IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

SANDY BRICK, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*,

Defendants.

Civil Action No. 2:21-CV-4386

DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendants hereby move to dismiss the Complaint, ECF No. 1, for lack of subject matter jurisdiction and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or in the alternative, move for summary judgment on all counts. For the reasons set forth in their brief, Defendants' motion should be granted and the case should be dismissed, or in the alternative, summary judgment should be entered for Defendants.

Dated: March 25, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director
Federal Programs Branch

/s/ Madeline M. McMahon
MICHAEL P. CLENDENEN (DC Bar No. 1660091)
MADELINE M. MCMAHON (DC Bar No. 1720813)

Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street N.W.
Washington, DC 20005
Phone: (202) 451-7722
Fax: (202) 616-8460
madeline.m.mcmahon@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

SANDY BRICK, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*,

Defendants.

Civil Action No. 2:21-CV-4386

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION ... 1

BACKGROUND ... 3

I. The COVID-19 Pandemic Has Had Devastating Effects. ... 3

II. Safe and Effective Vaccines and Masks Are Widely Available in the United States ... 4

III. The Head Start Act Grants the Secretary the Authority to Issue Performance Standards Related to Health and Safety of Participants and Employees in Head Start. ... 6

IV. Recent Developments Have Revealed an Urgent Need for Further Action to Protect the Health of All Involved in Head Start ... 7

V. The Secretary Issued the Vaccination and Masking Rule to Protect the Health and Safety of All Involved in Head Start from the Transmission of SARS-CoV-2 in Head Start Facilities ... 8

VI. The Present Controversy ... 9

STANDARD OF REVIEW ... 9

ARGUMENT ... 10

I. Plaintiff States Lack Standing to Pursue Their Claims. ... 10

II. Plaintiffs Have Failed to State a Claim. ... 12

A. The Rule Is Authorized by Statute. ... 12

1. The Plain Statutory Text Authorizes the Rule. ... 12

2. The Agency's Construction of the Statute Is Reasonable. ... 14

i. The History of Past Head Start Regulations Confirms that HHS Has the Authority to Regulate Health and Safety Within Head Start Programs ... 15

ii. Nothing in the Statute Forecloses the Secretary's Reading of the Statute. ... 19

iii. The Statute Does Not Violate the Nondelegation Doctrine ... 22

B. The Secretary Had Good Cause to Issue the Interim Rule Without Advance Notice and Comment. ... 23

C. The Rule Does Not Violate the Commerce Clause ... 25

D. The Rule Does Not Violate the Tenth Amendment ... 25

CONCLUSION ... 27

TABLE OF AUTHORITIES

CASES

Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.,
141 S. Ct. 2485 (2021) 20, 21

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 13

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 9, 10

Bankers Life & Cas. Co. v. United States,
142 F.3d 973 (7th Cir. 1998) 15

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 9, 10

Berry v. Esper,
322 F. Supp. 3d 88 (D.D.C. 2018) 10

Biden v. Missouri,
142 S. Ct. 647 (2022) .... *passim*

Big Time Vapes, Inc. v. FDA,
963 F.3d 436 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2746 (2021) 22

Bostock v. Clayton Cnty.,
140 S. Ct. 1731 (2020) 19

Brackeen v. Haaland,
994 F.3d 249 (5th Cir. 2021) 26

Case v. Bowles,
327 U.S. 92 (1946) 26

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 12, 14

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 11

Council of S. Mountains, Inc. v. Donovan,
653 F.2d 573 (D.C. Cir. 1981) 24

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 9

Florida v. Dep't of Health & Hum. Servs.,
19 F.4th 1271 (11th Cir. 2021) 21, 22

Funk v. Stryker Corp.,
631 F.3d 777 (5th Cir. 2011) 10

GEO Group, Inc. v. Newsom,
15 F.4th 919 (9th Cir. 2021) 13

Gomez v. Galmon,
18 F.4th 769 (5th Cir. 2021) 10

Gonzales v. Oregon,
546 U.S. 243 (2006) 19

Hodel v. *Va. Surface Mining & Reclamation Ass'n,*
452 U.S. 264 (1981) 26

In re Compl. of RLB Contracting, Inc. v. Butler,
773 F.3d 596 (5th Cir. 2014) 10

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 22

Jifry v. FAA,
370 F.3d 1174 (D.C. Cir. 2004) 23

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 17

Klaassen v. Trs. of Ind. Univ.,
7 F.4th 592 (7th Cir. 2021) 22

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,
140 S. Ct. 2367 (2020) 12, 20

Livingston Educ. Serv. Agency v. Becerra,
No. 22-cv-10127, 2022 WL 660793 (E.D. Mich. Mar. 4, 2022) .... *passim*

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 9

Machete Prods., LLC v. Page,
809 F.3d 281 (5th Cir. 2015) 10

Merck & Co. v. U.S. Dep't of Health & Hum. Servs.,
962 F.3d 531 (D.C. Cir. 2020) 21

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 10

Mourning v. Family Publ'ns Serv., Inc.,
411 U.S. 356 (1973) 13

National Federation of Independent Businesses v. Department of Labor,
142 S. Ct. 661 (2022) 20

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 12

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 25

Nat'l Welfare Rts. Org. v. Mathews,
533 F.2d 637 (D.C. Cir. 1976) 12

New York v. United States,
505 U.S. 144 (1992) 25

Northport Health Servs. of Ark., LLC v. Dep't of Health & Hum. Servs.,
14 F.4th 856 (8th Cir. 2021) 22

Norwegian Nitrogen Prods. Co. v. United States,
288 U.S. 294 (1933) 17

Okla. rel. Okla. Dep't of Pub. Safety v. United States,
161 F.3d 1266 (10th Cir. 1998) 26

PennEast Pipeline Co. v. New Jersey,
141 S. Ct. 2244 (2021) 19

Pinnacle Armor, Inc. v. United States,
923 F. Supp. 2d 1226 (E.D. Cal. 2013) 10

Raines v. Byrd,
521 U.S. 811 (1997) 11

Sabri v. United States,
541 U.S. 600 (2004) 26

Smirnov v. Clinton,
806 F. Supp. 2d 1 (D.D.C. 2011), *aff'd*, 487 F. App'x 582 (D.C. Cir. 2012) 10

Sorenson Commc'ns Inc. v. FCC,
755 F.3d 702 (D.C. Cir. 2014) 23

Tellabs, Inc. v. Makor Issues & Rts., Ltd.,
551 U.S. 308 (2007) 10

Thorpe v. Hous. Auth. of City of Durham,
393 U.S. 268 (1969) 12, 13

United States v. Comstock,
560 U.S. 126 (2010) 25

United States v. Hatch,
722 F.3d 1193 (10th Cir. 2013) 25

United States v. Mikhel,
889 F.3d 1003 (9th Cir. 2018), *cert. denied*, 140 S. Ct. 157 (2019) 25

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 26

Walker v. Beaumont Indep. Sch. Dist.,
938 F.3d 724 (5th Cir. 2019) 10

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 23

STATUTES

5 U.S.C. § 553 23

42 U.S.C. § 264 21

42 U.S.C. § 9831 6

42 U.S.C. § 9832 ....11, 14, 15, 16

42 U.S.C. § 9835 16

42 U.S.C. § 9836 25

42 U.S.C. § 9836a ....*passim*

42 U.S.C. § 9837 16

42 U.S.C. § 9840a 6

42 U.S.C. § 9843 15

Headstart, Economic Opportunity, & Community Partnership Act of 1974,
Pub. L. No. 93-644, 88 Stat. 2291 6

