellate Case No. 2021-000889

ORIGINAL JURISDICTION

Opinion No. 28056
Heard August 31, 2021 – Filed September 2, 2021

JUDGMENT DECLARED

Attorney General Alan Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Petitioner.

Teresa A. Knox and Patrick L. Wright, Richard A. Harpootlian, Christopher Phillip Kenney all of Columbia, for Respondent.

W. Allen Nickles III, of Nickles Law Firm, LLC, of Columbia, for Amicus Curiae South Carolina Education Association.

B. Eric Shytle, of the Municipal Association of South Carolina, and James H. Goldin, of Jamey Goldin, Esq., both of Columbia, for Amicus Curiae Municipal Association of South Carolina.

Wilbur E. Johnson and Julia P. Copeland, of Charleston, and Kathleen F. Monoc, of Monoc Law, LLC, of Charleston, all for Amicus Curiae City of Charleston.

Elizabeth A. McLean, of Columbia, and Danny C. Crowe, of Crowe LaFave, LLC, of Columbia, both for Amicus Curiae Richland County.

JUSTICE KITTREDGE: South Carolina Attorney General Alan Wilson brings this declaratory judgment action in our original jurisdiction. This is the second case involving legislation passed by our General Assembly concerning the use of facemasks in the public schools of South Carolina during the coronavirus pandemic. Recently, we construed Proviso 117.190 of the 2021-2022 Appropriations Act,[1] which related to public institutions of higher learning, and determined from the language in that proviso that the University of South Carolina was not precluded from issuing a universal mask mandate that applied equally to vaccinated and unvaccinated students and faculty alike. *Creswick v. Univ. of S.C.*, Op. No. 28053 (S.C. Sup. Ct. filed Aug. 17, 2021) (per curiam).

Just as *Creswick* was easily resolved purely as a function of statutory interpretation, so too is this case. This case involves a different proviso from the 2021-2022 Appropriations Act, Proviso 1.108, relating to public schools serving students grades kindergarten through 12 (K-12). Unlike the proviso in *Creswick*, Proviso 1.108 manifestly sets forth the intent of the legislature to prohibit mask mandates funded by the 2021-2022 Appropriations Act in K-12 public schools. The Attorney General contends the City of Columbia passed ordinances—in direct opposition to Proviso 1.108—mandating masks in all K-12 public schools in the City of Columbia. We appreciate that the South Carolina legislature and the City of Columbia have differing views on whether parents of school children should decide whether their children must wear masks at school or whether the government should mandate that decision. Each legislative body has clearly expressed its respective position through legislative enactments, and both legislative bodies have acted in good faith. While allowing school districts flexibility to encourage one policy or the other, the state legislature has elected to

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[1] H. 4100, 124th Leg., 1st Reg. Sess. (S.C. 2021), *available at* https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm#s117.

leave the ultimate decision to parents. Conversely, the City of Columbia has attempted to mandate masks for all school children by following guidance from the Centers for Disease Control, which has the effect of disallowing parents a say in the matter.[2] For the reasons set forth below, we uphold Proviso 1.108 and declare void the challenged ordinances of the City of Columbia insofar as they purport to impose a mask mandate in K-12 public schools.[3]

I.

By prior order of this Court, we accepted this case in our original jurisdiction, for it involves a justiciable matter of significant public interest. Rule 245(a), SCACR.

II.

Proviso 1.108—enacted into law on June 22, 2021, and directed to the South Carolina Department of Education for South Carolina's K-12 public schools—provides with unmistakable clarity:

> (SDE: Mask Mandate Prohibition) No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.

The City of Columbia (the City) later enacted ordinances mandating masks in all K-12 public schools within the City, specifically Ordinances 2021-068[4] and 2021-

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[2] Justice Hearn characterizes the role of parental choice in the legislative policy debate as "political gloss." This characterization is completely and utterly incorrect. The role of parental choice in that debate is a fact. As noted above, we find the state legislature and the City of Columbia have demonstrated good faith. We even go further and recognize, as explained below, the possibility that a local government could impose a mask mandate without contravening Proviso 1.108. That potential result would, of course, hold true regardless of the presence or absence of parental involvement in the masking decision.

[3] No other issue concerning the ordinances is before the Court, and we offer no opinion on the validity of the balance of the ordinances.

[4] https://www.columbiasc.net/uploads/headlines/08-04-2021/emergency-meeting-ordinance/Ordinance_2021_068_Emergency_Order_Declaring_State_of_Emergen

069.[5] One ordinance is an "Emergency Order by the Mayor Declaring a State of Emergency," and the second ordinance ratifies and mirrors the Mayor's declaration of an emergency. Based on the City's policy judgment on how best to deal with the coronavirus, the ordinances mandate facemasks for "all faculty, staff, children over the age of two (2), and visitors, in all buildings at public and private schools or daycares."

By letter dated August 11, 2021, Attorney General Wilson notified the City of the conflict between Proviso 1.108 and the City's ordinances:

> It is the opinion of my office that these ordinances are in conflict with state law and should either be rescinded or amended. Otherwise, the city will be subject to appropriate legal actions to enjoin their enforcement. Encouragement of facemask wearing by city officials and even requirements for facemasks in city buildings and other facilities would not be in violation of the proviso. Also, parents, students, and school employees may choose to wear facemasks anywhere at any time.
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> My office has previously opined that budget provisos have the full force and effect of state law throughout the fiscal year for which a budget is adopted. . . .
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> . . . .
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> . . . While we appreciate the efforts of city leaders around the state to protect their populace from the spread of the COVID-19 virus and variants of it, these efforts must conform to state law.

On the same day, the City responded to the Attorney General:

> In the matter at hand, the issue is whether a Proviso that acts as a "Mask Mandate Prohibition" for schools and school districts[] is germane to fiscal issues, raising and spending taxes, which is the sole purpose of the appropriations act[.] The clear answer, using the sound

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cy_Facial_Coverings.pdf.

[5] https://www.columbiasc.net/uploads/headlines/08-05-2021/citycouncil-ratifies-state-of-emergency-ordinance/Ordinance_2021_069_Ratifying_Ordinance_2021_068_Declaring_State_of_Emergency_Facial_Coverings.pdf.

> logic of our Supreme Court[,] is that it is not. A mask mandate prohibition is clearly not a matter that is germane to fiscal issues[,] which is the only issue allowed to be taken up in the general appropriations act[,] and therefore it is unconstitutional and unenforceable.

As we will explain, the City's legal opinion is incorrect. Moreover, the City claims that it has the legal authority to impose and enforce the mask mandate ordinances, for there is allegedly no conflict with state law.

III.

We first address what is perhaps the most important underlying issue in the case: the Court's authority to decide the better policy decision between competing determinations made by the South Carolina General Assembly and a local government. We, of course, have no such authority to countermand a constitutional policy judgment of our state legislature, just as we have no power to impose our own policy judgment on the state legislature or local legislative bodies.

In *Creswick*, we noted that we were "simply construing [Proviso 117.190] as it [was] written," and that our holding was "not an approval or disapproval of a [mask] mandate, nor [was] it an approval or disapproval of an attempt by the General Assembly to prohibit a [mask] mandate." The same holds true today, as we emphatically remind the parties and the public that the wisdom or efficacy of mandating school children to wear facemasks to combat the coronavirus is not before us. As noted above, the South Carolina General Assembly and the City have expressed their respective positions through legislative enactments. The state legislature has elected to leave the decision to parents; the City believes it should make the decision without parental involvement.

We fully recognize that strong and passionate opinions exist on both sides of this debate. Yet, we must remind ourselves, the parties, and the public that, as part of the judicial branch of government, we are not permitted to weigh in on the merits of the facemask debate. Rather, we are a court that is constitutionally bound by the rule of law—specifically, separation of powers—to interpret and apply existing laws; we do not, and cannot, set public policy ourselves. Instead, the people of South Carolina, through their elected state representatives, set the state's policy.

Where, as here, the General Assembly establishes policy via legislation, it is our solemn duty to uphold that law absent a clear constitutional infirmity. More to the point, the policy of the state legislature to leave to parents the masking decision is

most assuredly well within the broad parameters of the legislature's constitutional boundaries. *See Elliott v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 925 (1958) ("All considerations involving the wisdom, policy, or expediency of an act are addressed exclusively to the General Assembly. We are only concerned with the power of that body to enact a law.").[6]

IV.

A.

We next address the City's constitutional challenge to Proviso 1.108, namely, that the proviso violates the one-subject rule. Given the deferential standard of review, we respectfully disagree. *See, e.g.*, *Doe v. State*, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017) (describing the "limited" standard of review).

"All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); *see also Sojourner v. Town of St. George*, 383 S.C. 171, 175, 679 S.E.2d 182, 185 (2009) ("Every presumption [must be] made in favor of a statute's constitutionality."). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs.*, 383 S.C. at 640, 528 S.E.2d at 650.

The one-subject rule of the South Carolina Constitution provides: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. art. III, § 17. Thus, an act must relate to only one subject, "with topics in the body of the act being kindred in nature and having a legitimate and natural association with the subject of the title," and the title of the act must "convey reasonable notice of the subject matter to the legislature and the public." *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 64, 467 S.E.2d

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[6] We emphasize the Court's limited role in this case because the City's Answer and Counterclaim appears to invite this Court into making a legislative and policy decision based on our own individual views of facemask mandates for school children. For example, the City of Columbia asserts, "Transmission rates of the SARS-CoV-2 virus, including the highly contagious delta variant, are rising in Columbia and surrounding communities." Even giving credence to that statement, we find, as we must, that the wisdom of the state legislature to allow parents to decide whether their children wear masks—instead of mandating masks for all school children—is for others to debate, not for this Court to decide.

739, 741 (1995). A provision in a general appropriations act does not violate the one-subject rule if it "reasonably and inherently relates to the raising *and spending* of tax monies." *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 35, 484 S.E.2d 104, 107 (1997) (emphasis added).

Proviso 1.108 is reasonably and inherently related to the spending of tax money. It was included as part of the Department of Education's budget and prohibits funds appropriated by the act from being spent on mask mandates in K-12 public schools. The title of the 2021-2022 Appropriations Act is:

> AN ACT TO MAKE APPROPRIATIONS AND TO PROVIDE REVENUES TO MEET THE ORDINARY EXPENSES OF STATE GOVERNMENT FOR THE FISCAL YEAR BEGINNING JULY 1, 2021, *TO REGULATE THE EXPENDITURE OF SUCH FUNDS*, AND TO FURTHER PROVIDE FOR THE OPERATION OF STATE GOVERNMENT DURING THIS FISCAL YEAR AND FOR OTHER PURPOSES.

(Emphasis added.) This title "convey[s] reasonable notice of the subject matter to the legislature and the public." *Westvaco Corp.*, 321 S.C. at 64, 467 S.E.2d at 741. Likewise, Proviso 1.108 has a legitimate and natural association with the title of the Appropriations Act, as it regulates the expenditure of appropriated funds by K-12 public schools. Proviso 1.108 therefore does not violate the one-subject rule.[7]

B.

The City next suggests its ordinances do not conflict with state law because the City will itself fund and enforce the mandate in the City's public schools, rather than using any state-appropriated funds to do so. We find this second argument similarly without merit. The notion that City employees would infiltrate the schools and, without any assistance from school personnel and without a penny of state funds, would be able to mandate masks and impose civil penalties for

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[7] We note that numerous amici briefs have been filed which seek to raise additional issues, including constitutional challenges wholly distinct from that asserted by the City (i.e., the one-subject rule). The parties, through their pleadings, determine the issues before the Court. The issues before the Court may not be expanded through amici briefs, and we therefore decline to address the merits of any additional constitutional challenges.

violations strains credulity and, in fact, is demonstrably false, as proven by the terms of the ordinances themselves.

Expressly contrary to Proviso 1.108, the ordinances require school personnel to enforce the City's mask mandate or face monetary and other legal sanctions. The City ordinances would impose a $100 fine for each "civil infraction." In addition to the fine, "repeated violations of this Ordinance by a person who owns, manages, operates or otherwise controls a school" are subject to a host of legal sanctions. The ordinance then defines a "person" as "any individual associated with the school . . . who has control and authority . . . such as a principal, vice principal, administrator, staff, owner, manager or supervisor." The ordinance further expands the definition of a "person" in breathtaking fashion to "also include an employee or other designee that is present at the business but does not have the title of principal, administrator, manager or supervisor, etc., but has the authority and ability to ensure that the requirements of this Ordinance are met while the school or business is open." By making "etc." responsible for enforcing the mask mandate, the City has made clear that every school employee is in the crosshairs. Simply put, whether intentionally or inadvertently, the City threatens all school personnel with far-reaching and unknown legal liability unless all school personnel ensure obedience to the ordinances. Thus, the ordinances force school personnel—all of whom have an obvious connection to state-appropriated funds—to choose between violating state law (Proviso 1.108) or city law (the ordinances). We therefore reject the City's argument that the ordinances can be harmonized with state law.

We do not outright reject the possibility that a local government could impose a mask mandate without contravening Proviso 1.108. Here, however, the enforcement provisions of the City's ordinances make clear that school personnel—paid at least in part with "funds appropriated or authorized pursuant to [the 2021-2022 Appropriations Act]"—are responsible for enforcing the City's mask mandate. That is in direct conflict with Proviso 1.108.

C.

This brings us to the real point of contention—may the City enact ordinances in direct conflict with state law? The answer is unsurprisingly and unequivocally "no." *See McAbee v. S. Ry. Co.*, 166 S.C. 166, 168, 164 S.E. 444, 444 (1932) ("The government of a municipality is created by the laws of the State of South Carolina, and the creature cannot be greater than its creator, and the laws of a municipality to be good must not be inconsistent with the laws of the State.").

"It is well settled that where there is a conflict between a State statute and a city ordinance, as where an ordinance permits that which a statute prohibits, the ordinance is void." *State v. Solomon*, 245 S.C. 550, 575, 141 S.E.2d 818, 831 (1965). This Court has never wavered in its adherence to this bedrock principle. *See, e.g., id.* at 574–75, 141 S.E.2d at 831 ("The trial judge held that the City [of Charleston's] ordinance was in direct conflict with the prior State statute and void for that reason. The effect of his ruling was that the City ordinance could not make legal that which the State statute declared unlawful. We think that the trial judge ruled correctly."). As we explained in *City of North Charleston v. Harper*,

> Local governments derive their police powers from the state. The state has granted local governments broad powers to enact ordinances respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities. This is in recognition that more stringent regulation often is needed in cities than in the state as a whole. *However, the grant of power is given to local governments with the proviso that the local law not conflict with state law.*

306 S.C. 153, 156, 410 S.E.2d 569, 571 (1991) (emphasis added) (internal citations omitted) (internal quotation marks omitted).

The City premises its authority to enact the ordinances under the Home Rule Act, S.C. Code Ann. §§ 5-7-10 to -310 (2004), merely upon its unilateral declaration of a state of emergency and an alleged need to preserve the "health, peace, order and good government of its citizens." We find such an argument specious and wholly unsupported by law. The Home Rule doctrine in no manner serves as a license for local governments to countermand a legislative enactment by the General Assembly, nor has this Court ever construed it in that manner. *See, e.g., City of N. Charleston*, 306 S.C. at 156, 410 S.E.2d at 571 (noting a grant of police power to local governments is given with the caveat that the locality may not enact ordinances that conflict with state law); *see also Williams v. Town of Hilton Head Island*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) (explaining Home Rule "bestow[s] upon municipalities the authority to enact regulations . . . so long as such regulations are not inconsistent with the Constitution and general law of the state"). A declaration of an emergency does not alter this settled principle, for otherwise local governments could arbitrarily and unilaterally ignore—effectively overrule—legislative enactments by the General Assembly. *Cf. Moye v. Caughman*, 265 S.C. 140, 143, 217 S.E.2d 36, 37 (1975) (finding, in the context of public education, that Home Rule does not apply to local governments "because public education is not the duty of [local governments], but of the General

Assembly," and the "General Assembly has not been mandated by any constitutional amendment to enact legislation to confer upon [local governments] the power to control the public school system").

The City's ordinances are in conflict with state law. Resolving a conflict between state law and a city (or county) ordinance invokes the principle of preemption.

> Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible. *See Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 530, 476 S.E.2d 477, 480 (1996) ("To determine whether the ordinance has been preempted by Federal or State law, we must determine whether there is a conflict between the ordinance and the statutes and whether the ordinance creates any obstacle to the fulfillment of Federal or State objectives."); . . . 56 Am. Jur. 2d *Municipal Corporations* [§] 392 [(2000)] ("[Implied] conflict preemption occurs when an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute[.]") . . . .

S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 400–01, 629 S.E.2d 624, 630 (2006).

The conflict here is express, and, thus, Proviso 1.108 preempts the ordinances because "compliance with both is impossible." *Id.* at 400, 629 S.E.2d at 630. Moreover, even in the absence of an express conflict, the ordinances cannot stand, for the ordinances frustrate the purpose of the proviso and are therefore preempted. 5 McQuillin *Municipal Corporations* § 15:19 (3d ed. Aug. 2020 Update) ("[E]ven when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose.").

V.

In sum, the City's challenged ordinances cannot stand. We reiterate that we address and decide only the legal question before the Court. The supreme legislative power in this state is vested in the South Carolina General Assembly, not a local government. Absent a constitutional infirmity (and we find the City has not shown one), Proviso 1.108 is accorded supremacy and preempts the contrary ordinances of the City. Accordingly, we uphold Proviso 1.108 and declare void the challenged ordinances of the City insofar as they purport to impose a mask mandate in K-12 public schools.

JUDGMENT DECLARED.

FEW and JAMES, JJ., concur. JAMES, J., concurring in a separate opinion. HEARN, J., concurring in result only in a separate opinion, in which BEATTY, C.J., concurs.

JUSTICE JAMES: I wholeheartedly concur with the majority. I write separately to emphasize the limited role of the judiciary in deciding the issues before us.

As the majority states, we are not permitted to weigh in on the policy debate of whether mask mandates are appropriate or inappropriate in schools or elsewhere. Indeed, the parties to this action acknowledged during oral argument that this Court is not called upon to declare what the "right science" is or to declare whether the proviso reflects either sound public health policy or a complete lack of common sense on the part of the General Assembly. It cannot be said enough that we are not permitted to substitute our policy judgment for a constitutional legislative enactment, nor are we permitted to add to or take away from a constitutional legislative enactment. "We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996).

Some oppose mask mandates no matter what the setting, especially for people who have been vaccinated. Some favor mask mandates in all settings, even for people who have been vaccinated. Others fall somewhere in between. Some say masks should be required to protect those who have not been vaccinated or to ward off variants of the original virus. Some say mask mandates are vehicles for virtue-signaling and government overreach. Some say mandates are responsible governance. The list goes on, and everything on the list represents an issue we have no authority to rule upon.

The vast majority of people on all sides of the virus debate want what is best for their loved ones and their communities. They simply disagree with each other and do so respectfully. The exchange of arguments between the Attorney General and the City has been zealous but professional. Oral argument was a pleasure to watch. However, in other settings, respectful and productive public debate has been drowned out by people who cast those with opposing views in pejorative terms too numerous to list. Some leaders—past and present—who publicly advance the need for mask-wearing are seen maskless at large gatherings. Some leaders refuse to endorse any form of mask protection. Some medical professionals cast opposing medical opinions as moronic, deadly, or evil. Most medical professionals calmly and respectfully express their disagreements with opposing opinions. Some speakers against mask mandates scream and curse during public school board meetings; for the most part, school boards treat them respectfully. Social media platforms suspend the posting of views they deem dangerous or misleading but do not acknowledge when those views turn out to be correct. Those who post their views on social media do not acknowledge when those views turn out to be demonstrably wrong. Some teachers and college professors will not tolerate

opposing views expressed in their classrooms. Many television commentators, radio commentators, and bloggers of all ideological persuasions dwell in echo chambers and blow a gasket when discussing mask mandates but at the same time profess to present calm and reasoned opinions on the subject.

These differing viewpoints and the sad state of public debate do not affect our decision-making; actually, they help define the limited role of the judiciary. In spite of the explosion of public opinion on masks and mask mandates and the sometimes unfortunate manner in which these opinions are expressed, our focus and our authority are limited to applying the law. I repeat—it is not within our power to decree which side of the public health debate regarding masks or mask mandates is correct. Likewise, we have no authority to issue a policy decision "in favor of" or "against" mask mandates in schools. We did not do so in *Creswick*,[8] and we do not do so here.

[8] *Creswick v. Univ. of S.C.*, Op. No. 28053 (S.C. Sup. Ct. filed Aug. 17, 2021) (Howard Adv. Sh. No. 28 at 32) (per curiam).

JUSTICE HEARN: While I wholeheartedly agree with the result, I feel the majority unnecessarily departs from the stated goal of remaining neutral on the policy decisions of both the General Assembly and the City of Columbia (the City).

Our General Assembly, in Proviso 1.108, decided that this year's *appropriated funds* must not be used to implement or enforce a requirement that K-12 students and employees wear a facemask. To be clear, this proviso does not prohibit mask mandates in K-12 schools—counsel for the Attorney General admitted as much at oral argument.

Subsequent to the enactment of Proviso 1.108, the City instituted a conflicting ordinance that does not clearly set forth an enforcement plan that would not invoke funding from the 2021 Appropriations Act. The majority characterizes this conflict as a debate between parental choice and government mandates. Nowhere in the Appropriations Act is the verbiage "parental choice," the Attorney General mentions the concept only once, and yet the majority uses it five times. Neither the Attorney General nor this Court has the authority to create legislative policy. This Court should not, through its language, construct a binary which, in my view, puts an unnecessary political gloss on the issue before the Court.

Some may see the City's actions through this same lens, but still others may view it merely as an earnest attempt to follow health guidelines. Indeed, Justice James correctly identifies these differences by recounting the multitude of views this topic ignites. Regardless of the motivations or how one frames the policy issue, the Court's sole responsibility in this case is to decide whether the City's ordinances conflict with Proviso 1.108, which they unmistakably do.[9] Our responsibility stops there.

Accordingly, I concur in result only.

BEATTY, C.J., concurs.

[9] Because the ordinances are expressly preempted, it is also unnecessary to reach whether they frustrate the purpose of the proviso.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Richland County School District 2 and Malika Stokes in her individual capacity and on behalf of her three children "J. S., J.S., and J.C". . . . . Petitioner,

v.

James H. "Jay" Lucas, Speaker of the South Carolina House of Representatives; Harvey S. Peeler, Jr., as President of the South Carolina Senate; Molly Spearman, Superintendent of Education; and Curtis M. Loftis, Jr., Treasurer of South Carolina . . . . . Respondents.

AMICUS RETURN OF ATTORNEY GENERAL WILSON

Petitioners' remedy lies not with this Court, but with the Legislature. Their constitutional claims are without merit and should be dismissed. We fully understand and are sensitive to the dangers of this virus, particularly to our children, but it is the function of the Legislature, not the courts, to address issues of masks in schools. The fact that the Legislature's prohibition of mask mandates in the schools is contained in the Appropriations Act makes that prohibition no less the law and no less binding upon Petitioners. The Proviso is a general law which cannot be superseded under Home Rule.

The assertion that the General Assembly has "invaded" the authority of local school boards is without any foundation whatsoever. A school board has no "vested rights" in its authority. *Park v. Grwd. Co.*, 174 S.C. 35, 176 S.E. 870, 871 (1934)

[Subordinate governmental corporations have no vested rights against the State.] A school district is a creature of the General Assembly. Yet that creature is suing its creator, something it cannot do. *Georgetown Co. v. Davis & Floyd, Inc. et al.*, 426 S.C. 52, 824 S.E.2d 471 (Ct. App. 2019). As recognized, "[i]t is clear that under our Constitution, school districts have no permanent existence inasmuch as the General Assembly has plenary power" over them. *Miller v. Farr*, 243 S.C. 342, 349, 133 S.E.2d 832, 838 (1963). Proviso 1.1.08 is a limitation on the power of political subdivisions.

Moreover, Petitioners have no argument under S.C. Const. art. XI, § 3, either. This Court has steadfastly maintained that education is the sole province of the General Assembly with wide discretion in fulfilling such duties. Separation of powers guides the Court in this area so that "the courts of this State . . . [not] become super-legislatures or super-school boards." *Abbeville Cty. Sch. Dist. v. State*, 335 S.C. 58, 69, 515 S.E.2d 535, 541 (1999) (*Abbeville I*). As Justice Kittredge subsequently explained, "fundamental separation of powers principles" require that education is "a matter that lies exclusively in the Legislative Branch." *Abbeville Cty. Sch. Dist. v. State*, 415 S.C. 19, 22, 780 S.E.2d 609, 610-11 (2015) (Kittredge, J., dissenting). In dismissing the Abbeville School District case, and any claim under art. XI, § 3, a majority of this Court concluded that "[t]o continue to exercise jurisdiction over the Legislature and Executive Branches under these circumstances would be a gross overreach of judicial power and violation of separation of powers. . . ." Order of Dismissal in *Abb. Sch. Dist. v. State*, (Nov. 2017) (Kittredge, Few and James, JJ.). See also *Moseley v. Welch*, 209 S.C. 19, 33-34, 39 S.E.2d 133, 140-41

(1946) (details of education left to the Legislature's discretion). Certainly, no art. XI, § 3 violation exists here.

Likewise, there is no Equal Protection infringement. Where no fundamental right is involved, this Court affords "'great deference to a legislatively created classification and the classification will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it.'" The "fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. Cty. Of Greenville*, 313 S.C. 459, 465, 493 S.E.2d 383, 386 (1996). Here, the Legislature chose to make the wearing of masks a personal choice, not a mandate, in the schools. That is the policy choice for legislators, not judges, to make. Equal protection provides no relief.

Similarly, the proviso does not violate S.C. Const. art. III, §17. *S.C. Pub. Int. Found. v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016), relied upon by the Petitioners, is wholly inapposite. *Lucas* involved a proviso concerning "suspension of the appointment authority." The Court held the proviso did not "reasonably and inherently" relate to the raising or spending of tax monies. By sharp contrast, Proviso 1.108 does so relate. Here, the Legislature has mandated that appropriated funds not be used to require masks in schools. This is a classic case where the General Assembly "has the right to specify the conditions under which the appropriated monies shall be spent" and "The assembly traditionally does [this] by way of the annual State Appropriations Bill." *State ex rel. Hodges v. Condon*, 349 S.C. 232, 244, 562 S.E.2d 623, 630 (2002). In Proviso 1.108, the Legislature imposed conditions upon its appropriation of funds to school district in the

Appropriations Act. That is a "right" which the Legislature has always had and which the Court has consistently recognized.

Finally, Petitioners seek to carve out an exception to the Proviso by proposing it may use "other funds" such as federal monies or local revenues to circumvent the prohibition of a mask mandate. This argument is misplaced and threatens to open the floodgates for avoidance of budget provisos. This Court rejected such an argument in *Edwards v. State*, 383 S.C. 82, 678 S.E.2d 412 (2009), when Governor Sanford was ordered to comply with a proviso requiring him to apply for federal funds. This Court held that "the General Assembly has the authority to mandate that the Governor apply for federal funds which it has appropriated." 338 S.C. at 91, 678 S.E.2d at 417 (emphasis added). In *Parrish v. Gilstrap*, 280 S.C. 184, 312 S.E.2d 4 (1984), Pickens County refused to abide by a Proviso appropriating funds to the Probate Judge, conditioned on their use as a salary supplement and for additional clerical help. Pickens County Council claimed the hiring of employees was within the County's discretion and placed the funds in its general fund. This Court viewed Council's action as "an attack upon the authority of the General Assembly to appropriate funds for the operation of the office of probate judge and direct the particular uses for which the funds must be expended." 290 S.C. at 187, 312 S.E.2d at 6. According to the Court, county council "had no discretion in the matter." 280 S.C. at 188, 312 S.E.2d at 6.

And, in *Hampton v. Haley*, 403 S.C. 395, 405, 743 S.E.2d 258, 263 (2013), the Court stated quite clearly that "where the General Assembly directs that appropriated

funds be treated in a particular manner, executive agencies must comply with those directions." (emphasis added). The Court went on to emphasize that "if the Board could decline appropriated funds based on its own policy choices, it would have the unbridled power to disregard the General Assembly's appropriations and make its own appropriations decisions." (403 S.C. at 408, 743 S.E.2d at 265. All of these decisions say Proviso 1.108 is the law. The Proviso must be complied with and cannot be avoided through the back door.

As was written in *Segars v. Parrot*, 54 S.C. 1, 31 S.E.677, 699 (1898) (opinion of Buchanan, J.), "[w]ithout a legislature and the exercise of power to appropriate funds, . . . anarchy and chaos would pervade society." If Petitioners could evade the Proviso, based upon a bookkeeper's tracing of the funding source, the law would be eviscerated and the appropriations power marginalized. As in *Parrish*, Petitioners' action is likewise an "attack upon the authority of the General Assembly to appropriate funds . . . and direct the particular uses for which the funds must be expended."

CONCLUSION

The foregoing action should be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

s/ J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680; (803)734-3677 (Fax)
esmith@scag.gov

August 23, 2021

ATTORNEYS FOR THE ATTORNEY GENERAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richland County School District 2 and Malika Stokes, in her individual capacity and on behalf of her children "J.S., J.S., and J.C.", Petitioners,

v.

James H. "Jay" Lucas, Speaker of the South Carolina House of Representatives; Harvey S. Peeler Jr., President of the South Carolina Senate; Molly Spearman, Superintendent of Education, Respondents.

Appellate Case No. 2021-000892

ORIGINAL JURISDICTION

Opinion No. 28063
Heard August 31, 2021 – Filed September 30, 2021

JUDGMENT DECLARED

Carl L. Solomon, of Solomon Law Group, LLC, of Columbia, and Skyler B. Hutto, of Williams & Williams, of Orangeburg, for Petitioner Richland County School District 2.

W. Allen Nickles III, of Nickles Law Firm, LLC, of Columbia, for Petitioner Malika Stokes.

Susan P. McWilliams, Michael A. Parente, and Emily R. Wayne, all of Nexsen Pruet, LLC, of Columbia, for Respondent James H. "Jay" Lucas.

Kenneth M. Moffitt, Sara S. Parrish, and John P. Hazzard V, all of Columbia, for Respondent Harvey S. Peeler Jr.

Cathy L. Hazelwood and V. Henry Gunter Jr., both of Columbia, for Respondent Molly Spearman.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Amicus Curiae the Attorney General.

PER CURIAM: We granted Petitioners' request to hear this declaratory judgment action in our original jurisdiction. Petitioners ask this Court to declare that Provisos 1.108 and 1.103 of the 2021-2022 Appropriations Act[1] are invalid. We hold the provisos are constitutional, and we reject the remaining challenges to the validity of the provisos.

I.

Proviso 1.108—enacted into law on June 22, 2021, and directed to the South Carolina Department of Education for South Carolina's kindergarten through 12th grade (K-12) public schools—provides:

> (SDE: Mask Mandate Prohibition) No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.

Proviso 1.103 states:

> (SDE: Public School Virtual Program Funding) For Fiscal Year 2021-22, school districts shall be permitted to offer a virtual education program for up to five percent of its student population based on the most recent 135 day ADM [(average daily membership)]count without impacting any state funding. The Department of Education

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[1] H. 4100, 124th Leg., 1st Reg. Sess. (S.C. 2021), *available at* https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm.

> shall establish guidelines for the virtual program and parameters students must meet in order to participate in the virtual program. School districts must submit their plans for the virtual program to the State Board of Education for approval.
> . . .
>
> For every student participating in the virtual program above the five percent threshold, the school district will not receive 47.22% of the State per pupil funding provided to that district as reported in the latest Revenue and Fiscal Affairs revenue per pupil report pursuant to Proviso 1.3. This amount shall be withheld from the EFA [(Educational Facilities Authority)] portion of the State Aid to Classrooms district allocation and, if necessary, the state minimum teacher salary schedule portion of State Aid to Classrooms.

II.

Although the School District has not required its students to wear masks in its education facilities, it claims Proviso 1.108 conflicts with local laws[2] regarding mask requirements in schools and places the School District in an untenable position. In addition, Petitioners claim the School District has reached the five

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[2] Both Richland County (the County) and the City of Columbia (the City) enacted emergency ordinances requiring masks in K-12 schools. The City's ordinances were declared void by this Court in *Wilson v. City of Columbia*, Op. No. 28056 (S.C. Sup. Ct. filed Sept. 2, 2021) (Howard Adv. Sh. No. 31 at 9). Based on *City of Columbia*, Richland County subsequently indicated it would not enforce its ordinance as of Sept. 2, 2021. *See Updates to the County's Face Mask Ordinance*, Richland Cnty. S.C., https://www.richlandcountysc.gov/facemasks (last visited Sept. 23, 2021). However, both the City and the County have since enacted new ordinances that require masks in K-12 schools. *See* Columbia, S.C., Ordinance 2021-078 (Sept. 8, 2021), https://www.columbiasc.net/uploads/headlines/09-08-2021/mask-ordinance-no-2021-078/Ordinance%202021-078%20enactment%20of%20certain%20ordinances%20related%20to%20COVID-19.pdf; Richland County, S.C., An Emergency Ordinance Requiring the Wearing of Face Masks to Help Alleviate the Spread of COVID 19, Specifically the Recent Surge in the Delta Variant (Sept. 15, 2021), https://www.richlandcountysc.gov/Portals/0/Departments/PublicInformationOffice/Docs/9_14_21%20mask%20ordinance.pdf. The validity of those ordinances is not before us.

percent cap for virtual enrollment and does not wish to risk losing state funds by exceeding the cap in Proviso 1.103. The School District asks for guidance on its options and obligations regarding facemasks and virtual education.

Petitioner Malika Stokes is the parent of three minor children who reside in Orangeburg County School District, one of whom (J.S.) is severely asthmatic. Although J.S.'s pediatrician recommended he be allowed to attend school virtually, the school district is at capacity for virtual schooling.

Petitioners contend (1) Provisos 1.108 and 1.103 violate the one-subject rule of article III, section 17 of the South Carolina Constitution; (2) the plain language of Proviso 1.108 permits the School District to implement and enforce mask mandates in its education facilities if the School District does so with funds not appropriated or authorized in the 2021-2022 Appropriations Act; (3) Provisos 1.108 and 1.103 improperly invade the authority of local school boards; and (4) Provisos 1.108 and 1.103 deny equal protection to students and violate their constitutional right to free public education. We address these argument below.

III.

In *Wilson v. City of Columbia*, we held "Proviso 1.108 manifestly sets forth the intent of the legislature to prohibit mask mandates funded by the 2021-2022 Appropriations Act in K-12 public schools." Op. No. 28056 (S.C. Sup. Ct. filed Sept. 2, 2021) (Howard Adv. Sh. No. 31 at 10). We also rejected the City's constitutional challenge to the proviso. *Id.* at 14. We held Proviso 1.108 does not violate the one-subject rule, as it "reasonably and inherently relates to the raising *and spending* of tax monies." *Id.* at 15 (quoting *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 35, 484 S.E.2d 104, 107 (1997)). We further rejected the argument that Proviso 1.108 violates the Home Rule Act[3] because Home Rule does not grant local governments the authority to effectively overrule a legislative enactment by the General Assembly. *Id.* at 17-18. Finally, we held the proviso preempted the conflicting local ordinances. *Id.* at 18. For the reasons we set forth in *City of Columbia*, we respectfully reject Petitioners' challenges to the provisos.