RULES

Fed. R. Civ. P. 12 .... 9, 10

Fed. R. Civ. P. 56 10

REGULATIONS

45 C.F.R. § 1302.42 18

45 C.F.R. § 1302.47 16

45 C.F.R. § 1302.93 .... 16, 26

45 C.F.R. § 1304.2 11

45 C.F.R. § 1304.3-3 (1975) 6, 17

45 C.F.R. § 1304.3-4 (1975) 2, 6, 17

45 C.F.R. § 1304.5 16

45 C.F.R. § 1304.22 17

45 C.F.R. § 1306.35 17

45 C.F.R. § 1308 App'x (2015) 17

61 Fed. Reg. 57,186 (Nov. 5, 1996) 2, 6, 17

81 Fed. Reg. 61,294 (Sept. 6, 2016) 17

86 Fed. Reg. 68,052 (Nov. 30, 2021) .... *passim*

U.S. CONSTITUTION

U.S. Const. amend. X 25

OTHER AUTHORITIES

153 Cong. Rec. S14375-02 (daily ed. Nov. 14, 2007) 22

Ashley Fowlkes, Manjusha Gaglani, Kimberly Groover, et al., Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance—Eight U.S. Locations, December 2020–August 2021, (Aug. 27, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1167–69, https://perma.cc/5YKH-QYR4) 5

CDC, "COVID-19 Guidance for Operating Early Care and Education/Child Care Programs," updated Nov. 10, 2021, https://perma.cc/6VRE-FRTR) 8

CDC, COVID Data Tracker,
https://perma.cc/4CNT-7SKN 13

CDC, Delta Variant: What We Know About the Science (updated Aug. 26, 2021),
https://perma.cc/4YRA-UWSP..4

Centers for Disease Control and Prevention ("CDC"), COVID Data Tracker (Mar. 14, 2022),
https://covid.cdc.gov/covid-data-tracker/#datatracker-home
[https://perma.cc/T9UT-QSXZ] 1, 3, 4

Donna St. George, *Head Start Expands in Md. County Where Scandal Flared Two Years Ago*, Washington Post (Sept. 12, 2018),
https://perma.cc/RB7C-YP5B..7

Forum on Child and Family Statistics,
https://perma.cc/8EU9-V2HA 7

HHS, Grant Policy Statement (Jan. 1, 2007),
https://perma.cc/PME5-9724.. 6, 25

Megan Jehn, J. Mac McCullough, Ariella P. Dale, et al. Association Between K-12 School Mask Policies and School-Associated COVID-19 Outbreaks—Maricopa and Pima Counties, Arizona, July-August 2021, (Sept. 24, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1372–73,
https://perma.cc/Z9YT-3P28) 3

Miranda J. Delahoy, Dawud Ujamaa, Michael Whitaker, et al. Hospitalizations Associated with COVID-19 Among Children and Adolescents—COVID-NET, 14 States, Mar. 1, 2020-Aug. 14, 2021, (Sept. 10, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1255–60,
https://perma.cc/F535-GXNZ..4

OHS, *CDC Community Levels Recommendations and Mask Wearing*,
https://tmsc.createsend.com/campaigns/reports/viewCampaign.aspx?d=j&c=3A108D6223F50AA6&ID=AB3F63F79F75CFE62540EF23F30FEDED&temp=False&tx=0&source=SnapshotHtml..9

"Spikevax and Moderna COVID-19 Vaccine," U.S. Food & Drug Administration,
https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/spikevax-and-moderna-covid-19-vaccine 5

Tracy Lam-Hine, Stephen A. McCurdy, Lisa Santora, et al. Outbreak Associated with SARS-CoV-2 B.1.617.2 (Delta) Variant in an Elementary School—Marin County, California, May-June 2021, (Sept. 3, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1214,
https://perma.cc/27TA-622J..3

The White House, Path Out of the Pandemic,
https://perma.cc/M4GG-HB2Q..8

INTRODUCTION

COVID-19 has killed over 965,000 people and infected nearly 80 million in the United States alone. *See* Centers for Disease Control and Prevention ("CDC"), COVID Data Tracker (Mar. 14, 2022), https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/T9UT-QSXZ]. Those numbers continue to grow as the highly transmissible virus passes easily from person to person. As a result, the pandemic has been devastating for children and families alike. Fortunately, safe and effective vaccines are now approved or authorized for emergency use to protect against COVID-19. And now, the Supreme Court has confirmed that the "unprecedented circumstances" of the COVID-19 pandemic "provide no grounds for limiting the exercise of authorities [the Department of Health and Human Services] has long been recognized to have," and that such authorities may be used to impose vaccination requirements like the one challenged here. *See Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (per curiam).

Head Start, a federal grant program, provides funding to aid school readiness for infants, toddlers, and pre-school aged children from low-income families. The COVID-19 pandemic has hit Head Start students and families particularly hard. Head Start students are five years old and younger, and thus most cannot be vaccinated. Many of these students rely on the programs not just for educational purposes, but also for everyday needs, so program closures due to COVID-19 outbreaks have severe negative consequences beyond the classroom. In addition, a majority of Head Start children and personnel come from minority and low-income communities, which have been disproportionately impacted by COVID-19.

The Secretary of Health and Human Services (the "Secretary") reviewed the evidence and concluded that he must take urgent measures to protect Head Start students and those interacting with them from infection. Congress has assigned the Secretary a statutory responsibility to protect the health and safety of Head Start students and personnel. To carry out this statutory duty, the Secretary issued an Interim Final Rule, Vaccine and Mask Requirements to Mitigate the Spread of COVID 19 in Head Start Programs, 86 Fed. Reg. 68,052 (Nov. 30, 2021) (the "Rule"), requiring that those interacting with Head Start students be vaccinated for COVID-19, or otherwise qualify for an

exemption. These individuals were required to receive a single-shot vaccine or to obtain the second shot of a two-dose vaccine by January 31, 2022, or to request an exemption from this requirement from their employer. The Rule also requires masking, effective immediately, for all Head Start students over two years old and those Head Start personnel who have contact with students. Just as the Secretary did with the Supreme Court's approval in *Missouri*, 142 S. Ct. at 654, he issued the Rule on an emergency basis and waived a comment period in advance of publication due to an anticipated spike in COVID-19 cases in winter months and planned return to fully in-person services in January 2022. The Rule is therefore necessary to avoid further disruption to Head Start children's development and learning.

Plaintiffs, two employees of Head Start providers, challenge the Rule on statutory and constitutional grounds. As an initial matter, Plaintiffs lack standing to pursue their claims. Regardless, Plaintiffs have failed to state a claim for relief. The Secretary has express statutory authority to ensure that federal funds are used to protect the health and safety of Head Start students and personnel. He has exercised this authority for decades, including by promulgating regulations requiring Head Start participants to receive a slate of vaccinations, *see, e.g.*, 45 C.F.R. § 1304.3-4(2) (1975), and requiring staff to undergo health examinations and screenings, *see, e.g.*, Head Start Program, 61 Fed. Reg. 57,186, 57,210, 57,223 (Nov. 5, 1996). Similarly, here, the Secretary reasonably exercised that authority to arrive at the vaccination and mask Rule. He explained that the need to protect the health and safety of those in the Head Start program compelled him to act now. In exercising this authority Congress lawfully delegated to him under the Spending Clause, he did not run afoul of any Constitutional provision.

The Supreme Court upheld a similar Department of Health and Human Services vaccination requirement in *Missouri*, 142 S. Ct. 647, just last month. In light of that decision, a district court in the Eastern District of Michigan recently declined to issue a preliminary injunction of the Rule, holding that Plaintiffs were not likely to succeed on the merits of their claims because the Rule "plainly falls within the Secretary's authority." *Livingston Educ. Serv. Agency v. Becerra*, No. 22-cv-10127, 2022 WL

660793, at *4 (E.D. Mich. Mar. 4, 2022). For these reasons, this Court should dismiss the Complaint, or in the alternative, enter summary judgment in favor of Defendants.

BACKGROUND

I. The COVID-19 Pandemic Has Had Devastating Effects.

The novel coronavirus SARS-CoV-2 causes a severe acute respiratory disease known as COVID-19. 86 Fed. Reg. at 68,052. SARS-CoV-2 is primarily transmissible through exposure to respiratory droplets when one person is in close contact with another person who has COVID-19. As of March 2022, nearly 80 million COVID-19 cases and over 965,000 COVID-19 deaths had been reported in the United States. *See* CDC, COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/T9UT-QSXZ] (cited at 86 Fed. Reg. at 68,052 n.6). There can be no dispute that "COVID-19 is a highly contagious, dangerous, and . . . deadly disease." *Missouri*, 142 S. Ct. at 652. COVID-19 has had a disproportionate effect on low-income and minority communities. 86 Fed. Reg. at 68,054–56.