IV.

Petitioners also argue both provisos deprive children of their constitutional right to a free public education and equal protection of the law. This Court will presume

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[3] S.C. Code Ann. §§ 5-7-10 to -310 (2004 & Supp. 2020).

an act is constitutional unless its "repugnance to the constitution is clear and beyond a reasonable doubt." *Doe v. State*, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). The general presumption of validity can be overcome only by a clear showing the act violates the constitution. *Id.*

Article I, section 3 of the South Carolina Constitution prohibits the denial of equal protection of the law. Success on an equal protection claim requires "a showing that similarly situated persons received disparate treatment." *Id.* at 504, 808 S.E.2d at 814. In this case, there is no evidence that any students are receiving disparate treatment. Indeed, there cannot be any argument of disparate treatment, as the provisos apply equally to all students and all public K-12 schools. Accordingly, Petitioners' equal protection argument is without merit.

As to Petitioners' argument that the provisos violate the constitutional guarantee of a free education for all children, article XI, section 3 of the South Carolina Constitution provides: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." Petitioners contend the provisos limit the options available to school districts to ensure a free education to all children and condition the right to a free education on assuming the unnecessary risk of serious illness or even death.

Proviso 1.108 does not limit a student's right to a free education or prohibit students from wearing masks. The reduction in funding for excess virtual education set forth in Proviso 1.103 does not limit a school district's ability to provide virtual education. Instead, it reflects the reduced cost associated with providing an education virtually instead of in the physical classroom. We hold the provisos do not deprive students of their constitutional right to a free education.

The School District also asks this Court for guidance as to its options and obligations regarding facemasks and virtual education. We have no authority to do so. "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

V.

Finally, the School District asks this Court to declare Proviso 1.108 does not prevent it from (1) apportioning its budget so that any mask requirement is funded by federal or local funds, (2) functionally announcing and enforcing a mask

requirement without using any funding whatsoever, and (3) designating an employee or series of employees to enforce mask requirements who would be paid exclusively with federal or local funds. We repeat that Proviso 1.108 prohibits the use of funds appropriated or authorized by the 2021-2022 Appropriations Act to announce or enforce a mask mandate. As we noted in *City of Columbia*, we do not reject the possibility that funds not appropriated or authorized by that act may be used to announce or enforce a mask mandate.

VI.

As we emphasized in *City of Columbia*, our role in this dispute is limited, and "[w]e do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996). We reaffirm our holding in *City of Columbia* that Proviso 1.108 is valid and enforceable.

As we held in *City of Columbia*, Proviso 1.108 prohibits the School District from using funds appropriated or authorized under the 2021-2022 Appropriations Act to announce or enforce a mask mandate in its K-12 schools. We do not reject the possibility that other funds might be used to do so.

We also hold Proviso 1.103 is constitutional. We decline to give the School District advisory guidance as to its options and obligations regarding virtual education.

JUDGMENT DECLARED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

DISABILITY RIGHTS SOUTH CAROLINA, et al. Plaintiffs, v. HENRY MCMASTER, etc. et al, Defendants.	)	Civil Action No. 3:21-CV-02728-MGL **MOTION OF ATTORNEY GENERAL TO DISMISS AMENDED COMPLAINT**

The Defendant Alan Wilson, as named herein, hereby moves for dismissal of the Amended Complaint against him pursuant to Rules 12(b)(1) and (6), FRCP, in that, for the reasons set forth below and in the accompanying Memorandum and as set forth in the Governor's Motion to Dismiss Amended Complaint (ECF No. 109), this Court lacks subject matter jurisdiction of this case, and Plaintiffs have failed to state a claim upon which relief can be granted:

1. Plaintiffs lack standing.

2. This case presents no case or controversy or justiciable controversy.

3. The Attorney General has no responsibility for enforcement of the Proviso at issue, and Plaintiffs otherwise fail to state a claim upon which relief can be granted as to the Attorney General. Rule 12(b)(6).

Respectfully submitted,

ALAN WILSON
Attorney General
Federal ID No.10457

[Signature block continues next page]

ROBERT D. COOK
Solicitor General
Federal ID No. 285
Email: RCook@scag.gov

/s/ J. Emory Smith, Jr.
J. EMORY SMITH, JR.
Deputy Solicitor General
Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3680
Fax: (803) 734-3677

Thomas T. Hydrick
Assistant Deputy Attorney General
Federal ID No. 13322
Email: ThomasHydrick@scag.gov

October 29, 2021

Counsel for Defendant Wilson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA,
By and through its Attorney General, JEFF LANDRY;

THE STATE OF ALABAMA,
By and through its Attorney General, STEVE MARSHALL;

THE STATE OF ALASKA,
By and through its Attorney General, TREG R. TAYLOR;

THE STATE OF ARIZONA,
By and through its Attorney General, MARK BRNOVICH;

THE STATE OF ARKANSAS,
By and through its Attorney General, LESLIE RUTLEDGE;

THE STATE OF FLORIDA,
By and through its Attorney General, ASHLEY MOODY;

THE STATE OF GEORGIA,
By and through its Attorney General, CHRISTOPHER CARR;

THE STATE OF INDIANA,
By and through its Attorney General, TODD ROKITA;

THE STATE OF IOWA;
By and through its Attorney General;

THE STATE OF KANSAS,
By and through its Attorney General, DEREK SCHMIDT;

THE COMMONWEALTH OF KENTUCKY,
By and through its Attorney General, DANIEL CAMERON;

CIVIL ACTION NO. _____

THE STATE OF MISSISSIPPI,
By and through its Attorney General, LYNN FITCH;

THE STATE OF MISSOURI,
By and through its Attorney General, ERIC S. SCHMITT;

THE STATE OF MONTANA,
By and through its Attorney General, AUSTIN KNUDSEN;

THE STATE OF NEBRASKA,
By and through its Attorney General, DOUGLAS J. PETERSON;

THE STATE OF NORTH DAKOTA,
By and through its Attorney General, Wayne Stenehjem;

THE STATE OF OHIO,
By and through its Attorney General, Dave Yost;

THE STATE OF OKLAHOMA,
By and through its Attorney General, JOHN M. O'CONNOR;

THE STATE OF SOUTH CAROLINA,
By and through its Attorney General, ALAN WILSON;

THE STATE OF SOUTH DAKOTA,
By and through its Attorney General, JASON R. RAVNSBORG;

THE STATE OF TENNESSEE,
By and through its Attorney General, HERBERT H. SLATERY III;

THE STATE OF UTAH,
By and through its Attorney General, SEAN D. REYES;

THE STATE OF WEST VIRGINIA,

By and through its Attorney General, PATRICK MORRISEY;

THE STATE OF WYOMING,
By and through its Attorney General, BRIDGET HILL;

PLAINTIFFS,

v.

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

THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND FAMILIES;

JOOYEUN CHANG, in her official capacity as Principal Deputy Assistant for Children and Families;

BERNADINE FUTRELL, in her official capacity as the director of the Office of Head Start.

DEFENDANTS.

COMPLAINT

The States of Louisiana, Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Wyoming, and West Virginia bring this civil action against the above-listed Defendants for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. The Biden Administration has quadrupled down on its lawless mandates. Facing a barrage of court orders enjoining its first three vaccine mandates, the Administration has not begun to rethink its "sledgehammer" approach. *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 612 (5th Cir. 2021). Instead it enacted a new Mandate materially similar to—and in some ways more draconian than—its first three. The Head Start Mandate applies to all preschool programs funded by the federal Head Start program, regulating hundreds of thousands of staff, volunteers, and preschool students nationwide. It forces vaccinations on staff, volunteers, and others in contact with Head Start students and forces masks on everyone age two and up. It includes few exceptions, is projected to lead to tens of thousands of Head Start agency staff losing their jobs, and will cause programs to close or reduce capacity—achieving the very *opposite* result of its purported goal. The Department of Health and Human Services enacted the Head Start Mandate 82 days after announcing its intent to do so, but made the Mandate effective immediately and (like the other three federal vaccine mandates) bypassed notice and comment.

2. The Head Start Mandate is unlawful. It exceeds the executive's statutory authority; is contrary to law; illegally bypassed notice and comment; is arbitrary and capricious; constitutes an exercise of legislative power in violation of the Nondelegation Doctrine; and violates the Congressional Review Act, the Tenth Amendment, the Anti-Commandeering doctrine, the Spending Clause, and the Treasury and General Government Appropriations Act of 1999.

PARTIES

3. Plaintiff State of Louisiana is a sovereign State of the United States of America. Jeff Landry is the Attorney General of the State of Louisiana. He is authorized by Louisiana law

to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. His offices are located at 1885 North Third Street, Baton Rouge, Louisiana 70802, and the Northeast Louisiana State Office Building, 24 Accent Drive, Suite 117, Monroe, Louisiana, 71202.

4. Plaintiff State of Alabama is a sovereign State of the United States of America. Plaintiff Steve Marshall is the Attorney General of the State of Alabama. He is authorized by Alabama law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. His offices are located at 501 Washington Avenue, Montgomery, AL 36104.

5. Plaintiff State of Alaska is a sovereign State of the United States of America. Michael J. Dunleavy is the Twelfth Governor of the State of Alaska and is authorized to bring suit in the name of the State to enforce compliance with any constitutional or legislative mandate. Alaska Const. art. III, §16. Treg R. Taylor is the Attorney General of the State of Alaska, and is authorized by Alaska law to bring suit in the name of the State to protect the U.S. and Alaska Constitutions. Alaska Stat. §44.23.020(b)(1), (9). His offices are located at 1031 West 4th Ave., Suite 200, Anchorage, AK 99501.

6. Plaintiff State of Arizona is a sovereign State of the United States of America. Plaintiff Mark Brnovich is the Attorney General of the State of Arizona. He is authorized by Arizona law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. His offices are located at 109 State Capitol, Cheyenne, WY 82002.

7. Plaintiff State of Arkansas is a sovereign State of the United States of America. Plaintiff Leslie Rutledge is the Attorney General of the State of Arkansas. She is authorized by Arkansas law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. Her offices are located at 323 Center St., Suite 200, Little Rock, AR 72201.

8. Plaintiff State of Florida is a sovereign State of the United States of America. Plaintiff Ashley Moody is the Attorney General of the State of Florida. She is authorized by Florida law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. Her offices are located at the Florida Capitol, Pl-01, Tallahassee, FL 32399.

9. Plaintiff State of Georgia is a sovereign State of the United States of America. Plaintiff Christopher Carr is the Attorney General of the State of Georgia. He is authorized by Georgia law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. His offices are located at 40 Capitol Square, SW, Atlanta, GA 30334.

10. Plaintiff State of Indiana is a sovereign State of the United States of America. This action is brought by the State in its sovereign capacity through its Attorney General Todd Rokita who is authorized to bring legal actions to protect the interests of the State of Indiana and its citizens as *parens patriae*. His offices are located at 302 W. Washington Street, 5th Floor, Indianapolis, IN 46204.

11. Plaintiff State of Iowa is a sovereign State of the United States of America. The Attorney General of Iowa is authorized by law to prosecute legal actions on behalf of the State of Iowa and its citizens when requested to do so by the Governor. The office of the Attorney General is located at 1305 E. Walnut Street, Des Moines, IA 50319.

12. Plaintiff State of Kansas is a sovereign State of the United States of America. Plaintiff Derek Schmidt is the Attorney General of the State of Kansas. He is authorized by Kansas law to bring legal actions on behalf of the State of Kansas and its citizens. He sues to vindicate its sovereign, quasi-sovereign, proprietary, and *parens patriae* interests. The office of the Attorney General is located at 120 SW 10th Ave, 2d Fl., Topeka, KS 66612.

13. The Commonwealth of Kentucky is a sovereign State of the United States of America. Daniel Cameron is the Attorney General of the Commonwealth and is authorized by law to bring actions on its behalf and that of its citizens. He is "charged with the duty of protecting the interest of all people," *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973), including ensuring that government actors perform their duties lawfully. *Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). His office is located at 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601.

14. Plaintiff State of Mississippi is a sovereign State of the United States of America. Lynn Fitch is the Attorney General of the State of Mississippi. She is authorized by Mississippi law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. Her offices are located at 550 High Street, Jackson, MS 39201.

15. The State of Missouri is a sovereign State of the United States of America, and it is not a citizen of any state. This action is brought by Missouri in its sovereign capacity in order to protect its interests and those of its citizens as *parens patriae*, by and through Eric S. Schmitt, the Attorney General of Missouri. Attorney General Schmitt acts under his authority to "institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state." Mo. Rev. Stat. §27.060. His offices are located at 207 High Street, P. O. Box 899, Jefferson City, MO 65102.

16. Plaintiff State of Montana is a sovereign State of the United States of America. This action is brought by the State in its sovereign capacity through its Attorney General Austin Knudsen, who is authorized to bring legal actions to protect the interests of the State of Montana and its citizens as *parens patriae*. His offices are located at 215 N. Sanders St., Helena, MT 59601.

17. Plaintiff State of Nebraska is a sovereign State of the United States of America. Douglas J. Peterson is the Attorney General of the State of Nebraska. He is authorized by Nebraska law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. His offices are located at 2115 State Capitol, Lincoln, NE 68509.

18. Plaintiff State of North Dakota is a sovereign State of the United States of America. Wayne Stenehjem is the North Dakota Attorney General, and he is authorized by law to bring legal actions on behalf of the State of North Dakota and its citizens. N.D. Cent. Code 54-12-02. The office of the Attorney General is located at 600 E. Boulevard Ave., Bismarck, ND 58505.

19. Plaintiff State of Ohio is a sovereign State of the United States of America. This action is brought by the State in its sovereign capacity through its Attorney General Dave Yost, who is authorized to bring legal actions to protect the interests of the State of Ohio and its citizens as *parens patriae*. His offices are located at 30 Broad St., 14th Fl., Columbus, OH 43215.

20. Plaintiff State of Oklahoma is a sovereign State of the United States of America. Plaintiff John M. O'Connor is the Attorney General of the State of Oklahoma. He is authorized by Oklahoma law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. Okla. Stat. tit. 74, §18b(A)(2)-(3). His offices are located at 313 N.E. 21st Street, Oklahoma City, OK 73105.

21. Plaintiff State of South Carolina is a sovereign state of the United States of America. Plaintiff Alan Wilson is the Attorney General of the State of South Carolina. He is authorized by South Carolina law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. His offices are located at 1000 Assembly St, Columbia, SC 29201.

22. The State of South Dakota is a sovereign State of the United States of America. This action is brought by the State in its sovereign capacity in order to protect the interests of the

State of South Dakota and its citizens as *parens patriae*, by and through Jason R. Ravnsborg, the South Dakota Attorney General. The Attorney General is acting pursuant to his authority to appear for the State and prosecute any civil matter in which the State is a party or interested when, in his judgment, the welfare of the State demands. SDCL §1-11-1(2). His offices are located at 1302 E. Hwy 14, Suite 1, Pierre SD 57501-8501.

23. Plaintiff State of Tennessee is a sovereign State of the United States of America. Herbert H. Slatery III is the Attorney General and Reporter of the State of Tennessee. Attorney General Slatery is authorized to bring legal actions on behalf of the State of Tennessee and its citizens. His offices are located at 500 Dr. Martin L. King Jr. Blvd., Nashville, TN 37243, and his mailing address is P.O. Box 20207, Nashville, TN 37202-0207.

24. Plaintiff State of Utah is a sovereign State of the United States of America. Sean D. Reyes is the Attorney General of Utah. Attorney General Reyes is authorized to bring legal actions on behalf of the State of Utah and its citizens. His offices are located at 350 North State Street, Suite 230, Salt Lake City, Utah 84114.

25. Plaintiff State of Wyoming is a sovereign State of the United States of America. This action is brought by Wyoming in order to protect its interests and those of its citizens as *parens patriae*, by and through Bridget Hill, the Attorney General of Wyoming. Attorney General Hill is authorized to bring legal actions on behalf of the State of Wyoming and its citizens. Wyo. Stat. Ann. §9-1-603(a). Her offices are located at 109 State Capitol, Cheyenne, WY 82002.

26. Plaintiff West Virginia is a sovereign State of the United States of America. Patrick Morrisey is the Attorney General of the State of West Virginia. He is authorized by West Virginia law to sue on the State's behalf and to protect the interests of its citizens as *parens patriae*. His offices are located at the State Capitol Complex, Bldg. 1, Room E-26 Charleston, WV 25305.

27. Defendants are officials of the United States government and United States governmental agencies responsible for promulgating or implementing the Head Start Mandate.

28. Defendant Xavier Becerra is the Secretary of Health and Human Services. He oversees, among other things, the Administration for Children and Families and the Office of Head Start. He is sued in his official capacity.

29. Defendant United States Department of Health and Human Services is an executive department of the United States Government headquartered in Washington, D.C., and responsible for the Head Start program.

30. Defendant Jooyeun Chang is the Principal Deputy Assistant for Children and Families. She is sued in her official capacity.

31. Defendant Administration for Children and Families is a division within HHS that is headquartered in Washington, D.C., and administers the Head Start program.

32. Defendant Bernadine Futrell is the director of the Office of Head Start. She is sued in her official capacity.

JURISDICTION AND VENUE

33. This Court has subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§1331, 1346, 1361; 5 U.S.C. §§701-06. An actual controversy exists between the parties within the meaning of 28 U.S.C. §§2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief under 28 U.S.C. §§2201-02, 5 U.S.C. §§705-06, and its inherent equitable powers.

34. Defendants' publication of the Mandate in the Federal Register on November 30, 2021 constitutes a final agency action that is judicially reviewable under the APA. 5 U.S.C. §§704, 706.

35. Venue is proper in this Court under 28 U.S.C. §1391(e)(1) because (1) Defendants are United States agencies or officers sued in their official capacities, (2) the State of Louisiana is a resident of this judicial district, (3) no real property is involved, and (4) a substantial part of the events or omissions giving rise to the Complaint occur within this judicial district. *See Atlanta & F.R. Co. v. W. Ry. Co. of Ala.*, 50 F. 790, 791 (5th Cir. 1982); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482 (D. Md. 2020).

BACKGROUND

I. The Head Start Program.

36. Through the Head Start program, the Department of Health and Human Services provides funding for educational and related services to low-income families of preschool-age children. *See* 42 U.S.C. §§9831 et seq.; *see, e.g.*, *Doe v. Woodard*, 912 F.3d 1278, 1286 n.2 (10th Cir. 2019) ("Head Start primarily functions as an educational institution for very young children"); *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1339 (9th Cir. 1997) ("The Head Start program is devoted to providing quality pre-school education to needy children").

37. The statutorily-defined purpose of the Head Start program is "to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development[.]" 42 U.S.C. §9831.

38. Studies have shown that Head Start "improves educational outcomes—increasing the probability that participants graduate from high school, attend college, and receive a post-secondary degree, license, or certification." Diane Whitmore Schanzenbach and Lauren Bauer, *The long-term impact of the Head Start program*, Brookings (Aug. 19, 2016), https://brook.gs/3lQ6JNY.

39. The Head Start program funds public, non-profit, and for-profit agencies that provide preschool education. 42 U.S.C. §§9833, 9836(a).

40. The Administration for Children and Families, a federal agency within the Department of Health and Human Services, has primary responsibility for overseeing the Head Start program.

41. The Biden Administration has described Head Start educators as "essential workers who have been on the frontlines in the pandemic." *See* President Biden Announces Vaccine Priority for Child Care, Head Start, and Early Childhood Settings, Office of Head Start, Mar. 3, 2021, https://bit.ly/3rCcMJz.

42. States have direct and indirect interests in the Head Start grant program. Some States, like Georgia and Utah directly participate as grantees. PI Exs. B, O. They are directly regulated by the Head Start Mandate and must either comply at considerable expense or lose their funding.

43. Some States also enforce Head Start standards. *Id.* They will "be required to collect individual health information on staff that are funded through this grant," an endeavor for which the federal government provides no additional funding. PI Ex. B at 2.

44. All States have Head Start programs, which are important safety-net education programs for pre-school aged children that improve educational readiness for entry into Kindergarten, but also provide critical health care and social support resources to families that States would have to find funding to backfill.

45. State funding is often blended into funding for these programs, and this program funding is often blended into school district funding. Losing federal funding will upset local school

district budgets and place new demands on local and state governments to find funding to support these programs to keep them open. *See* PI Ex. P.

46. Head Start funds sometimes go directly to public schools that have preschool programs. *See* PI Exs. C, G, P. These Head Start programs are often "funded with different sources of state, federal, and local dollars." PI Ex. P at 2.

47. At these public schools, qualifying low-income students are funded by Head Start and others are funded locally. These public schools anticipate that the Head Start Mandate will mean that they will have to segregate the low-income students and force them to wear masks while the other students are allowed to breathe freely. PI Ex. I at 2. In other words, as one Head Start Director explained, "the Head Start children, mostly 'disadvantaged or poverty level,' children would be the only children in the school wearing masks. Not only is this stigmatizing them, but it is also a form of segregation." *Id.*

48. States have deeply entrenched and intertwined interests in the Head Start Program.

49. For example, Head Start programs have been operating in Alaska since 1965. There are currently 17 Head Start and Early Head Start programs in Alaska. These Head Start programs belong to one of two regions: Region X (Alaska, Washington, Oregon, and Idaho) and Region XI, which is specifically for Native populations (12 Tribal Grantees). The Alaska Department of Education and Early Development is charged with the statutory duty to exercise general supervision over pre-elementary schools that receive direct state or federal funding. Alaska Stat. §14.07.020(a)(8).

50. The Alaska Department of Education and Early Development also has the regulatory authority to review and approve applications for Head Start programs seeking to operate in

Alaska and the authority to conduct onsite or remote monitoring of pre-elementary schools, including Head Start programs. 4 AAC 60.036; 4 AAC 60.039.

51. The Commonwealth of Kentucky has approximately 400 Head Start centers operating within its borders, many of which partner with public schools districts staffed by public employees. *See* Head Start Center Locator, *available* at https://perma.cc/CS9D-NBCA; Head Start in Kentucky, *available* at https://perma.cc/668A-CL4D. According to the Kentucky Head Start Association, Kentucky Head Start programs received $185,763,527 in federal funds in fiscal year 2021. These funds support the attendance of 15,167 children in Head Start programs and approximately 2,402 children at Early Head Start programs. *See id*. These programs also employ 4,631 paid staff who work in 1,151 classrooms throughout Kentucky. *Id*.

52. Kentucky also commits state funding to pre-school programs. Each year, school districts and Head Start programs enter into full utilization agreements to coordinate services to eligible children to avoid duplication of preschool services with the goal of serving as many children as possible. The Head Start Mandate threatens to upset this balance and place more burden on Kentucky to fund pre-school programs with state funds.

53. According to the Department of Health and Human Services' Tracking Accountability in Government Grants System website, entities in Ohio, including the Ohio Department of Education, received more than $392 million in Head Start funding in fiscal year 2021. Tracking Accountability in Government Grants System, https://taggs.hhs.gov/ (select "Advanced Search" and enter award title "Head Start" and Legal Entity State "Ohio"). As of 2019, more than 34,000 low-income Ohio children enrolled in Head Start funded programs. *See*, Head Start Program Facts: Fiscal Year 2019, Department of Health and Human Services, https://bit.ly/3J3Jytq (last visited Dec. 16, 2021).

54. States have long relied on Head Start as an integral part of their safety net and education services. *See, e.g.*, PI Ex. C.

55. Nearly every State has an office that works with the federal government, pursuant to the creation of State and National Collaboration Offices authorized by Section 642B(a)(2)(A) of the Head Start Act, 42 U.S.C. 9837b. According to the Head Start Collaboration 2016 Annual Report, 22 States had Head Start Collaboration Offices inside their Departments of Education, while 15 were located in State Departments of Human or Social Services, 3 were in Departments of Commerce or Workforce Development, and 7 were in other State offices. *See*, Head Start Collaboration Annual Report 2016, https://bit.ly/3dSiuyW.

56. Louisiana's Early Childhood Care and Education Advisory Council, for example, was created though 2014 La. Acts 868 to inform policies related to the unification launched by 2021 La. Acts. 3, which unified expectations for child care, Head Start, and pre-kindergarten programs.

57. States also have *parens patriae* interests in protecting some of the most vulnerable people in their communities: children in poverty.

58. Congress charged the Secretary of Health and Human Services with certain administrative responsibilities related to the Head Start program. *See id.* §9836a.

59. Specifically, Congress delegated to the Secretary limited authority to "modify" Head Start performance standards. *Id.* §9836a(a)(1). The Secretary's power to modify standards includes—as invoked here—the authority to "modify, as necessary, program performance standards by regulation … including … administrative and financial management standards; standards relating to the condition and location of facilities … and … such other standards as the Secretary finds to be appropriate." *Id.* §9836a(a)(1)(C)-(E).

60. Congress expressly prohibited the Secretary, in modifying standards, from doing anything that "result[s] in the elimination of or any reduction in quality, scope, or types of … services required to be provided" under the law as of 2007. *Id. §*9836a(a)(2)(C)(ii).

61. Congress also required the Secretary to "take into consideration ... the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations." *Id.* §9836a(a)(2)(B)(x).

II. The Biden Administration's Vaccine and Mask Policy.

62. As President-Elect, Mr. Biden promised he "d[id]n't think [vaccination] should be mandatory" and "wouldn't demand it be mandatory." Jacob Jarvis, *Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020*, Newsweek (Sept. 10, 2021), https://bit.ly/3ndyTn5. Once he took office, his Administration's policy was: "The government is not now, nor will we be supporting a system that requires Americans to carry a [vaccine] credential." *See* Press Briefing by Press Secretary Jen Psaki, April 6, 2021, https://bit.ly/3rBJVoL. At the time, the Administration conceived of the federal executive's role as ensuring that "Americans' privacy and rights [were] protected" and that the vaccine rollout is "not used against people unfairly." *Id.* Even as recently as this summer the Biden Administration continued to disclaim authority to mandate that Americans get a COVID-19 vaccine. *See, e.g.*, Press Briefing by Press Secretary Jen Psaki, July 23, 2021, https://bit.ly/3pWnJVr (mandating vaccines "not the role of the federal government").

63. Mr. Biden also took the position that the federal executive power to mandate masks was narrow. He explained that, as President, "I cannot mandate people wearing masks." *Transcript of CNN Presidential Town Hall with Joe Biden*, CNN, Sept. 17, 2020, https://cnn.it/3rFcxNZ. Rather, he said the President could mandate masks only on federal property and in federal buildings:

"On Federal land, I'd have the authority. If you're on Federal land, you must wear a mask. In a Federal building, you must wear a mask and we could have a fine for them not doing it." *Id.*; *see also Read the full transcript of Joe Biden's ABC News town hall*, ABC News, Oct. 15, 2020, https://abcn.ws/3dpbidj. ("you can't mandate a mask"). As President-Elect, Mr. Biden explained that he would, upon taking office, "require masks *everywhere I can*," which meant only on federal land. Joe Biden (@JoeBiden), Twitter (Dec. 9, 2020, 8:59 a.m.), https://bit.ly/3dmWYC4 (emphasis added); *see also Executive Order 13991 of January 20, 2021: Protecting the Federal Workforce and Requiring Mask-Wearing*, 86 Fed. Reg. 7045 (Jan. 25, 2021).

64. As Defendants acknowledge, the Administration for Children and Families "initially chose, among other actions, to allow Head Start programs to decide whether or not to require staff vaccination rather than require vaccination." 86 Fed. Reg. at 68054.

65. But as time passed, the President announced that his "patience" began "wearing thin" with those "who haven't gotten vaccinated." White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://bit.ly/3Ey4Zj6. He expressed similar disdain for those who opposed mask mandates, calling their concerns "ugly" and "wrong." *Id.*

66. So, in early September 2021, the Administration abandoned persuasion for brute force and announced an unprecedented series of federal mandates, aimed at compelling most of the adult population of the United States to get a COVID-19 vaccine and at expanding mask mandates. *Id.* His program sought to "increase vaccinations among the unvaccinated with new vaccination requirements" and to "increas[e] masking." *Id.*; *see also* The White House, *Path Out of the Pandemic: President Biden's Covid-19 Action Plan*, https://bit.ly/3adkMXx; The White House, *Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy* (Oct. 7, 2021), https://bit.ly/3lorbp0.

67. In part, those vaccine and masking requirements include the policy challenged here. In his September address, President Biden announced that he would impose—through unilateral executive action—a vaccine mandate on "all of nearly 300,000 educators" in Head Start programs. Biden Sept. 9, 2021 Remarks, *supra*.

68. In announcing those mandates, President Biden declared that he was "tak[ing] on elected officials and states" and that he would "use my power as President to get them out of the way." *Id.*

III. The Head Start Mandate.

69. Over two months later, on November 30, 2021, HHS published an interim final rule requiring (1) vaccination of Head Start staff, volunteers, and anyone else who comes in contact with Head Start children and (2) masking of all Head Start children two years or older and all adults. *See Vaccine and Mask Requirements To Mitigate the Spread of COVID–19 in Head Start Programs*, 86 Fed. Reg. 68052 (Nov. 30, 2021).

70. The Head Start Mandate's vaccine requirement demands that a wide range of Head Start personnel—all staff, all contractors who come into contact with or provide direct services to children and families, and all volunteers in classrooms or working directly with children—submit to full Covid vaccination. 86 Fed. Reg. at 68101; 45 C.F.R. §§1302.93(a)(1), 1302.94(a)(1). It adopts the moving standard of "fully vaccinated" as defined by the CDC, which currently means the primary doses of an approved vaccine. *See* 86 Fed. Reg. at 68060.

71. Other than those who can establish a medical exception and those entitled to accommodation under existing federal law, the Mandate provides no alternative to vaccination. 45 C.F.R. §§1302.93(a)(1); 1302.94(a)(1). The Mandate does not offer a testing alternative for those unwilling to submit to vaccination. *See id.* For those who qualify for an exemption, the Program must conduct, track, and document testing weekly (at least) and is not provided funds to do so.

72. The Head Start Mandate's masking requirement forces all children two years old and older, and all adults, to wear masks (1) "indoors in a setting when Head Start services are provided," (2) "for those not fully vaccinated"—which includes all preschool-age children—"outdoors in crowded settings or during activities that involve sustained close contact with other people," and (3) in a Head Start vehicle with another person. 86 Fed. Reg. at 68101; 45 C.F.R. §1302.47(b)(5)(vi). The mask must cover the person's chin, mouth, and nose. 86 Fed. Reg. at 68060 ("the Toddler Mask Mandate").

73. Children and adults may take off their masks only when eating, drinking, or napping. 45 C.F.R. §1302.47(b)(5)(vi). They may not show their faces to each other in any other circumstances. *See id.*

74. Programs are required to provide masks using existing funds or American Rescue Plan funds (while they last), which may not have been distributed to them.

75. Effective "immediately" as of publication of the Mandate, teachers are required to enforce the Toddler Mask Mandate with corrective measures under threat of teacher discipline. Specifically, the Mandate dictates that teachers implement "reminders and reinforcements to comply with this new practice," while also abiding "by the Standards of Conduct outlined in 1302.90 Personnel Policies in the Head Start Program Performance Standards, namely that staff, consultants, contractors, and volunteers implement positive strategies to support children's well-being and do not use harsh disciplinary practices that could endanger the health and safety of children." 86 Fed. Reg. 68060.

76. All adults and toddlers must submit to the mask requirement unless they are already protected by federal disability law, a religious exemption, or "a child's health care provider advises

an alternative face covering to accommodate the child's special health care needs." *Id.* §1302.47(b)(5)(vi)(C)-(D).

77. Beyond that, the Toddler Mask Mandate requires anyone at a Head Start program—including parents visiting, dropping their children off, or picking them up—to wear masks.

78. The Head Start Mandate includes no exception for people with natural immunity.

79. The Head Start Mandate includes no exception for people who test negative for Covid before entering school each day. While those who fall into preexisting exceptions must submit to testing, anybody else who tests negative—no matter how often—must nonetheless submit to the vaccine and masking requirements.

80. HHS made the Mandate's masking requirements enforceable immediately and the vaccine requirements enforceable on January 31, 2022. 86 Fed. Reg. at 68052. A person is considered fully vaccinated two weeks after completing a primary vaccination series, which can itself take several weeks to complete. *Id.* at 68060.

81. The Office of Head Start is advising staff and volunteers who want to keep their jobs to get their first Moderna shot by January 3, their first Pfizer shot by January 10, or their single Johnson & Johnson shot by January 31. *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs* at 15, Office of Head Start (Dec. 2, 2021), https://bit.ly/3Gw4Sp8.

82. And while the deadlines are fixed, issues arising with these vaccines continues to develop. Notably, within days from the time this Mandate was issued, the CDC conducted an emergency meeting to review new data and update recommendations on the Johnson & Johnson vaccine. That meeting resulted in a committee of advisors to the CDC recommending against using

the Johnson & Johnson vaccine due to concerns about blood clots. The CDC has also, as of December 14, 2021, updated its Fact Sheet on the risks of this vaccine to individuals 18 years and older. *See* Coronavirus (COVID-19) Update: December 14, 2021; https://bit.ly/3qadGux.

83. The definition of fully vaccinated depends on the CDC's definition, so it could soon include more shots—and, as noted above, may exclude some shots. *See id.*; *see also* Lexi Lonas, *Fauci says changing definition of fully vaccinated to include boosters is 'on the table'*, The Hill (Nov. 24, 2021), https://bit.ly/3Iyczgp.

84. If a Head Start provider does not comply with the Mandate, the Secretary must initiate proceedings to terminate its funding. 42 U.S.C. §9836a(e)(1)(C).[1]

IV. HHS's Bypass of Notice and Comment.

85. In enacting the Mandate, HHS evaded the APA's notice-and-comment requirements. *Id.* at 68058.

86. HHS invoked the following reasons for evading the APA's notice-and-comment requirements:

a. HHS cited the number of Covid cases, particularly of the Delta variant. *Id.* at 68058. Specifically, HHS said that Covid cases, hospitalizations, and deaths were higher than they were at some point about six months earlier, although it acknowledged a "trend downward" in recent months. *Id.* HHS also pointed to "potential increases" in some states—particularly "northern states." *Id.*

[1] The governing provision states that "[i]f the Secretary determines … that a Head Start agency … fails to meet the standards described in subsection (a)(1) … the Secretary shall … initiate proceedings to terminate the designation of the agency unless the agency corrects the deficiency." The "standards described in subsection (a)(1)" are those that HHS purports to be making in enacting the Mandate. *See* 86 Fed. Reg. 68053.

b. HHS pointed to the "large COVID–19 wave in the winter of *2020*," combined with the fact that "30 percent of people aged 12 years and older" were not fully vaccinated as of November 2021. *Id.* at 68058 (emphasis added).

c. HHS invoked certain data concerning vaccine effectiveness. *Id.* HHS repeatedly emphasized its view that "COVID–19 vaccines are a key component in controlling the COVID–19 pandemic" and are "highly effective." *Id.* at 68059. It also emphasized that the vaccines are effective against the Delta variant. *Id.*

d. HHS cited the vaccines' effectiveness against asymptomatic infection, as demonstrated in a study ending on August 14, 2021, along with "[e]merging evidence" that vaccinated people "have the potential to be less infectious" in transmitting the Delta variant. *Id.* at 68059.

e. HHS relied on the "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." *Id.*

87. HHS acknowledged that the Mandate derived from President Biden's September speech, which was 82 days before it published the Mandate. *Id.* at 68069.

V. HHS's Claimed Statutory Authority.

88. HHS purports to derive the authority for the Mandate from a single statutory provision. *See* 86 Fed. Reg. 68053; 42 U.S.C. §9836a(a)(1)(C)-(E). In truth, that statutory provision gives HHS only limited administerial power to modify performance standards.

89. That sole provision relied on by HHS states that:

> The Secretary shall modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs under this subchapter, including …
>
> (C) administrative and financial management standards;
>
> (D) standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate) for such agencies, and programs, including regulations that require that the facilities used by Head Start agencies (including Early Head Start agencies and any delegate agencies) for regularly scheduled center-based and combination program option classroom activities … shall meet or exceed State and local requirements concerning licensing for such facilities; and … shall be accessible by State and local authorities for purposes of monitoring and ensuring compliance, unless State or local laws prohibit such access; and
>
> (E) such other standards as the Secretary finds to be appropriate.

Id. §9836a(a)(1)(C)-(E).

90. The statute expressly forbids HHS to modify standards in any way that reduces the quality or scope of any Head Start services. As the statute provides, the Secretary, "[i]n developing any modifications to standards," must "ensure that any such revisions in the standards will not result in the elimination of or any reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services required to be provided under such standards as in effect on December 12, 2007." *Id.* §9836a(a)(2)(C)(ii).

VI. HHS's Omissions.

91. HHS did not address why it delayed its rulemaking for 82 days after the President's speech.

92. HHS does not explain whether the "substantial health benefits," 86 Fed. Reg. at 68064, it accounts for the effects of vaccines over time. *See* Barbara A. Cohn, *SARS-Cov-2 vaccine protection and deaths among US veterans during 2021*, Science (2021), https://bit.ly/307PLCP (reporting that within six months, efficacy of vaccines against infection declined to 13% (Johnson & Johnson), 43% (Pfizer), and 58% (Moderna)). *See also* Ex. S.

93. HHS did not explain why it did not require toddlers to wear masks in the Head Start program before now, including when case numbers were higher and everybody was unvaccinated and despite President-elect Biden stating in December 2020, that he would require masks "everywhere [he] can." Joe Biden (@JoeBiden), Twitter (Dec. 9, 2020, 8:59 a.m.), https://bit.ly/3dmWYC4. HHS also did not explain why it would require masks now despite the fact that such a requirement was not mentioned in President Biden's COVID-19 action plan. That plan described mandatory vaccination in Head Start and increased penalties for failing to abide by other mask mandates. *See* The White House, *Path Out of the Pandemic: President Biden's Covid-19 Action Plan*, https://bit.ly/3adkMXx.

94. HHS did not explain why it failed to consider the alternative of natural immunity. Emerging studies and experts support the conclusion that natural immunity can afford benefits comparable to or better than vaccination. *See* PI Ex. S at 19-22; *see also*, e.*g.,* Sivan Gazit et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, Medrxiv (Aug. 25, 2021), https://bit.ly/3DnKzIZ ("This study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity. And it is unclear if vaccination of an individual who has natural immunity will provide any perceptible benefit in fighting future infection.").

95. HHS acknowledged that closing programs harms children and families, even resulting in increased incidents of domestic violence, but did not acknowledge that many programs have been open for months and would close or lose capacity to serve their existing enrollment of children *as a result of the Mandate*. In light of the Mandate's identification of which programs

closed and when they reopened and how, HHS appears to have readily available information regarding the impact of the Mandate on already-open programs, but did not engage with this issue at all.

96. HHS acknowledged Head Start is a critical feature of early childhood education but did not acknowledge that States' have relied upon and aligned their early childhood educations programs with Head Start programming. *See, e.g.* Louisiana's Birth to Five Early Learning & Development Standards, Dep't of Education, https://bit.ly/3p0JRwQ (discussing the importance of early childhood for school readiness and later school success).

97. HHS did not evaluate impairment to children who are English as a Second Language learners, or the corresponding impact on the public school systems caused to this population when programs close due to the Mandate.

98. HHS did not consult with States or acknowledge that closure of programs due to the Mandate will cause children to lose critical early childhood educational opportunities, which will impair academic and social performance and retention rates and increase referrals to special education, all of which will cause short term and long term harm to the State's most vulnerable residents and will cost the States more in remediating for these lost programs.

99. HHS did not engage with research that shows that unnecessary corrective and negative interaction with Toddlers, as it acknowledges will likely occur with two and three years olds due to the Toddle Mask Mandate, results in a loss of teaching time and impairs the bonding relationship between the teacher and the child.

100. HHS did not address or engage with hygiene issues created by requiring two and three year olds to wear masks.

101. HHS did not engage with the actual cost or accessibility of tests in the short or long term, and the likely impairment to Programs caused by the diversion of funds or inability to backfill the lack of or eventual loss of funds to pay for masks or tests.

102. Though several rulings had already been issued raising serious constitutional concerns about federal vaccine mandates, HHS did not engage at all with this series of recent decisions enjoining these mandates as unlawful.[2]

103. HHS did not address its legal basis for adding new conditions to a pre-existing grant program without any directive from Congress.

VII. The Targeted Workers and Children.

104. According to HHS, the Head Start Mandate targets 273,000 staff, up to one million volunteers, and up to 864,289 children at America's 20,717 Head Start Centers. 86 Fed. Reg. at 68068-69, 68077. It applies to the staff regardless of whether they work in-person or remotely.

105. HHS's "baseline scenario" estimated that 55,121 staff were unvaccinated. *Id.* at 68078. On that assumption, combined with HHS's estimate of 29,953 staff who would submit to the Mandate, 25,169 staff would remain unvaccinated. Even with HHS's assumption that 13,650 staff would receive an exemption, *id.* at 68094, the Mandate would cause Head Start programs to fire 11,519 staff. If those same proportions held as to volunteers, the Mandate would cause Head Start programs to banish 42,000 volunteers. (The National Head Start Association Survey provides data suggesting Head Start programs may lose 50% of their staff, or up to 60,000 people.)

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[2] *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604 (5th Cir. 2021) (enjoining OSHA vaccine mandate); *Missouri v. Biden*, No. 4:21-CV-01329-MTS, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021) (enjoining CMS vaccine mandate); *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846 (W.D. La. Nov. 30, 2021) (enjoining CMS vaccine mandate); *Kentucky v. Biden*, No. 3:21-CV-00055-GFVT, 2021 WL 5587446, (E.D. Ky. Nov. 30, 2021) (enjoining federal-contractor vaccine mandate); *Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021).

106. HHS's "lower-bound scenario" estimated that 30 percent of staff are unvaccinated, five percent would be entitled to exemptions, and ten percent would submit to the Mandate. *Id*. at 68077-78. The remaining 45,500 paid staff would be fired and 151,500 willing volunteers would be banished from Head Start programs. *Id.* This "lower-bound" estimate that 30 percent of staff are unvaccinated is based on data showing that among adult Americans, 30 percent are unvaccinated. *See id.*

107. On either assumption, the Head Start Mandate's vaccine requirements would force tens of thousands of staff and volunteers to submit to the vaccination against their wishes—or, as HHS puts it, become "fully vaccinated attributable to the interim final rule." *Id.* at 68078. And on either assumption, the Head Start Mandate prohibit tens of thousands of staff and volunteers from providing critical services to vulnerable children.

108. The National Head Start Association surveyed Head Start programs and found that at 20% of Head Start programs, less than half of the staff is vaccinated. PI Ex. A at 3. At another 31% of Head Start programs, between 50% and 70% of the staff is vaccinated. *Id.*

109. The National Head Start Association's survey showed that over one-fourth of Head Start programs anticipate losing more than 30% of their staff. *Id.* All told, the results indicated that "Head Start programs stand to lose between 46,614 and 72,422 staff." *Id.*

110. Because the Head Start Mandate's vaccine requirements will apply to everybody who the CDC considers to be not "fully vaccinated," it could soon apply to hundreds of thousands more staff and volunteers. Only about 25 percent of American adults have chosen to take a third shot, and none have received a fourth shot. *See* Ed Browne, *Americans Aren't Getting Enough Booster Shots, and It's Causing a Serious Problem* (Dec. 7, 2021), https://bit.ly/3IB7zYr. Meanwhile, the Toddler Mask Mandate would force practically all of the 864,289 children subject to it

to either submit to masking, expend funds they may not have to obtain medical exemptions, or surrender their preschool education.

111. The Head Start Mandate creates conflicts between programs' compliance with State and federal laws, and requires participants to give up rights protected by State law.

112. For example, in Louisiana, parents and students would be denied their State law right to opt-out of a vaccine requirement for any reason. *See* La. R.S. 17:150(E). In other States, such as Montana, Alabama, and Florida, Programs would be placed in direct conflict with state law prohibitions on vaccine mandates. *See, e.g.*, Mont. H.B. 702 (2021); Ala. Act. 2021-493 §1(a); Fla. H.B. 1B (2021).

113. The Mandate conflicts with Alaska Constitution and Alaska statutes. Alaskans' fundamental right to privacy is enshrined in Alaska Constitution Article I, Section 22. The Alaskan's fundamental right to privacy protects their ability to make decisions about medical treatment for themselves and their minor children unless there is no less restrictive alternative. Further, the State of Alaska enacted a statute that grants its citizens the right to refuse COVID-19 vaccination based on religious, medical, and other grounds, and no person may require documentation or justification for the refusal. Sec. 17, ch. 2, SLA 2021. *See also,* §§381.00317, 112.0441, 381.00319.

114. And the Head Start Mandate would force all of the 273,000 staff and nearly one million volunteers to either submit to masking or leave Head Start. HHS did not estimate or apparently even examine how many children, staff, or volunteers would leave the program due to the Head Start Mandate.

115. As Defendants admit, enforcing the Toddler Mask Mandate will require frequent staff physical corrective intervention: "It should be noted that like all new skills, children will need to be taught the proper way to put a mask on and keep a mask on. While children are adaptable,

they are still in the early stages of development and may need reminders and reinforcements to comply with this new practice." 86 Fed. Reg. at 68,060. Reports from those on the frontlines confirm the obvious: "It is extremely difficult and labor-intensive to enforce a mask mandate on three and four year old children, who are very active and do not understand why they should wear a mask." PI Ex. C. at 3.

VIII. The Implications for Children and Families.

116. As a result of the Head Start Mandate, staff and volunteers will likely leave the Head Start program. As a natural and foreseeable result, certain providers will close and children from low-income families in affected areas will be denied access to the preschool education that Congress guaranteed them and children who are denied access to preschool education will miss out on crucial years of development. Those programs that do not close entirely still may have to decrease enrollment capacity to meet teacher-student ratios. Parents will have to leave their jobs or hire others to take care of them. And States and local school boards will have to immediately address the impairment to early-childhood education program alignment with entry into Kindergarten programs.

117. The National Head Start Association's survey of Head Start programs found that the closures would be worse than the Mandate anticipated. "When asked if classrooms would need to close if the vaccine mandate was implemented on January 31," as it is scheduled to be, a full 50% of respondents said "yes." PI Ex. A at 3. Another 32% were "unsure." *Id.* Only 18% said no. *Id.* As the survey acknowledged, if even just the first 50% of programs "have to close classrooms when the mandate goes into effect, the survey results suggest that 1,324 classrooms will close." *Id.*

118. Staff, public school superintendents, and Head Start Directors bear witness to the extent of destruction that the Mandate will cause.

119. Many Head Start staff across America are like Lisa Sanburn. Ms. Sanburn, a Head Start Teacher's Assistant, has worked at the same Head Start program in Grant Parish for 17 years. *See* PI Ex. M at 1. She and her fellow teachers "love this program," and "work on our own time, after hours to better provide for our students." *Id.* at 2. "Like a lot of teachers, we don't stop caring for and worrying about our students when the bell strikes at the end of the day. We take them home with us in our hearts." *Id.* But when the Head Start Mandate was announced, both Sanburn and the lead teacher in her program "applied for and were denied religious exemptions from the vaccine mandate." *Id.* They are the only two teachers at their program and now, unless the Mandate is enjoined, will be fired before Christmas. *Id.* "Those students who are under our care will either return from Christmas break to teachers they do not know or they won't be able to return at all." *Id.* And for what? "We don't want anything more than to be able to do our jobs." *Id.*

120. Tammie Slayter, a Head Start Teacher, has worked for Head Start for twenty years. PI Ex. N at 1. She "do[es] not feel comfortable receiving" the COVID-19 vaccine. *Id.* at 2. She applied for a religious exemption and was effectively denied when she was told that she would be placed on administrative leave or "considered to have voluntarily resigned" if she had not submitted to the first dose of a vaccine by December 17, 2021. *Id.* Her firing is all the more arbitrary in light of the fact that her program remains *closed* due to damage that it sustained in Hurricane Laura. *Id.*

121. Amanda Gros, a Head Start Teacher, reports that her job and the job of the only other Head Start staff at her center have already been posted for new applicants because the two of them will not submit to the Mandate. PI Ex. L at 1-2. "[W]e are being told to choose between

our jobs where we serve kids that we love and our principles which are our right to believe in," and as a result, "the center will likely temporarily close." *Id.*

122. Jami Jo Thompson is a public school superintendent with extensive Head Start partnerships, including Head-Start-funded students within her public schools. PI Ex. C at 1. "Immediately upon notification of this possible mandate, staff indicated that they would not take the vaccine and that they believe it is a violation of their human rights for us to try to force the vaccine on them." *Id.* at 2. She anticipates that her staff will either resign or be fired. *Id.* "Ultimately, if we cannot staff our program, we cannot keep it running." *Id.* She also worries that her program may receive its $178,000 in annual federal funding. *Id.*

123. Jeff Powell, Superintendent of the Rapides Parish School Board, which serves 628 Head Start children, explained that "[a]pproximately twenty percent of my staff members and volunteers currently do not meet the mandate" and "[t]he loss of just one of these staff members means that we will not be able to provide the same amount and quality of care to our families and students as before the rule." PI Ex. E at 2.

124. Similarly, Wes Watts, Superintendent of the West Baton Rouge Parish School System, explained that the Mandate "is likely to achieve the exact opposite" of its stated purpose of "ensur[ing that early childhood centers safely remain open." PI Ex. D at 2. He anticipates that the Mandate will force programs to exclude needy children due to staff shortages. *Id.*

125. Head Start Directors report that "Staff members and volunteers have advised [them] that they are prepared to quit should their exemptions from vaccination not be granted," PI Ex. F at 2, and that "a number of vital staff … have decided not to be vaccinated and may not meet an exemption or be agreeable to weekly testing" and have "advised [them] that they are prepared to resign due to this mandate," PI Ex. I at 3; *see also* PI Ex. Q at 3. They predict that they will lose

around "35% of staff due to this mandate." PI Ex. I at 3. In the end, they "will have to shut down classrooms and, in some cases, entire centers[.]" PI Ex. J at 2. One Head Start Director reports that "the program sees the potential of losing approximately 42-49% of its staff" due to the Mandate unless they all receive exemptions. PI Ex. G at 2.

126. Another Director reports that the program has already "lost three staff members since the mandate was shared with the staff" and if the Mandate goes into full effect, they "will lose between 27-30% of our existing families and children [they] serve." PI Ex. H at 2; *see also* PI Ex. O at 5-6 ("To date at least 3 full time staff have submitted resignations based on the Biden Administration Head Start COVID 19 vaccine and mask requirements. More resignations are anticipated.").

127. A recent news report highlighted a Head Start preschool serving 164 children, where "[m]ore than half of the licensed teaching staff has told [the principal] they will not get vaccinated." Chad Frey, *Vaccine mandate affecting Newton Head Start staff*, The Kansan (Nov. 9, 2021), https://bit.ly/3oB1dQL. The principal anticipated that such an exodus would force the preschool to close. *Id.*

128. A recent survey of 28 Head Start grantees from the Executive Director of the Kentucky Head Start Association returned alarming results. Approximately 35% of those grantees reported that they had 89% or less of their full staffing levels. Grantees surveyed anticipated firing approximately 17% of the staff who will refuse to be vaccinated and not qualify for an exemption, creating or exacerbating staffing shortages. The 14 grantees responding to the survey also estimated that approximately 40% of contractors and other service providers—*e.g.* specialist mental health providers, and occupational therapist—will not comply with the Head Start Mandate by the

January 31, 2022 deadline causing a deterioration of the quality and scope of services offered to Head Start children.

129. With only 54% of the Kentucky population vaccinated and no state or school vaccination mandates, the Head Start Mandate will cause staffing shortages at Head Start Programs in Kentucky and the loss of critical services to some of Kentucky's most vulnerable citizens, particularly in rural areas where rates are lower than the state average. *See* Kentucky Covid-19 Vaccination Dashboard, https://perma.cc/V9RL-9GY5 (click on "View Dashboard") (last visited Dec. 14, 2021).

130. The Head Start Mandate will also impact many Kentucky school districts partnering with Head Start grantees for on-site classrooms and services. These school districts employ support staff, including cafeteria workers, bus drivers and janitorial staff that come into contact with children in Head Start programs. These employees are not currently subject vaccination requirements, and some will not voluntarily agree to get a vaccine. In fact, Kentucky grantees surveyed stated that around 50% of the school district partners will refuse to comply with the Head Start Mandate, and approximately 34% may withdraw from current contracts, agreements or MOUs with Head Start programs. Consequently, a significant number of Head Start programs at these school district locations cannot continue to offer Head Start services if forced to comply with the Head Start Mandate.

131. These programs will not be able to replace these teachers. The requirements for being hired by Head Start are often more strenuous than those for being hired by a public school, but the pay is lower. *See* PI Exs. C, D, E, F, Q. The process for hiring new staff takes considerable time at any time, let alone in the middle of the school year. *See* PI Exs. F at 3, G at 3; R at 5. Furthermore, many Head Start programs already are suffering from a tight labor market and were

unable to fill open positions before the Mandate. PI Exs. G. at 2; J at 3; P at 4; R at 4. When they finally find teachers to whom they want to offer jobs, those teachers sometimes refuse to accept specifically because of the Mandate. *See* PI Ex. G at 2.

132. As the superintendent of the Iberville Parish School System, Arthur M. Joffrion, Jr., attested, "[w]e cannot, as Head Start representatives cavalierly suggested to us a zoom call about this new rule, 'just get rid of the ones who won't get vaccinated and use their salaries to advertise for someone better to fill their position.' That is a ridiculous suggestion on its face and especially in light of the teacher shortage across the nation." PI Ex. P at 4. In fact, his district has "the highest starting salaries of any Parish in Louisiana and yet there are still [preexisting] vacancies. Our teachers and assistants are not so easily replaced." *Id.*

133. Even putting aside the exodus of irreplaceable teachers, the Mandate will cause Head Start programs to reduce their services or close because of the compliance costs that it imposes. The Head Start programs will have to make budget cuts to pay for gathering medical records, enforcing vaccination schedules, buying masks for the low-income children who will be forced to wear them, and supplying tests for their exempted staff and volunteers. *See, e.g.*, PI Ex. E. at 3 ("Whether we comply or not, centers will be forced to make drastic cuts on programming in order to implement the mandate from existing funds."); *id.* at 2 ("We cannot afford to spend that much money a week on testing 20% of our staff indefinitely."); *see also* PI Exs. D, E.

134. As Joffrian explained, "the regulatory, logistical, and administrative costs associated with the development of policies and documentation of exemptions surrounding compliance would be sky high." PI Ex. P at 3. He anticipates being forced to "make drastic cuts on programming in order to implement the mandate from existing funds or risk losing our funds entirely if we don't comply." *Id.* at 4. Because his programs "would be forced to comply or lose funding," and

because compliance itself is so costly, "that is really just a choice between slowly shutting down and shutting down immediately." *Id.* at 3.

135. As HHS acknowledges, these hardships will fall disproportionately on members of minority communities. In 2019, "37% of Head Start children were Hispanic or Latino," "30% were Black or African American, 10% were biracial or multiracial, 4% were American Indian or Alaska Native, and 2% were Asian." 86 Fed. Reg. at 68098. Affected non-student populations are similarly diverse: "71 percent of families, and 69 percent of staff, self-identify as Hispanic/Latino, Black/African American, American Indian, or Alaska Native." *Id.* at 68056.

136. Some parents will likely remove their child from Head Start programs due to the Toddler Mask Mandate. When New York imposed a similar mask mandate in September, parents "withdr[ew] their children from the [covered] day care and [were] looking other options to avoid masking." *See* Tyler Brown, *Day care says parents are removing kids due to state masking mandate*, ABC/WHAM (Sept. 16, 2021), https://bit.ly/3y8ltMU. In other places, parents have quit their jobs to homeschool their children to ensure that the children are not forced to mask. *See, e.g.*, Kailey Schuyler, *Parents pulling students out of school systems due to mask mandates*, WAFF/NBC (Aug. 15, 2021).

137. Head Start directors explain that "[i]t is not only the vaccine mandate that would cause an exit of staff and children, but the federal masking mandate as well." PI Ex. I at 3. "Many parents," they report, "are upset about the masking mandate." PI Ex. G at 3. Thus, "many parents have threatened to remove their children from SUU Head Start if the Biden Administration requirements become mandatory." PI Ex. O at 6. And as one director explained, "[t]he majority of our parents do not want their young children masked and no schools in our local service area masked children below middle school." PI Ex. I at 3.

138. For those who are required to comply, the Toddler Mask Mandate may cause psychological and health problems. As Pediatric Nurse Anthony Luczak attests, it is "fundamentally important in development for children to see the faces of their peers and caregivers," "I have had to treat cases of children with mask related medical issues," and "reinforcement of wearing masks because of the threat of the pandemic is a reinforcement of fear that directly is triggering a toxic stress in children's lives." PI Ex. T at 3-4.

139. The World Health Organization itself has concluded that "based on the safety and overall interest of the child and the capacity to appropriately use a mask," "children aged 5 years and under should not be required to wear masks." *Coronavirus disease (COVID-19): Children and masks*, World Health Organization (Aug. 21, 2020), https://bit.ly/3Gxzg2n.

140. Studies show that masking children is not effective in stemming the spread of Covid-19 and poses other risks to children, especially toddlers. *See, e.g.,* Krista Conger, *Surgical masks reduce COVID-19 spread, large-scale study shows*, Stanford Medicine (Sept. 1, 2021), https://stan.md/3s9nkjs (showing no statistically significant difference in wearing cloth masks vs. nothing at all); Suresh K. Sharma et al., *Efficacy of cloth face mask in prevention of novel coronavirus infection transmission: A systematic review and meta-analysis*, 9 J. Educ. Health Promot. 192 (2020), https://bit.ly/3E0F8jk ("Cloth masks show minimum efficacy in source control"); *Coronavirus disease (COVID-19): Children and masks*, World Health Organization (Aug. 21, 2020), https://bit.ly/3Gxzg2n. ("An international and multidisciplinary expert group brought together by WHO reviewed evidence on COVID-19 disease and transmission in children and the limited available evidence on the use of masks by children. Based on this and other factors such as childrens' psychosocial needs and developmental milestones, WHO and UNICEF advise the following: Children aged 5 years and under should not be required to wear masks.").

141. By requiring masks, the Toddler Mask Mandate will inhibit speech or language-impaired children, autistic children, deaf children, staff, and volunteers—who rely on seeing the faces of those with whom they interact in order to communicate—from experiencing a complete and inclusive preschool education. *See* PI Ex. T; *also, e.g.*, Deepa Shivaram, *New normal of masks is an 'added barrier' for deaf and hard-of-hearing community*, NBC News (May 23, 2020), https://nbcnews.to/3pHBply.

142. At the end of the day, children will lose their teachers, their educational development will be set back, low-income parents will be forced to quit their jobs, and communities will suffer the effects for a long time to come. *See* PI Exs. F at 3, J at 3, K at 2-3; O at 6; T at 3-4.

IX. Harm to the Plaintiff States.

143. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above. The Head Start Mandate causes irreparable harm to the States' most vulnerable residents: underprivileged children in Head Start programs. It threatens the jobs of trained and certified Head Start teachers, who cannot be easily replaced, and it threatens irreparable harm to the Plaintiff States, who have all expended untold resources in support of early childhood education program alignment with educational standards for K-12 education.

144. The Head Start Mandate will make it more difficult for States to "enhance collaboration and coordination of Head Start services by Head Start agencies with other entities providing early childhood education and development . . . , health care, mental health care, welfare, child protective services, education and community service activities, family literacy services, reading readiness programs (including such programs offered by public and school libraries), services relating to children with disabilities, other early childhood education and development for limited English proficient children and homeless children, and services provided for children in foster care

and children referred to Head Start programs by child welfare agencies." 42 U.S.C. §9837b(a)(4)(B)(i). That is because, among other reasons, many entities with which Head Start programs collaborate and coordinate, particularly in rural communities, do not impose vaccination and masking requirements as demanded by the Head Start Mandate.

145. The Head Start Mandate will make it more difficult for States to "promote partnerships between Head Start agencies, State and local governments, and the private sector to help ensure that children from low-income families, who are in Head Start programs or are preschool age, are receiving comprehensive services to prepare the children for elementary school." 42 U.S.C. §9837b(a)(4)(C). That is because, among other reasons, many private, state, and local entities with which Head Start programs collaborate and coordinate, particularly in rural communities, do not impose vaccination and masking requirements as demanded by the Head Start Mandate.

146. The Head Start Mandate will make it more difficult for States to "identify other resources and organizations (both public and private) for the provision of in-kind services to Head Start agencies." 42 U.S.C. §9837b(a)(4)(G). That is because, among other reasons, the Head Start Mandate will prohibit in-kind services from organizations that do not impose the same vaccination and masking requirements and from individuals (including volunteers) who do not comply with the same vaccination and masking requirements.

147. Based on their own statements: School closures, heightened stress, loss of income, and social isolation are all stressors that increase the risk for child abuse and neglect, and program closures contribute to disruption of service access for Head Start children, "who often experience trauma and are most in need of the consistent care, education, and comprehensive services that Head Start provides." 86 Fed. Reg. 68057.

148. According to the HHS, research also indicates Early Head Start can serve as a child abuse and neglect prevention program, and these programs are "known to help prevent child abuse" and "provide supports to families experiencing domestic violence (2.5 percent or 24,000 families in 2019 OHS data." *Id*. at 68057-58. The closure of Head Start programs in Plaintiff States, by HHS's own admission, increases risk of these irreparable harms to vulnerable children. Correspondingly, the burden is increased on State and local governments to respond to these societal harms.

149. Plaintiff States also suffer irreparable harm from the loss of their ability to consult and comment before the imposition of a Mandate with such drastic implications for their educational systems and their citizens.

CLAIMS FOR RELIEF

COUNT I
The Head Start Mandate Is Beyond the Executive Branch's Authority
(5 U.S.C. §706)

150. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above.

151. Courts must "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory ... authority." 5 U.S.C. §706(2)(A), (C).

152. The Head Start Mandate is a final agency action.

153. The Head Start Mandate is a federal action involving issues of major economic, social, and political significance. The Mandate affects approximately a million children and hundreds of thousands of staff and volunteers. It also impacts hundreds of millions of dollars in funding and disrupts the education of children at a critical developmental period in their lives and impairs alignment of early childhood education programs across the country and specifically in

Plaintiff States. Certainly, this is a decision of vast economic and political significance. *Louisiana v. Becerra*, 2021 WL 5609846, at *11 (W.D. La. Nov. 30, 2021).

154. Because the Mandate triggers the major questions doctrine, it must be authorized by a clear statement of unambiguous congressional intent. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021). The Executive cannot "bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp.*, 573 U.S. at 324; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 159 (rejecting Executive claim to "jurisdiction to regulate an industry constituting a significant portion of the American economy" absent clear congressional authorization). Yet the Mandate does precisely that. This lack of statutory authorization is doubly fatal because "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001), particularly when the Executive's action would threaten to alter "the constitutional balance between the National Government and the States," *Bond v. United States*, 572 U.S. 844, 862 (2014).

155. Neither the Head Start Act nor any other provision of law contains the necessary clear statement to authorize the Head Start Mandate, which pushes the limits of congressional power under the Nondelegation Doctrine, exceeds the limits of congressional power under the Spending Clause, intrudes into an area of traditional State control, and implicates a question of major social, political, and economic importance.

156. The provision of the Head Start Act that HHS cites as authority for the Mandate comes nowhere close to the clear statement needed to authorize this major federal action.

157. HHS asserts that Section 641A of the Act authorizes the Mandate. But the cited provision only authorizes the Secretary to "modify, as necessary ... administrative and financial management standards," "standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate) for such agencies, and programs," and "such other standards as the Secretary finds to be appropriate." 42 U.S.C. §9836a(a)(1)(C)-(E). This provision does not grant express authority to impose the Head Start Mandate.

158. Such a mandate is not an "administrative and financial management standard[]."

159. It is not a "standard relating to the condition and location of facilities," which, as the specification of "indoor air quality assessment" demonstrates, refers to physical conditions and locations of Head Start facilities rather than conditions on participation, employment, and volunteer eligibility.

160. Finally, the general "other standards as the Secretary finds to be appropriate" clause cannot be relied upon as authority given the major questions implicated and the difference between a vaccine and masking mandate and the other authorities specifically enumerated. *See Louisiana v. Becerra*, 2021 WL 5609846, at *10 (W.D. La. Nov. 30, 2021) ("Not only do the statutes not specify such superpowers, but principles of separation of powers weigh heavily against such powerful authority being transferred to a government agency by general authority."); *see also id.* at *7 ("The Court stated the Applicants had made a compelling argument that, although 29 U.S.C. 655 gave broad authority to OSHA, to avoid 'giving unintended breadth to Acts of Congress' the Court should use the principle of 'noscitur a sociis'—meaning, a word is known by the company it keeps—to limit OSHA's authority.") (quoting *BST Holdings*, 17 F.4th at 613).

161. Furthermore, in enacting the Head Start Mandate, the Secretary is not "modifying, as necessary" any standards. *See* 42 U.S.C. §9836a(a)(1). The word "modify" refers to a much

more limited action. It means "(1) "To make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness;" (2) "To make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate;" or (3) "To describe the or limit the meaning of." *Modify*, Black's Law Dictionary (10th ed. 2014); *see also* Random House Dictionary of the English Language 1236 (2d ed. 1987) ("to change somewhat the form or qualities of; alter partially; amend"); Webster's Third New International Dictionary 1452 (1981) ("to make minor changes in the form or structure of: alter without transforming"); 9 Oxford English Dictionary 952 (2d ed. 1989) ("[t]o make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation").

162. In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the Supreme Court held that a statute authorizing the Federal Communications Commission to "modify any requirement" for tariff filing did not authorize the challenged regulation because it effected a fundamental change rather than a "modification." The Court relied heavily on the narrowing function of the word "modify" in the authorizing statute. It explained that "[v]irtually every dictionary we are aware of says that 'to modify means to change moderately or in a minor fashion." *Id.* at 225. It cited those dictionaries at length and then concluded that "'[m]odify,' in our view, connotes moderate change." *Id.* at 228. The Secretary here thus cannot claim to be acting pursuant to his authority to "modify" performance standards when he enacts sweeping and unprecedented mandates dictating the private medical decisions of hundreds of thousands of people and effectively exiling a substantial number of educators and children.

163. Because the Head Start Act does not clearly authorize the Head Start Mandate, the Executive Branch has acted "in excess" of its constitutional and statutory authority. 5 U.S.C. §706(2)(C).

COUNT II
The Head Start Mandate Is Contrary to Law
(5 U.S.C. §706; 42 U.S.C. §9836a)

164. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above.

165. Courts must "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory ... authority." 5 U.S.C. §706(2)(A), (C).

166. The purpose of the Head Start program is "to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development." 42 U.S.C. §9831.

167. The Head Start Act has been reauthorized several times for the purpose of expanding eligibility and enrollment. *See, e.g.*, Improving Head Start for School Readiness Act of 2007 (P.L. 110-134).

168. The Head Start Mandate is contrary to the Head Start Act because it would decrease Programs and student enrollment, which would harm the school readiness of low-income children.

169. The Head Start Mandate is contrary to the Head Start Act because it would decrease staff and volunteer levels, which would harm the school readiness of low-income children. *See* 42 U.S.C. §9831.

170. The Mandate violates 42 U.S.C. §9836a(a)(2)(B)(x), which requires the Secretary to "take into consideration ... the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations." Although the Secretary specifically included a statement regarding the Mandate's Tribal impact, the Secretary nowhere mentions the Mandate's impact on rural areas or States where programs will close or lose capacity as a result of the Mandate.

171. The Mandate violates 42 U.S.C. §9836a(2)(A), which requires that the Secretary "shall consult with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head Start programs." The Secretary did not do so. And his consultation with "experts in child health, including pediatricians, a pediatric infectious disease specialist, and the recommendations of the CDC and FDA," 86 Fed. Reg. at 68054, comes nowhere close to meeting §9836a(2)(A)'s specific requirements. HHS also failed to meet §9836a(2)(A)'s requirements because it failed to disclose who specifically it actually consulted.

172. The Mandate violates 42 U.S.C. §9836a(a)(2)(C)(ii), which requires the Secretary to "ensure that any such revisions in the standards will not result in the elimination of or any reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services required to be provided under such standards as in effect on December 12, 2007." By excluding children who do not comply with the Mandate and reducing eligible staff and volunteers, the Mandate will result in the reduction of the quality, scope, and types of health, education, parental involvement, nutrition, social, and other services provided to students.

173. The Mandate violates 42 U.S.C. §9836a(b)(3)(B)'s fundamental command that measures promulgated under the authority of Section 641A "shall not be used to exclude children from Head Start programs." That is *precisely* the Mandate's design—the exclusion of children of parents who refuse to have their children comply with the masking requirement.

COUNT III
The Head Start Mandate Violates the APA's Notice-and-Comment Requirement
(5 U.S.C. §706)

174. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above.

175. A "reviewing court shall ... hold unlawful and set aside agency action ... found to be ... without observance of procedure required by law." 5 U.S.C. §706(2)(D).

176. The Head Start Mandate is a final agency action and legislative rule that requires notice-and-comment rulemaking procedures under the APA.

177. HHS acknowledges that the Mandate is a legislative rule that normally would have to go through the APA's notice-and-comment procedures. 86 Fed. Reg. at 68058.

178. HHS acknowledges that the Mandate was promulgated without notice-and-comment procedures.

179. HHS relies on the APA's "good cause" exception to exempt the Mandate from notice-and-comment rulemaking. 86 Fed. Reg. at 68058.

180. An agency may employ the APA's good-cause exception only when notice-and-comment procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(3)(B).

181. "The 'good cause' exception in 5 U.S.C. 553 is read narrowly to avoid providing agencies with an escape clause from the" APA's "notice and comment requirements." *Louisiana v. Becerra*, 2021 WL 5609846, at *9 (W.D. La. Nov. 30, 2021).

182. "The good cause exception [is] 'meticulous and demanding,' 'narrowly construed,' 'reluctantly countenanced,' and evoked only in 'emergency situations.'" *Id.* (quoting *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014)).