Because the virus that causes COVID-19 is highly transmissible, it readily spreads among unvaccinated individuals in classroom settings, even when infection control practices are followed. *Id.* at 68,053. Unvaccinated educators are at a much higher risk of infection and, therefore, pose a higher risk of transmitting the virus to young unvaccinated children in their care. *Id.* Studies have also shown that a lack of consistent mask usage in schools is associated with a higher risk of transmission.[1] Transmission of SARS-CoV-2 in child care settings often leads to infection and hospitalization in family members, including family members who are more susceptible to the effects of COVID-19 due to age or underlying condition. *Id.* at 68,055. When a child or staff member tests positive or is exposed to someone who has tested positive for SARS-CoV-2, classrooms and school programs often

[1] *See* 86 Fed. Reg. at 68,056 & nn.47–48 (citing Tracy Lam-Hine, Stephen A. McCurdy, Lisa Santora, et al. Outbreak Associated with SARS-CoV-2 B.1.617.2 (Delta) Variant in an Elementary School—Marin County, California, May-June 2021, (Sept. 3, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1214, https://perma.cc/27TA-622J; Megan Jehn, J. Mac McCullough, Ariella P. Dale, et al. Association Between K-12 School Mask Policies and School-Associated COVID-19 Outbreaks—Maricopa and Pima Counties, Arizona, July-August 2021, (Sept. 24, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1372–73, https://perma.cc/Z9YT-3P28).

must be closed for days or weeks to allow time to receive test results and for quarantining. *Id.* Closures impose hardship on Head Start children and families by preventing in-person attendance in Head Start, thereby impairing early learning and development and diminishing the ability of parents to work. *Id.*

In June and July 2021, an especially contagious strain of SARS-CoV-2 known as the Delta variant drove dramatic increases in COVID-19 case and hospitalization rates throughout the United States. *Id.* at 68,052 & n.4 (citing CDC, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), https://perma.cc/4YRA-UWSP). The Delta variant is associated with a higher risk of hospitalization in children: From June to mid-August 2021, weekly COVID-19-related hospitalizations among children and adolescents were nearly five times higher than in the preceding months. *Id.* at 68,054 & n.26 (citing Miranda J. Delahoy, Dawud Ujamaa, Michael Whitaker, et al. Hospitalizations Associated with COVID-19 Among Children and Adolescents—COVID-NET, 14 States, Mar. 1, 2020-Aug. 14, 2021, (Sept. 10, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1255–60, https://perma.cc/F535-GXNZ (noting also that hospitalization among children ages four and below increased tenfold)). Vaccination and mask usage remain effective mitigation strategies against the Delta variant. *Id.*

When the Secretary issued the Rule, there were troubling indications of a resurgence of the virus in the forthcoming winter months. *Id.* at 68,058; CDC, COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/T9UT-QSXZ]. Respiratory viruses, like SARS-CoV-2, typically circulate more easily in cold weather, and the United States experienced a large spike in COVID-19 cases during the winter of 2020. 86 Fed. Reg. at 68,058.

II. Safe and Effective Vaccines and Masks Are Widely Available in the United States.

Currently, three manufacturers offer vaccines approved or authorized for emergency use in the United States by the Food and Drug Administration ("FDA"). *See* 86 Fed. Reg. at 68,052. These vaccines are manufactured by Pfizer-BioNTech, Moderna, and Janssen (Johnson & Johnson), respectively. *Id.* On October 29, 2021, the FDA authorized the Pfizer-BioNTech vaccine for use in

children ages five and up. *Id.* at 68,059.[2] There is currently no vaccine available in the United States for children under the age of five. *Id.*

These vaccines are highly effective at preventing serious outcomes of COVID-19, including severe disease, hospitalization, and death. *Id.* at 68,054–55. The available evidence indicates that these vaccines offer strong protection against all known variants of the virus, including the Delta variant—particularly against hospitalization and death. *Id.* at 68,054. Other studies indicate that the vaccines are 80% effective in preventing SARS-CoV-2 infection among frontline workers—more effective in practice than other protocols, such as regular testing. *Id.* at 68,059 & n.74 (citing Ashley Fowlkes, Manjusha Gaglani, Kimberly Groover, et al., Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance—Eight U.S. Locations, December 2020–August 2021, (Aug. 27, 2021), MMWR Morb. Mortal Wkly. Rep. 2021; 70:1167–69, https://perma.cc/5YKH-QYR4).

Like all vaccines, COVID-19 vaccines are not 100% effective at preventing infection, and some breakthrough cases are expected among people who are fully vaccinated. However, the risk of developing COVID-19 remains much higher for unvaccinated than for vaccinated people, and therefore the presence of unvaccinated personnel is expected to lead to higher rates of transmission to other Head Start personnel and students. *Id.* at 68,055 & n.74. Vaccinated people with breakthrough COVID-19 cases are less likely to develop serious disease, be hospitalized, and die than those who are unvaccinated and get COVID-19. *Id.* at 68,059 (citing Fowlkes, et al., *supra*). Studies have also shown that vaccinated people with breakthrough infections may be less infectious than unvaccinated individuals with primary infections, resulting in fewer opportunities for transmission. *Id.*

Because children under age five cannot receive a COVID-19 vaccine at this time, masking remains an important mitigation strategy, along with vaccination among older individuals with whom

[2] After the Rule was issued, the FDA also authorized the Moderna COVID-19 vaccine for use in individuals eighteen years of age and older. *See* "Spikevax and Moderna COVID-19 Vaccine," U.S. Food & Drug Administration, https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/spikevax-and-moderna-covid-19-vaccine.

young children come in contact. *Id.* at 68,055.

III. The Head Start Act Grants the Secretary the Authority to Issue Performance Standards Related to Health and Safety of Participants and Employees in Head Start.

Head Start is a federal discretionary grant program that promotes school readiness in low-income children up to age five. 42 U.S.C. § 9831. Children under age three are eligible for the related Early Head Start program. *Id.* § 9840a. The Head Start program began as a summer program and demonstration grant in 1964, and in 1974 the Headstart–Follow Through Act made it a permanent program. Headstart, Economic Opportunity, & Community Partnership Act of 1974, Pub. L. No. 93-644, 88 Stat. 2291. The Head Start program is administered by the Office of Head Start ("OHS"), within the Administration for Children and Families ("ACF") of the Department of Health and Human Services ("HHS"). Head Start is a direct federal-to-local grant that does not pass through the state.

The Headstart–Follow Through Act required the Secretary of Health, Education, and Welfare (predecessor to HHS) to issue regulations prescribing standards for Head Start grantees. Pub. L. No. 93-644, § 8(a), 88 Stat. 2291, 2300. Since 1975, these standards, known as the Head Start Performance Standards, have included comprehensive health screening for children. 45 C.F.R. §§ 1304.3-3(b)(4)–(5), 1304.3-4(2) (1975). Over the years, additional health-related performance standards have been added. And in 1996, HHS added health screenings for staff and regular volunteers. 61 Fed. Reg. at 57,210, 57,223.

Because of the discretionary nature of Head Start grants, all participants necessarily agree to abide by the standards HHS sets when they voluntarily seek to join the program. *See* HHS, Grant Policy Statement, at I-1, I-3 to I-4 (Jan. 1, 2007), https://perma.cc/PME5-9724. No one is entitled to a Head Start grant or to attend a Head Start program. As a discretionary grant, the federal government maintains the authority to choose which entities receive grants. *See id.* Any entity that chooses to apply for and receives a Head Start grant agrees that it will meet the performance standards HHS imposes, even if those entities are school districts or educational institutions. *See id.*

Head Start is not a universal program, nor does it dominate early childhood care in the United

States. Of the 24.6 million children ages five and under in the United States, *see* Forum on Child and Family Statistics, https://perma.cc/8EU9-V2HA (last visited Dec. 23, 2021), only 864,289 are currently enrolled in Head Start programs, 86 Fed. Reg. at 68,077. Many alternative pre-kindergarten programs are available to families that object to the Head Start Performance Standards. For example, many school districts provide, in the same schools, both Head Start pre-K services and non-Head Start pre-K services, the latter of which are not subject to the Head Start standards or the Rule. *See Louisiana v. Becerra*, No. 3:21-cv-4370 (W.D. La.), Decl. of Jami Jo Thompson ¶ 2, Pls.' Ex. C, ECF No. 2-4; *Louisiana*, No. 3:21-cv-4370, Decl. of Arthur M. Joffrion, Pls.' Ex. P, ECF No. 2-17. Alternative options are also available to entities that object to the Head Start Performance Standards, including health standards such as the Rule. For instance, before the COVID-19 pandemic began, one Maryland school system determined that it could no longer maintain the standards set for Head Start, so it relinquished its grant and provided services through its own non-Head Start pre-K program instead. *See* Donna St. George, *Head Start Expands in Md. County Where Scandal Flared Two Years Ago*, Washington Post (Sept. 12, 2018), https://perma.cc/RB7C-YP5B.