183. HHS's justification for avoiding notice and comment comes nowhere close to meeting the stringent good-cause standard. HHS states that although "COVID-19 cases, hospitalizations and deaths have begun to trend downward at a national level," notice and comment must be avoided because of the "threat to the country's progress on the COVID-19 pandemic" posed by the unvaccinated. 86 Fed. Reg. at 68058-59.

184. HHS's justification amounts to no more than a generalized desire for immediate implementation of the Mandate. But this is precisely the justification court have repeatedly rejected. *See, e.g.*, *United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) ("[T]he good cause exception should not be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them."); *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.").

185. This Court and the Fifth Circuit have rejected precisely the same claims of exemption from APA and other notice-and-comment requirements. *See BST Holdings*, 17 F.4th at 611-12 ("The Mandate's stated impetus—a purported "emergency" that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to—is unavailing as well."); *Louisiana v. Becerra*, 2021 WL 5609846, at *10 (W.D. La. Nov. 30, 2021) ("It took CMS almost two months, from September 9, 2021 to November 5, 2021, to prepare the interim final rule at issue. Evidently, the situation was not so urgent that notice and comment were not required. It took CMS longer to prepare the interim final rule without notice than it would have

taken to comply with the notice and comment requirement. Notice and comment would have allowed others to comment upon the need for such drastic action before its implementation."). Indeed, courts across the country have rejected agency reliance on the good-cause exception for COVID-19 measures. *See Florida v. Becerra*, 2021 WL 2514138, at *45 (M.D. Fla. June 18, 2021); *Regeneron Pharms., Inc. v. H.H.S*, 510 F. Supp. 3d 29, 48 (S.D.N.Y. 2020); *Chamber of Com. of the U.S. v. D.H.S.*, 504 F. Supp. 3d 1077, 1094 (N.D. Cal. 2020); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 496 (D. Md. 2020).[3]

186. As courts, including this Court and the Fifth Circuit, have consistently held, *see supra*, HHS's generalized desire to immediately publish the Mandate comes nowhere close to meeting the APA's good-cause standard. Accordingly, the Head Start Mandate is unlawful because it was promulgated without the notice-and-comment procedures required by the APA.

COUNT IV
The Head Start Mandate Is Arbitrary and Capricious
(5 U.S.C. §706)

187. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above.

188. Under the APA, a court must "hold unlawful and set aside agency action" that is arbitrary or capricious or otherwise not in accordance with law or contrary to the Constitution. 5 U.S.C. §706(2)(A).

189. "Federal administrative agencies are required to engage in reasoned decision-making." *Louisiana v. Becerra*, 2021 WL 5609846, at *12 (W.D. La. Nov. 30, 2021).

[3] Further undermining HHS's emergency rationale is the fact that the Mandate was subjected to OIRA review under Executive Order 12866. That means HHS views compliance with an Executive Order as more important than compliance with the APA's mandatory statutory procedures for transparency and public involvement in rulemaking.

190. "[A]gency action is lawful only if it rests on a consideration of the relevant factors" and "important aspects of the problem." *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring "reasoned decisionmaking"). This means agencies must "examine all relevant factors and record evidence." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

191. Further, agencies must actually analyze the relevant factors. "'Stating that a factor was considered ... is not a substitute for considering it.'" *Texas v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021). The agency must instead provide more than "conclusory statements" to prove it considered the relevant statutory factors. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

192. The Head Start Mandate is arbitrary and capricious for several independently sufficient reasons.

193. *First*, the Mandate will decrease eligible students, staff, and volunteers, undermining the Head Start Act's focus on student enrollment, education, and wellbeing. *See* 42 U.S.C. §9831. Indeed, soon after the Mandate came out, the National Head Start Association conducted a survey to examine the Mandate's impact. The results: 26% of programs anticipate losing more than 30% of their staff and 60% anticipate losing from 10% to 20% of their staff. According to the NHSA survey, on average, Head Start could lose 22% of its total workforce, amounting to 60,000 staff and teachers. When asked if classrooms would need to close if the Mandate was implemented on January 31, 50% of the programs said yes. The survey results indicate 1,324 classrooms will close. *See* PI Ex. A.

194. Each prong of the President's vaccination policy is aimed at the same overarching goal: increasing individual vaccination rates in society. *See* Remarks by President Biden on Fighting the COVID-19 Pandemic" (Sept. 9, 2021), https://bit.ly/3oI0pKr (Head Start Vaccine

Mandate part of President's plan to "increase vaccinations among the unvaccinated with new vaccination requirements"); The White House, *Path Out of the Pandemic: President Biden's Covid-19 Action Plan*, https://bit.ly/3adkMXx. This policy comes at the expense of exacerbating staff shortages. *Cf. Louisiana v. Becerra*, 2021 WL 5609846, at *12 ("The Plaintiff States further maintain the goal of the CMS Mandate is to increase individual vaccine rates, which will actually have the effect of harming patient well-being due to staff shortages of providers and suppliers.").

195. As discussed above, the Mandate would cause Head Start programs to fire thousands of staff and ban thousands of volunteers from serving at Head Start programs. The staff and volunteer shortages caused by the Mandate will have a detrimental effect on child education. *See, e.g.*, Chad Frey, *Vaccine mandate affecting Newton Head Start staff*, The Kansan (Nov. 9, 2021), https://bit.ly/3oB1dQL; Adam Kurtz, *Mayville State University's Head Start program could be impacted by vaccine mandate*, Grand Forks Herald (Dec. 9, 2021), https://bit.ly/3oFENOA ("Van Horn said he was concerned about being able to maintain services for all of those children if the mandate remains in place.").

196. Beyond that, the Toddler Mask Mandate would force practically all of the 864,289 children subject to it to either submit to masking or surrender participation in Head Start. And HHS did not indicate how many children, staff, or volunteers would leave the program due to the Mandate. The inevitable drop in students whose parents are unwilling to comply with the Mandate's requirements will undermine the Act's central focus on maintaining student enrollment. *See* 42 U.S.C. §9836a(b)(3)(B) ("Such measures shall not be used to exclude children from Head Start programs."); *See* Tyler Brown, *Day care says parents are removing kids due to state masking mandate*, ABC/WHAM (Sept. 16, 2021), https://bit.ly/3y8ltMU; Kailey Schuyler, *Parents pulling students out of school systems due to mask mandates*, WAFF/NBC (Aug. 15, 2021).

197. The Mandate ignores that mask wearing is not in the best interest of children, and subordinates students' interests—the purpose of the Act—to the Administration's vaccination and masking rules. *Coronavirus disease (COVID-19): Children and masks*, World Health Org. (Aug. 21, 2020), https://bit.ly/3Gxzg2n.

198. The Mandate also ignores the best interest of speech and language impaired, autistic, or deaf children from experiencing a complete preschool education. *See, e.g.*, Deepa Shivaram, *New normal of masks is an 'added barrier' for deaf and hard-of-hearing community*, NBC News (May 23, 2020), https://nbcnews.to/3pHBply. Indeed, the Mandate never once mentions the interests of deaf students and is generally dismissive of all impaired students and the disparate impact of the Mandate on this population. *But see* 42 U.S.C. §9836a(b)(2)(F) ("The measures under this subsection shall ... provide for appropriate accommodations for children with disabilities.").

199. The Mandate also ignores another statutorily mandated factor—its disparate impact on rural areas. *See* 42 U.S.C. §9836a(a)(2)(B)(x) (the Secretary must "take into consideration ... the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations").

200. The Mandate ignores the disparate impact of program closures or limited opportunities on minorities.

201. *Second*, HHS failed to consider or arbitrarily rejected obvious alternatives to vaccine and masking requirements.

202. Emerging studies increasingly indicate natural immunity affords benefits comparable to or better than vaccination. Some experts have suggested that natural immunity is both superior to and more durable than the vaccines. *See, e.g.*, Sivan Gazit et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*,

Medrxiv (Aug. 25, 2021), https://bit.ly/3DnKzIZ ("This study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity. And it is unclear if vaccination of an individual who has natural immunity will provide any perceptible benefit in fighting future infection."); Yair Goldberg, et al., *Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel*, Medrxiv (Apr. 24, 2021), https://bit.ly/3n8uXTe; *see also, e.g.*, Martin Kuldorff and Jay Bhattacharya, *The ill-advised push to vaccinate the young*, The Hill (June 17, 2021), https://bit.ly/2Z2ZpX6; R. R. Goel et al., *mRNA vaccines include durable immunity to SARS-CoV-2 and variants of concern*, Science (Oct. 14, 2021), https://bit.ly/3DXLS1K ("[B]oosting of pre-existing immunity from prior infection with mRNA vaccination mainly resulted in a transient benefit to antibody titers with little-to-no long-term increase in cellular immune memory."). And a highly reported study from Israel involving review of 74,000 cases of infection concluded that a person with natural immunity is 27 times less likely to be reinfected than a vaccinated person. *See* Sivan Gazit, Roei Shlezinger, et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, MEDRXIV (Aug. 30, 2021), https://bit.ly/3FjArCG. Additional studies support this conclusion.[4]

[4] *See* Dr. Michel C. Nussenzweig, Senior Physician, *Natural infection versus vaccination: Differences in COVID antibody responses emerge*, THE ROCKEFELLER UNIV. (Aug. 24, 2021), https://bit.ly/3ojdfNz; Don W. Hackett, Robert Carlson, M.D., *Natural Immunity After Covid-19 Found Durable and Robust*, PRECISION VACCINATIONS (updated Aug. 2, 2021), https://bit.ly/30goyOE; Sharon Reynolds, *Lasting immunity found after recovery from COVID-19*, NAT'L INST. OF HEALTH (Jan. 26, 2021), https://bit.ly/3kPYFwb.

203. HHS's Mandate is arbitrary because it fails to even consider or mention natural immunity as an alternative to vaccination or mask wearing. *Cf. Louisiana v. Becerra*, 2021 WL 5609846, at *13 ("The rejection of natural immunity as an alternative is puzzling."); *see also BST Holdings*, 17 F.4th at 615 ("[A] naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus.").

204. *Third*, the Head Start Mandate is arbitrary and capricious because its rationales are flagrantly pretextual. As recounted above, the President has stated several times that the Head Start Mandate is part of a broader program aimed at increasing vaccination rates throughout American society, writ large. The Mandate, however, eschews this rationale and tries (unsuccessfully and after-the-fact) to pigeonhole the Mandate into the Head Start Act's statutory factors. Such obvious regulatory reframing of the Mandate here leads to the inescapable conclusion that the Mandate's stated rationale is pretextual. And the presence of such blatant pretext is enough to render the Mandate arbitrary and capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019); *see also Louisiana v. Becerra*, 2021 WL 5609846, at *14 ("[T]he 46-page CMS Mandate does not even mention President Biden's declaration of a national vaccine mandate. The presence of pretext is enough to render a rule arbitrary and capricious."). What's more, as this Court has found, the Administration's shifting rationales across all vaccine mandates demonstrate pretext. *See Louisiana v. Becerra*, 2021 WL 5609846, at *14. For example, the OSHA ETS declares that vaccines are necessary to protect worker safety. And the CMS Mandate purported to focus on patient safety. But those rationales would not be sufficient under the Head Start Act. So HHS manufactured a new rationale to cram the mandate into the Head Start Act. Accepting HHS's description of the Head Start Mandate requires this Court to "'exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 139 S. Ct. at 2575-76.

205. *Fourth*, the Head Start Mandate completely ignores State reliance interests. Plaintiff States have substantial reliance interests in the functioning of Head Start programs, which are often administered by public entities. Specifically, the Mandate ignores: (1) the Plaintiff States' reliance interests in public and private Head Start programs continuing to operate under existing rules without facing this new Mandate that threatens to cause significant harm to the States' children, particularly minorities and children in rural and low-income communities; (2) Head Start providers' similar reliance interests in staffing their facilities under the existing rules without facing this new Mandate that threatens their workforce, the services they provide, and their very existence; and (3) Head Start workers' reliance interests, especially the interests of workers in rural communities, in selecting a job and building a career under the existing rules. The Mandate is arbitrary and capricious because it utterly ignores these reliance interests. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020).

206. *Fifth*, the Mandate fails to consider the uncertainty it imposes on providers due to the existence of potentially conflicting State provisions. The effects of such uncertainty are already being felt by providers. *See, e.g.*, Jeffrey S. Solochek, *Head Start providers caught in crossfire of conflicting mask, vaccine rules*, Tampa Bay Times (Dec. 9, 2021), https://bit.ly/3lT0NDA; Adam Kurtz, *Mayville State University's Head Start program could be impacted by vaccine mandate*, Grand Forks Herald (Dec. 9, 2021), https://bit.ly/3oFENOA. Due to the uncertainty surrounding the legality of the Head Start Mandate, particularly in the wake of other mandates being enjoined, providers—particularly smaller and rural providers without ready access to expert legal advice—face a conundrum about whether to follow State law or the likely void and illegal Head Start Mandate.

207. *Sixth*, the Mandate is arbitrary and capricious because it "is staggeringly over-broad." *BST Holdings*, 17 F.4th at 615. Like the OSHA Mandate, the Head Start Mandate is "a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in" community measures, levels of transmissions, levels of hospitalization, levels of infection across communities. *Id.* at 612.

208. *Seventh*, HHS fails to account for the fact that Head Start students often are blended with other public school students or attend school with students who are not in Head Start. Requiring Head Start toddlers to mask, while other children in the same school are unmasked, if programs remain open, will likely result in segregation of these children from others who are not subject to the Mandate, impairing the social interaction of the Head Start. This psychological and developmental impact is an important aspect of the problem that HHS failed to address.

COUNT V
The Head Start Mandate Violates the Congressional Review Act
(5 U.S.C. §706)

209. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above.

210. The Congressional Review Act requires all rules to be submitted to Congress to allow it an opportunity to pass a resolution disapproving the rule. A "major rule" must also receive a report from the Government Accountability Office and its effective date must be delayed. 5 U.S.C. §801.

211. HHS concedes that the Head Start Mandate is a "major rule" for purposes of the CRA. 86 Fed. Reg. at 68063. Yet it relies on the CRA's "limited exception[]" for rules which "an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor

in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §808.

212. For the reasons discussed as to the APA good-cause exception, HHS's dismissal of its CRA obligations comes nowhere close to meeting the exacting standards allowing a major rule to avoid the CRA's exacting procedures. *Sorenson Commc'ns*, 755 F.3d at 706 ("Deference to an agency's invocation of good cause—particularly when its reasoning is potentially capacious, as is the case here—would conflict with this court's deliberate and careful treatment of the exception in the past."); *see also* OMB, *Guidance on Compliance with the Congressional Review Act*, M-19-14 (Apr. 11, 2019) (noting APA good-cause standard applies in CRA context).

213. Accordingly, the Head Start Mandate violates the Congressional Review Act.

COUNT VI
The Head Start Mandate Violates the Nondelegation Doctrine

214. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above.

215. The Constitution vests Congress with all legislative powers it granted to the federal government. U.S. Const. art. 1, §1. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935).

216. If the Head Start Act authorizes the President to require Head Start programs to mandate vaccines and mask based on the amorphous term "such other standards as the Secretary finds to be appropriate," this provision lacks an intelligible principle and is thus an unconstitutional delegation of legislative power to the Executive. *See Louisiana v. Becerra*, 2021 WL 5609846, at *15 ("If CMS has the authority by a general authorization statute to mandate vaccines, they have authority to do almost anything they believe necessary, holding the hammer of termination of the

Medicare/Medicaid Provider Agreement over healthcare facilities and suppliers."). Because the word "appropriate" is not an intelligible principle, §9836a(1)(E) is an unconstitutional delegation of legislative power, is void, and therefore cannot justify the Mandate.

COUNT VII
The Head Start Mandate Violates the Tenth Amendment

217. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above.

218. "The powers not delegated by the Constitution to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

219. No clause of the Constitution authorizes the federal government to impose the Head Start Mandate. Education and public health have long been recognized as an aspect of police powers reserved to the *States*, not the Federal Government. *See, e.g.*, *BST Holdings*, 17 F.4th at 617 ("[T]o mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power."); *Louisiana v. Becerra*, 2021 WL 5609846, at *15; *see also Hillsborough Cty.*, 471 U.S. at 719 ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief) (our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect"); *United States v. Lopez*, 514 U.S. 549, 580, 115 S. Ct. 1624, 1640, 131 L. Ed. 2d 626 (1995) (Kennedy, J., concurring) ("it is well established that education is a traditional concern of the States"); *accord id.* at 564 (majority op.); *Missouri v. Jenkins*, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring) ("We have long recognized that education is primarily a concern of local authorities."); *Florida v. Becerra*, 2021 WL 2514138, at *15 (M.D. Fla. June 18, 2021)

("The history shows ... that the public health power ... was traditionally understood—and still is understood—as a function of state police power.").

220. The Mandate expressly conflicts with State laws, rules, and policies. *See, e.g.*, Jeffrey S. Solochek, "Head Start providers caught in crossfire of conflicting mask, vaccine rules," Tampa Bay Times (Dec. 9, 2021), https://bit.ly/3lT0NDA. And as with the CMS Mandate, the Head Start Mandate purports to expressly preempt State and local provisions. 86 Fed. Reg. at 68063; *cf. Louisiana v. Becerra*, 2021 WL 5609846, at *5 ("The CMS Mandate specifically preempts state laws with regard to COVID-19 Vaccine requirements and/or exemptions.").

221. By encroaching upon the States' traditional police powers over public health and education, particularly without clear authorization from Congress, Defendants have exceeded their authority and violated the Tenth Amendment. *See Louisiana v. Becerra*, 2021 WL 5609846, at *15 (W.D. La. Nov. 30, 2021) ("The Plaintiff States make a strong case that the CMS Mandate violates the States' police power.").

COUNT VIII
The Head Start Mandate Violates the Anti-Commandeering Doctrine

222. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above herein.

223. The Tenth Amendment and structure of the Constitution deprive Congress of "the "the power to issue direct orders to the governments of the States," *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018), and do not tolerate the federal government commandeering State officers "into administering federal law," *Printz v. United States*, 521 U.S. 898, 928 (1997).

224. State entities will be required to enforce the Head Start Mandate. *See, e.g.*, PI Ex. B.

225. Accordingly, the Mandate clearly violates the anti-commandeering doctrine by requiring State entities to enforce the Mandate against students, employees, and volunteers.

COUNT IX
The Head Start Mandate Violates the Spending Clause

226. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above herein.

227. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," so "States [can] exercise their choice knowingly." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

228. The Head Start Act does not clearly authorize or unambiguously impose the Vaccine Mandate or Mask Mandate. And there is no nexus whatsoever between Head Start grants and vaccine and mask requirements. *Cf. South Dakota v. Dole*, 483 U.S. 203 (1987).

229. Accordingly, the Head Start Mandate is an unconstitutional new condition on the receipt of federal funds and is not authorized under the Spending Clause.

COUNT X
The Head Start Mandate Violates the Treasury and General Government Appropriations Act of 1999

230. Plaintiff States repeat and incorporate by reference each of the Complaint allegations stated above herein.

231. Section 654 of the Treasury and General Government Appropriations Act of 1999 requires that agencies "shall" prepare an impact assessment "[b]efore implementing policies and regulations that may affect family well-being." Public Law 105-277, 5 U.S.C. §601 note. Congress has mandated that the impact analysis meet several specific requirements including, among others, an assessment of whether the regulatory action "strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children," whether "the action may be

carried out by State or local government or by the family," and whether "the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society." 5 U.S.C. §601 note.

232. HHS acknowledges that Section 654 applies to the Head Start Mandate. *See* 86 Fed. Reg. at 68062. But HHS arbitrarily rejects the need for an impact assessment with the conclusory claim that "it is not necessary to prepare a family policymaking assessment ... because [the Mandate] will not have *any* impact on the autonomy or integrity of the family as an institution." *Id.* (emphasis added).

233. The Head Start Mandate explicitly affects "family well-being." It intrudes into fundamental decisions about whether a toddler must wear a mask at school. It also imposes obligations on parents picking children up from school. (And it is likely to result in numerous children not even having a school to attend.) It goes straight to the heart of the allocation of power between State and family.

234. Because the Mandate affects family well-being and because HHS failed to prepare an impact analysis, the Mandate is contrary to Section 654 of the Treasury and General Government Appropriations Act of 1999 and must be vacated.

PRAYER FOR RELIEF

NOW, THEREFORE, Plaintiffs request an order and judgment:

a. Declaring, under 28 U.S.C. §2201, that the Head Start Mandate is arbitrary and capricious and unlawful under the APA;

b. Declaring, under 28 U.S.C. §2201, that the Head Start Mandate is contrary to law and in excess of statutory authority under the APA;

c. Declaring, under 28 U.S.C. §2201, that the Head Start Mandate violates the APA because it was promulgated without notice and comment;

d. Declaring that the Head Start Mandate violates the Constitution;

e. Holding the Head Start Mandate is unlawful and vacating it;

f. Preliminarily and permanently enjoining, without bond, Defendants from imposing Head Start Mandate;

g. Tolling the Head Start Mandate's compliance deadlines pending judicial review;

h. Granting all other relief to which Plaintiff States are entitled, including but not limited to attorneys' fees and costs

Dated: December 21, 2021

Respectfully submitted,

By: */s/ Elizabeth B. Murrill*

ELIZABETH B. MURRILL (La #20685)
Solicitor General
J. SCOTT ST. JOHN (La #36682)
Deputy Solicitor General
MORGAN BRUNGARD*
JOSIAH KOLLMEYER (La #39026)
Assistant Solicitors General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
Tel: (225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov
brungardm@ag.louisiana.gov
kollmeyerj@ag.louisiana.gov

Counsel for the State of Louisiana

STEVE MARSHALL
Alabama Attorney General
/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.*
Solicitor General
Office of the Attorney General
State of Alabama
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov

Counsel for the State of Alabama

AUSTIN KNUDSEN
Montana Attorney General
/s/Kristin Hansen
Kristin Hansen*
Lieutenant General
David M.S. Dewhirst*
Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov

Counsel for the State of Montana

TREG R. TAYLOR
Attorney General of Alaska
/s/ Charles E. Brasington
Charles E. Brasington*
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501

DOUGLAS J. PETERSON
Nebraska Attorney General
/s/ James A. Campbell
James A. Campbell*
Solicitor General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682

Phone: (907) 269-6612
charles.brasington@alaska.gov

Counsel for the State of Alaska

MARK BRNOVICH
Arizona Attorney General
/s/ Robert J. Makar
Robert J. Makar*
Assistant Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
Tel: (602) 542-4389
Robert.Makar@azag.gov
ACL@azag.gov

Counsel for the State of Arizona

LESLIE RUTLEDGE
Arkansas Attorney General
/s/ Dylan L. Jacobs
Dylan L. Jacobs*
Assistant Solicitor General
Office of the Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-2007
Dylan.Jacobs@arkansasag.gov

Counsel for the State of Arkansas

ASHLEY MOODY
Florida Attorney General
/s/ Natalie P. Christmas
Natalie P. Christmas*
Assistant Attorney General of Legal Policy
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
natalie.christmas@myfloridalegal.com

Counsel for the State of Florida

jim.campbell@nebraska.gov

Counsel for the State of Nebraska

WAYNE STENEHJEM
North Dakota Attorney General
/s/ Matthew Sagsveen
Matthew Sagsveen*
Solicitor General
Director of Civil Litigation, Natural Resources, and Indian Affairs Division
North Dakota Office of Attorney General
600 E. Boulevard Avenue
Dept 125
Bismarck, ND 58505
masagsve@nd.gov

Counsel for the State of North Dakota

DAVE YOST
Ohio Attorney General
/s/ Benjamin M. Flowers
Benjamin M. Flowers*
Solicitor General
30 E. Broad St., 17th Floor
Columbus, OH 43215
bflowers@ohioAGO.gov

Counsel for the State of Ohio

JOHN M. O'CONNOR
Oklahoma Attorney General
/s/ Mithun Mansinghani
Mithun Mansinghani*
Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-4392
Mithun.Mansinghani@oag.ok.gov

Counsel for the State of Oklahoma

CHRISTOPHER M. CARR
Georgia Attorney General
/s/ Stephen J. Petrany
Stephen Petrany*
Solicitor General
Ross W. Bergethon
Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Counsel for the State of Georgia

THEODORE E. ROKITA
Indiana Attorney General
/s/Thomas M. Fisher
Thomas M. Fisher*
Solicitor General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204
Tom.fisher@atg.in.gov

Counsel for the State of Indiana

JEFFREY S. THOMPSON
Iowa Solicitor General
/s/ Samuel P. Langholz
Samuel P. Langholz*
Assistant Solicitor General
Office of the Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
jeffrey.thompson@ag.iowa.gov
sam.langholz@ag.iowa.gov

Counsel for the State of Iowa

DEREK SCHMIDT
Kansas Attorney General
/s/ Shannon Grammel
Shannon Grammel*
Deputy Solicitor General
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor

ALAN WILSON
South Carolina Attorney General
/s/ Thomas T. Hydrick
Thomas T. Hydrick*
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4127
thomashydrick@scag.gov

Counsel for the State of South Carolina

JASON R. RAVNSBORG
South Dakota Attorney General
/s/David M. McVey
David M. McVey*
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Phone: (605) 773-3215
david.mcvey@state.sd.us

Counsel for the State of South Dakota

HERBERT H. SLATERY III
Attorney General and Reporter of Tennessee
/s/Andree S. Blumstein
Andree S. Blumstein*
Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3492
Andree.Blumstein@ag.tn.gov

Counsel for the State of Tennessee

SEAN D. REYES
Utah Attorney General
/s/ Melissa A. Holyoak
Melissa A. Holyoak*
Solicitor General
Utah Attorney General's Office
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320

Topeka, Kansas 66612
Phone: (785) 296-2215
Email: shannon.grammel@ag.ks.gov

Counsel for the State of Kansas

DANIEL CAMERON
Attorney General
/s/ Jeremy J. Sylvester
Jeremy J. Sylvester*
Assistant Attorney General
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Jeremy.Sylvester@ky.gov

Counsel for the Commonwealth of Kentucky

LYNN FITCH
Attorney General of Mississippi
/s/Whitney H. Lipscomb
Whitney H. Lipscomb*
Deputy Attorney General
John V. Coghlan*
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
550 High Street
Jackson, MS 39201
Tel: (601) 359-3680

Counsel for the State of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri
/s/ D. John Sauer
D. John Sauer*
Solicitor General
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-8870
Fax: (573) 751-0774
John.Sauer@ago.mo.gov

Counsel for the State of Missouri

385.271.2484
melissaholyoak@agutah.gov

Counsel for the State of Utah

BRIDGET HILL
Wyoming Attorney General
/s/ Ryan Schelhaas
Ryan Schelhaas*
Chief Deputy Attorney General
Wyoming Attorney General's Office
Attorneys for the State of Wyoming
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5786
ryan.schelhaas@wyo.gov

Counsel for the State of Wyoming

PATRICK MORRISEY
West Virginia Attorney General
/s/ Lindsay S. See
Lindsay S. See*
Solicitor General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
Lindsay.s.see@wvago.gov

Counsel for the State of West Virginia

**Pro Hac Vice admission application forthcoming*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA,
By and through its Attorney General, JEFF LANDRY;

THE STATE OF MONTANA,
By and through its Attorney General, AUSTIN KNUDSEN;

THE STATE OF ARIZONA, By and through its Attorney General, MARK BRNOVICH;

THE STATE OF ALABAMA, By and through its Attorney General, STEVE MARSHALL;

THE STATE OF GEORGIA, By and through its Attorney General, CHRISTOPHER CARR;

THE STATE OF IDAHO, By and through its Attorney General, LAWRENCE G. WASDEN;

THE STATE OF INDIANA, By and through its Attorney General, THEODORE M. ROKITA;

THE STATE OF MISSISSIPPI, By and through its Attorney General, LYNN FITCH;

THE STATE OF OKLAHOMA, By and through its Attorney General, JOHN M. O'CONNOR;

THE STATE OF SOUTH CAROLINA, By and through its Attorney General, ALAN WILSON;

THE STATE OF UTAH, By and through its Attorney General, SEAN D. REYES;

THE STATE OF WEST VIRGINIA, By and through its Attorney General, PATRICK MORRISEY;

CIVIL ACTION NO. _____

PLAINTIFFS,

v.

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

THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES;

CHIQUITA BROOKS-LASURE, in her official capacity of Administrator of the Centers for Medicare & Medicaid Services;

CENTERS FOR MEDICARE & MEDICAID SERVICES;

DEFENDANTS.

COMPLAINT

The States of Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, and West Virginia bring this civil action against the above-listed Defendants for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. The Biden Administration is playing statutory shell games with the courts, straining to justify an unjustifiable and unprecedented attempt to federalize public health policy and diminish the sovereign States' constitutional powers. The Administration has announced three COVID-19 vaccine mandates to—as the President himself has confirmed—increase societal vaccination rates. There's just one problem: no statute authorizes the federal Executive to mandate vaccines to increase societal immunity. The Administration's solution? Use statutory schemes never before interpreted to allow federal vaccine mandates to shoehorn the President's goals into the fabric of American society. In one instance, the Administration grabbed an obscure workplace safety statute to impose a vaccine mandate on 100 million Americans. That mandate suffers from so many patent constitutional and statutory

problems that the Fifth Circuit stayed it a day after it issued and reaffirmed its stay within a week. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845 (Nov. 12, 2021). Second, the Administration tried to use the federal procurement system to impose a vaccine mandate on another fifth of the American workforce. That mandate, too, is already subject to multiple challenges. The third mandate is the one at issue here: the Administration has coopted the Medicare and Medicaid system to impose a vaccine on 17 million healthcare workers.

2. But the Social Security Act focuses on *patient* welfare and *patient* access to care. By forcing a significant number of healthcare workers to take the shot(s) or exit the Medicare and Medicaid workforce, CMS's Vaccine Mandate harms access to (and thus quality of) patient care. This "one-size-fits-all sledgehammer" expressly undermines the Social Security Act's singular focus on providing access to care. *BST Holdings,* No. 21-60845, slip op. at 6 (5th Cir. Nov. 12, 2021). By forcing employees to choose "between their job(s) and their jab(s)," *id.* at 19, the Mandate completely ignores the unprecedented labor shortage prevailing in the healthcare sector and patient wellbeing in favor of the President's ambition to increase societal vaccination rates.

3. Aside from being fundamentally at odds with the Social Security Act, the Vaccine Mandate suffers from a host of fatal flaws. It exceeds CMS's statutory authority; violates the Social Security Act's prohibition on regulations that control the selection and tenure of healthcare workers; is arbitrary and capricious; and violates the Spending Clause, the Anti-Commandeering doctrine, and the Tenth Amendment. Furthermore, CMS flouted the basic procedural requirements that Congress imposed on it, including the Administrative Procedure Act's notice-and-comment requirement, the Congressional Review Act's publication-and-review requirements, and the Social Security Act's consultation and regulatory-impact-analysis requirements. The Vaccine Mandate causes grave danger to the vulnerable persons whom Medicare and Medicaid were designed to protect—the poor, children, sick, and the elderly—by forcing the termination of millions of essential "healthcare heroes."

PARTIES

4. Plaintiff State of Louisiana is a sovereign State of the United States of America. Plaintiff Jeff Landry is the Attorney General of the State of Louisiana. He is authorized by Louisiana law to sue on the State's behalf. His offices are located at 1885 North Third Street, Baton Rouge, Louisiana 70802, and the Northeast Louisiana State Office Building, 24 Accent Drive, Suite 117, Monroe, Louisiana, 71202.

5. Plaintiff State of Montana is a sovereign State of the United States of America. Plaintiff Austin Knudsen is the Attorney General of the State of Montana. He is authorized by Montana law to sue on the State's behalf. His offices are located at 215 North Sanders Street, Helena, Montana 59601.

6. Plaintiff State of Arizona is a sovereign State of the United States of America. Plaintiff Mark Brnovich is the Attorney General of the State of Arizona. He is authorized by Arizona law to sue on the State's behalf. His offices are located at 2005 North Central Avenue, Phoenix, Arizona 85004.

7. Plaintiff State of Alabama is a sovereign State of the United States of America. Plaintiff Steve Marshall is the Attorney General of the State of Alabama. He is authorized by Alabama law to sue on the State's behalf. His offices are located at 501 Washington Avenue Montgomery, AL 36104.

8. Plaintiff State of Georgia is a sovereign State of the United States of America. Plaintiff Christopher Carr is the Attorney General of the State of Georgia. He is authorized by Georgia law to sue on the State's behalf. His offices are located at 40 Capitol Square, SW, Atlanta, GA 30334.

9. Plaintiff State of Idaho is a sovereign State of the United States of America. Plaintiff Lawrence G. Wasden is the Attorney General of the State of Idaho. He is authorized by Idaho law to sue on the State's behalf. His offices are located at 700 W. Jefferson Street, Boise, Idaho 83720.

10. Plaintiff State of Indiana is a sovereign State of the United States of America. Plaintiff Theodore M. Rokita is the Attorney General of the State of Indiana. He is authorized by Indiana law to sue on the State's behalf. His offices are located at 302 West Washington Street, 5th Floor, Indianapolis, IN 46204.

11. Plaintiff State of Mississippi is a sovereign State of the United States of America. Plaintiff Lynn Fitch is the Attorney General of the State of Mississippi. She is authorized by Mississippi law to sue on the State's behalf. Her offices are located at 550 High Street, Jackson, Mississippi 39201.

12. Plaintiff State of Oklahoma is a sovereign State of the United States of America. Plaintiff John M. O'Connor is the Attorney General of the State of Oklahoma. He is authorized by Oklahoma law to sue on the State's behalf. His offices are located at 313 NE 21st Street, Oklahoma City, OK 73105.

13. Plaintiff State of South Carolina is a sovereign State of the United States of America. Plaintiff Alan Wilson is the Attorney General of the State of South Carolina. He is authorized by South Carolina law to sue on the State's behalf. His offices can be reached at P.O. Box 11549, Columbia, South Carolina 29211.

14. Plaintiff State of Utah is a sovereign State of the United States of America. Plaintiff Sean D. Reyes is the Attorney General of the State of Utah. He is authorized by Utah law to sue on the State's behalf. His offices are located at 350 North State Street, Suite 230, Salt Lake City, Utah 84114.

15. Plaintiff West Virginia is a sovereign State of the United States of America. Plaintiff Morrisey is the Attorney General of the State of West Virginia. He is authorized by West Virginia law to sue on the State's behalf. His offices are located at the State Capitol Complex, Bldg. 1, Room E-26 Charleston, WV 25305.

16. Defendants are officials of the United States government and United States governmental agencies responsible for promulgating or implementing the Vaccine Mandate.

17. Defendant Xavier Becerra is the Secretary of Health and Human Services. He oversees, among other things, CMS and the Medicare program. He is sued in his official capacity.

18. Defendant United States Department of Health and Human Services is an executive department of the United States Government headquartered in Washington, D.C., and responsible for CMS and the Medicare program.

19. Defendant Chiquita Brooks-LaSure is the CMS Administrator. She administers the Medicare program on behalf of the Secretary. She is sued in her official capacity.

20. Defendant Center for Medicare & Medicaid Services is an administrative agency within HHS that is headquartered in Baltimore County, MD, and administers the Medicare program and the federal role in the Medicaid program administered by State Medicaid agencies.