IV. Recent Developments Have Revealed an Urgent Need for Further Action to Protect the Health of All Involved in Head Start.

As noted above, the emergence of the Delta variant over the summer months led to a dramatic spike in cases, hospitalizations, and deaths caused by COVID-19, a resurgence that has been driven by the spread of infection among the unvaccinated population. The Secretary's initial policy approach after vaccines became available to the general population during the early months of 2021 was to encourage, rather than require, vaccination. 86 Fed. Reg. at 68,054. However, as the agency eventually determined, "uptake of vaccination among Head Start staff has not been as robust as hoped for and has been insufficient to create a safe environment for children and families." *Id.* The vaccination rate among Head Start personnel was estimated to be 77.1% on November 10, 2021. *Id.* at 68,070. In September 2021, the President announced his COVID-19 Action Plan, which set out a series of regulatory actions that federal agencies were planning to undertake in response to the pandemic. As relevant here, the announcement described HHS's plans to require vaccinations for teachers and

personnel in Head Start programs. The White House, Path Out of the Pandemic, https://perma.cc/M4GG-HB2Q. On November 10, 2021, the CDC issued updated guidance to early childhood education and child care programs, which, among other things, recommended universal indoor masking for children ages two and older in these programs. 86 Fed. Reg. at 68,054 & n.28 (citing CDC, "COVID-19 Guidance for Operating Early Care and Education/Child Care Programs," updated Nov. 10, 2021, https://perma.cc/6VRE-FRTR).

V. The Secretary Issued the Vaccination and Masking Rule to Protect the Health and Safety of All Involved in Head Start from the Transmission of SARS-CoV-2 in Head Start Facilities.

On November 30, 2021, ACF published the interim final rule at issue here. The Rule adds to the Head Start Performance Standards that all Head Start staff, volunteers, and contractors whose activities involve contact with or providing direct services to children and families in classrooms (collectively, "Head Start personnel") must be fully vaccinated for COVID-19. 86 Fed. Reg. at 68,060. Under the Rule, all non-exempt personnel must receive the second dose of a two-dose COVID-19 vaccine or a single-dose COVID-19 vaccine by January 31, 2022. *Id.* at 68,052. Non-exempt individuals must provide documentation of their vaccination status. *Id.* at 68,061. Exemptions from the vaccination requirement will be given to individuals "who cannot be vaccinated because of a disability under the ADA, medical condition, or sincerely held religious beliefs, practice, or observance." *Id.* Each Head Start program must establish a process for reviewing and reaching a determination regarding exemption requests. *Id.* The Rule provides that exempt individuals must be tested for COVID-19 on a weekly basis. *Id.* at 68,053.

The Rule also adds to the Head Start Performance Standards a universal masking requirement. *Id.* at 68,060. All individuals ages two and over must wear a mask indoors in any setting where Head Start services are provided and inside any vehicle owned, leased, or arranged by the Head Start program. *Id.* Exceptions are permitted for individuals when they are eating or drinking, for children when they are napping, and for certain individuals who cannot wear a mask due to a disability. *Id.* Unvaccinated individuals are also required to wear a mask outdoors in crowded settings or during activities that involve sustained close contact with other people. *Id.* The masking requirement became

effective immediately upon publication of the Rule. *Id.*[3] The Secretary also concluded that there was good cause to waive the notice-and-comment process in rulemaking. *Id.* at 68,058–59.

VI. The Present Controversy

Plaintiffs challenge the Rule, asserting claims purportedly arising under the United States Constitution and the Administrative Procedure Act ("APA"). Compl. ¶¶ 39–84, ECF No. 1. On January 3, 2022, the Court denied Plaintiffs' motion for a preliminary injunction on the ground that the preliminary injunction in *Louisiana*, No. 3:21-cv-4370, mooted the need for relief. *See* Jan. 3, 2022 Mem. Order at 1, ECF No. 9. Plaintiffs have filed a motion to consolidate this action with *Louisiana*, *see* Mot. to Consolidate, ECF No. 12, and Defendants do not oppose that motion, *see* Notice, ECF No. 17. The Court granted Defendants' motion to extend the deadline to respond to the Complaint to March 24, 2022. *See* Mar. 8, 2022 Order, ECF No. 19.

STANDARD OF REVIEW

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a plaintiff bears the burden to establish a court's jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). It is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted).

Under both Rule 12(b)(1) and Rule 12(b)(6), to survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the

---

[3] On February 28, 2022, OHS released a statement that it "is reviewing the new CDC recommendations" concerning mask usage and, "[w]hile reviewing the guidelines, OHS will not evaluate compliance with the mask requirement in its program monitoring." OHS, *CDC Community Levels Recommendations and Mask Wearing*, https://tmsc.createsend.com/campaigns/reports/viewCampaign.aspx?d=j&c=3A108D6223F50AA6&ID=AB3F63F79F75CFE62540EF23F30FEDED&temp=False&tx=0&source=SnapshotHtml.

line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, "mere conclusory statements" and "legal conclusion[s] couched as . . . factual allegation[s]" are "disentitle[d] . . . to th[is] presumption of truth." *Id.* at 678, 681 (citation omitted).

While courts apply the plausibility standard under both rules, "in examining a Rule 12(b)(1) motion, a district court is empowered to find facts as necessary to determine whether it has jurisdiction." *Machete Prods., LLC v. Page*, 809 F.3d 281, 287 (5th Cir. 2015). Accordingly, "the district court may consider evidence outside the pleadings and resolve factual disputes." *In re Compl. of RLB Contracting, Inc. v. Butler*, 773 F.3d 596, 601 (5th Cir. 2014). In considering a Rule 12(b)(6) motion, courts may also consider "documents attached to the complaint," *Gomez v. Galman*, 18 F.4th 769, 775 (5th Cir. 2021) (quoting *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019)), as well as "documents incorporated into the complaint by reference," *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)).

A moving party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "Challenges to agency decisions under the APA are properly resolved on motions for summary judgment . . . ." *Berry v. Esper*, 322 F. Supp. 3d 88, 90 (D.D.C. 2018); *see also Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1245 (E.D. Cal. 2013) ("Normally, APA cases are resolved on cross-motions for summary judgment . . . ."); *Smirnov v. Clinton*, 806 F. Supp. 2d 1, 21 n.16 (D.D.C. 2011) ("[M]ost APA cases [are resolved] through the consideration of cross motions for summary judgment . . . ."), *aff'd*, 487 F. App'x 582 (D.C. Cir. 2012).

ARGUMENT

I. Plaintiffs Lack Standing to Pursue Their Claims.

To establish standing, Plaintiffs must show that they have suffered an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). Where, as here, the case involves deciding "whether an action taken by one of the other two branches of the Federal

Government was unconstitutional," the "standing inquiry [is] especially rigorous." *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997). There is a "well-established requirement that threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013)

Plaintiffs have not alleged that any injury is certainly impending, because they may not even be subject to the Rule if they fall within one of the Rule's exemptions from vaccination. Those exemptions include individuals who "cannot be vaccinated because of a disability under the ADA, medical condition, or sincerely held religious beliefs, practice, or observance." 86 Fed. Reg. at 68,061. Plaintiffs do not allege that they have requested an exemption and have been denied one. Accordingly, they have not shown that they have suffered an imminent injury-in-fact.