JURISDICTION AND VENUE

21. This Court has subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§1331, 1346, 1361; 5 U.S.C. §§701-06. An actual controversy exists between the parties within the meaning of 28 U.S.C. §§2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief under 28 U.S.C. §§2201-02, 5 U.S.C. §§705-06, and its inherent equitable powers.

22. Defendants' publication of the Rule in the Federal Register on November 5, 2021 constitutes a final agency action that is judicially reviewable under the APA. 5 U.S.C. §§704, 706.

23. Venue is proper in this Court under 28 U.S.C. §1391(e)(1) because (1) Defendants are United States agencies or officers sued in their official capacities, (2) the State of Louisiana is a resident of this judicial district, (3) no real property is involved, and (4) a substantial part of the events or omissions giving rise to the Complaint occur within this judicial district. *See Atlanta & F.R. Co. v. W.*

Ry. Co. of Ala., 50 F. 790, 791 (5th Cir. 1982); *Ass'n of Cmty. Cancer Centers v. Azar*, 509 F. Supp. 3d 482 (D. Md. 2020).

BACKGROUND

I. The Medicare and Medicaid Framework Established by Congress.

24. Since 1965, the federal government and the States have worked together to provide medical assistance to certain vulnerable populations under Titles XVIII and XIX of the Social Security Act, commonly known as Medicare and Medicaid. *See* 42 U.S.C. §§1395 et seq.; 1396 et seq.; *see also Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985) (noting that Congress designed Medicaid to "subsidize[ ]" States in "funding ... medical services for the needy").

25. Medicaid is a cooperative state-federal program, implemented by the States, that helps States finance the medical expenses of their poor and disabled citizens.

26. The Social Security Act charges the Secretary of Health and Human Services with a wide range of administrative responsibilities relating to maintaining the programs under his purview, including Medicare and Medicaid. *See* 42 U.S.C. §301 et seq.

27. It also delegates to the Secretary certain limited rulemaking authority, including—as most relevant here—the authority 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 [he] is charged under this chapter." 42 U.S.C. §1302(a).

28. The Centers for Medicare & Medicaid Services, a federal agency within the Department of Health and Human Services, has primary responsibility for overseeing the Medicare and Medicaid programs.

II. The Biden Administration's Vaccine Policy.

29. As President-Elect, Mr. Biden promised he "d[i]dn't think [vaccines] should be mandatory" and "wouldn't demand it be mandatory." Jacob Jarvis, *Fact Check: Did Joe Biden Reject Idea of*

Mandatory Vaccines in December 2020, Newsweek (Sept. 10, 2021), https://bit.ly/3ndyTn5. Toeing that line, as recently as this summer the Biden Administration disclaimed authority to require Americans to get a COVID-19 vaccine. *See, e.g.*, Press Briefing by Press Secretary Jen Psaki, July 23, 2021, https://bit.ly/3pWnJVr (mandating vaccines "not the role of the federal government"). But as time passed, the President admitted that his "patience" began "wearing thin" with those "who haven't gotten vaccinated." White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://bit.ly/3Ey4Zj6.

30. So in early September 2021, the Administration abandoned persuasion for brute force. It announced an unprecedented series of *federal* mandates aimed at compelling most of the adult population of the United States to get a COVID-19 vaccine. The White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://bit.ly/3oI0pKr. His program sought to "increase vaccinations among the unvaccinated with new vaccination requirements." *Id.*; *see also* The White House, Path Out of the Pandemic: President Biden's Covid-19 Action Plan, https://bit.ly/3adkMXx; The White House, Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy (Oct. 7, 2021), https://bit.ly/3lorbp0.

31. In part, those vaccine requirements include the actions challenged here. President Biden announced he would impose—though unilateral executive action—a vaccine mandate on "a total of 17 million healthcare workers." Biden Sept. 9, 2021 Remarks, *supra*. As he explained, he'd already announced his intent to "requir[e] vaccinations that [sic] all nursing home workers who treat patients on Medicare and Medicaid," contending he "ha[s] that federal authority." *Id.* Now, invoking "that same" purported "authority," he "expand[ed] that" edict "to cover those who work in hospitals, home healthcare facilities, or other medical facilities." *Id.*

32. President Biden also expressed disrespect for state governments: "Let me be blunt. My plan also takes on elected officials and states that are undermining . . . these lifesaving actions." *Id.* Speaking of "governor[s]" who oppose the new federal mandates, he promised that "if these governors won't help us beat the pandemic, I'll use my power as President to get them out of the way." *Id.*

III. The Vaccine Mandate.

33. On November 5, 2021, CMS published an interim final rule requiring vaccination of staff of certain Medicare and Medicaid providers and suppliers. Medicare and Medicaid Programs; Omnibus COVID-19 Heath Care Staff Vaccinations, 86 Fed. Reg. 61555 (Nov. 5, 2021).

34. The rule governs 21 types of Medicare- and Medicaid-certified providers and suppliers that are subject to Medicare or Medicaid conditions of participation, conditions for coverage, or requirements for participation. *See id.* at 61556.

35. Specifically, the rule governs the following types of facilities: Ambulatory Surgical Centers; Hospices; Psychiatric residential treatment facilities; Programs of All-Inclusive Care for the Elderly; Hospitals; Long-Term Care Facilities, including Skilled Nursing Facilities and Nursing Facilities; Intermediate Care Facilities for Individuals with Intellectual Disabilities; Home Health Agencies; Comprehensive Outpatient Rehabilitation Facilities; Critical Access Hospitals; Clinics; rehabilitation agencies; public health agencies as providers of outpatient physical therapy and speech-language pathology services; Community Mental Health Centers; Home Infusion Therapy suppliers; Rural Health Clinics; Federally Qualified Health Centers; and End-Stage Renal Disease Facilities. *See id.*

36. The rule applies the same substantive standards to each of the 21 types of governed entities. *See id.* at 61570, 61616-61627. As CMS put it, "we are issuing a common set of provisions for each applicable provider and supplier." *Id.* at 61570. There are "no substantive regulatory differences across settings." *Id.*

37. The regulations themselves require that every entity "develop and implement policies and procedures to ensure that all staff are fully vaccinated for COVID–19." *See, e.g.*, 42 C.F.R. §416.51(c).

38. The policy must apply to every person "who provide[s] any care, treatment, or other services for the [entity] and/or its patients"—including employees, contractors, trainees, students, and volunteers—regardless of whether they have any patient-care responsibilities or even any contact with patients. *Id.* §416.51(c)(1).

39. To be exempt, a healthcare worker must "exclusively provide" telehealth or support services "outside of the [entity's] setting" and "not have any direct contact with patients and other staff." *Id.* §416.51(c)(2).

40. The entity must ensure that, by December 6, 2021, all such healthcare workers submit to at least one vaccine dose before they can provide "any care, treatment, or other services for the [entity] and/or its patients." *Id.* §416.51(c)(3)(i); 86 Fed. Reg. at 61555.

41. The entity must then ensure that, by January 4, 2022, all such healthcare workers "are fully vaccinated." 42 C.F.R. §416.51(c)(3)(ii); 86 Fed. Reg. at 61555.

42. The entity may provide an exemption for those granted temporary delays based on the CDC's recommendations or for those who are eligible for exemptions under certain federal statutes. 42 C.F.R. §416.51(c)(3). But the entity must "track[] and securely document[] information provided by those staff who have requested, and for whom the [entity] has granted, an exemption" or a temporary delay. *Id.* §416.51(c)(3)(vi)-(vii). And it must ensure that all documentation "support[ing] staff requests for medical exemptions from vaccination, has been signed and dated by a licensed practitioner" with specific information about which vaccines are clinically contraindicated and a statement of reasons for each. *Id.* §416.51(c)(3)(viii).

43. The entity must implement a "process for tracking and securely documenting the COVID–19 vaccination status of all staff," including booster-shot status. *Id.* §416.51(c)(3)(iv)-(v).

44. Finally, the entity must implement "[c]ontingency plans" for all persons who are "not fully vaccinated." *Id.* §416.51(c)(3)(x).

45. The only way for an entity to avoid those regulations is to forfeit its federal funding. Medicaid providers receive this funding for services via a provider contract with States. Likewise, an entity that fails to comply fully with the regulations may face penalties up to and including "termination of the Medicare/Medicaid provider agreement." 86 Fed. Reg. at 61574. The termination of those provider agreements is a death knell for healthcare providers and for access to care for millions of people.

46. This is the first—and only—mandatory vaccination program in the history of the Medicare or Medicaid programs. *See id.* at 61567 ("We have not previously required any vaccinations"); *id.* at 61568 ("We acknowledge that we have not previously imposed such requirements").

IV. CMS's Claimed Statutory Authority.

47. CMS purports to derive the authority for this unprecedented edict primarily from two statutes that grant it rulemaking authority. *See id.* at 61567. In truth, the authority those statutes provide stops well short of what would be required to authorize this sweeping mandate.

48. The first relied-upon statute delegates to the Secretary of HHS the authority 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 [he] is charged under this chapter." 42 U.S.C. §1302(a).

49. The second delegates to the Secretary the authority to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs under" the Medicare program. 42 U.S.C. §1395hh(a)(1).

50. Nothing in either statute establishes that the Secretary may mandate vaccines. Nor do the statutes to which they refer—governing the "efficient administration of the [Secretary's] functions" under the Act and "the administration of the insurance programs" under the Medicare program—supply a basis for mandating vaccines.

51. CMS also invokes a number of additional statutes as purported authority for applying the Vaccine Mandate to certain types of entities. 86 Fed. Reg. at 61567. For the sake of comprehensiveness—and with apologies to the reader—Plaintiff States catalogue those claimed authorities here.

52. First, for Psychiatric Residential Treatment Facilities, CMS invokes 42 U.S.C. §1396d(h)(1)(B)(i), which defines the term "inpatient psychiatric hospital services for individuals under age 21" to "include[] only . . . inpatient services which . . . involve active treatment which meets such standards as may be prescribed in regulations by the Secretary." This statute implies that the Secretary may create regulations setting "standards" for the "active" inpatient psychiatric "treatment" of individuals under age 21. But a mandatory vaccine requirement for the *staff* at those facilities is not a "standard" for "active treatment" of the facilities' patients.

53. Second, CMS invokes 42 U.S.C. §1396d(d)(1) as authority for including Intermediate Care Facilities for Individuals with Intellectual Disabilities in the vaccine mandate. That statute defines those facilities to mean an institution whose "primary purpose . . . is to provide health or rehabilitative services for [intellectually disabled] individuals" if "the institution meets such standards as may be prescribed by the Secretary." This implies that the Secretary may create standards for the kinds of "health or rehabilitative services" the facility provides. But a mandatory vaccine requirement for the *staff* at those facilities is not a "health or rehabilitative service[]" for intellectually disabled individuals.

54. Third, CMS claims power under 42 U.S.C. §1395i–4(e) to subject Critical Access Hospitals to the vaccine mandate. That statute says that "[t]he Secretary shall certify a facility as a critical access hospital if the facility—(1) is located in a State that has established a Medicare rural hospital

flexibility program . . . ; (2) is designated as a critical access hospital by the State in which it is located; and (3) meets such other criteria as the Secretary may require." This statute implies that the Secretary may create "other criteria" similar to the two expressly listed requirements. But it does not establish that the Secretary may impose mandatory vaccines on the staff at such hospitals.

55. Fourth, End-Stage Renal Disease facilities. According to CMS, 42 U.S.C. §1395rr(b)(1)(A) subjects them to the Vaccine Mandate. That statute authorizes payments for end-stage renal disease services to "providers of services and renal dialysis facilities which meet such requirements as the Secretary shall by regulation prescribe for institutional dialysis services and supplies …. transplantation services, self-care home dialysis support services which are furnished by the provider or facility, and routine professional services performed by a physician during a maintenance dialysis episode." The Secretary may create "requirements" for "institutional dialysis services," "transplantation services," and the like. But a mandatory vaccine requirement for the *staff* at those facilities is not a requirement "for" institutional dialysis services or supplies, transplantation services, or other services listed in the statute.

56. Fifth, as for Ambulatory Surgical Centers, CMS relies principally on 42 U.S.C. §1395k(a)(2)(F)(i), which provides that Medicare benefits shall include payments for "services furnished in connection with surgical procedures specified by the Secretary … performed in an ambulatory surgical center (which meets health, safety, and other standards specified by the Secretary in regulations)." Though this statute implies that the Secretary may create regulations setting "health, safety, and other standards," it does not establish that the Secretary's regulatory power is so broad that he may mandate vaccines for employees of the ASCs.

57. Sixth, CMS invokes two statutes to justify subjecting Programs of All-Inclusive Care for the Elderly facilities in the vaccine mandate. The first—42 U.S.C. §1395eee(f) (Medicare)—provides that "[t]he Secretary shall issue interim final or final regulations to carry out this section," and

that "[n]othing in this subsection shall be construed as preventing the Secretary from including in regulations provisions to ensure the health and safety of individuals enrolled in a PACE program." The second—42 U.S.C. §1396u–4(f) (Medicaid)—is materially indistinguishable in its relevant language. Though these statutes authorize the Secretary to adopt some health- and safety-related regulations, they do not establish that the Secretary's regulatory power is so broad that he may mandate vaccines for employees.

58. As for Rural Health Clinics, CMS relies principally on 42 U.S.C. §1395x(aa)(2)(K), which defines the term "rural health clinic" to "mean[] a facility which," among certain qualifying factors, "meets such other requirements as the Secretary may find necessary in the interest of the health and safety of the individuals who are furnished services by the clinic." The expressly listed qualifying factors include the types of services provided, staff qualifications, medication requirements, and administrative matters. They do not include *staff* vaccination. This statute thus does not give the Secretary the power to mandate vaccines.

59. For Home Infusion Therapy Suppliers, CMS turns to 42 U.S.C. §1395x(iii)(3)(D)(i)(IV), which defines the term "qualified home infusion therapy supplier" to "mean[] a pharmacy, physician, or other provider of services or supplier" that, among certain qualifying factors, "meets such other requirements as the Secretary determines appropriate, taking into account the standards of care for home infusion therapy established by Medicare Advantage plans under part C and in the private sector." The expressly listed qualifying factors include the types of services provided and staff qualifications. They do not include vaccination. This statute thus does not give the Secretary the power to mandate vaccines.

60. According to CMS, 42 U.S.C. §1395x(p)(4)(A)(v) makes facilities that provide outpatient physical therapy and speech-language pathology services subject to the vaccine mandate. That statute defines "outpatient physical therapy services" to exclude services "furnished by a clinic or

rehabilitation agency" that does not, among certain qualifying factors, "meet[] such other conditions relating to the health and safety of individuals who are furnished services by such clinic or agency on an outpatient basis, as the Secretary may find necessary." The expressly listed qualifying factors include the types of services provided, staff qualifications, and administrative matters. They do not include vaccination. This statute thus does not give the Secretary the power to mandate vaccines.

61. Community Mental Health Centers, in turn, are purportedly subject to the vaccine mandate under 42 U.S.C. §1395x(ff)(3)(B). That statute defines a "community mental health center" to "mean[] an entity that," among certain qualifying factors, "meets such additional conditions as the Secretary shall specify to ensure . . . the health and safety of individuals being furnished such services." The expressly listed qualifying factors include the types of services provided, staff qualifications, and administrative matters. They do not include vaccination. This statute thus does not give the Secretary the power to mandate vaccines.

62. Eleventh, CMS claims authority under 42 U.S.C. §1395x(e)(9) to include hospitals in the vaccine mandate. That statute defines the term "hospital" to "mean[] an institution which," among certain qualifying factors, "meets such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." The expressly listed qualifying factors include the types of services provided, staff qualifications, and administrative matters. They do not include vaccination. This statute thus does not give the Secretary the power to mandate vaccines.

63. CMS includes hospices in the vaccine mandate based on 42 U.S.C. §1395x(dd)(2)(G). That statute says that "[t]he term 'hospice program' means a public agency or private organization (or a subdivision thereof) which," among certain qualifying factors, "meets such other requirements as the Secretary may find necessary in the interest of the health and safety of the individuals who are provided care and services by such agency or organization." The expressly listed qualifying factors

include the types of services provided, staff qualifications, and administrative matters. They do not include vaccination. This statute thus does not give the Secretary the power to mandate vaccines.

64. As for Comprehensive Outpatient Rehabilitation Facilities, CMS invokes 42 U.S.C. §1395x(cc)(2)(J), which provides that "[t]he term 'comprehensive outpatient rehabilitation facility' means a facility which," among certain qualifying factors, "meets such other conditions of participation as the Secretary may find necessary in the interest of the health and safety of individuals who are furnished services by such facility, including conditions concerning qualifications of personnel in these facilities." The expressly listed qualifying factors include the types of services provided, staff qualifications, and administrative matters. They do not include vaccination. This statute thus does not give the Secretary the power to mandate vaccines.

65. CMS next invokes two additional statutes as authority for including long-term-care facilities in the vaccine mandate. The first—42 U.S.C. §1395i–3(d)(4)(B) (Medicare)—states that "[a] skilled nursing facility must meet such other requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary." The second—42 U.S.C. §1396r(d)(4)(B) (Medicaid)—likewise provides that "[a] nursing facility must meet such other requirements relating to the health and safety of residents or relating to the physical facilities thereof as the Secretary may find necessary." The expressly listed qualifying factors include the types of services provided, staff qualifications, licensing requirements, sanitation issues, and administrative matters. They do not include vaccination. These statutes thus do not give the Secretary the power to mandate vaccines.

66. Finally, Home Health Agencies. Here CMS invokes a few additional statutes. The first—42 U.S.C. §1395x(o)(6)—defines a "home health agency" to "mean[] a public agency or private organization, or a subdivision of such an agency or organization, which," among certain qualifying factors that do not include vaccination requirements, "meets the conditions of participation specified

in [42 U.S.C. §1395bbb(a)] and such other conditions of participation as the Secretary may find necessary in the interest of the health and safety of individuals who are furnished services by such agency or organization." The second—42 U.S.C. §1395bbb—outlines various "conditions of participation that a home health agency is required to meet," none of which include vaccination requirements. See 42 U.S.C. §1395bbb(a). That statute also says that "[i]t is the duty and responsibility of the Secretary to assure that the conditions of participation and requirements specified in or pursuant to [42 U.S.C. §1395x(o)] and subsection (a) of this section and the enforcement of such conditions and requirements are adequate to protect the health and safety of individuals under the care of a home health agency." 42 U.S.C. §1395bbb(b). While these statutes give the Secretary authority to protect the health and safety of people served by HHAs, they do not give the Secretary the power to mandate vaccines for employees of home health agencies.

V. The Targeted Healthcare Workers.

67. According to CMS, the Vaccine Mandate regulates over 10 million healthcare workers and suppliers in the United States. *Id.* at 61603. Of those, CMS estimates roughly 2.4 million are currently unvaccinated. *Id.* at 61607. Those healthcare workers are the Vaccine Mandate's targets.

68. CMS's objective is to coerce the unvaccinated workforce into submission or cause them to lose their livelihoods. *See id.* at 61607 ("The most important inducement will be the fear of job loss, coupled with the examples set by fellow vaccine-hesitant workers who are accepting vaccination more or less simultaneously"); *id.* at 61608 ("it is possible there may be disruptions in cases where substantial numbers of health care staff refuse vaccination and are not granted exemptions and are terminated, with consequences for employers, employees, and patients").

69. Though medical and religious exemptions may be granted in narrow circumstances, the goal of the program is to vaccinate "nearly all health care workers." *Id.* at 61569. This can be done

only by changing millions of minds or losing millions of healthcare workers. After all, healthcare workers can begin working for providers not subject to it, or for entities potentially subject to the now-stayed OSHA Emergency Technical Standard, which at least provides a masking-and-testing alternative. Those alternatives all but ensure that healthcare workers unwilling to receive a vaccine will leave the covered systems subject to it, decimating those covered facilities' ability to provide critical healthcare services and possibly forcing their exit from the Medicaid and Medicare programs or forcing their closure altogether.

VI. The Implications for Vulnerable Americans Seeking Care.

70. Because workers in the healthcare industry have already faced prolonged pressure to undergo vaccination and many others have not submitted to employer-imposed mandates, it stands to reason that many of the 2.4 million unvaccinated healthcare workers will not submit to federally coerced vaccination. If the Vaccine Mandate is not enjoined, these healthcare workers will lose their jobs; States will lose providers, suppliers, and services; and ultimately America's most vulnerable populations will lose access to necessary medical care.

71. CMS acknowledges that there are currently "endemic staff shortages for all categories of employees at almost all kinds of health care providers and suppliers." *Id.* at 61607. And of course, it acknowledges that "these may be made worse" when unvaccinated workers leave as a result of the rule. *Id.*

72. A few statistics illustrate the extent of the problem. Already 39% of nursing homes in Montana face staff shortages. *See AARP Nursing Home COVID-19 Dashboard*, AARP Public Policy Institute (Nov. 10, 2021), https://www.aarp.org/ppi/issues/caregiving/info-2020/nursing-home-covid-dashboard.html. That number exceeds 45% in Georgia, Idaho, and Utah, and ranges from 11% to 43% in the remaining Plaintiff States. Indeed, a recent study by the AARP shows that nearly one-third of the nation's 15,000 nursing homes recently reported a shortage of nurses or aides. *See* Emily

Paulin, *Worker Shortages in Nursing Homes Hit Pandemic Peak as Covid Deaths Continue*, https://bit.ly/3Dr8wji. According to the AARP, the numbers represent the worst staffing shortages since the government began collecting data from nursing homes in May 2020. Low staffing levels in nursing homes, particularly among registered nurses, are associated with worse outcome for residents, including more COVID-19 cases, deaths, and a higher likelihood of an outbreak. *Id.*

73. Meanwhile, somewhere between 22% and 42% of healthcare workers in those states are not fully vaccinated, despite having faced considerable pressure to get vaccinated. *Id.*

74. CMS admits that it does not know how many unvaccinated workers will submit. *Id.* at 61607, 61612.

75. It brushes aside the specter of chronic healthcare shortages with bureaucratic jargon:

> While it is true that compliance with this rule may create some short-term disruption of current staffing levels for some providers or suppliers in some places, there is no reason to think that this will be a net minus even in the short term, given the magnitude of normal turnover and the relatively small fraction of that turnover that will be due to vaccination mandates.

Id. at 61609. But CMS's self-assurance is not based on evidence or reality. It cites no evidence that—in the current climate of long-running, wide-ranging, and persistent healthcare staffing shortages—new recruitment will magically replenish staffing shortages caused by those who will leave their jobs rather than submit to federally coerced vaccination. CMS's "small fraction" appears supported by little more than wishful thinking. The Agency's glass-half-full (and fact-free) optimism offers only cold comfort to those healthcare heroes who have worked tirelessly from the outset of the pandemic and who now face joblessness as the cost for pushing back against federal overreach—and to the patients who will no longer receive healthcare because of it.

VII. Devastation to the Plaintiff States.

76. The Plaintiff States have all entered into agreements with the federal government to participate in Medicaid.

77. Medicare is a medical-funding program paid for and administered by the federal government.

78. The Plaintiff States and the facilities within them rely heavily on funds provided through the Medicaid and Medicare programs.

79. The Plaintiff States also operate state-run healthcare facilities that receive Medicare and Medicaid funding. They are thus required to impose the mandate on their own state employees.

80. Many of those facilities are small rural hospitals.

81. In state fiscal year 2021, Louisiana's $43 billion budget was composed of $16 billion in funding related to the State Medicaid program, with $1.8 billion coming from the State's general fund. Louisiana added 300,000 more people to its Medicaid rolls since March 2020 when the COVID-19 outbreak began. As of May 2021, about 1.9 million of 4.5 million residents in Louisiana were enrolled in Medicaid, amounting to about 40% of the States' population. Thousands of facilities participate, including every hospital provider in the State. Louisiana, in part, implements its Medicaid program through Managed Care Contractors.

82. In state fiscal year 2021, Montana received $1.78 billion in Medicaid federal revenues. Of its total state budget, federal Medicaid revenues alone account for 25%.

83. Likewise, in state fiscal year 2022, West Virginia received $3.9 billion in Medicaid funding. Federal Medicaid dollars are expected to account for almost 18% of West Virginia's total projected revenue for fiscal year 2022. Roughly a third of West Virginians are on Medicaid.

84. Plaintiff State South Carolina retains 51.5 staff positions performing duties related to surveying and certification for 6,385 Medicare facilities. South Carolina's state survey agency for Medicaid, the Department of Health and Environmental Control, follows the procedures set forth in the CMS State Operations Manual for certifying and surveying facilities and investigating complaints.

85. Montana operates six state-run healthcare facilities that receive both Medicare and Medicaid funding and are subject to the Vaccine Mandate. These include the Montana State Hospital, the Montana Mental Health Nursing Care Center, the Montana Chemical Dependency Center, the Montana Veteran's Home, the Eastern Montana Veteran's Home, and the Southwestern Montana Veteran's Home.

86. Similarly, West Virginia operates seven state-run healthcare facilities that receive Medicare and Medicaid funding, including Hopemont Hospital, Jackie Withrow Hospital, John Manchin Sr. Health Care Center, Lakin Hospital, Mildred Mitchell-Bateman Hospital, Welch Community Hospital, and William R. Sharpe Jr. Hospital. Many of these facilities serve rural communities that otherwise lack access to necessary medical care.

87. The Plaintiff States employ state surveyors who regularly evaluate healthcare facilities' compliance with Medicare and Medicaid requirements. When the state surveyors conduct inspections, they assess compliance with both federal and state regulations at the same time.

88. Unless state surveyors confirm a healthcare facilities' compliance with Medicare and Medicaid requirements, those facilities are not entitled to obtain Medicare or Medicaid reimbursements.

89. When state surveyors find that a healthcare facility is not in compliance with federal Medicare or Medicaid regulations, they send the facility a violation report—known as a 2567 Form—informing it of the deficiencies.

90. The Vaccine Mandate seeks to commandeer the state-employee surveyors and certification staff to become enforcers of CMS's unlawful attempt to federalize national vaccine policy and override the States' police power on matters of health and safety.

91. By requiring state-run healthcare facilities and state surveyors to enforce the Vaccine Mandate, the Plaintiff States will face increased enforcement costs.

92. By requiring state-run healthcare facilities and state surveyors to enforce the Vaccine Mandate, that mandate directly infringes the Plaintiff States' sovereign authority.

93. The Plaintiff States are injured because the Vaccine Mandate purports to preempt their state and local laws on matters of vaccines and the rights of their citizens. This violates the Plaintiff States' sovereign right to enact and enforce their laws. It also violates the Plaintiff States' sovereign right to exercise their police power on matters such as compulsory vaccination.

94. For example, the Vaccine Mandate purports to preempt Montana's H.B. 702, which prohibits discrimination based on vaccination status; Indiana's H.B. 1405, which prohibits government entities from requiring anyone—including employees—to show proof of vaccination; Utah's H.B. 308, which prohibits state agencies from conditioning employment on vaccination; and West Virginia's H.B. 335, which provides for broader medical and religious exemptions to vaccination requirements. It similarly purports to preempt Alabama law, which prohibits any state government entity from soliciting its employees' vaccination status, *see* Ala. Act. 2021-493 §1(a), and Louisiana law, which permits students at all levels to opt-out of vaccine requirements, *see* La. R.S. 17:180(E), without being barred from admission (or exclusion after admission).

95. The Plaintiff States will suffer other pocketbook injuries. The Vaccine Mandate requires covered healthcare facilities to maintain documentation of their staff's vaccination status. 86 Fed. Reg. at 61572. That documentation can consist of records from the "State immunization information system." *Id.* A predictable consequence of the Vaccine Mandate is thus to increase the number of people seeking documentation from the Plaintiff States regarding vaccination status. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019).

96. The Plaintiff States have quasi-sovereign and *parens patriae* interests in protecting the rights of their citizens and vindicating them in court. The Plaintiff States thus may sue to challenge unlawful actions that "affect the [States'] public at large." *In re Debs*, 158 U.S. 561, 584 (1895). As a

result of the Vaccine Mandate, significant numbers of their citizens who are healthcare employees will be forced to submit to bodily invasion or lose their jobs and their livelihoods. All of their citizens will suffer as a result of the predictable and conceded exacerbation of labor shortages in hospitals and other healthcare facilities.

VIII. The Careless Enactment of the Vaccine Mandate.

97. CMS recognized that the Administrative Procedure Act, 5 U.S.C. §553, and the Social Security Act, 42 U.S.C. §1395hh(b)(1), ordinarily require notice and a comment period before a rule like this one takes effect. 86 Fed. Reg. at 61583.

98. But CMS "believe[d] it would be impracticable and contrary to the public interest . . . to undertake normal notice and comment procedures." *Id.* at 61586. For those reasons, it thus found "good cause to waive" those procedures. *Id.*

99. Trying to justify its good-cause finding, CMS stated that "[t]he data showing the vital importance of vaccination" indicates that it "cannot delay taking this action." *Id.* at 61583.

100. But CMS did not reconcile that finding with its acknowledgement that "the effectiveness of the vaccine[s] to prevent disease transmission by those vaccinated [is] not currently known." *Id.* at 61615.

101. CMS recognized that although summer brought a Delta-variant-driven COVID-19 surge, "newly reported COVID–19 cases, hospitalizations, and deaths have begun to trend downward at a national level." *Id.* at 61583. Yet CMS still sought to immediately impose the vaccine mandate because it claimed, without citing any support, that "there are emerging indications of potential increases in . . . northern states where the weather has begun to turn colder." *Id.* at 61584.

102. CMS also asserted that it must immediately implement the vaccine mandate because "the 2021–2022 influenza season" will soon begin. *Id.* at 61584. CMS offered this justification while simultaneously admitting that "the intensity of the upcoming 2021-2022 influenza season cannot be

predicted" and that "influenza activity during the 2020-2021 season was low throughout the U.S." *Id.* (Notably, the CMS did not mandate *flu* vaccines.)

103. In claiming that it must immediately implement the Vaccine Mandate, CMS ignored that it waited almost two months after President Biden's directive before it promulgated the IFC to the public—and waited much longer than that for the vaccine mandate for nursing homes.

104. CMS also recognized that the Vaccine Mandate is a "major rule" for purposes of the Congressional Review Act, and that the CRA Act requires all rules to be submitted to Congress to allow it an opportunity to pass a resolution disapproving the rule. A "major rule" must also receive a report from the Government Accountability Office and its effective date must be delayed. 5 U.S.C. §801.

105. Yet CMS did not even purport to comply with those procedural requirements. Nor did it demonstrate how the IFC satisfies the exacting standards required for an exception from them.

106. CMS also recognized that the Vaccine Mandate was subject to 42 U.S.C. §1395z, which requires that "the Secretary shall consult with appropriate State agencies and recognized national listing or accrediting bodies, and may consult with appropriate local agencies" when "carrying out his functions, relating to determination of conditions of participation by providers of services, under subsections (e)(9), (f)(4), (j)(15), (o)(6), (cc)(2)(I), and[] (dd)(2), and (mm)(1) of section 1395x of this title, or by ambulatory surgical centers under section 1395k(a)(2)(F)(i) of this title."

107. CMS conceded that it did not comply with §1395z's consultation requirement. Fed. Reg. at 61567.

108. CMS instead "intend[s] to engage in consultations with appropriate State agencies ... following the issuance of th[e] rule," 86 Fed. Reg. at 61567—action that on its face does not satisfy 42 U.S.C. §1395z.

109. CMS also failed to comply with 42 U.S.C. §1302(b)(1), which requires that "[w]henever the Secretary [of HHS] publishes a general notice of proposed rulemaking for any rule or regulation proposed under subchapter XVIII, subchapter XIX, or part B of [title IX of the Social Security Act] that may have a significant impact on the operations of a substantial number of small rural hospitals, the Secretary shall prepare and make available for public comment an initial regulatory impact analysis."

110. The Vaccine Mandate threatens to exacerbate already devastating shortages in healthcare staffing by forcing small rural hospitals to terminate their unvaccinated workers. healthcare workers at rural hospitals can quit working at rural hospitals subject to the Vaccine Mandate and begin working at places not subject to it, or at jobs potentially subject to the now-stayed OSHA Emergency Technical Standard, which at least provides a masking-and-testing alternative to mandatory vaccination. If unvaccinated workers quit or are fired, that will compel those hospitals to close certain divisions, cancel certain services, or shutter altogether. Those dire consequences stretch across rural America, and their collective force required CMS to prepare a regulatory impact analysis.

IX. Irreparable Harm to Individual Recipients and Providers.

111. If the Vaccine Mandate goes into effect, it will irreparably harm patients and providers by impeding access to care for the elderly and for persons who cannot afford it—a complete reversal of the core objectives of Medicare and Medicaid.

112. The direct relationship between the healthcare labor crisis and access to care is well known by CMS and all Medicaid providers. *See, e.g.*, Dep't for Professional Employees, *Safe Staffing: Critical for Patients and Nurses* (Apr. 2019), https://bit.ly/3Ddhdxw; Am. Hosp. Ass'n, *Fact Sheet: Strengthening the Health Care Workforce* (May 2021), https://bit.ly/3osJ4Ui; Charlene Harrington, et al., *Appropriate Nurse Staffing Levels for U.S. Nursing Homes*, Sage Journals (June 29, 2020), https://bit.ly/3C8tMsv.

113. In fact, CMS has developed criteria tying reimbursements to staffing. *See e.g.*, Centers for Medicare & Medicaid Services, *Design for* Care Compare *Nursing Home Five-Star Quality Rating System: Technical Users' Guide* at 1 (Oct. 2021), https://go.cms.gov/30nko7w.

114. CMS surely knows that the termination of millions of health care workers will have an immediate catastrophic impact on access to care for eligible Medicaid or Medicare recipients, more so in minority and already-underserved communities. Its failure to address this critical issue while log-rolling an interim rule is patently unlawful. CMS also openly acknowledges that the Vaccine Mandate targets "aides" who it believes account for more of the under-vaccinated, *see* 86 Fed. Reg. at 61560, but who are predominately women and minorities.

115. Beyond that, the Vaccine Mandate deprives patients and providers of their procedural right to notice and comment under the APA. The "depriv[ation] of the opportunity to offer comments" on a rule "may constitute irreparable injury while a rule promulgated in violation of [the APA] is in effect, provided that plaintiffs suffer some additional concrete harm as well." *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 865 (N.D. Cal. 2018), *aff'd as amended on denial of reh'g en banc*, 993 F.3d 640 (9th Cir. 2021). An affected party thus suffers irreparable harm where a rule improperly promulgated without notice and comment "will dramatically alter" a "complex and far-reaching regulatory regime" and the affected party has articulated "meaningful concerns." *Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17-18 (D.D.C. 2009).

CLAIMS FOR RELIEF

COUNT I

The Vaccine Mandate Is in Excess of CMS's Statutory Authority

116. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

117. 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).

118. The Vaccine Mandate is in excess of CMS's statutory authority because the Social Security Act does not clearly authorize CMS to impose a vaccine mandate.

119. CMS has never relied upon its Social Security Act authority to mandate healthcare worker vaccination. *See, e.g.*, 86 Fed. Reg. at 61567 ("We have not previously required any vaccinations"); *id.* at 61568 ("[W]e have not, until now, required any health care staff vaccinations"); *id.* ("We acknowledge that we have not previously imposed such requirements"). Although "there is a first time for everything ... sometimes 'the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent.'" *NFIB*, 567 U.S. at 549.

120. The Vaccine Mandate raises major issues of vast political, social, and economic importance.

121. The Vaccine Mandate imposes hundreds of millions of dollars in cost on industry and has other major economic effects.

122. The Vaccine Mandate imposes obligations on States that exceed the limits of the federal government's authority under the Spending Clause and Commerce Clause.

123. CMS's interpretation of the Social Security Act to authorize it to impose the Vaccine Mandate raises grave constitutional questions under the Nondelegation Doctrine about the breadth of the Social Security Act's delegation of authority. If Defendants are right that the Social Security Act grants authority to mandate vaccination, both "the degree of agency discretion" and "the scope of the power congressionally conferred" must be limitless. *Id.* at 475. Yet Congress lacks authority to delegate "unfettered power" over the American economy to an executive agency. *Tiger Lily, LLC v. HHS*, 5 F.4th 666, 672 (6th Cir. 2021); *see also State v. Becerra*, 2021 WL 2514138, at *20, *37. Accordingly,

Congress's "delegation ... of authority to decide major policy questions"—such as whether all healthcare workers must be vaccinated—would violate the nondelegation doctrine. *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Justice Kavanaugh respecting the denial of certiorari); *see also Tiger Lily*, 5 F.4th at 672 ("[T]o put 'extra icing on a cake already frosted,' the government's interpretation of § 264(a) could raise a nondelegation problem."); *State v. Becerra*, 2021 WL 2514138, at *37.

124. Accordingly, CMS's Vaccine Mandate triggers three separate clear statement rules. First, "[a]bsent a clear statement of intention from Congress, there is a presumption against a statutory construction that would significantly affect the federal-state balance." *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984); *see United States v. Bass*, 404 U.S. 336, 349 (1971). Second, the Executive cannot unilaterally "push the limit of congressional authority." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engr's*, 531 U.S. 159, 172-73 (2001). And third, Congress must clearly delegate power to the Executive to address issues of "deep economic and political significance." *King v. Burwell*, 576 U.S. 473, 486 (2015).

125. CMS cites no statutes clearly authorizing a vaccine mandate—nor any previous interpretation of those statutes during the past 55 years of the Medicare and Medicaid programs that would support this exercise of authority.

126. The Act's conferrals of general rulemaking authority do not contain a clear statement authorizing the Vaccine Mandate. The main authorities CMS relies upon, Section 1102 and Section 1871, are general authorizations to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration" of the Medicare program, 42 U.S.C. §1302(a), and to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs," *id.* §1395hh(a)(1). These grants of general rulemaking authority are not sufficient to authorize an action as major as the Vaccine Mandate.

127. If the Act's general rulemaking provisions were interpreted to authorize the Vaccine Mandate, their constitutionality would be doubtful under the Nondelegation Doctrine, the Tenth Amendment, and the Spending Clause. Accordingly, the Act's general grants should be construed to avoid those grave constitutional issues.

128. For the reasons discussed in paragraphs 47-66, the specific statutes that CMS cites also do not provide the clear authority needed to impose the Vaccine Mandate.

129. Because the Vaccine Mandate is a federal action involving issues of major economic, social, and political significance, and is not authorized by a clear statement in the Social Security Act, it is beyond CMS's statutory authority. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

COUNT II

The Vaccine Mandate Violates 42 U.S.C. §1395

130. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

131. 42 U.S.C. §1395 provides that nothing in Title 18 of the Social Security Act "shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person." That limit is hardly surprising "given the structure and limits of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (cleaned up); *see also id.* (noting that federal law "presume[s] and rel[ies] upon a functioning medical profession regulated under the States' police powers").

132. The Vaccine Mandate violates 42 U.S.C. §1395 by authorizing federal officials at CMS to exercise "supervision" and "control" over the "selection" and "tenure" of employees (including state employees) and other persons "providing health services." It does so by prohibiting covered healthcare facilities from hiring unvaccinated employees and forcing those facilities to terminate—and thus end the tenure of—unvaccinated employees.

133. The Vaccine Mandate also violates §1395 because it authorizes federal officials at CMS to exercise "supervision" and "control" over the "administration" and "operation" of institutions, agencies, and persons that provide health services (including state facilities and employees). It does so by dictating the hiring and firing policies of those institutions for unvaccinated workers.

COUNT III

The Vaccine Mandate Was Issued Without Notice and Comment in Violation of the APA & Social Security Act

134. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

135. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. §706(2)(D).

136. The APA requires agencies to publish notice of all "proposed rule making" in the Federal Register, *id.* §553(b), and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* §553(c). Likewise, the Social Security Act requires the HHS Secretary, before issuing the relevant types of regulations "in final form," to "provide for notice of the proposed regulation in the Federal Register and a period of not less than 60 days for public comment thereon." 42 U.S.C. §1395hh(b)(1).

137. Such requirements "are not mere formalities" but rather "are basic to our system of administrative law." *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018).

"Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984); *see also NRDC*, 894 F.3d at 115 (notice and comment serves "the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking"); *Spring Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (notice and comment "ensures fairness to affected parties[] and provides a well-developed record that enhances the quality of judicial review").

138. Congress has specifically emphasized the importance of a robust period of notice and comment for considering changes to the Medicare system. The Supreme Court has explained that "Medicare touches the lives of nearly all Americans … as the largest federal program after Social Security." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1808 (2019). Even "minor changes" to the way the program is administered "can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate." *Id.* at 1816. "Recognizing this reality," *id.* at 1808, Congress doubled the standard 30-day comment period under the APA for any establishment of or change to a "substantive legal standard" affecting the payment for services under Medicare. 42 U.S.C. §1395hh(a)(2), (b)(1); *see also id.* §1395hh(e)(1)(B)(i) (providing for a 30-day delay in effective date).

139. The CMS Vaccination Mandate was issued as an interim final rule—without either notice or comment—with an effective date of November 5, 2021, the day of the Rule's publication in the Federal Register. 86 Fed. Reg. 61555 (Nov. 5, 2021). This bypass of the APA's keystone requirement was unnecessary and unlawful. At bottom, CMS rushed to enact the mandate not to stem the pandemic, but to deliver on the President's promotions before the crisis expired.

140. CMS does not dispute that the IFC is a final agency action and substantive legislative rule that ordinarily would be required to go through notice and comment. Instead, CMS's sole reason for not pursuing notice and comment is a brief reference to the APA's "good cause" exception, which allows agencies to dispense with notice-and-comment procedures only "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B); *see id.* §553(d)(3); 42 U.S.C. §§1395hh(b)(2)(C) and (e)(1)(B)(ii). CMS claims that it faces such an emergency in this case "as a result of the COVID-19 public health emergency." 86 Fed. Reg. at 61555. CMS concludes that "[i]n light of [its] responsibility to protect the health and safety of individuals providing and receiving care and services from Medicare-and Medicaid-certified providers and suppliers," CMS is "compelled to require staff vaccinations for COVID-19 in these settings" without required notice and comment. *Id.* at 61560.

141. Contrary to CMS's claims, 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); *see also Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (good-cause exception is not an "escape clause[]" to be "arbitrarily utilized at the agency's whim"). "[T]he good cause exception should not be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *Johnson*, 632 F.3d at 929; *see also Ass'n of Cmty. Cancer Centers 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.").

142. 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 and citation 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 S. Mountains, Inc. v. Donovan*, 653 F.2d 473, 580 (D.C. Cir. 1981) (citation omitted). Courts therefore generally restrict agencies' use of the "good cause" exception "to emergency situations," *Mack Trucks*, 682 F.3d at 93 (citation omitted), such as where a "delay would imminently threaten life or physical property" or risk "fiscal calamity," *Sorenson Commc'ns 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.

143. CMS's good-cause explanation comes nowhere close to meeting those exacting standards.

144. CMS gave two reasons for immediately implementing the vaccine mandate. First, it thought immediate implementation necessary "[d]ue to the urgent nature of the vaccination requirements established in this IFC." 86 Fed. Reg. at 61573. Second, "to provide protection to residents, patients, clients, and PACE program participants (as applicable)," CMS "believe[d] it is necessary to begin staff vaccinations as quickly as reasonably possible." *Id.* In suggesting those reasons, however, CMS ignored that it waited almost two months after President Biden's directive before it promulgated the IFC to the public. Beyond that, CMS's finding that the vaccine mandate is necessary was undermined by its delay in adopting it. Vaccines have had a Food & Drug Administration Emergency Use Authorization for almost a year, yet CMS did not impose this mandate until two months after the President instructed it to do so as part of his "six-point plan" to federalize public-health policy—and three months after CMS announced the plan to require nursing home employees to be vaccinated.

145. Here, there is no "emergency" sufficient to justify CMS dispensing with proper rule-making. *Florida v. Becerra*, 8:21-cv-839-SDM-AAS, 2021 WL 2514138, at *45 (M.D. Fla. June 18, 2021) (concluding that the COVID-19 pandemic was insufficient for "good cause"); *Regeneron Pharms. v. HHS*, 510 F. Supp. 3d 29, 48 (S.D.N.Y. 2020) (similar).

146. By all measures, the justifications and data cited by CMS are stale, misleading, and one-sided. As recently stated by the Los Angeles County Sheriff faced with a local mandatory vaccine order threatening his staff, "[t]his mandate is like putting up storm windows after the storm has passed." Joshua R. Miller, *Los Angeles County sheriff blasts vaccine mandate causing 'mass exodus,'* N.Y. Post (Oct. 29, 2021), https://bit.ly/3n5I9tm.

147. What's more, the pandemic is a feeble excuse for avoiding transparency and public input considering the year-long public debate over mandatory vaccines. *See Chamber of Commerce of the U.S. v. Dep't of Homeland Sec.,* No. 20-CV-07331, 2020 WL 7043877, at *8 (N.D. Cal. Dec. 1, 2020) (*Chamber of Commerce* Order) (rejecting the pandemic as justification for proceeding by interim rule and stating that "even if the problems [the Administration] purport[s] to solve with the Rule[] may have been exacerbated by the COVID-19 pandemic, [the Administration] do[es] not suggest they are new problems"); *see also Ass'n of Cmty. Cancer Centers v. Azar*, 509 F. Supp. 3d at 496 ("CMS here relies more on speculation than on evidence to establish that the COVID-19 pandemic has created an emergency in Medicare Part B drug pricing sufficient to justify dispensing with valuable notice and comment procedures"); *Regeneron Pharms., Inc. v. U.S. Dep't of Health & Human Servs.*, 510 F. Supp. 3d 29, 47 (S.D.N.Y. 2020) (rejecting claim that a "new surge in COVID-19 cases … may lead to additional hardship and require immediate action" justifying good cause for interim rule on drug pricing).

148. Finally, considering the magnitude of the impact on the healthcare system, the healthcare labor market, and areas of State authority, it was incumbent on CMS to consult with the States on both the wisdom and implementation of such a far-reaching endeavor. Its failure to do so

was not harmless error. *See Johnson*, 632 F.3d at 931 ("An overreaching harmless error doctrine would allow the agency to inappropriately 'avoid the necessity of publishing a notice of a proposed rule and perhaps, most important, [the agency] would not be obliged to set forth a statement of the basis and purpose of the rule, which needs to take account of the major comments—and often is a major focus of judicial review.'").

149. Under these circumstances, the failure of CMS to comply with the APA's notice and comment provisions is fatal to the CMS interim final rule. *Id.* at 928-29 ("Without good cause, we must enforce Congress's choice in favor of the traditional, deliberative rulemaking process.").

COUNT IV

The Vaccine Mandate Violates the Congressional Review Act

150. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

151. The Congressional Review Act requires all rules to be submitted to Congress to allow it an opportunity to pass a resolution disapproving the rule. A "major rule" must also receive a report from the Government Accountability Office and its effective date must be delayed. 5 U.S.C. §801.

152. CMS concedes that the Vaccine Mandate is a "major rule" for purposes of the CRA. 86 Fed. Reg. at 61602. Yet it relies on the CRA's "limited exception[]" for rules which "an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §808.

153. For the reasons discussed regarding the APA good-cause exception, CMS's dismissal of its CRA obligations comes nowhere close to meeting the exacting standards allowing a major rule to avoid the CRA's exacting procedures. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir.

2014) ("Deference to an agency's invocation of good cause—particularly when its reasoning is potentially capacious, as is the case here—would conflict with this court's deliberate and careful treatment of the exception in the past."); *see also* OMB, *Guidance on Compliance with the Congressional Review Act*, M-19-14 (Apr. 11, 2019) (noting APA good-cause standard applies in CRA context).

154. Accordingly, the IFC violates the Congressional Review Act.

COUNT V

The Vaccine Mandate Is Arbitrary and Capricious

155. Plaintiff States repeat and incorporate by reference all the Complaint's allegations stated above.

156. Under the APA, a court must "hold unlawful and set aside agency action" that is arbitrary or capricious or otherwise not in accordance with law or contrary to the Constitution. 5 U.S.C. §706(2)(A).

157. "[A]gency action is lawful only if it rests on a consideration of the relevant factors" and "important aspects of the problem." *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring "reasoned decisionmaking"). This means agencies must "examine all relevant factors and record evidence." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

158. For starters, an agency cannot "entirely fail[ ] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Am. Wild Horse*, 873 F.3d at 931 ("the Service's Finding of No Significant Impact not only failed to take a 'hard look' at the consequences of the boundary change, it averted its eyes altogether"); *Gresham v. Azar*, 363 F. Supp. 3d 165, 177 (D.D.C. 2019) ("The bottom line: the Secretary did no more than acknowledge—in a conclusory manner, no less—that commenters forecast a loss in Medicaid coverage").

159. Further, agencies must actually analyze the relevant factors. "'Stating that a factor was considered ... is not a substitute for considering it.'" *State v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) The agency must instead provide more than "conclusory statements" to prove it considered the relevant statutory factors. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

160. The IFC is arbitrary and capricious for several independently sufficient reasons.

161. First, it ignores the Social Security Act's focus on patient wellbeing rather than the health of providers. Each prong of the President's vaccination policy is aimed at the same overarching goal: increasing individual vaccination rates in society. *See* Remarks by President Biden on Fighting the COVID-19 Pandemic" (Sept. 9, 2021), https://bit.ly/3oI0pKr (CMS Vaccine Mandate part of President's plan to "increase vaccinations among the unvaccinated with new vaccination requirements"); The White House, Path Out of the Pandemic: President Biden's Covid-19 Action Plan, https://bit.ly/3adkMXx

162. And the evidence, even that relied upon by CMS, shows that mandating vaccines will *harm* patient health and wellbeing. For example, the Mandate will cause or exacerbate nursing home staff shortages that will significantly harm patient health and well-being. There is already a critical shortage of healthcare workers. In Montana alone, there is already a 39% nurse and aide shortage in nursing homes. AARP, "AARP Nursing Home COVID-19 Dashboard" (updated Nov. 10, 2021), https://bit.ly/3HhAWyy. Likewise, hospitals in West Virginia—particularly rural ones—are facing a serious strain when it comes to nursing and support staff in intensive care units and other critical care facilities. Aaron Williams, *WV's COVID Crisis: Hospital Staffing Shortages and the Toll It's Taking Inside the ICU and Beyond*, 12WBOY (Oct. 5, 2021), https://bit.ly/3nctZ9J. Studies also show that Vaccine Mandates will exacerbate those shortages. *See* Liz Hamel, et al., *KFF COVID-19 Vaccine Monitor: October 2021*, Kaiser Family Foundation (Oct. 28, 2021), https://bit.ly/3wEiJWN; Chris Isidore & Virginia Langmaid, *72% of unvaccinated workers vow to quit if ordered to get vaccinated*, CNN.com (Oct. 28, 2021),

https://cnn.it/3HdgDlw.[1] And CMS acted arbitrarily and capriciously by failing to consider an exemption from the requirement to terminate employees who refused to be vaccinated for healthcare facilities in HPSAs, where those facilities cannot replace terminated employees.

163. Second, the Secretary failed to consider or arbitrarily rejected obvious alternatives to a Vaccine Mandate. The Secretary rejected daily or weekly testing—an option that even OSHA approved in its ETS. 86 Fed. Reg. 61614 (Nov. 5, 2021) ("We have reviewed scientific evidence on testing and found that vaccination is a more effective infection control measure.") That conclusion is facially deficient: it fails to identify the "evidence" supporting this decision, or to explain how such evidence relates to the goal of protecting workers or patients in a healthcare setting. In fact, there is no relationship, as CMS's careful wording reveals. The goal here is "effective infection control," not protection in any particular environment.

164. The rejection of natural immunity as a basis for exemption is equally dismissive and unsupported. 86 Fed. Reg. at 61614 ("There remain many uncertainties about as to the strength and length of this [natural] immunity compared to people who are vaccinated… [It] would have potentially reduced benefits… It would have also[] complicated administration and likely require standards that do not now exist for reliably measuring the declining levels of antibodies over time in relation to the risk of reinfection. Because of current CDC guidance and understanding of relevant scientific findings, we found that it was not warranted to exempt previously infected individuals.").

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[1] Because CMS did not conduct notice and comment, outside sources and studies are appropriately used in review of the IFC. *Cf. Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984) ("We say no more than that evidence based on risk-assessment analysis is precisely the type of data that may be more uncritically accepted after public scrutiny, through notice-and-comment rulemaking, especially when the conclusions it suggests are controversial or subject to different interpretations."); *see also id.* at 420 n.12 ("Because of the extraordinary posture of the court reviewing an ETS, made more extraordinary by the statutory requirement that we review it under a substantial evidence standard, 29 U.S.C. § 655(f), we also considered the unfavorable reviews as well as the favorable ones to aid us in our understanding of this technologically complex case. To do otherwise 'would convert the reviewing process into an artificial game.'").

165. In short, the Secretary fails to identify the evidence supporting his decision, proffers a vague "administrative" excuse, and punts to the CDC *despite* an intense public debate and a trove of scientific data on the strength and durability of natural immunity from COVID-19, alone and compared to vaccine-induced immunity.

166. For example, a highly reported study from Israel involving review of 74,000 cases of infection concluded that a person with natural immunity is 27 times less likely to be reinfected than a vaccinated person. *See* Sivan Gazit, Roei Shlezinger, et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, MEDRXIV (Aug. 30, 2021), https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1. Additional studies support this conclusion.[2]

167. Emerging studies show that natural immunity affords benefits comparable to or better than vaccination. *See e.g.,* Melissa Healy, *Study shows dramatic decline in effectiveness of all three COVID-19 vaccines over time,* L.A. Times (Nov. 4, 2021), https://lat.ms/30hQIbj ("As the Delta variant became the dominant strain of coronavirus across the United States, all three COVID-19 vaccines available to Americans lost some of their protective power, with vaccine efficacy among a large group of veterans dropping between 35% and 85%, according to a new study"). Experts have suggested that natural immunity is both superior to and more durable than the vaccines. *See, e.g.*, Sivan Gazit et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, Medrxiv (Aug. 25, 2021), https://bit.ly/3DnKzIZ ("This study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization

[2] *See* Dr. Michel C. Nussenzweig, Senior Physician, *Natural infection versus vaccination: Differences in COVID antibody responses emerge*, THE ROCKEFELLER UNIVERSITY (Aug. 24, 2021), https://bit.ly/3ojdfNz; Don W. Hackett, Robert Carlson, M.D., *Natural Immunity After Covid-19 Found Durable and Robust*, PRECISION VACCINATIONS (updated Aug. 2, 2021), https://bit.ly/30goyOE; Sharon Reynolds, *Lasting immunity found after recovery from COVID-19*, NATIONAL INSTITUTE OF HEALTH (Jan. 26, 2021), https://bit.ly/3kPYFwb.

caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity. And it is unclear if vaccination of an individual who has natural immunity will provide any perceptible benefit in fighting future infection."); Yair Goldberg, et al., *Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel*, Medrxiv (Apr. 24, 2021), https://bit.ly/3n8uXTe; *see also, e.g.*, Martin Kuldorff and Jay Bhattacharya, *The ill-advised push to vaccinate the young*, The Hill (June 17, 2021), https://bit.ly/2Z2ZpX6; R. R. Goel et al., *mRNA vaccines include durable immunity to SARS-CoV-2 and variants of concern*, Science (Oct. 14, 2021), https://bit.ly/3DXLS1K ("[B]oosting of pre-existing immunity from prior infection with mRNA vaccination mainly resulted in a transient benefit to antibody titers with little-to-no long-term increase in cellular immune memory.").

168. Third, CMS failed to estimate benefits to patients from requiring vaccines for those several steps removed from patient care and interaction. This failing is particularly glaring in light of the Social Security Act's focus on the health and wellbeing of *patients* rather than of healthcare workers.

169. Fourth, the IFC is arbitrary and capricious because its rationales are flagrantly pretextual. As recounted above, the President has stated several times that the CMS Vaccine Mandate is part of a broader program aimed at increasing vaccination rates throughout American society, writ large. The IFC, however, eschews this rationale and tries (unsuccessfully and after-the-fact) to pigeonhole the Mandate into the Social Security Act's statutory factors. Such obvious regulatory reframing of the Mandate here leads to the inescapable conclusion that the IFC's stated rationale is pretextual. And the presence of such blatant pretext is enough to render the CMS Vaccine Mandate arbitrary and capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019). What's more, the Administration's shifting rationales across all vaccine mandates demonstrate pretext. For example, the OSHA ETS declares that vaccines are necessary to protect worker safety. But that rationale that would not be sufficient under the Social Security Act. So CMS fabricated a new rationale to cram the mandate

into the Social Security Act. Accepting CMS's description of the Vaccine Mandate requires this Court to "'exhibit a naiveté from which ordinary citizens are free.'" *Id.*

170. Fifth, the CMS rule completely ignores State reliance interests. Plaintiff States have overwhelming reliance interests in their Medicaid systems. Specifically, the IFC ignores: (1) the Plaintiff States' reliance interests in their healthcare providers continuing to operate under existing rules without facing this new mandate that threatens to cause significant harm to the States' citizens, particularly those in rural communities; (2) healthcare providers' similar reliance interests in staffing their facilities under the existing rules without facing this new mandate that threatens their workforce, the services they provide, and their very existence; and (3) healthcare workers' reliance interests, especially the interests of minority workers in rural communities, in selecting a job and building a career under the existing rules. The IFC is arbitrary and capricious because it utterly ignores these reliance interests. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020).

171. Sixth, the scope of the Vaccine Mandate is arbitrary and capricious. The mandate reaches many categories of healthcare facilities, such as psychiatric residential treatment facilities for individual under 21 years of age, see 86 Fed. Reg. at 61576, that are not related to CMS's asserted interest in protecting elderly and infirm patients from the transmission of COVID-19. Indeed, CMS recognizes that "risk of death from infection from an unvaccinated 75- to 84-year-old person is 320 times more likely than the risk for an 18- to 29-years old person." *Id.* at 61610 n.247. Beyond that, the mandate applies to "any individual that . . . has the potential to have contact with anyone at the site of care." *Id.* at 61571 (emphasis added). This includes "staff that primarily provide services remotely via telework" but "occasionally encounter fellow staff . . . who will themselves enter a health care facility." *Id.* at 61570. And the mandate also covers a contracted "crew working on a construction project whose members use shared facilities (restrooms, cafeteria, break rooms) during their breaks." *Id.* at 61571. The mandate's vast reach is far removed from the purported purpose of protecting patient safety.

172. Finally, CMS fails to weigh important civil liberty implications from forced vaccination—the right to refuse medical treatment rooted in the doctrine of informed consent under state law[3] and the impact (as opposed to merely the benefits) of the mandate on protected demographics in the health care labor market—or the principles of federalism threatened by imposing such far-reaching requirement on States without consultation or consent.

173. For each of these independently sufficient reasons, the OMB Rule is arbitrary and capricious.

COUNT VI

The Vaccine Mandate Violates 42 U.S.C. §1395z

174. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

175. Under 42 U.S.C. §1395z, "the Secretary shall consult with appropriate State agencies and recognized national listing or accrediting bodies, and may consult with appropriate local agencies" when "carrying out his functions, relating to determination of conditions of participation by providers of services, under subsections (e)(9), (f)(4), (j)(15), (o)(6), (cc)(2)(I), and[] (dd)(2), and (mm)(1) of section 1395x of this title, or by ambulatory surgical centers under section 1395k(a)(2)(F)(i) of this title."

176. As CMS acknowledges, this consultation requirement applies to the Vaccine Mandate because that mandate purports to establish conditions of participation for hospitals under 42 U.S.C. §1395x(e)(9), long-term-care facilities (also known as skilled nursing facilities) under 42 U.S.C. §1395x(j) and 42 U.S.C. §1395i–3, Home Health Agencies ("HHAs") under 42 U.S.C. §1395x(o)(6),

[3] Louisiana, in particular, has a robust right "to refuse medical treatment" rooted in the State constitution. *See* La. Const. art. 1, §5; *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 414 (La. 1989) ("we conclude that the Louisiana Constitution's right to privacy also provides for a right to decide whether to obtain or reject medical treatment").

Comprehensive Outpatient Rehabilitation Facilities ("CORFs") under 42 U.S.C. §1395x(cc)(2), hospices under 42 U.S.C. §1395x(dd)(2), Critical Access Hospitals ("CAHs") under 42 U.S.C. §1395x(mm)(1) and 42 U.S.C. §1395i–4(e), and Ambulatory Surgical Centers ("ASCs") under 42 U.S.C. §1395k(a)(2)(F)(i).

177. CMS concedes that it did not comply with §1395z's requirement that it "consult with appropriate State agencies." 86 Fed. Reg. at 61567.

178. CMS's "inten[t] to engage in consultations with appropriate State agencies ... following the issuance of th[e] rule," 86 Fed. Reg. at 61567, does not satisfy 42 U.S.C. §1395z. The statute requires that the consultation with States when the Secretary is "carrying out his functions[] relating to determination of conditions of participation by providers of services," 42 U.S.C. §1395z, or *before* a rule is issue. Yet the Secretary, via CMS, has already determined—without consulting with States—that the vaccine mandate should be a condition of participation for providers. Since he did not complete the statutory consultation requirement before adopting the IFC, the Secretary, acting through CMS, violated 42 U.S.C. §1395z.

179. The Vaccine Mandate thus violates 42 U.S.C. §1395z and must be vacated and enjoined.

COUNT VII

The Vaccine Mandate Violates 42 U.S.C. §1302

180. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

181. 42 U.S.C. §1302(b)(1) requires that "[w]henever the Secretary [of HHS] publishes a general notice of proposed rulemaking for any rule or regulation proposed under subchapter XVIII, subchapter XIX, or part B of [title IX of the Social Security Act] that may have a significant impact

on the operations of a substantial number of small rural hospitals, the Secretary shall prepare and make available for public comment an initial regulatory impact analysis."

182. 42 U.S.C. §1302(b)(1) applies to the CMS Vaccine Mandate because CMS's cited statutory authority for its vaccine mandate falls under Titles 18 and 19 of the Social Security Act and because the mandate will have a significant impact on the operations of a substantial number of small rural hospitals.

183. The CMS Vaccine Mandate threatens to exacerbate already devastating shortages in healthcare staffing by forcing small rural hospitals to terminate their unvaccinated workers. That, in turn, will compel those hospitals to close certain divisions, cancel certain services, or shutter altogether. Those dire consequences stretch across rural America, and their collective force required CMS to prepare a regulatory impact analysis.

184. Accordingly, the IFC violates 42 U.S.C. §1302(b)(1) because CMS did not prepare a regulatory impact analysis.

COUNT VIII

The Vaccine Mandate Violates the Spending Clause

185. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

186. The CMS Vaccine Mandate is an unconstitutional condition on Plaintiff States' receipt of federal funds.

187. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," so "States [can] exercise their choice knowingly," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

188. Nothing in federal law gave States clear notice that a vaccine mandate would be a condition of accepting federal Medicaid (or, where applicable, Medicare) funds.

189. And for the reasons discussed above, the Vaccine Mandate goes far beyond the federal interest in patient health and wellbeing. Thus, the CMS Vaccine Mandate violates the Spending Clause because it is not necessary to preventing the spread of COVID-19. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012).

190. Additionally, because noncompliance with the Vaccine Mandate threatens a substantial portion of Plaintiff States' budgets, it violates the Spending Clause by leaving the States with no choice but to acquiesce. *See id.* at 581-82 ("[T]he States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.' The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.").

COUNT IX

The Vaccine Mandate Violates the Anti-Commandeering Doctrine

191. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

192. The Tenth Amendment and structure of the Constitution deprive Congress of "the "the power to issue direct orders to the governments of the States," *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018), and forbid the federal government to commandeer State officers "into administering federal law," *Printz v. United States*, 521 U.S. 898, 928 (1997).

193. The Vaccine Mandate violates this doctrine by requiring Plaintiff States' state-run hospitals that are covered by the Mandate to either fire their unvaccinated employees or forgo all Medicaid (or, where applicable, Medicare) funding.

194. The Vaccine Mandate also commandeers the States because it forces State surveyors to enforce the Mandate by verifying healthcare provider compliance. This "dragoons" States into enforcing federal policy by threatening Plaintiff States' Medicaid (and, where applicable, Medicare) funds.

COUNT X

The Vaccine Mandate Violates the Tenth Amendment

195. "The powers not delegated by the Constitution to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

196. No clause of the Constitution authorizes the federal government to impose the Vaccine Mandate. Public health—and vaccinations in particular—have long been recognized as an aspect of police power reserved to the *States*, not the Federal Government. *See, e.g.*, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 24 (1905); *see also Hillsborough Cty.*, 471 U.S. at 719 ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief) (our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect"); *State v. Becerra*, 2021 WL 2514138, at *15 (M.D. Fla. June 18, 2021) ("The history shows ... that the public health power ... was traditionally understood — and still is understood — as a function of state police power.").

197. By encroaching upon the States' traditional police power, particularly without clear authorization from Congress, Defendants have exceeded their authority and violated the Tenth Amendment.

PRAYER FOR RELIEF

NOW, THEREFORE, Plaintiffs request an order and judgment:

1. Declaring, under 28 U.S.C. §2201, that the IFC is arbitrary and capricious and unlawful under the APA;

2. Declaring, under 28 U.S.C. §2201, that the IFC is contrary to law and in excess of statutory authority under the APA;

3. Declaring, under 28 U.S.C. §2201, that the Vaccine Mandate violates the APA and Social Security Act because it was promulgated without notice and comment;

4. Declaring, under 28 U.S.C. §2201, that the Vaccine Mandate violates 42 U.S.C. §§1302(b)(1), 1395, and 1395z;

5. Declaring that the Vaccine Mandate violates the Constitution;

6. Holding the Vaccine Mandate unlawful and vacating it;

7. Preliminarily and permanently enjoining, without bond, Defendants from imposing the Vaccine Mandate;

8. Tolling the Mandate's compliance deadlines pending judicial review;

9. Granting all other relief to which Plaintiff States are entitled, including but not limited to attorneys' fees and costs.

Dated: November 15, 2021

Respectfully submitted,

By: */s/ Elizabeth B. Murrill*

AUSTIN KNUDSEN
Montana Attorney General
David Dewhirst*
Solicitor General
215 North Sanders Street
Helena, MT 59601
David.dewhirst@mt.gov

Counsel for the State of Montana

MARK BRNOVICH
Arizona Attorney General
Robert J. Makar*
Assistant Attorney General
2005 North Central Avenue
Phoenix, AZ 85004
Robert.makar@azag.gov

Counsel for the State of Arizona

STATE OF ALABAMA
Office of the Attorney General Steve Marshall
Edmund G. LaCour Jr.*
Solicitor General
Thomas A. Wilson*
Deputy Solicitor General
Office of the Attorney General
501 Washington Ave.
Montgomery, AL 36130
Tel.: (334) 353-2196
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Thomas.Wilson@AlabamaAG.gov

Counsel for the State of Alabama

ELIZABETH B. MURRILL (La #20685)
Solicitor General
J. SCOTT ST. JOHN (La #36682)
Deputy Solicitor General
MORGAN BRUNGARD*
JOSIAH KOLLMEYER (La #39026)
Assistant Solicitors General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
Tel: (225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov
brungardm@ag.louisiana.gov
kollmeyerj@ag.louisiana.gov

JIMMY R. FAIRCLOTH, JR. (La. #20645)
jfaircloth@fairclothlaw.com
MARY KATHERINE PRICE (La. #38576)
kprice@fairclothlaw.com
Faircloth Melton Sobel & Bash, LLC
105 Yorktown Drive
Alexandria, Louisiana 71303
Telephone: (318) 619-7755
Facsimile: (318) 619-7744

Counsel for the State of Louisiana

CHRISTOPHER M. CARR
Georgia Attorney General
Drew F. Waldbeser*
Deputy Solicitor General
Ross W. Bergethon
Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
dwaldbeser@law.ga.gov

Counsel for the State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho
Brian Kane*
Chief Deputy Attorney General
Leslie M. Hayes
Megan A. Larrondo
Deputy Attorneys General
700 W. Jefferson Street, Ste. 210
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8071
brian.kane@ag.idaho.gov
leslie.hayes@ag.idaho.gov
megan.larrondo@ag.idaho.gov

Counsel for the State of Idaho

LYNN FITCH
Attorney General of Mississippi
Whitney H. Lipscomb*
Deputy Attorney General
John V. Coghlan*
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
550 High Street
Jackson, MS 39201
Tel: (601) 359-3680

Counsel for the State of Mississippi

SEAN D. REYES
Utah Attorney General
Melissa A. Holyoak*
Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114
melissaholyoak@agutah.gov

Counsel for the State of Utah

THEODORE M. ROKITA
Indiana Attorney General
Thomas M. Fisher*
Solicitor General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204
Tom.fisher@atg.in.gov

Counsel for the State of Indiana

JOHN M. O'CONNOR
Attorney General of Oklahoma
Mithun Mansinghani*
Solicitor General
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Counsel for the State of Oklahoma

ALAN WILSON
South Carolina Attorney General
Thomas T. Hydrick*
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
thomashydrick@scag.gov

Counsel for the State of South Carolina

PATRICK MORRISEY
West Virginia Attorney General
Lindsay S. See*
Solicitor General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
Lindsay.s.see@wvago.gov

Counsel for the State of West Virginia

**Pro Hac Vice admission application forthcoming*

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

The States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia; Brian P. Kemp in his official capacity as Governor of the State of Georgia; Kay Ivey in her official capacity as Governor of the State of Alabama; Brad Little in his official capacity as Governor of the State of Idaho; Henry McMaster in his official capacity as Governor of the State of South Carolina; the Board of Regents of the University System of Georgia; Gary W. Black in his official capacity as Commissioner of the Georgia Department of Agriculture; Alabama Department of Agriculture and Industries; Alabama Department of Public Health; Alabama Department of Rehabilitation Services; Idaho State Board of Education, Plaintiffs, v. Joseph R. Biden in his official capacity as President of the United States; Safer Federal Workforce Task Force; United States Office of Personnel Management; Kiran Ahuja in her official capacity as director of the Office of Personnel Management and as co-chair of the Safer Federal Workforce Task Force; Office of Management and Budget; Shalanda Young in her official capacity as Acting Director of the Office of Management and Budget and as a member of the Safer Federal Workforce Task Force; General Services Administration; Robin Carnahan in her official capacity as	Civil Action No. 1:21-cv-163-RSB-BKE

Administrator of the General Services Administration and as co-chair of the Safer Federal Workforce Task Force; Jeffrey Zients in his official capacity as co-chair of the Safer Federal Workforce Task Force and COVID-19 Response Coordinator; L. Eric Patterson in his official capacity as Director of the Federal Protective Service; James M. Murray in his capacity as Director of the United States Secret Service; Administrator Deanne Criswell in her official capacity as Administrator of Federal Emergency Management Agency; Rochelle Walensky in her official capacity as Director of the Center for Disease Control; United States Department of Defense; Lloyd Austin in his official capacity as the United States Secretary of Defense; United States Department of Health and Human Services; Xavier Becerra in his official capacity as the United States Secretary of Health and Human Services; National Institutes of Health; Francis S. Collins in his official capacity as Director of the National Institutes of Health; United States Department of Veterans Affairs; Denis Mcdonough in his official capacity as United States Secretary of Veterans Affairs; National Science Foundation; Sethuraman Panchanathan in his official capacity as Director of the National Science Foundation; United States Department of Commerce; Gina Raimondo in her official capacity as United States Secretary of Commerce; National Aeronautics and Space Administration; Bill Nelson in his official capacity as Administrator of the National Aeronautics and Space Administration; United States Department of Transportation; Richard Chávez, in his official capacity as the Director of the Department of Transportation; the

United States Department of Energy; and Jennifer Granholm in her official capacity as United States Secretary of Energy,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

1. On September 9, 2021, President Biden announced that his patience was "wearing thin" with unvaccinated Americans,[1] and he issued an executive order that required federal departments and agencies to mandate that all of their federal contractors fully vaccinate their workforce. Executive Order 14042 is astonishing—not only for its tremendous breadth and unworkably short deadline, but also because so little care has been given to how it will work in the real world. The mandate, as the federal government has conceived, and thus far implemented, applies not only to contractor employees working on federal contracts, but also *any* employee that *may* have contact with someone working on a federal contract (even if that contact is nothing more than walking past them outside, in a parking lot). There are no exceptions for employees that work alone, outside, or even exclusively remotely. And the federal government is insisting that every federal contractor fully comply by January 18, 2022, which means employees have until December 7, 2021 to begin their two-shot vaccine regimen. The contractual language in question even, remarkably,

[1] Office of Public Engagement, Transcript, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

commits federal contractors to comply with any amendments to the administrative guidance that may be issued in the future.