Even if Plaintiffs were not granted an exemption, they have not demonstrated that they are at imminent risk of being terminated. When HHS "determines through monitoring . . . that a grantee fails to comply with" a performance standard such as the vaccine requirement, "the official will notify the grantee promptly in writing, identify the area of noncompliance, and specify when the grantee must correct the area of noncompliance." 45 C.F.R. § 1304.2(a). If the noncompliance remains "unresolved," it turns into a "deficiency," or a "systemic or substantial material failure of an agency in an area of performance." 42 U.S.C. § 9832(2)(A), (C). After HHS identifies a deficiency, the Secretary, at his discretion, may require the agency "to correct the deficiency immediately," "to correct the deficiency not later than 90 days after the identification of the deficiency," or "to comply with" a "quality improvement plan." *Id.* § 9836a(e)(1)(B). This statutory scheme therefore establishes several steps that must be completed before any Head Start grantee could lose funding for failure to ensure its staff is vaccinated. As described in the statute, the performance standard regime is not intended to punish Head Start programs—it is designed to allow the Secretary to work with the programs to bring them back in alignment with the performance standards. Accordingly, the Head Start programs are not at risk of losing funding in the immediate future if they decide not to terminate Plaintiffs for failing to get the vaccine. Plaintiffs thus have not shown that they would suffer an imminent injury—losing their jobs—by staying unvaccinated.

II. Plaintiffs Have Failed to State a Claim.

A. The Rule Is Authorized by Statute.

The vaccination requirement falls within the Secretary's "broad rule-making powers." *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 277 n.28 (1969); *see also Nat'l Welfare Rts. Org. v. Mathews*, 533 F.2d 637, 640 (D.C. Cir. 1976) (referencing Congress's "broad grant of power" to the Secretary). When analyzing an agency's construction of a statute, courts apply *Chevron* deference to the agency's interpretation. Where, as here, "Congress has directly spoken to the precise question at issue," courts "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Only "if the statute is silent or ambiguous with respect to the specific issue," does the court assess "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Although this Court previously found a likelihood of success on the claim that HHS lacked statutory authority to implement the Rule, *see Louisiana*, No. 3:21-cv-4370, Order (Jan. 1, 2022), ECF No. 15 at 15–22, that opinion was issued before the Supreme Court made clear in *Missouri* that HHS had the statutory authority to enact a similar COVID-19 vaccine requirement that also derived from the federal government's authority to protect beneficiaries in a federally funded program. *See Missouri*, 142 S. Ct. at 652. And since the Supreme Court issued the *Missouri* opinion, another court has interpreted the Head Start Act as authorizing HHS to implement the Rule. *See Livingston*, 2022 WL 660793, at *4–8.

1. The Plain Statutory Text Authorizes the Rule.

Like any other question of statutory interpretation, an analysis of an agency's statutory authority "begins with the statutory text"—and, when the text is clear, it "ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted); *see, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020). Here, the Secretary's authority to adopt the Rule flows directly from the unambiguous text of the statute.

Congress charged the Secretary with adopting "standards relating to the condition . . . of [Head Start] facilities," as well as to address other "administrative . . . standards" necessary for safely carrying

out day-to-day operations of Head Start programs. 42 U.S.C. § 9836a(a)(1)(C), (D). Moreover, Congress vested the Secretary with broad authority to issue "such other standards as the Secretary finds to be appropriate" for Head Start agencies and programs. *Id.* § 9836a(a)(1)(E). Binding Supreme Court case law confirms the extent of the Secretary's authority under these statutes. Addressing similar enabling language in other statutes, the Supreme Court has concluded that this language grants the agency "broad authority." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973) (quotation marks omitted). More specifically, "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,'" the Court held that "the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Id.* at 369 (quoting *Thorpe*, 393 U.S. at 280–81); *see also Livingston*, 2022 WL 660793, at *5. The same is true of statutes that authorize regulations as the Secretary finds to be "appropriate." *See, e.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992); *GEO Grp., Inc. v. Newsom*, 15 F.4th 919, 930 (9th Cir. 2021) ("statutory language—'appropriate' and 'necessary and proper'—is a hallmark of vast discretion" (footnote omitted)).

The vaccination and masking Rule fits comfortably within the Secretary's statutory authority under this standard. *See Livingston*, 2022 WL 660793, at *4 ("[T]he Rule plainly falls within the Secretary's authority."). By requiring vaccines and masking for certain Head Start personnel and participants under certain circumstances and subject to exemptions, the Secretary was imposing an "administrative . . . standard" that was "necessary" for the safe management of Head Start programs, 42 U.S.C. § 9836a(a)(1)(C), and it was also a standard "relating to the condition . . . of facilities" to ensure they do not become places of viral contagion, *id.* § 9836a(a)(1)(D). At a bare minimum, he was imposing a "standard[]" he found to be "appropriate" for the Head Start program. *Id.* § 9836a(a)(1)(E). As noted above, Congress created the Head Start program as a means to provide a healthy and safe learning environment for low-income children across the country. This measure was "appropriate" to protect student health. The agency began by noting a CDC report that showed that over 51 million COVID 19 cases and 800,000 COVID-19 deaths had been reported in the United States. *See* CDC, COVID Data Tracker, https://perma.cc/4CNT-7SKN (cited at 86 Fed. Reg. at

68,052 n.6). It then explained that "vaccination is the most important measure for reducing risk for SARS-CoV-2 transmission and in avoiding severe illness, hospitalization, and death." 86 Fed. Reg. at 68,052 (footnote omitted). HHS went on to reason that "[g]iven that children under age 5 years are too young to be vaccinated at this time, requiring masking and vaccination among everyone who is eligible are the best defenses against COVID-19." *Id.* at 68,055. HHS further noted that in addition to protecting individuals from COVID-19, the requirements will "reduce closures of Head Start programs, which can cause hardship for families, and support the Administration's priority of sustained in-person early care and education that is safe for children—with all of its known benefits to children and families." *Id.* at 68,053 (footnote omitted). In short, the agency spelled out in great detail the connection between the Rule and the purposes of the Head Start Act.

In addition, the Secretary is charged with issuing deficiencies when programs fail to follow "program performance standards," 42 U.S.C. § 9836a(e)(1). The act defines a "deficiency" as "a systematic or substantial material failure of an agency in an area of performance that the Secretary determines involves—(i) a threat to the health, safety, or civil rights of children or staff; [or] (iii) a failure to comply with standards related to early childhood development and health services . . . ." *Id.* § 9832(2)(A). By its plain language, then, the Secretary can certainly establish "standards related to early childhood development and health services" and "the health . . . of children or staff" because he can issue deficiencies on failures to follow standards that are a threat to health and safety. *Id.*; *see Missouri*, 142 S. Ct. at 652 (explaining that a vaccination requirement "fits neatly within the language of [a] statute" addressed to the "health and safety of individuals" (internal quotation marks omitted)); *see also Livingston*, 2022 WL 660793, at *5 (discussing the Secretary's power to identify and correct "deficiencies").

2. The Agency's Construction of the Statute Is Reasonable.

Even if the Court were to disagree with the Government's arguments as to the plain meaning of the statute and move to step two of the Chevron deference framework, the agency's interpretation, at a minimum, "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In order to determine whether an interpretation is permissible, courts consider the statute's text, whether

the agency's interpretation matches the purpose of the statute (discussed above), and the history of past regulation in the area. *See Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998).

i. The History of Past Head Start Regulations Confirms that HHS Has the Authority to Regulate Health and Safety Within Head Start Programs.

For decades, HHS has issued regulations under the Head Start Act that concern the health and safety of Head Start children and personnel, similar to the Rule at issue here. In upholding a COVID-19 vaccine requirement for health care workers who treat Medicare and Medicaid patients, the Supreme Court emphasized a similar "longstanding practice of [HHS] in implementing the relevant statutory authorities." *Missouri*, 142 S. Ct. at 652. The Court rejected the state challengers' narrow reading of the statute at issue there because it was inconsistent with HHS's historical practice of imposing "conditions that address the safe and effective provision of health care, not simply sound accounting." *Id.*; *see also Livingston*, 2022 WL 660793, at *7.