2. For state agencies that work on federal contracts, this situation is untenable. This mandate puts billions of contracting dollars in peril, including huge portions of some state agencies' budgets. Some agencies have received notice of their need to comply with this mandate (or lose all their funding) within the past few days, leaving compliance all but impossible. At its core, the mandate forces contractors to make an impossible choice: either (1) take enforcement action that may include termination of all unvaccinated employees, or (2) face losing billions of dollars in federal funding. And because the administration has already amended the guidance multiple times, there is no telling what other onerous obligations may put state agencies in breach at a moment's notice.

3. The States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia, Georgia Governor Brian Kemp, Alabama Governor Kay Ivey, Idaho Governor Brad Little, South Carolina Governor Henry McMaster, the Board of Regents of the University System of Georgia, Commissioner Gary W. Black of the Georgia Department of Agriculture, the Alabama Department of Agriculture and Industries, the Alabama Department of Public Health, the Alabama Department of Rehabilitation Services, and the Idaho State Board of Education bring this action to stop this unprecedented and unconstitutional use of power by the federal government, and to end the nationwide confusion and disruption that the mandate has caused.

PARTIES

4. Plaintiff State of Georgia is a sovereign state with many agencies that are federal contractors.

5. Plaintiff State of Alabama is a sovereign state with many agencies that are federal contractors.

6. Plaintiff State of Idaho is a sovereign state possessing all of the powers reserved to it under the 10th Amendment to the United States Constitution with many agencies that contract directly and administer contracts with the federal government.

7. Plaintiff State of Kansas is a sovereign state of the United States of America. Several of its agencies are federal contractors, and some of these agencies, including multiple state universities, have already been presented with contract amendments incorporating the Contractor Mandate.[2] The State of Kansas employs "covered contractor employees" at "covered contractor workplaces" as defined by the Task Force Guidance.

8. Plaintiff State of South Carolina is a sovereign state of the United States of America. South Carolina citizens and entities, who are federal contractors and subcontractors, have been and will be forced to comply with the unlawful COVID-19 vaccine mandate. Because of that unlawful action as to the State's citizens and

[2] As used throughout, Contractor Mandate includes, individually and collectively, Executive Order 14042, the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, the FAR Council's Class Deviation Clause 252.223-7999, and the Office of Management and Budget's *Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042.*

entities, Attorney General Alan Wilson brings this action on behalf of the State pursuant to his *parens patriae*, constitutional, and common law authority.

9. Plaintiff State of Utah is a sovereign State and has the authority and responsibility to protect its sovereign interests, public fisc, and the health, safety, and welfare of its citizens. Utah has many state entities that are federal contractors and thus Utah employs "covered contractor employees" and maintains "covered contractor workplaces" as defined by the Contractor Mandate. These contracts are worth millions of dollars, if not more. Utah expects to continue pursuing government contracts in the future. Utah also has current contracts subject to renewal or the exercise of options. The federal government has presented Utah with contract modifications that incorporate the Contractor Mandate. Utah will face irreparable harm if forced to comply.

10. Plaintiff State of West Virginia is a sovereign State and has the authority and responsibility to protect its sovereign interests, public fisc, and the health, safety, and welfare of its citizens. West Virginia has state entities that are signatories to "contract-like instruments" that may render affected employees and workplaces "covered contractor employees" and "covered contractor workplaces" as defined by the Contractor Mandate. These instruments are worth significant sums. West Virginia expects to continue pursuing government contracts in the future. West Virginia also has current agreements subject to renewal or the exercise of options. West Virginia will face irreparable harm if it is forced to comply with requirements imposed by the Contractor Mandate.

11. Plaintiff Brian P. Kemp is named in his official capacity as Governor of the State of Georgia and appears on behalf of the State of Georgia.

12. Plaintiff Kay Ivey is named in her official capacity as Governor of the State of Alabama and appears on behalf of the State of Alabama.

13. Plaintiff Brad Little, in his official capacity as Governor of the State of Idaho, has an interest in preventing the loss of federal funding that will result as a direct consequence of the Contractor Mandate. Additionally, the Governor has an interest in ensuring that all State laws, including the Idaho Constitution and Idaho Statutes, are executed, rather than subverted through federal overreach.

14. Plaintiff Henry McMaster is named in his official capacity as Governor of the State of South Carolina and appears on behalf of the State of South Carolina.

15. Plaintiff Board of Regents of the University System of Georgia was established in 1931 as a part of a reorganization of Georgia's state government. The Georgia Constitution grants to the Board of Regents the exclusive right to govern, control, and manage the University System of Georgia, an educational system comprised of twenty-six institutions of higher learning including universities with extensive research institutions such as Augusta University, the Georgia Institute of Technology, Georgia State University, and the University of Georgia.

16. Plaintiff Gary W. Black is named in his official capacity as Commissioner of the Georgia Department of Agriculture.

17. Plaintiff Alabama Department of Agriculture and Industries is a state agency responsible for serving farmers and consumers of agricultural projects.

18. Plaintiff Alabama Department of Rehabilitation Services is the state agency primarily responsible for serving Alabamians with disabilities.

19. Plaintiff Alabama Department of Public Health is the state agency primarily responsible for serving Alabamians' public health needs.

20. Plaintiff Idaho State Board of Education appears in its capacity as Regents of the University of Idaho, Board of Trustees of Boise State University, Board of Trustees of Idaho State University, and Board of Trustees of Lewis-Clark State College.

21. Defendant Joseph R. Biden is the 46th President of the United States who, on September 9, 2021, signed Executive Order 14042, titled *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* ("EO 14042").

22. Defendant Safer Federal Workforce Task Force (the "Task Force") was established pursuant to President Biden's Executive Order 13991 (86 Fed. Reg. 7045 (Jan. 25, 2021)). Three co-chairs oversee the Task Force, including: (1) the Director of the Office of Personnel Management ("OPM"); (2) the Administrator of the General Services Administration ("GSA"); and (3) the COVID–19 Response Coordinator. The Director of OPM is also a member of the Task Force.

23. Defendant Office of Personnel Management Director, Kiran Ahuja ("Director Ahuja"), is a co-chair and member of the Task Force and represents the federal agency responsible for managing human resources for civil service of the federal government.

24. Defendant Administrator of General Services, Robin Carnahan (the "GSA Administrator"), is a co-chair and member of the Task Force and represents the federal agency responsible for managing and supporting the basic functioning of federal agencies.

25. Defendant COVID–19 Response Coordinator, Jeffrey Zients (the "COVID-19 Response Coordinator"), is a co-chair and member of the Task Force.

26. Defendant Office of Management and Budget Director, Shalanda Young (the "OMB Director"), is a member of the Task Force and represents the federal agency with delegated authority, by President Biden, to publish determinations relevant to EO 14042 and the Task Force Guidance to the Federal Register.

27. Defendant Director of the Federal Protective Service, L. Eric Patterson (the "FPS Director"), is a member of the Task Force.

28. Defendant Director of the United States Secret Service, James M. Murray (the "Secret Service Director"), is a member of the Task Force.

29. Defendant Director of the Federal Emergency Management Agency, Deanne Criswell (the "FEMA Director"), is a member of the Task Force.

30. Defendant Director of the Center for Disease Control, Rochelle Walensky (the "CDC Director"), is a member of the Task Force.

31. Defendant Office of Management and Budget ("OMB") is an agency of the United States government.

32. Defendant Office of Personnel Management ("OPM") is an agency of the United States government.

33. Defendant General Services Administration ("GSA") is an agency of the United States government, located within HHS.

34. Defendant United States Department of Defense ("DOD") is an agency of the United States government.

35. Defendant United States Secretary of Defense, Lloyd Austin, is named in his official capacity as the United States Secretary of Defense.

36. Defendant United States Department of Health and Human Services ("DHHS") is an agency of the United States government.

37. Defendant United States Secretary of Health and Human Services, Xavier Becerra, is named in his official capacity as the United States Secretary of Health and Human Services.

38. Defendant National Institutes of Health ("NIH") is an agency of the United States government, located within DHHS.

39. Defendant NIH Director, Francis S. Collins, is named in his official capacity as the Director of the NIH.

40. Defendant United States Department of Veterans Affairs ("DVA") is an agency of the United States government.

41. Defendant United States Secretary of Veterans Affairs, Denis McDonough, is named in his official capacity as the United States Secretary of Veterans Affairs.

42. Defendant National Science Foundation ("NSF") is an agency of the United States government.

43. Defendant Director of the NSF, Sethuraman Panchanathan, is named in his official capacity as the Director of the NSF.

44. Defendant United States Department of Commerce ("DOC") is an agency of the United States government.

45. Defendant United States Secretary of Commerce, Gina Raimondo, is named in her official capacity as the United States Secretary of Commerce.

46. Defendant National Aeronautics and Space Administration ("NASA") is an agency of the United States government.

47. Defendant Administrator of the NASA, Bill Nelson, is named in his official capacity as the Director of the NASA.

48. Defendant United States Department of Transportation ("DOT") is an agency of the United States government.

49. Defendant Director of the DOT, Richard Chávez, is named in his official capacity as the Director of the DOT.

50. Defendant United States Department of Energy ("DOE") is an agency of the United States government.

51. Defendant United States Secretary of Energy, Jennifer Granholm, is named in her official capacity as the United States Secretary of Energy.

STATEMENT OF JURISDICTION AND VENUE

52. This Court has exclusive jurisdiction over this case under 28 U.S.C. §§ 1331 and 1346 because Plaintiffs' claims arise under the Administrative Procedure Act, 5 U.S.C. §§ 702–703, and the United States Constitution, U.S. Const. art. III, § 2.

53. This Court is authorized to grant the requested declaratory and injunctive relief under 5 U.S.C. §§ 702 and 706, and 28 U.S.C. §§ 2201–02.

54. Venue is proper within this District pursuant to 28 U.S.C. § 1391(e) because (1) certain Plaintiffs reside in Georgia and no real property is involved, and (2) "a substantial part of the events or omissions giving rise to the claim occurred" in this District.

55. Venue further lies in this District pursuant to 28 U.S.C. § 1391(e)(1) because the State of Georgia is a resident of every judicial district in its sovereign territory including this judicial District (and Division). *See California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018).

FACTUAL ALLEGATIONS

Executive Order 14042 and the Safer Federal Workforce Task Force Guidelines

56. On September 9, 2021, President Biden signed Executive Order 14042, titled *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* ("EO 14042"), a true and accurate copy of which is attached as **Exhibit A**.

57. EO 14042 purports to "promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument . . . ." **Ex. A** at 1.

58. EO 14042 claims that "ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement." **Ex. A** at 1.

59. EO 14042 directs executive agencies subject to the Federal Property and Administrative Services Act (the "Procurement Act") to include in *all* federal contracts and "contract-like instruments" a clause that contractors and subcontractors will comply with all future guidance issued by the Task Force.

60. EO 14042 requires that the Task Force issue specific COVID safety protocols by September 24, 2021.

61. On September 24, 2021 the Task Force released its first *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (the "First Task Force Guidance") to federal agencies, imposing a vaccine mandate on federal contractors and subcontractors, a true and accurate copy of which is attached as **Exhibit B**.

62. The First Task Force Guidance has been amended on several occasions, with the most recent amendment having occurred on November 10, 2021 (specifically referred to as the "Current Task Force Guidance" and generally referred to as the "Task Force Guidance"), a true and accurate copy of which is attached as **Exhibit C**.

63. EO 14042 further required that the Director of OMB publish a determination in the Federal Register as to "whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors." **Ex. A** at 2.

64. On September 28, 2021, Director Young published the OMB's *Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042* (the "First OMB Determination") stating in conclusory fashion "I have determined that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,691 (Sept. 28, 2021), a true and correct copy of which is attached as **Exhibit D**.

65. The First OMB Determination contained no research or data in support of its claims. Moreover, the First OMB Determination underwent no notice-and-comment period.

66. On November 16, 2021, Director Young issued a second OMB determination, *Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis* (the "Revised OMB Determination"). 86 Fed. Reg. 63,418 (Nov. 16, 2021), a true and correct copy of which is attached as **Exhibit E**.

67. The Revised OMB Determination purports to be immediately effective and provides only a thirty-day notice and comment period through December 16, 2021. The putative immediate effectiveness of the Revised OMB Determination is based on a waiver of the ordinary sixty-day notice and comment period before the Revised OMB Determination would otherwise become effective. *Id.*

68. Through EO 14042 and without legislative intervention, the President purported to give the Task Force, the OMB Director, and various federal agencies broad authority to impose vaccine mandates on federal contractors.

69. While EO 14042 did not specifically call for a vaccine mandate, it did purport to delegate rulemaking authority to the Task Force, OMB, and the Federal Acquisition and Regulatory Council (the "FAR Council").

70. On September 30, 2021, the FAR Council issued Class Deviation Clause 52.223-99 (the "FAR Deviation Clause") with accompanying guidance, a true and correct copy of which is attached as **Exhibit F**.

71. The FAR Deviation Clause requires federal contractors to follow the Task Force Guidance and any *future* amendments to the Guidance. **Ex. F**.

72. EO 14042, the Task Force Guidance, the FAR Deviation Clause, and the First and Revised OMB Determinations are hereinafter collectively referred to as the "Contractor Mandate."

73. Ultimately, prior to implementing the FAR Deviation Clause, the Task Force Guidance was never published to the Federal Register for the purpose of receiving public comment.

74. Pursuant to the Current Task Force Guidance, "[p]eople are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine." **Ex. C** at 4.

75. The First Task Force Guidance established that "covered contractor employees" are to be "fully vaccinated" by December 8, 2021.[3]

76. The Current Task Force Guidance requires that covered contractor employees be fully vaccinated by January 18, 2022—meaning said employees must obtain the final dose of their vaccine of choice no later than January 4, 2022.

77. Accordingly, any covered contractor employee inclined to take the Moderna vaccine would have had to receive their first dose by December 7, 2021 in order to comply with the January 18, 2022 deadline.[4]

78. Covered contractor employees must obtain a Pfizer vaccine by December 14, 2021[5] or a Johnson & Johnson vaccine by January 4, 2022.[6]

79. Pursuant to the Current Task Force Guidance, "covered contractor employees" refers to "any full-time or part-time employee of a covered contractor working on or *in connection with* a covered contract or working at a covered contractor workplace. *This includes employees of covered contractors who are not themselves working on or in connection with a covered contract*." **Ex. C** at 3 (emphasis added).

80. For the same reason, the Guidance also specifies that subcontractors working in a covered workplace must also be fully vaccinated. **Ex. C**. at 1.

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[3] This deadline was first amended on November 4, 2021 by way of a White House press release. Office of Public Engagement, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies (Nov. 4, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/.

[4] Center for Disease Control, Different COVID-19 Vaccines, (Oct. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html.

[5] *Id.*

[6] *Id.*

81. Pursuant to the Current Task Force Guidance, a covered contractor workplace "means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract." **Ex. C** at 4.

82. Pursuant to the First Task Force Guidance and the updated Frequently Asked Questions on the Task Force website, "unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance," employees in other areas of the building site or facility are also a part of the covered contractor workplace. **Ex. B** at 11, Q9.[7]

83. Accordingly, the Contractor Mandate mandates vaccination for those who work both directly and indirectly with federal contracts.

84. For example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for the Department of Defense in a remote office facility and that person merely shares a parking garage with non-contracted employees once a week, those non-contracted employees are subject to the Contractor Mandate.

[7] *See* Safer Federal Workforce Task Force, FAQs: Federal Contractors (last visited Nov. 18, 2021), https://www.saferfederalworkforce.gov/faq/contractors/. The Frequently Asked Questions were previously within the First Task Force Guidance; however, they were removed from the Current Task Force Guidance and are instead located on the Task Force website. The content published in response to each question remains the same.

85. In another example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for NASA in a remote office facility and that person merely shares an elevator with non-contracted employees every other Friday, those non-contracted employees are subject to the Contractor Mandate.

86. The First Task Force Guidance imposed a deadline of October 15, 2021 for federal agencies to include a vaccination mandate clause in new contracts.

87. EO 14042, in general terms, and the Task Force Guidance, in specific terms, further required that the Federal Acquisition Regulatory Council ("FAR Council") "conduct a rulemaking to amend the [Federal Acquisition Regulation ("FAR")] to include the [Contractor Mandate]." **Ex. B** at 12.

88. Pursuant to the First Task Force Guidance, by October 8, 2021 and prior to any rulemaking, the FAR Council was required to develop a recommended contract clause to impose the Contractor Mandate for federal agencies to include in their subsequent contracts. **Ex. B** at 12.

89. The First Task Force Guidance instructed the FAR Council to "recommend that agencies exercise their authority to deviate from the FAR" by using a vaccination mandate clause in contracts prior to the FAR Council actually amending the FAR. **Ex. B** at 12.

Development and Implementation of the FAR Deviation Clause

90. Before the FAR Deviation Clause was even published on September 30, 2021, the Defense Acquisition Regulations System and the Department of Defense published their intent to comply with EO 14042 via a Notice to the Federal Register

on September 17, 2021 (the "DOD Notice"). A true and correct copy of the DOD Notice is attached as **Exhibit G**.

91. In response, there were seventeen letter comments from members of the public, raising hundreds of key concerns that have yet to be addressed by OMB or the Task Force.

92. A few of the DOD Notice comments included concerns such as:

a. "Are contractors or the government [*sic*] be liable for employee disability or damage claims (side effects, etc.)?"[8]

b. "How will DOD monitor and measure any productivity disruptions?"[9]

c. "Are contractors expected to violate or undermine collective bargaining agreements as they comply with these requirements?"[10]

d. "Implementing a flow down vaccine mandate and/or testing will likely cause our subcontractors to experience significant employee attrition and financial hardship, potentially leaving them unable to fulfill their role in the distribution network."[11]

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[8] Aerospace Industries Association (AIA), Comment Letter on DOD Implementation Planning for Executive Order 14042 (Sept. 23, 2021), https://www.acq.osd.mil/dpap/dars/docs/early_engagement_opportunity/executive_order_14042/AIA%20Comments%20-%20EO%2040142%20DARS%20EEO.9-23-21.pdf.

[9] *Id.*

[10] *Id.*

[11] AmerisourceBergen, Comment Letter on DOD Implementation Planning for Executive Order 14042 (Sept. 23, 2021), https://www.acq.osd.mil/dpap/dars/docs/early_engagement_opportunity/executive_order_14042/Amerisource%20Bergen%20Comments%20to%20DOD%20Early%20Eng

93. The DOD Notice comments were never considered prior to issuing the Task Force Guidance. Indeed, the DOD ultimately published the DOD FAR Deviation Memo just one day after the FAR Deviation Clause, with no alterations.

94. Upon information and belief, even some federal agencies were unable to implement the Task Force Guidance due to the quick turnaround time of just 21 days from the date the Guidance was issued to the October 15, 2021 deadline.

Many Employees Are Likely to Quit Rather Than Submit to Mandatory Vaccination

95. From an employer's perspective, 9 in 10 employers fear significant reductions in their workforce if they had to implement vaccine mandates.[12]

96. In a recent survey, approximately 70% of unvaccinated workers said they would leave their job before complying with an employer-issued vaccine mandate.[13]

97. "Just under one in five U.S. adults, 18%, can be described as vaccine-resistant. These Americans say they would not agree to be vaccinated if a COVID-19 vaccine were available to them right now at no cost and that they are unlikely to

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agement%20Opportunity%20Ensuring%20Adequate%20COVID%20Safety%20Protocols%20for%20Federal%20Contractors%20EO%2014042%20final.pdf.

[12] Karl Evers-Hillstrom, *9 in 10 Employers Say They Fear They'll Lose Unvaccinated Workers Over Mandate: Survey*, The Hill (Oct. 18, 2021), https://thehill.com/business-a-lobbying/business-a-lobbying/577201-9-in-10-employers-say-they-will-lose-unvaccinated.

[13] Liz Hamel et al., Kaiser Family Found., KFF COVID-19 Vaccine Monitor: October 2021(Oct. 28, 2021), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-october-2021/.

change their mind about it. The percentage holding these views has been stable in recent months."[14]

The Georgia Board of Regents and University System of Georgia

98. The Board of Regents (the "Board") of the University System of Georgia (the "University System") is composed of 19 members, five of whom are appointed from the state-at-large, and one from each of the state's 14 congressional districts.

99. The Board oversees the 26 higher education institutions that comprise the University System including four research universities, four comprehensive universities, nine state universities and nine state colleges. It also includes the Georgia Public Library Service, which encompasses approximately 389 facilities within the 61 library systems throughout the State of Georgia. The University System also includes the Georgia Archives which identifies, collects, manages, preserves and provides access to records and information about Georgia.

100. Every employee of the 26 higher education institutions within the University System is an employee of the Board.

101. The University System has an annual budget of more than $8.1 billion for fiscal year 2021.

102. The University System's economic impact on the state was $18.5 billion in fiscal year 2019, according to the most recent study conducted by the Selig Center for Economic Growth.

[14] Jeffrey M. Jones, *About One in Five Americans Remain Vaccine Resistant*, Gallup (Aug. 6, 2021), https://news.gallup.com/poll/353081/one-five-americans-remain-vaccine-resistant.aspx (last visited Oct. 26, 2021).

103. Of the 157,770 jobs noted in a Selig Center for Economic Growth report, 33% are on the campuses while 67% are off campuses.

104. For every person employed at the University System or a member institution, two people have jobs in the local community that support the presence of the institution.

The Board and University System's Response to COVID-19

105. The University System has provided students with access to COVID-19 vaccination sites on 15 campuses statewide.

106. Students can schedule their first or second dose at the University System campus closest to them, regardless of whether they are enrolled at that institution.

107. Since the beginning of the pandemic, the University System has worked closely with the Georgia Department of Public Health and the Governor's Office and Task Force to make sure their students keep learning and stay healthy.

108. While the University System strongly encourages that all faculty, staff, students, and visitors get vaccinated, it has not mandated vaccination.

109. The University System has stated publicly that "getting vaccinated is an individual decision and not required to be a part of the USG campuses."[15]

[15] *USG Vaccination Locator*, U. Sys. Ga., https://www.usg.edu/vaccination/ (last visited Oct. 26, 2021).

Impact of the Contractor Mandate on the University System and Other Georgia State Agencies

110. Universities and research institutions within the University System maintain hundreds of contracts with various federal agencies.

111. The University System employees who work on these federal agency contracts work throughout the University System campuses and in remote locations.

112. Relevant to the University System, a "covered contractor employee" goes beyond the individuals specifically assigned to a contract. Instead, "covered contractor employees" include "any full-time or part-time employee of a covered contractor working on or *in connection with* a covered contract or working at a covered contractor workplace." **Ex. C** at 3–4 (emphasis added).

113. Moreover, "covered contractor employees," specifically include other employees that come into *minimal* contact directly with contractor employees "unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance of a covered contract." **Ex. B** at 11, Q9.

114. The "covered contractor workplace" broadly includes "a location controlled by a covered contractor at which *any employee* of a covered contractor working on or in connection with a covered contract is *likely to be present* during the period of performance for a covered contract." **Ex. C** at 4 (emphasis added).

115. While a "covered contractor workplace" does not include a covered contractor employee's residence, covered contractors working exclusively from their residence are required to be vaccinated. **Ex. B** at 10, Q8.

116. Ultimately, the Contractor Mandate extends to all employees that share "common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages." **Ex. B** at 10.

117. Augusta University has a portfolio of at least 45 federal government agreements and contracts, many concerning the university's healthcare research for the Department of Veterans Affairs and Department of Health and Human Services. Augusta University's health and research arm—Augusta University Health—is Georgia's only public academic health center, where world-class clinicians daily perform lifesaving research and development work under federally funded agreements and contracts.

118. Many, if not all, of the federal agencies associated Augusta University's contracts have already issued memorandums requiring compliance with the Contractor Mandate.

119. Over 200 employees of Augusta University work on the approximately 45 government contracts. University employees who are not themselves working on or in connection with these contracts must also abide by the Contractor Mandate if they share elevators, lobbies, and even parking garages with the employees who do work on government contracts.

120. In practice, if Augusta University cannot "affirmatively determine" that employees working on federal contracts will be completely separated from the rest of the university, every employee must be fully vaccinated by January 18, 2022.

121. The total budget for federal contracts at Augusta University is $17.1 million for fiscal year 2021.

122. In the event Augusta University cannot comply with the Contractor Mandate—i.e., if they cannot obtain 100% on-campus employee vaccination—their $17.1 million budget for federal contracts is in jeopardy.

123. Similarly, Georgia Institute of Technology (Georgia Tech) is one of the many University System institutions that will suffer significant harm as a result of the Contractor Mandate.

124. Since the 1940s, Georgia Tech has performed research under federal contracts. Federal funding has been crucial to the development of its applied and fundamental research programs, which have been pivotal to addressing the United States' security and other national priorities.

125. Georgia Tech and its research entities maintain multiple contracts with the Department of Defense, the National Science Foundation, the Department of Health and Human Services, the Department of Energy, NASA, the Department of Commerce, the Department of Transportation, the Center for Disease Control, the General Services Administration, and others, all of which are impacted by the Contractor Mandate. Many, if not all, of these federal agencies have already issued memorandums to Georgia Tech requiring compliance with the Contractor Mandate.

126. Georgia Tech relies on federal resources and personnel to help define and direct its research activities.

127. Indeed, for fiscal year 2021, Georgia Tech received $663,868,899.00 in annual revenue from federal contracts. This accounts for 33% of Georgia Tech's annual revenue for fiscal year 2021.

128. Georgia Tech maintains approximately 1,781 active covered federal contracts with approximately 4,079 employees who work on those contracts. This accounts for almost 20% of all Georgia Tech employees. Another approximately 2,374 employees work in connection with federal contracts and a total of approximately 8,949 employees work in "covered contractor workplaces" as defined by the Task Force Guidance—including some students.

129. Accordingly, based upon the plain language of the EO 14042 and the Task Force Guidance, nearly 32% of all Georgia Tech employees are directly implicated by the Contractor Mandate. Moreover, if Georgia Tech is unable to "affirmatively determine" that its employees working on government contracts will share no common areas with its remaining employees, nearly all of Georgia Tech's on-campus employees are subject to the Contractor Mandate.

130. The University of Georgia ("UGA") has approximately 300 federal contracts, subcontracts, and cooperative agreements with federal agencies such as the CDC, NSF, NIH, the FBI, and the Civilian Agency Administration Council.

131. Work performed under these contracts includes the development of a new, more advanced influenza vaccine designed to protect against multiple strains of

influenza virus in a single dose; the study of influenza virus emergence and infection in humans and animals while also making preparations to combat future outbreaks or pandemics; and sample collection from a variety of avian and mammalian species internationally for the identification and characterization of emerging influenza viruses and to develop predictive models describing the epidemiology of influenza in wild avian species.

132. In fiscal year 2021, UGA received at least $56 million from federal agency contracts.

133. Many, if not all, of the federal agencies with which UGA contracts have already issued memorandums to UGA in connection with contracts between such federal agencies and UGA in its role as either a prime or sub-contractor, requiring UGA to accept the FAR Deviation Clause, or a variant of it, and thus comply with the Contractor Mandate.

134. If UGA is unable to "affirmatively determine" that its contractor employees will share no common areas with its remaining employees, nearly all of UGA's on-campus employees are subject to the Contractor Mandate.

135. As a direct result of the Contractor Mandate, the impacted University System institutions face loss of funding, increased costs to ensure compliance, and potential employee shortages from resignations, terminations, or unspecified leave.

136. On information and belief, other University System universities will be similarly impacted by the Contractor Mandate.

137. Plaintiff, Gary W. Black, in his official capacity as Commissioner of the Georgia Department of Agriculture, oversees personnel on one or more campuses of the University of Georgia who will be directly impacted by the Contractor Mandate and may have other Department personnel and operations impacted by the mandate.

138. Moreover, within the last few days, other Georgia agencies have been informed by federal agencies that they must also sign new contracts containing the Contractor Mandate.

Impact of the Contractor Mandate on the State of Alabama and Its Agencies

139. The Contractor Mandate will harm the State of Alabama's sovereign and proprietary interests.

140. On May 24, 2021, Alabama enacted Senate Bill 267 (now Alabama Act 2021-493). The Act prohibits Alabama state entities, their officers, and their agents from "requir[ing] the publication or sharing of immunization records or similar health information for an individual." Ala. Act. 2021-493 § 1(a).

141. To comply with the federal government's Contractor Mandate, state entities, their officers, and their agents would need to "require the publication or sharing of immunization records or similar health information for an individual" by certifying to the federal government that employees have received the COVID-19 vaccine. Thus, to comply with the Contractor Mandate, state entities, their officers, and their agents will need to violate Alabama law.

142. If a federal contractor does not or cannot comply with these requirements, the government-contracting funds on which the contractor relies will be jeopardized.

143. The sums of money Alabama would lose if it were not to comply with the Contractor Mandate are staggering. And the coercive nature of potentially losing these sums is magnified by the fact that the federal government's demands arose only recently and leave almost no time for the state to come into compliance or line up substitute funding.

144. For example, Alabama public universities stand to lose hundreds of millions of dollars in federal contracts if they do not comply with the Contractor Mandate.

145. Less than half of Alabamians ages 18 and up are fully vaccinated.

146. Many employees of Alabama's public universities are unvaccinated and would likely quit their jobs rather than receive the COVID-19 vaccine as a condition of further employment.

147. Alabama and its public universities will be harmed if the universities lose these federal contract funds, particularly on such short notice. Conversely, Alabama and its public universities will be harmed if the universities lose employees.

148. Plaintiff Alabama Department of Public Health ("ADPH") is the state agency primarily responsible for serving Alabamians' public health needs. ADPH too stands to lose funds if it does not comply with the Contractor Mandate. ADPH has received conflicting guidance from federal agencies as to whether its contracts are subject to the Contractor Mandate.

149. ADPH has over 2,600 employees. Many of these employees are unvaccinated, and many are likely to quit their jobs if forced to receive the COVID-19 vaccination as a condition of further employment.

150. Alabama and ADPH would be harmed if ADPH loses federal contract funds it would have otherwise received were it to comply with the Contractor Mandate. Conversely, Alabama and ADPH would be harmed if ADPH employees quit, particularly because ADPH is already struggling to fill empty positions even before the Contractor Mandate was issued.

151. Plaintiff Alabama Department of Agriculture and Industries ("ADAI") is a state agency responsible for serving farmers and consumers of agricultural projects. ADAI employs several hundred people. ADAI provides expert regulatory control over products and services and promotes national and international consumption of Alabama products.

152. ADAI has leased property to the United States Department of Agriculture ("USDA") continuously for the past 26 years. On October 20, 2021, a USDA officer sent ADAI a lease amendment incorporating "the mandatory Executive Order 14042 . . . which needs to be part of every Federal contract now." ADAI requested clarification on October 22, 2021, to which USDA sent the following response:

> [I]t's "encouraged" for the Lessors to sign, BUT if you don't, then [USDA] won't be able to do any future lease actions with you if you don't, as well as anything regarding the current lease, such as an extensions or expansions if needed. So we'd have to move out when the lease expires.

153. As the federal government's correspondence unequivocally demonstrates—indeed, the scare quotes around "encourage" remove any doubt—if ADAI does not comply with the Contractor Mandate, the federal government will cancel its lease and will refuse to "do any future lease actions" with ADAI going forward, depriving ADAI of the revenues it had relied on for its quarter-century contracting relationship with the federal government.

154. Plaintiff Alabama Department of Rehabilitation Services ("ADRS") is the state agency primarily responsible for serving Alabamians with disabilities. Through ADRS, Alabama offers these Alabamians state-funded services from birth through every stage their lives.

155. ADRS seeks to aid legally blind vendors by administering a program through which ADRS matches these vendors with government entities whose buildings have vending machines. These vending agreements ensure economic opportunities for Alabama's blind vendors.

156. To facilitate its blind-vendor program, Alabama has contracted with the federal government since 1946, when ADRS established the Alabama Business Enterprise Program for the Blind and Visually Impaired ("BEP") with the mission to enable qualified blind individuals to achieve independence through self-employment. Since that time, the BEP program has had contracts with the federal government regarding services on federal properties.

157. The Department of Homeland Security issued a contract modification for the ADRS contract with FEMA on October 14, 2021.

Impact of the Contractor Mandate on the State of Idaho and Its Agencies

158. The State of Idaho includes agencies and entities affected by the Contractor Mandate.

159. Idaho's institutions of higher learning maintain covered contracts with numerous federal agencies, including, but not limited to, NSF, NASA, HHS, DOE, and DOD sub-entities.

160. Additionally, other Idaho agencies maintain contracts with the federal government and will be impacted by the Contractor Mandate. Federal officials are beginning to pressure these Idaho agencies to adopt the Contractor Mandate not only for future contracts, but for existing contracts. For example, on October 22, 2021, CDC sent an email to the Idaho Department of Health and Welfare instructing it to execute a mandatory contract modification for the purpose of adding language implementing the Contractor Mandate in an existing contract. The email stated: "Contractors will sign and return the modification via email to the Contracting Officer of record by November 9, 2021."

161. Thousands of Idaho employees will be affected by the Contractor Mandate.

162. The agencies and institutions have worked throughout the pandemic, in consultation and collaboration with other government entities and officials, to develop plans to stop the spread of COVID-19.

163. On information and belief, there are Idaho employees that have indicated that they will not be vaccinated. Due to policies regarding termination of some employees, if termination is necessary to comply with the Contractor Mandate,

the termination process will take months to complete, and some employees will draw a salary during a portion of the process

Impact of the Contractor Mandate on the State of Kansas and Its Agencies

164. The State of Kansas has multiple contracts with various federal agencies. These contracts are "covered contracts" under the Contractor Mandate.

165. Kansas's budget is highly dependent upon federal dollars it receives under its federal contracts.

166. Kansas employs hundreds of "covered contractor employees" and multiple "contractor or subcontractor workplace locations" as those terms are used in the Contractor Mandate

167. The Contractor Mandate requires hundreds of Kansas employees to get vaccinated. For the same and similar reasons articulated throughout this Complaint, imposing the Contractor Mandate against Kansas will result in significant and irreparable harm to Kansas.

168. In addition, the State of Kansas will suffer irreparable harm in its *parens patriae* capacity based on application of the Contractor Mandate to private citizens employed by federal contractors who stand to lose their jobs if they choose not to receive the vaccine.

Impact of the Contractor Mandate on the State of South Carolina and Its Agencies

169. The State of South Carolina has multiple contracts with various federal agencies. These contracts are "covered contracts" under the Contractor Mandate.

170. South Carolina's budget relies on the federal dollars it receives under its federal contracts.

171. South Carolina employs hundreds of "covered contractor employees" and multiple "contractor or subcontractor workplace locations" as those terms are used in the Contractor Mandate

172. The Contractor Mandate will require hundreds of South Carolina employees to get vaccinated. For the same and similar reasons articulated throughout this Complaint, imposing the Contractor Mandate against South Carolina will result in significant and irreparable harm to South Carolina.

Impact of the Contractor Mandate on the State of Utah and Its Agencies

173. Plaintiff State of Utah is a sovereign State that has many state entities that are federal contractors. Utah employs "covered contractor employees" and maintains "covered contractor workplaces" as defined by the Contractor Mandate.

174. The contracts that Utah's agencies have with federal agencies are worth millions of dollars, if not more. Many of Utah's current contracts are subject to renewal or the exercise of options. The federal government has presented Utah with contract modifications that incorporate the Contractor Mandate. Utah will face substantial and irreparable harm if forced to comply.

175. Because Utah's employees are generally not required to be vaccinated, the Contractor Mandate places undue pressure on Utah to create new policies and change existing ones, which threatens Utah with imminent irreparable harm.

176. The Contractor Mandate will likely cause many Utah employees to resign, causing significant loss to Utah's operations by decreasing institutional

knowledge and human capital. As a result, Utah will incur significant recruitment, on-boarding, and training costs to replace lost employees.

Impact of the Contractor Mandate on the State of West Virginia and Its Agencies

177. The State of West Virginia has multiple contracts with various federal agencies. These contracts are "covered contracts" under the Contractor Mandate.

178. West Virginia's budget relies on the federal dollars it receives under its federal contracts.

179. West Virginia employs hundreds of "covered contractor employees" and multiple "contractor or subcontractor workplace locations" as those terms are used in the Contractor Mandate.

180. The Contractor Mandate will require hundreds of West Virginia employees to get vaccinated. For the same and similar reasons articulated throughout this Complaint, imposing the Contractor Mandate against West Virginia will result in significant and irreparable harm to West Virginia.

The Contractor Mandate Creates Confusion and Uncertainty

181. In response to the Contractor Mandate, Plaintiffs have scrambled to comply with the ever-changing Guidelines and amended implementation logistics.

182. In particular, the Georgia Tech has already expended a vast amount of time and financial resources to create a portal for its employees to submit their vaccination status.

183. In addition to their specific challenges, all impacted units of the University System will have to overcome the following hurdles in order to comply:

a. Track employee vaccination statuses;

b. Develop a robust process to review requests for accommodation;

c. Identify impacted employees and locations;

d. Spend an undetermined amount of money to fund its compliance program; and

e. Track data from subcontractors to ensure that they are likewise performing (a), (b), (c), and (d) above.

184. Upon information and belief, some covered contractor employees will not obtain the vaccine and will not seek an exemption, despite the Contractor Mandate and its allowance for narrowly prescribed exemptions for medical reasons or strongly held religious beliefs.

185. For context, nearly 50% of Georgians are fully vaccinated while the remaining 50% have yet to obtain one or oppose the vaccine altogether.[16]

186. With respect to employees who refuse vaccination, the Georgia universities will have no choice but to consider enforcement action up to and including potential termination, lest they lose billions in federal funding.

187. With national labor shortages crippling the current labor market, losing employees because of the Contractor Mandate will cause significant harm to the University System.

[16] Georgia Department of Public Health, Press Release, 50% of Georgians Fully Vaccinated Against COVID-19 (Oct. 25, 2021), https://dph.georgia.gov/press-releases/2021-10-25/50-georgians-fully-vaccinated-against-covid-19.

188. Equally important, the loss of employees will jeopardize the universities' ability to complete the contracted for work in the contracted for time, thereby materially undermining the very efficiency and economy in contracting that purportedly is the core rationale for implementing the Contractor Mandate in the first place.

189. The broad application of the Contractor Mandate is expected to substantially impact each Plaintiff in that any of their unvaccinated employees must be terminated or reallocated to uncovered workplaces lest they risk breaching their federal contracts by failing to fully comply with the Contractor Mandate.

190. The Contractor Mandate, therefore, forces Plaintiffs to choose between two equally problematic outcomes: (1) maintain a fully vaccinated (but reduced) workforce of covered employees by firing those who are unvaccinated and risk breaching the contracts by not satisfactorily performing due to lack of qualified workers; or (2) breach the contract by continuing to employ unvaccinated, covered employees so that they can timely perform and complete the contract requirements. Either way, Plaintiffs face a risk of breach and material noncompliance for reasons totally beyond their control.

COUNT I – Violation of the Procurement Act

(Under 40 U.S.C. §§ 101 and 121)

191. Plaintiffs incorporate each of the Complaint allegations stated above herein.

192. The purpose of the Procurement Act is to provide the Federal Government with an "economical and efficient system" for, among other things,

procuring and supplying property and nonpersonal services. 40 U.S.C. § 101. The Contractor Mandate, however, will actually and materially undermine the efficient and economical delivery of property and services by disrupting the continuity of the contractor workforce.

193. The purpose of the Procurement Act is *not* to impose a sweeping vaccination mandate on broad swaths of the American people or to use the federal procurement system as a proxy for implementing a nationwide public health mandate.

194. The Procurement Act empowers the President to "prescribe policies and directives that [he] considers necessary to carry out [the Procurement Act.]" 40 U.S.C. § 121(a). Those policies "*must* be consistent with" the Procurement Act's purpose, i.e., promoting economy and efficiency in federal contracting. *Id.* § 121(a) (emphasis added).

195. Defendants have failed to demonstrate a "nexus" between the Contractor Mandate (EO 14042, the Initial and Revised OMB Determinations, the Task Force Guidance, and the FAR Deviation Clause) and the Procurement Act's purpose of promoting an "economical and efficient system" for federal contracting. 40 U.S.C. § 101; *see Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (explaining that the Procurement Act is violated when the President does not demonstrate a "nexus" between executive action and the Procurement Act's policy). The Procurement Act's text obligates the President to

exercise his statutory authority "consistently with [the Act's] structure and purposes." *Id.*

196. Instead, EO 14042 exceeds the President's Procurement Act authority by directing the Task Force, without a demonstrable nexus to the Procurement Act's purpose, to prescribe a sweeping public health scheme.

197. Here, the text of the Procurement Act clearly demonstrates that Congress has not authorized the Contractor Mandate, and thus, EO 14042 violates the Procurement Act.

198. Further, before the executive branch may regulate a major policy question of "great and economic and political significance"—such as mandating vaccination for every employee of every federal contractor in the country—Congress must "speak clearly" to assign the authority to implement such a policy. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014)).

199. When the federal government intrudes on a traditional state function, it must clearly articulate the scope of the intrusion and the rationale behind its unprecedented action, which it has not done here. *Gregory v. Ashcroft*, 501 U.S. 452, 463–64 (1991).

200. The Contractor Mandate implicates critical issues of federalism as public health and the regulation of inoculation regimes are traditional state functions.

201. Because the statutory language that the President relies on to issue EO 14042 does not contain a clear statement affirmatively sanctioning the broad scope of the Contractor Mandate, EO 14042 violates the Procurement Act.

202. Therefore, under both the plain text of the Procurement Act and the clear statement principle, EO 14042 is unlawful, and thus the Contractor Mandate is unenforceable.

COUNT II – Violation of Federal Procurement Policy

(Under 41 U.S.C. § 1707(a))

203. Plaintiffs incorporate each of the Complaint allegations stated above herein.

204. Pursuant to 41 U.S.C. § 1707(a)(1), a procurement policy may not take effect until 60 days after it is published for public comment in the Federal Register if it relates to the expenditure of appropriated funds; and has a significant effect beyond the internal operating procedures of the issuing agency; or has a significant cost or administrative impact on contractors or offerors.

205. The Contractor Mandate will require contractors to develop, implement, and monitor a host of new policies and procedures impacting, for some contractors, their entire workforce. In order to fully comply with the Contractor Mandate, contractors will have to fire any covered employee who refuses to be vaccinated and has not asserted an exemption.

206. Federal agencies will have to budget for and expend appropriated funds to administratively implement the Contractor Mandate and, thereafter, compensate contractors for their increased cost of compliance in violation of § 1707(a).

207. Because the Contractor Mandate requires vaccination of hundreds of thousands of Americans, it certainly has "a significant effect beyond internal operating procedures" in violation of § 1707(a).

208. The Contractor Mandate also has a significant cost or administrative impact on current contractors, future contractors, and offerors in violation of § 1707(a).

209. In a tacit admission that the First OMB Determination violated the Procurement Policy Act, the Office of Management and Budget issued a Revised OMB Determination on November 16, 2021. The Revised OMB Determination purports to invoke the waiver provisions of the Procurement Policy Act and again fails to provide for notice and comment prior to the effectiveness of the Updated OMB Determination.

210. The Procurement Policy Act permits public notice and comment to happen *after* publication only when the procurement policy, regulation, or procedure is effective "on a temporary basis" and "urgent and compelling circumstances make compliance with the [pre-publication notice and comment] requirements impracticable." 41 U.S.C. § 1707 (d).

211. OMB's statement of purported urgency and compelling circumstances does not satisfy either requirement. Nothing about the Contractor Mandate is temporary. And, as shown by OMB's decision to push back the deadline for compliance, there are no urgent and compelling circumstances that warrant a departure from normal requirements.

212. Moreover, Defendants failed to provide the required 60-day comment period before the Task Force Guidance and Contractor Mandate became effective.

213. Accordingly, Defendants failed to comply with 41 U.S.C. § 1707(a) when issuing the Updated OMB Determination and the Task Force Guidance, making the Contractor Mandate invalid as a matter of law.

COUNT III – Nondelegation Claim

(Under Article I, Section 1 of the United States Constitution)

214. Plaintiffs incorporate each of the Complaint allegations stated above herein.

215. Pursuant to Article I, Section 1 of the United States Constitution, Congress is vested with all legislative powers.

216. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935).

217. The executive branch can only exercise its own discrete powers reserved by Article II of the United States Constitution and such power that Congress clearly authorizes through statutory command.

218. Congress gives such authorization when it articulates an intelligible principle to guide the Executive that not only sanctions but also defines and cabins the delegated legislative power.

219. Under the nondelegation doctrine, Congress cannot simply offer a general policy that is untethered to a delegation of legislative power. For a delegation to be proper, Congress must articulate a clear principle or directive of its

congressional will within the legislative act. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The principle must be binding, and the delegate must be "directed to conform" to it. *Id.*

220. The nondelegation doctrine preserves and protects important tenets of our democracy, including individual liberties and states' rights.

221. The President's direct delegation of authority to the OMB Director and the Task Force gives them unconstitutional and unconstrained rulemaking authority without a statutory directive.

222. Separately, the President's indirect delegation to the federal agencies of broad authority and discretion to enforce the already unconstitutional Contractor Mandate is unsupported by an explicit statutory directive within the Procurement Act or any other federal law.

223. Thus, the President's actions lack the requisite congressional direction in two regards:

a. First, Congress did not articulate clear or sufficient instructions in the Procurement Act directing the President to implement this public health policy scheme by executive order.

b. Second, even if Congress did clearly authorize a national vaccination schedule for federal contractors, it did not give sufficiently clear instructions to permit the President to delegate legislative judgment to the Task Force or the OMB Director.

224. EO 14042's reliance on the precatory statement of purpose in the Procurement Act is not a clear directive, and neither the President nor the federal agencies can rely on it to impose an intrusive and sweeping vaccine mandate.

225. Further, any delegation sanctioning broad and intrusive executive action cannot be sustained without clear and meaningful legislative guidance, especially given the important separation-of-powers and federalism concerns implicated. Under the nondelegation doctrine, the Contractor Mandate is unconstitutional because Congress did not articulate a clear principle by legislative act that directs the Executive to take sweeping action that infringes on state and individual rights.

226. Here, the Executive Order cuts deeply into the state's sphere of power without articulating the underlying reasons or providing a justification beyond a superficial, unsupported, and pretextual reference to efficiency and economy in federal contracts.

227. Without *explicit* congressional authorization, the President's delegation of power in EO 14042 through the OMB Determination, the Task Force, and the various executive agencies acting to implement the Contractor Mandate cannot survive constitutional scrutiny.

COUNT IV – Violation of Separation of Powers and Federalism

(Under Article I, Section 8 of and Amendment X to the United States Constitution)

228. Plaintiffs incorporate each of the Complaint allegations stated above herein.

229. To the extent Defendants argue that the Contractor Mandate is authorized, such authorization would violate the Constitution's nondelegation principles.

230. The Contractor Mandate exceeds congressional authority.

231. Pursuant to Article I, Section 1 of the United States Constitution, Congress is vested with all legislative powers, but Congress must act pursuant to the enumerated powers granted to it by Article I.

232. Pursuant to Article I, Section 8 of the United States Constitution, Congress has authority "to make all Laws which shall be necessary and proper for carrying into Execution" its general powers ("the Necessary and Proper Clause"). The Necessary and Proper Clause does not "license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (citation omitted).

233. Pursuant to the Tenth Amendment of the United States Constitution, "the powers not delegated by the Constitution to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

234. Nothing in the Constitution authorizes the federal agencies of the executive branch to impose the Contractor Mandate on states because requiring vaccinations for state employees is an exercise of the police power left to the states under the Tenth Amendment.

235. The Constitution does not empower Congress to require anyone who deals with the federal government to get vaccinated. It is not a "proper" exercise of Congress's authority to mandate that every employee who touches a federal contract or comes in contact with another employee who touches such a contract, has to be vaccinated because the action here falls outside the scope of an Article I enumerated power.

236. Further, the Commerce Clause does not empower Congress to regulate purely noneconomic inactivity, such as an individual's choice not to receive a vaccination. *BST Holdings*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *21 (5th Cir. Nov. 12, 2021).

237. Defendants, through the Contractor Mandate, have exercised power that Congress does not possess under the Constitution and, therefore, cannot delegate to other branches of the federal government.

238. If Congress intended the Procurement Act to authorize the Contractor Mandate, the Act exceeds Congress's authority, and thus Defendants must be enjoined from taking any action under the Act.

COUNT V – Violation of the Tenth Amendment

(Under Amendment X to the United States Constitution)

239. Plaintiffs incorporate each of the Complaint allegations stated above herein.

240. Pursuant to the Tenth Amendment of the United States Constitution, "the powers not delegated by the Constitution to the United States, nor prohibited by

it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

241. Defendants, through the Contractor Mandate, have exercised power far beyond what was delegated to the federal government by Constitutional mandate or congressional action.

242. Neither Article II of the U.S. Constitution nor any act of Congress authorizes the federal agencies of the executive branch to implement the Contractor Mandate, which traditionally falls under the police power left to the states under the Tenth Amendment.

243. The Tenth Amendment explicitly preserves the "residuary and inviolable sovereignty," of the states. *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

244. By interfering with the traditional balance of power between the states and the federal government and by acting pursuant to ultra vires federal action, Defendants violated this "inviolable sovereignty," and thus, the Tenth Amendment.

245. Therefore, the Contractor Mandate was adopted pursuant to an unconstitutional exercise of authority by Defendants and must be invalidated.

COUNT VI – Unconstitutional Exercise of the Spending Clause

(Under Article I, Section 8, Clause 1 of the United States Constitution)

246. Plaintiffs incorporate each of the Complaint allegations stated above herein.

247. The challenged actions are unconstitutional conditions on the states' receipt of federal funds.

248. Article I, Section 8, Clause 1 of the United States Constitution gives Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and the general Welfare of the United States."

249. While "Congress may attach appropriate conditions to . . . spending programs to preserve its control over the use of federal funds," it cannot wield federal funding to unreasonably constrain state autonomy. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012). "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

250. Federal contracts are an exercise of the Spending Clause, yet the challenged actions ask Plaintiffs to agree to a coercive contract term.

251. The federal contracts at issue here account for considerable portions of Plaintiffs' budgets for essential research, education, and other necessary programs. The pressure on Plaintiffs to comply with the Contractor Mandate rises to the level of coercion. The challenged actions are invalid for that reason alone.

COUNT VII – Violation of FAR and Procurement Policy Act's Notice and Comment Requirements

(Under 41 U.S.C. § 1707 and 48 CFR § 1.105-1, *et seq.*)

252. Plaintiffs incorporate each of the Complaint allegations stated above herein.

253. Pursuant to 5 U.S.C. § 553, agencies must publish "a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force."

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S.Ct. 2367, 2384 (2020); 5 U.S.C. § 553(b).

254. Pursuant to 48 C.F.R. 1.501, "significant revisions" to the FAR must be made through notice-and-comment procedures. DOD, NASA, and the General Services Administration must jointly conduct the notice-and-comment process. *Id.*

255. Instead of amending the FAR to implement this significant revision, the FAR Council issued a purported "class deviation" without engaging in the notice-and-comment process. *See* 5 U.S.C. § 553.

256. Proper "class deviations" must fit within one of the discrete definitions set forth in 48 C.F.R. 1.401.

257. Here, however, the FAR Deviation Clause fits none of the definitions.

258. Instead, the FAR Deviation Clause is in the nature of a rule within the meaning of the APA because it is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

259. The FAR Council violated the APA by failing to comply with the notice-and-comment requirements for rulemaking.

260. Good cause does not excuse the FAR Council's failure to comply with the notice-and-comment process. See 5 U.S.C. § 553(b)(3)(B).

COUNT VIII – Violation of the APA

(Under 5 U.S.C. § 706)

261. Plaintiffs incorporate each of the Complaint allegations stated above herein.

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

263. Both OMB Determinations adopting the Task Force guidance are contrary to law for at least four reasons.

264. First, both OMB Determinations violate 41 U.S.C. § 1303(a) because it is a government-wide procurement regulation, which only the FAR Council may issue.

265. EO 14042 apparently seeks to circumvent § 1303 by delegating the President's Procurement Act power to the OMB Director.

266. That attempt is unlawful because the President has no authority to issue regulations under § 1303—only the FAR Council may issue government-wide procurement regulations. *See* Centralizing Border Control Policy Under the Supervision of the Attorney General, 26 Op. OLC 22, 23 (2002) ("Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President.").

267. Second, and relatedly, the OMB determinations are contrary to law because the Procurement Act does not grant the President the power to issue orders with the force or effect of law. Congress authorized the President to "prescribe policies and directives that the President considers necessary to carry out." 40 U.S.C. § 121(a).

268. "[P]olicies and directives" describe the President's power to direct the exercise of procurement authority throughout the government. It does not authorize the President to issue regulations himself.

269. Congress knows how to confer that power, as it authorized the GSA Administrator, in the same section of the statute, to "prescribe regulations." *Id.* § 121(c); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

270. And Congress has given the President the power to "prescribe regulations" in other contexts, typically in the realm of foreign affairs and national defense. *See, e.g.*, 18 U.S.C. § 3496 ("The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular officers."); 32 U.S.C. § 110 ("The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.").

271. Third, even if the Procurement Act authorized the President to issue orders with the force or effect of law, it would not authorize approval of the Task Force guidance. The President appears to assume that the Procurement Act's prefatory statement of purpose authorizes him to issue any order that he believes promotes "an economical and efficient" procurement system. 40 U.S.C. § 101; *see* **Ex. A** at 1 ("This order promotes economy and efficiency in [f]ederal procurement."). In doing so, the President mistakenly construes the prefatory purpose statement for a grant of authority. *D.C. v. Heller*, 554 U.S. 570, 578 (2008) ("[A]part from [a] clarifying

function, a prefatory clause does not limit or expand the scope of the operative clause.").

272. And even if the Procurement Act did authorize the President to issue binding procurement orders solely because they may promote economy and efficiency, the OMB Determination does not adequately do so. Providing the federal government with an "economical and efficient system for" procurement is not a broad enough delegation to impose a national-scale vaccine mandate that Congress has not separately authorized.

273. Further, the executive order is divorced from the practical needs of procurement. In order to maintain a steady and predictable flow of goods and services—and the advancement of science and technology through research and development—the federal procurement system requires a stable and reliable workforce to timely perform work required under tens of thousands of federal contracts and funding agreements. The Contractor Mandate disrupts the stability and reliability of the contractor workforce by forcing contractors to potentially fire unvaccinated and non-exempt covered employees, many of whom are highly skilled and essential to the work.

274. Because the OMB Determination violates § 1303(a), seeks to exercise a delegated power the President does not possess, and relies on a misreading of the Procurement Act, it is contrary to law.

COUNT IX – Violation of the APA

(Under 5 U.S.C. § 706)

275. Plaintiffs incorporate each of the Complaint allegations stated above herein.

276. Pursuant to the Administrative Procedure Act, agency action that is "arbitrary [or] capricious" is unlawful and must be set as aside by a court of competent jurisdiction. 5 U.S.C. § 706(2)(A).

277. Pursuant to 48 C.F.R. 1.402, "[u]nless precluded by law, executive order, or regulation, deviations from the FAR may be granted [] when necessary to meet the specific needs and requirements of each agency."

278. The Contractor Mandate and the OMB Determinations impose universal and uniform requirements without regard to the particularized needs and circumstances of each federal agency and are therefore arbitrary and capricious in violation of the APA.

COUNT X - Declaratory Judgment

(Under 28 U.S.C. § 2201(a))

279. Plaintiffs incorporate each of the Complaint allegations stated above herein.

280. For all the forgoing reasons, Plaintiffs request that the Court declare the Contractor Mandate unlawful, unconstitutional, and unenforceable.

COUNT XI –Injunctive Relief

281. Plaintiffs incorporate each of the Complaint allegations stated above herein.

282. The Contractor Mandate threatens immediate and irreparable harm to Plaintiffs, including a loss of highly trained employees, difficulty in completing existing contracts, and significant expenditure of time and resources in ensuring compliance.

283. Monetary damages or other remedies at law cannot adequately address the injury caused by the Contractor Mandate.

284. The deadlines imposed in the Contractor Mandate will have widespread and permanent effects that no legal remedy can reverse, such that the only available remedy to redress the harms is injunctive relief.

285. Balancing the hardships to Plaintiffs relative to the hardships to Defendants, extraordinary equitable relief is warranted.

286. Specifically, absent an injunction, Plaintiffs' operations will be jeopardized as a result of Defendants' adoption and implementation of the unconstitutional, illegal, and logistically unworkable Contractor Mandate.

287. On the other hand, the hardship of an injunction to Defendants is minimal; they simply must abide by the Constitution and the laws of the United States.

288. Permanent injunctive relief would not disserve the public interest, because it would enjoin unconstitutional and illegal executive action.

Prayer for Relief

Wherefore, Plaintiffs respectfully request that this Court:

1. Enter judgment in favor of Plaintiffs and against Defendants on all

Counts asserted herein.

2. Enter a declaratory judgment that Defendants, individually and collectively, have acted to impose a broad-sweeping, unlawful, and unconstitutional COVID-19 vaccine mandate, and that such COVID-19 vaccine mandate is unlawful and unenforceable.

3. Grant a preliminary and permanent injunction prohibiting Defendants and those acting in concert with them from enforcing this broad-sweeping, unlawful, and unconstitutional mandate.

4. Grant any additional and different relief to which Plaintiffs may be entitled.

5. Award Plaintiffs costs of litigation, including reasonable attorneys fees, as allowable by law.

Respectfully submitted this 19th day of November, 2021.

STATE OF GEORGIA
Georgia Attorney General
Christopher M. Carr

/s/ Drew F. Waldbeser
Stephen Petrany
Solicitor General
Drew F. Waldbeser (Admitted Pro Hac Vice)
Deputy Solicitor General
Ross W. Bergethon
Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Tel.: (404) 458-3378
Fax: (404) 656-2199
dwaldbeser@law.ga.gov

Counsel for State of Georgia Plaintiffs

/s/ Harold D. Melton
Harold D. Melton (Ga Bar No. 501570)
Charles E. Peeler (Ga Bar No. 570399)
Misha Tseytlin (Admitted Pro Hac Vice)
Special Assistant Attorneys General for Plaintiffs the State of Georgia, Governor Brian P. Kemp in his official capacity, Commissioner Gary W. Black in his official capacity; and the Board of Regents of the University System of Georgia

Troutman Pepper Hamilton Sanders LLP
Bank of America Plaza, Suite 3000
600 Peachtree Street N.E.
Atlanta, Georgia 30308-2216
Tel.: (404) 885-3000
Fax: (404) 962-6515

Harold.Melton@Troutman.com

Counsel for State of Georgia Plaintiffs

/s/ Paul H. Dunbar III
Paul H. Dunbar III (233300)
Capers Dunbar Sanders & Bellotti, LLP
2604 Commons Boulevard
Augusta, Georgia 30909
Phone: (706) 722-7542
pauldunbar@bellsouth.net

Local Counsel for Plaintiff-States and Agencies

STATE OF ALABAMA
Office of the Attorney General Steve Marshall

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr. (Admitted Pro Hac Vice)
Solicitor General
Thomas A. Wilson (Admitted Pro Hac Vice)
Deputy Solicitor General
Office of the Attorney General
501 Washington Ave.
Montgomery, AL 36130
Tel.: (334) 353-2196
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Thomas.Wilson@AlabamaAG.gov

Counsel for Plaintiffs State of Alabama and Alabama Agencies

/s/ William G. Parker, Jr.
William G. Parker, Jr. ((Admitted Pro Hac Vice)
General Counsel
Office of the Governor
Alabama State Capitol
600 Dexter Avenue, Room N-203
Montgomery, Alabama 36130
Tel.: (334) 242-7120
Fax: (334) 242-2335
Will.Parker@governor.alabama.gov

Counsel for Governor Kay Ivey

STATE OF IDAHO
Office of the Attorney General Lawrence G. Wasden

/s/ W. Scott Zanzig
W. Scott Zanzig (Admitted Pro Hac Vice)
Deputy Attorney General
954 W Jefferson, 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Tel.: (208) 334-2400
Fax: (208) 854-8073
scott.zanzig@ag.idaho.gov

Counsel for the State of Idaho

STATE OF KANSAS
Office of Attorney General Derek Schmidt

/s/ Brant M. Laue
Brant M. Laue (Pro Hac Vice forthcoming)
Solicitor General
20 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Tel: (785) 296-2215
Fax: (785) 296-6296
brant.laue@ag.ks.gov

Counsel for the State of Kansas

STATE OF SOUTH CAROLINA
Office of South Carolina Attorney General Alan Wilson

/s/ J. Emory Smith, Jr.
J. Emory Smith, Jr. (Admitted Pro Hac Vice)
Deputy Solicitor General

Thomas T. Hydrick (Pro Hac Vice forthcoming)
Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Tel.: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov

Counsel for the State of South Carolina

STATE OF SOUTH CAROLINA
Office of Governor Henry McMaster

/s/ Thomas A. Limehouse, Jr.
Thomas A. Limehouse, Jr. (Admitted Pro Hac Vice)
Chief Legal Counsel
Wm. Grayson Lambert (Admitted Pro Hac Vice)
Senior Legal Counsel
Michael G. Shedd (Admitted Pro Hac Vice)
Deputy Legal Counsel
Office of the Governor
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
tlimehouse@governor.sc.gov

Counsel for Henry McMaster, in his official capacity as Governor of the State of South Carolina

STATE OF WEST VIRGINIA
Office of Attorney General Patrick Morrisey

/s/ Lindsay See
Lindsay See (Pro Hac Vice forthcoming)
Solicitor General
Office of the Attorney General
State Capitol Complex
Bldg. 1, Room E-26
Charleston, West Virginia 25305
Tel.: (304) 558-2021
Lindsay.S.See@wvago.gov

Counsel for the State of West Virginia

STATE OF UTAH
Office of the Attorney General Sean Reyes

/s/ Melissa A. Holyoak
Melissa A. Holyoak (Admitted Pro Hac Vice)
Solicitor General
Office of the Attorney General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Tel.: 385.271.2484
melissaholyoak@agutah.gov

Counsel for the State of Utah

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, I caused to be electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record

This 19th day of November, 2021.

/s/ Harold D. Melton

Harold D. Melton (Ga Bar No. 501570)
Troutman Pepper Hamilton Sanders LLP
Bank of America Plaza, Suite 3000
600 Peachtree Street N.E.
Atlanta, Georgia 30308-2216
Harold.Melton@Troutman.com
(404) 885-3000
(404) 885-3900

No. ___

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; HT STAFFING, LTD., D/B/A HT GROUP; STATE OF LOUISIANA; COX OPERATING, L.L.C; DIS-TRAN STEEL, LLC; DIS-TRAN PACKAGED SUBSTATIONS, LLC; BETA ENGINEERING, LLC; OPTIMAL FIELD SERVICES, LLC; STATE OF MISSISSIPPI; GULF COAST RESTAURANT GROUP INC.; STATE OF SOUTH CAROLINA; AND STATE OF UTAH,

Petitioners,

v.

U.S. DEPARTMENT OF LABOR; MARTIN J. WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; AND DOUGLAS PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

Respondents.

PETITION FOR REVIEW

In accordance with 29 U.S.C. § 655(f) and Federal Rule of Appellate Procedure 15, the State of Texas; HT Staffing, Ltd., d/b/a HT Group; the State of Louisiana; Cox Operating, L.L.C.; DIS-TRAN Steel, LLC; DIS-TRAN Packaged Substations, LLC; Beta Engineering, LLC; Optimal Field Services, LLC; the State of Mississippi; Gulf Coast Restaurant Group Inc.; the State of South Carolina; and the State of Utah petition the Court for review of the Occupational Safety and Health Administration's Emergency Temporary Standard ("ETS") entitled "COVID-19

Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61402 (Nov. 5, 2021), a copy of which is enclosed with this filing.

Jurisdiction and venue for this petition are proper in this Court under 29 U.S.C. § 655(f), because the petition "challenges the validity" of Respondents' ETS and this Circuit is the location where one or more petitioners "reside[]" or have their "principal place of business." This petition for review is timely because it was filed on November 5, 2021—a date that is "prior to the sixtieth day after" the ETS was "promulgated." Joinder of the parties is practicable under Fed. R. App. P. 15(a)(1).

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON F. REITZ
Deputy Attorney General
for Legal Strategy

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General

/s/ William F. Cole
WILLIAM F. COLE
RYAN S. BAASCH
Assistant Solicitors General
William.Cole@oag.texas.gov

LEIF A. OLSON
Special Counsel

Counsel for the State of Texas

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General

JOSEPH S. ST. JOHN
Deputy Solicitor General

JOSIAH KOLLMEYER
Assistant Solicitor General

MORGAN BRUNGARD
Assistant Solicitor General

Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, LA 70804
Tel.: (225) 326-6766
emurrill@ag.louisiana.gov
stjohnj@ag.louisiana.gov
kollmeyerj@ag.louisiana.gov
brungardm@ag.louisiana.gov

Counsel for the State of Louisiana

ROBERT HENNEKE
General Counsel

MATTHEW MILLER
Senior Attorney

CHANCE WELDON
Attorney

Texas Public Policy Foundation
901 Congress Avenue
Austin, TX 78701
Tel.: (512) 472-2700
Fax: (512) 472-2728
rhenneke@texaspolicy.com
mmiller@texaspolicy.com
cweldon@texaspolicy.com

Counsel for HT Staffing, Ltd., d/b/a HT Group

JOHN P. MURRILL
Attorney

JOHN STONE CAMPBELL III
Attorney

Taylor, Porter, Brooks & Phillips L.L.P.
450 Laurel Street, Suite 800
Baton Rouge, LA 70801
Tel.: (225) 381-0241
Fax: (225) 215-8704

Counsel for Cox Operating, L.L.C.; DIS-TRAN Steel, LLC; DIS-TRAN Packaged Substations, LLC; Beta Engineering, LLC; and Optimal Field Services, LLC

LYNN FITCH
Attorney General of Mississippi

WHITNEY H. LIPSCOMB
Deputy Attorney General

SCOTT G. STEWART
Solicitor General

JUSTIN L. MATHENY
Deputy Solicitor General

JOHN V. COGHLAN
Deputy Solicitor General

Mississippi Attorney General's Office
P.O. Box 220
Jackson, MS 39205
Tel.: (601) 359-3680
whitney.lipscomb@ago.ms.gov
scott.stewart@ago.ms.gov
john.coghlan@ago.ms.gov

Counsel for the State of Mississippi

ALAN WILSON
Attorney General of South Carolina

THOMAS T. HYDRICK
Assistant Deputy Solicitor General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Tel.: (803) 734-3680
Fax: (803) 734-3677
thomashydrick@scag.gov

Counsel for the State of South Carolina

AARON R. RICE
Director

Mississippi Justice Institute
520 George St.
Jackson, MS 39202
Tel.: (601) 969-1300
aaron.rice@msjustice.org

Counsel for Gulf Coast Restaurant Group Inc.

SEAN REYES
Attorney General

MELISSA A. HOLYOAK
Solicitor General

Office of the Attorney General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Tel.: (385) 271-2484
melissaholyoak@agutah.gov

Counsel for the State of Utah

Certificate of Service

On November 5, 2021, this petition for review was served by certified mail, return receipt requested, on:

Douglas Parker, Assistant Secretary
Occupational Health and Safety Administration
United States Department of Labor
200 Constitution Ave. NW, Rm. S-2315
Washington, D.C. 20210

Martin J. Walsh, Secretary of Labor
United States Department of Labor
Office of the Secretary
200 Constitution Ave. NW
Washington, D.C. 20210

Edmund C. Baird
Associate Solicitor for Occupational Safety & Health
Office of the Solicitor of Labor
200 Constitution Ave. NW, Rm. S-4004
Washington, D.C. 20210

The Hon. Merrick B. Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

/s/ William F. Cole
William F. Cole