Here, numerous provisions in the Head Start Act similarly charge the Secretary with the responsibility to issue regulations, as he deems necessary, to protect the health and safety of program participants and personnel. *See Missouri*, 142 S. Ct. at 653 (explaining numerous health and safety regulations fall within agency's grant of authority with respect to CMS). Those precise statutory provisions show that the health of children is a relevant consideration in the broader context of the statute. The Head Start Act directs that funding be used by Head Start agencies to provide "intensive training and technical assistance" for "[a]ctivities . . . to support . . . health services, and other services necessary to address the needs of children enrolled in Head Start programs." 42 U.S.C. § 9843(d)(1)(G). Other provisions are similarly in accord. *See id.* § 9832(21)(G)(i) (defining the "professional development" of "Head Start teachers and staff" that the act is intended to promote to include "activities that . . . assist teachers with . . . the acquisition of the content knowledge and teaching strategies needed to provide effective instruction and other school readiness services regarding . . . physical health and development"); *id.* § 9843(a)(3)(B)(xii)(VI), (b)(2)(D) (instructing the Secretary "to the maximum extent practicable" to "assist Head Start agencies and programs to address

the unique needs of programs located in rural communities, including . . . removing barriers to obtaining health screenings for Head Start participants in rural communities" and also to "support training for personnel . . . to recognize common health . . . problems in children for appropriate referral"); *see also id.* § 9835(m)(2) (directing the Secretary to establish rules requiring Head Start agencies "to allow families of homeless children to apply to, enroll in, and attend Head Start programs while required documents, such as . . . immunization and other medical records . . . are obtained within a reasonable time frame"); *id.* § 9836a(a)(2)(C)(ii) (requiring the Secretary to consider the effects of any revisions in Head Start standards on the "quality, scope, or types of health . . . services required to be provided under such standards as in effect on December 12, 2007").

HHS also has a long history of rulemaking related to Head Start health standards, including measures similar to the vaccine requirement at issue here, to which Plaintiffs have never objected. These health and wellness standards apply specifically to staff, who are required to have "an initial health examination and a periodic re-examination as recommended by their health care provider in accordance with state, tribal, or local requirements, that include screeners or tests for communicable diseases, as appropriate." 45 C.F.R. § 1302.93(a). In addition, all Head Start personnel are required to meet the child care standards of the states in which they operate. 42 U.S.C. § 9837(c)(1)(E)(iii); *see also id.* § 9832(2)(A)(vi) (defining a program deficiency in part as the "failure to meet any other Federal or State requirements that the agency has shown an unwillingness or inability to correct"); 45 C.F.R. § 1304.5(a)(2)(viii) (specifying that failure to abide by applicable state requirements is a ground for termination).

Head Start Programs also have a responsibility to "ensure staff do not, because of communicable diseases, pose a significant risk to the health or safety of others in the program." *Id.* § 1302.93(a). Current standards also include staff training on prevention and control of infectious diseases and establishing administrative procedures regarding protection from contagious diseases. *Id.* § 1302.47(b)(4)(i)(A) & (b)(7)(iii). Commonsense measures like demonstrably safe vaccines are logically included in Head Start Programs' preexisting obligations to prevent the spread of communicable diseases.

Further, HHS has long implemented regulations pertaining to program participants. The first Head Start Program Performance Standards were issued in 1975, and they included comprehensive health screening that "should be carried out for all of the Head Start children," including tests for anemia and tuberculosis as well as urinalyses. 45 C.F.R. § 1304.3-3(b)(4)–(6) (1975). Head Start staff were also required to verify immunizations records, *id.* § 1304.3-3(b)(8) (1975), and participants were required to complete all recommended immunizations, including for diphtheria/pertussis/tetanus, polio, rubeola, rubella, and mumps. 45 C.F.R. § 1304.3-4(2) (1975).[4]

Over the years, Head Start requirements pertaining to both staff and students have evolved in response to the most pressing health and medical threats of the times. For example, in the 1990s, guidance as an appendix to the performance standards included the appropriate treatment of children with HIV. 45 C.F.R. § 1308 App'x (2015). In 1996, HHS added health examinations for staff and tuberculosis screening for staff and regular volunteers to the Head Start Program Performance Standards. 61 Fed. Reg. at 57,210, 57,223. And in response to suggestions in comments that it no longer made sense to single out tuberculosis, HHS revised the staff health standard in 2016 to include more general language about staff health and communicable diseases. Head Start Performance Standards, 81 Fed. Reg. 61,294, 61,357, 61,433 (Sept. 6, 2016). Up through 2015, HHS even specifically mandated vaccinations for pets of families with children enrolled in home-based Head Start programs. 45 C.F.R. § 1306.35(b)(2)(ix) (2015).

Current and past standards have also included regulations similar to the Rule to avoid the spread of contagious diseases. In the past, standards have included spacing cribs three feet apart to avoid the spread of contagious diseases, *id.* § 1304.22(e)(7) (2015), and temporarily excluding children with acute or short-term contagious illnesses, *id.* § 1304.22(b). Current regulations also require Head

[4] These Standards are entitled to "peculiar weight" given that they were promulgated just a year after Congress made Head Start a permanent program and thus represent "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment) ("The government's early, longstanding, and consistent interpretation of a statute, regulation, or other legal instrument could count as powerful evidence of its original public meaning." (emphasis omitted)).

Start Programs to "[o]btain determinations from health care and . . . oral health care professionals as to whether or not the child is up-to-date on a schedule of age appropriate preventative and oral health care," including following "immunizations recommendations issued by the Centers for Disease Control and Prevention," *id.* § 1302.42(b)(1)(i), which currently include the COVID-19 vaccine for most Americans over age five, *see* CDC ACIP Recommendations. If a child is not up-to-date on vaccines, Head Start programs are directed to "[a]ssist parents with making arrangements to bring the child up-to-date as quickly as possible; and, if necessary, directly facilitate provision of health services to bring the child up-to-date with parent consent." 45 C.F.R. § 1302.42(b)(1)(ii). In order to accomplish this, Head Start programs are even permitted to "use program funds for professional medical and oral health services when no other source of funding is available." *Id.* § 1302.42(e)(2). As in *Missouri*, this history is a strong indication that the Head Start Act confers broad authority on the Secretary and that the Rule was a permissible exercise of that authority.

All of the aforementioned health regulations, including those regarding vaccinations and communicable disease precautions, have been considered "modifications" to the existing Head Start regulatory structure ever since 1975. 42 U.S.C. § 9836a(a)(1). Indeed, prior to this lawsuit, none of the Head Start Performance Standards had ever been challenged. Head Start grantees, some of which received their first Head Start grant as early as 1974, have abided by all of the Head Start Program Performance Standards, including the health standards such as health screening for staff and vaccination rules for participants, for decades. Those grantees have never suggested that those standards should be limited to exclude health. Many of these grantees applied and entered into the Head Start program with the knowledge that those standards already existed, and they accepted them. Yet now, as Head Start regulations continue to evolve to meet the challenges of the greatest public health threat of the present day—the global COVID-19 pandemic—Plaintiffs oppose the same sorts of health measures with which grantees have always complied. This history of compliance without complaint further undermines Plaintiffs' argument that the Secretary somehow lacks statutory authority for the similar measures required in the Rule.

As in *Missouri*, this history is a strong indication that the Head Start Act confers broad authority

on the Secretary and that the Rule was a permissible exercise of that authority. Further, *Missouri* recognizes that the federal government may exercise longstanding powers in new ways when faced with new challenges. The Court found it unsurprising that HHS's "vaccine mandate [went] further than what [HHS] has done in the past to implement infection control" because HHS "has never had to address an infection problem of [the] scale and scope" of the COVID-19 pandemic. *Missouri*, 142 S. Ct. at 653; *accord Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("[T]he fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command" (cleaned up)). That reasoning equally applies here. *See Livingston*, 2022 WL 660793, at *7. It is thus immaterial that HHS has not previously required Head Start personnel to be vaccinated. *See id.*; *see also PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2261 (2021) ("[T]he non-use[] of a power does not disprove its existence." (citation omitted)). What matters is that HHS has previously exercised its rulemaking authority to respond to novel challenges with nationally significant implications, and the exercise of that authority has never before been challenged.

ii. Nothing in the Statute Forecloses the Secretary's Reading of the Statute.

The agency's interpretation of the statute as including the authority to require masks and vaccinations should also be given deference as reasonable because the statute does not clearly express otherwise. *See generally Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (*Chevron* deference is warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation claiming deference was promulgated in the exercise of that authority" (citation omitted)); *see also Florida v. Dep't of Health & Hum. Servs.*, No. 21-14098 (11th Cir. Dec. 1, 2021), Order at 15–16 ("The imposition of a vaccine mandate as a condition on the receipt of federal funds to ensure patient safety within those facilities is not expressly foreclosed by this statute. There appears little likelihood of success on the APA claim.").

In discussing the Secretary's authority, Plaintiffs note the Supreme Court's statement that regulations of "major economic, social, and political significance" must be "authorized by a clear

statement" of congressional intent. Compl. ¶ 67 (citing *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)). Plaintiffs are likely to draw comparisons to the Occupational Safety and Health Administration ("OSHA") vaccination-or-testing requirement that the Supreme Court struck down in *National Federation of Independent Businesses v. Department of Labor*, 142 S. Ct. 661 (2022) ("*NFIB*") (per curiam). But *NFIB* is *particularly* distinguishable in that regard. The two rules are dramatically different in scope and operation. Whereas the OSHA requirement was considered inappropriate because it was overbroad in "imposing a vaccine mandate on 84 million Americans," *id.* at 665, this Rule's vaccination requirement would apply to only approximately 273,000 Head Start personnel, 86 Fed. Reg. at 68,077. And whereas the Supreme Court found that the OSHA requirement was not statutorily authorized because the threat was "untethered, in any causal sense, from the workplace," *NFIB*, 142 S. Ct. at 666, the threat exists with full force in a classroom environment with children who are too young to be vaccinated and where social distancing is often not possible. The Head Start context is more akin to health care facilities, where, the *NFIB* Court recognized, COVID-19 "poses a special danger because of the particular features of an employee's job or workplace" such as "particularly crowded or cramped environments." *Id.* at 665–66. Therefore, "targeted regulations are plainly permissible." *Id.* at 666. In other words, the analogous case is *Missouri*, where the Court held that a vaccination requirement "fits neatly within the language of the statute." *Missouri*, 142 S. Ct. at 652; *see also Livingston*, 2022 WL 660793, at *6 (discussing *NFIB* and *Missouri*).

In any event, Congress did speak clearly by authorizing the Secretary to impose, inter alia, "standards relating to the condition . . . of [Head Start] facilities," as well as to address other "administrative . . . standards" necessary for safely carrying out day-to-day operations of Head Start programs. 42 U.S.C. § 9836a(a)(1)(C), (D). Moreover, Congress gave the Secretary the authority to adopt any "other standards as the Secretary finds to be appropriate." *Id.* § 9836a(a)(1)(E). "Congress could have limited [the Secretary's] discretion in any number of ways, but it chose not to do so." *Little Sisters of the Poor*, 140 S. Ct. at 2380. And courts may not "impos[e] limits on an agency's discretion that are not supported by the text." *Id.* at 2381. Plaintiffs can point to no statutory text that would indicate that Congress intended the broad powers it granted the Secretary over "administrative . . .

standards," "standards relating to the condition . . . of facilities," and "such other standards as the Secretary finds to be appropriate" to mean anything other than their natural implication, which includes the protection of Head Start students and employees at federally-funded Head Start facilities from a virus that has killed more than 960,000 Americans. 42 U.S.C. § 9836a(a)(1)(C), (D), (E). Indeed, the Supreme Court recently rejected a similar effort to "offer a narrow[] view" of "seemingly broad [statutory] language," where "the longstanding practice of" HHS "in implementing the relevant statutory authorities [told] a different story." *Missouri*, 142 S. Ct. at 652.

Plaintiffs' reliance on *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), is misplaced. There, the Supreme Court held that an eviction moratorium imposed by the CDC exceeded the agency's authority to "prevent the [interstate] introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). Reading that language in context, the Court held that its scope was informed by the next sentence "illustrating the kinds of measures that could be necessary," such as "fumigation" or "pest extermination." 141 S. Ct. at 2488. Those measures "directly relate to preventing the interstate spread of disease," whereas the eviction moratorium "relate[d] to interstate infection" only "indirectly," through the "downstream connection between eviction" and possible spread of COVID-19 by evicted individuals moving "from one State to another." *Id.*

Here, the connection between the vaccine requirement and student and personnel health is direct: By requiring program personnel to take the measure that most effectively reduces the risk of contracting and spreading COVID-19, the Secretary sought to reduce the risk that Head Start students and personnel would contract the virus. *Cf. Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1287–88 (11th Cir. 2021); *see generally Merck & Co. v. U.S. Dep't of Health & Hum. Servs.*, 962 F.3d 531, 537–38 (D.C. Cir. 2020) (distinguishing an invalid rule with only "a hoped-for trickle-down effect on the regulated programs" from a valid rule with "an actual and discernible nexus between the rule and the conduct or management of Medicare and Medicaid programs"). Moreover, a COVID-19 outbreak in a Head Start program hampers students' ability to learn and benefit from the numerous ways in which Head Start supports children and families. The Secretary is simply exercising long-recognized

and common sense authority to adopt health and safety conditions for federally-funded programs for personnel who are already subject to extensive conditions of employment.

There is also no reason to think that Congress—which granted the Secretary broad authority to protect Head Start students and personnel precisely because it could not foresee all future threats to participant health and safety—would have regarded a vaccine requirement as a matter requiring specific authorization. *See* 153 Cong. Rec. S14375-02, S14376 (daily ed. Nov. 14, 2007) (statement of Sen. Kennedy) (Head Start "provides the starting point for a child's day, with a healthy meal each morning and a promise to parents that while they are at work and balancing two jobs, their children will see a doctor and dentist, and receive immunizations."). To the contrary, "[v]accination requirements are a common feature of the provision of healthcare in America," *Missouri*, 142 S. Ct. at 653, and have had particular prominence in the education context. *See, e.g.*, *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 25–35 (1905) (identifying vaccine requirements in the United States and other Western countries in the early 1800s). Thus, "when it comes to vaccination mandates, there was no reason for Congress to be more specific than authorizing the Secretary to make regulations." *Florida*, 19 F.4th at 1288 (in the context of the Secretary's rulemaking regarding Medicare and Medicaid facilities). At a bare minimum, the Secretary reasonably understood his authority to encompass this responsibility, and that understanding is entitled to deference from this Court. *See Northport Health Servs. of Ark., LLC v. Dep't of Health & Hum. Servs.*, 14 F.4th 856, 870 (8th Cir. 2021).

iii. The Statute Does Not Violate the Nondelegation Doctrine.

Plaintiffs also invoke the nondelegation doctrine to contend that Congress could not delegate to the Secretary the authority to protect the health and safety of participants and employees at schools that receive Head Start funding. Compl. ¶ 66. But "[d]elegations are constitutional so long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the authority is directed to conform." *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 441 (5th Cir. 2020) (cleaned up), *cert. denied*, 141 S. Ct. 2746 (2021). The Secretary's statutory authority to protect

the health and safety of Head Start students and personnel easily meets this minimal standard. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (upholding "public health" standard). The Secretary has been delegated authority in the Head Start Act merely to set standards for the performance of the Head Start program. Any performance standards that he implements under this statute, in addition to being "appropriate," must of course further the purpose of the Head Start program. He is not regulating broad swaths of the economy. He is setting the terms on which grantees may accept federal funds. There is no nondelegation issue here.

B. The Secretary Had Good Cause to Issue the Interim Rule Without Advance Notice and Comment.

Notice-and-comment rulemaking is not required "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). The exception excuses notice and comment where delay could result in serious harm. *See Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). The Supreme Court in *Missouri* recently upheld the good cause exception for a COVID-19 vaccination requirement in a substantially similar context, where the Secretary found that "accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID–19 infections, hospitalizations, and deaths." 142 S. Ct. at 654.

Based on this clear precedent, the Secretary properly invoked the good cause exception in promulgating the Rule. *Livingston*, 2022 WL 660793, at *8 (upholding Secretary's application of good cause exception in promulgating the Rule). He noted nearly identical concerns as in *Missouri*. *See* 86 Fed. Reg. at 68,058. He identified the "potential for the rapid and unexpected development and spread of additional new and more transmissible variants." *Id.* at 68,053. He addressed the proven efficacy of both masking and vaccines in mitigating the spread of COVID-19, noting that "[i]t is critical that all Head Start staff get fully vaccinated for COVID-19 and consistently wear masks to protect children, staff, and families from exposure." *Id.* Further, the emergence of the highly transmissible Delta variant, which "has resulted in greater rates of cases and hospitalizations among children," 86 Fed.

Reg. at 68,053, 68,055, amply justified taking urgent measures. *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (although good cause is rarely invoked, "we have approved an agency's decision to bypass notice and comment where delay would imminently threaten life"). Given the Rule's "life-saving importance," *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981), the Secretary found that any delay in issuing the Rule would "endanger the health and safety of staff, children and families, and be contrary to the public interest," 86 Fed. Reg. at 68,059. These factors are more than the "something specific . . . required to forgo notice and comment." *Missouri*, 142 S. Ct. at 654 (citation omitted); *see also Livingston*, 2022 WL 660793, at *8 (holding that the Secretary's good cause finding amounted to "something specific" permitting HHS to bypass notice and comment).

Plaintiffs contend that the Secretary should have issued the Rule earlier, Compl. ¶ 47, but *Missouri* rejected a nearly identical claim. *Missouri*, 142 S. Ct. at 654 ("[W]e cannot say that in this instance the two months the agency took to prepare a 73-page rule constitutes 'delay' inconsistent with the Secretary's finding of good cause."). Similarly, crafting a fifty-page rule with 144 cited sources in under two months is eminently reasonable. The agency's care in taking the time to make a reasoned and careful policy determination hardly means that the circumstances were not urgent enough to justify expediting the rulemaking by dispensing with a notice-and-comment period for the time being. As experience has shown, any delay in fighting the worst pandemic in a century can quite literally be fatal. Instead, the Secretary acted consistently with the reasons he gave for finding good cause. The Secretary initially chose a policy of "allow[ing] Head Start programs to decide whether or not to require staff vaccination." 86 Fed. Reg. at 68,054. But because of the Delta variant and the potential for new variants, the prospect of returning to fully in-person programs in January 2022, and a vaccination uptake among Head Start personnel that "has not been as robust as hoped for," *id.*, the Secretary properly concluded that further delay would be intolerable and invoked the good cause exception.

C. The Rule Does Not Violate the Commerce Clause

Plaintiffs next claim that imposing COVID-19 safety requirements violates the Commerce Clause. Compl. ¶¶ 68-80. But here, the government is not using its Commerce Clause authority to regulate anything. Instead, the Head Start Act was passed pursuant to Congress' authority to enact discretionary grant programs under the Spending Clause. "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012) ("*NFIB*"). "Grant recipients are aware when they apply to the program that they must abide by the Head Start Performance Standards and that they are free to leave the program and operate outside the Secretary's standards if they choose to do so." *Livingston*, 2022 WL 660793, at *9 (citing Grant Policy Statement; 42 U.S.C. §§ 9836(d)(2)(F), 9836a(a)(1)). Accordingly, the Rule does not violate the Commerce Clause.[5]

D. The Rule Does Not Violate the Tenth Amendment

Plaintiffs cannot succeed on their Tenth Amendment claim, Compl. ¶¶ 81-84, by simply invoking general maxims of federalism. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The powers specifically delegated to the federal government by the Constitution "are not powers that the Constitution 'reserved to the States.'" *United States v. Comstock*, 560 U.S. 126, 144 (2010) (citation omitted); *accord New York v. United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States[.]"). As long as federal action rests on a constitutionally delegated power, "there can be no violation of the Tenth Amendment." *United States v. Mikhel,* 889 F.3d 1003, 1024 (9th Cir. 2018) (citation omitted), *cert. denied*, 140 S. Ct. 157 (2019); *accord United States v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013).

[5] Without citing to any specific constitutional provision, Plaintiffs also argue that the Rule violates what they call the "Legislative Power Clause." Compl. ¶¶ 75-80. For the reasons explained, the Rule was promulgated under the Head Start Act, which Congress lawfully enacted pursuant to its Spending Clause power. Accordingly, the Rule does not run afoul of any constitutional provision, let alone any such "Legislative Power Clause," and this claim should also be dismissed.

As mentioned, Section § 9836a(a)(1) was enacted pursuant to the Spending Clause, an exercise of Congress's legislative power under the Constitution. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 (1982). Where (as here) a federal statute is validly enacted under one of Congress's enumerated powers, and the Executive Branch exercises authority lawfully delegated under that statute, the Tenth Amendment is no bar to federal action. *See Livingston*, 2022 WL 660793, at *9 (finding that the Rule did not violate the Tenth Amendment because it "rests on a constitutionally delegated power"). Congress has charged the Secretary with the responsibility to ensure that federal funds are used in the way that Congress directed, and this includes the responsibility to protect the health and safety of those in the Head Start program. "Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, . . . [and] to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Sabri v. United States*, 541 U.S. 600, 605 (2004). This power applies even when Congress legislates "in an area historically of state concern." *Id.* at 608 n.*; *see also Livingston*, 2022 WL 660793, at *9. "The Secretary did not intrude on state police powers when he issued the Rule any more than he did when he issued the long-standing rules conditioning federal funds on requiring that Head Start personnel do not 'pose a significant risk' 'of communicable disease.'" *Id.* at *10 (quoting 45 C.F.R. § 1302.93(a)).

Moreover, there is no general "doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its power[s] so as not to interfere with the free and full exercise of the powers of the other." *Case v. Bowles*, 327 U.S. 92, 101 (1946). Indeed, it is axiomatic that the federal government does not "invade[] areas reserved to the States by the Tenth Amendment simply because it exercises *its* authority" under the Constitution, even "in a manner that *displaces* the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981) (emphasis added); *accord Okla. ex rel. Okla. Dep't of Pub. Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998). Thus, "the Federal Government, when acting within a delegated power, may override countervailing state interests, whether those interests are labeled traditional, fundamental, or otherwise." *Brackeen v. Haaland*, 994 F.3d 249, 310 (5th Cir. 2021) (citation omitted).

Missouri confirms that Plaintiffs' constitutional claims are meritless. In their briefing before the Supreme Court, the Missouri plaintiffs argued that the vaccination rule challenged there unconstitutionally intruded on the states' police powers, *see* Response to Application for a Stay Pending Appeal, *Becerra v. Louisiana*, Nos. 21A240, 21A241, at 23–24, 27 (U.S. Dec. 30, 2021); violated the Tenth Amendment, *id.* at 1; and violated the non-delegation doctrine, *id.* at 27. The Supreme Court effectively rejected these claims, explaining that it "disagree[d] with respondents' remaining contentions in support of the injunctions entered below." *Missouri*, 142 S. Ct. at 653. Accordingly, these claims should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint, or in the alternative, enter summary judgment in favor of Defendants.

Dated: March 24, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director
Federal Programs Branch

/s/ Michael P. Clendenen
MICHAEL P. CLENDENEN (DC Bar No. 1660091)
MADELINE M. MCMAHON (DC Bar No. 1720813)
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street N.W.
Washington, DC 20005
Phone: (202) 305-0693
Fax: (202) 616-8460
michael.p.clendenen@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

SANDY BRICK, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No. 2:21-CV-4386

[DRAFT] PROPOSED ORDER

On this day came to be considered Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b). It is hereby **ORDERED** that Defendants' motion is **GRANTED**. Plaintiffs' Complaint, ECF No. 1, is hereby dismissed.

IT IS SO ORDERED.

March ___, 2022

____
THE HONORABLE TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE