

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH R. BIDEN, JR.,)
PRESIDENT OF THE UNITED STATES,)
ET AL.,)
 Applicants,)
 v.) No. 21A240
MISSOURI, ET AL.,)
 Respondents.)
 and)
XAVIER BECERRA, SECRETARY OF)
HEALTH AND HUMAN SERVICES, ET AL.,)
 Applicants,)
 v.) No. 21A241
LOUISIANA, ET AL.,)
 Respondents.)
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P R O C E E D I N G S

(12:12 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 21A240, Biden, President of the United States, versus Missouri, and the consolidated case.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER
ON BEHALF OF THE APPLICANTS

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

Hospitals, nursing homes, and other Medicare and Medicaid providers serve patients who are especially vulnerable to COVID-19 in settings that are especially conducive to the spread of the virus.

The Secretary required those providers to make sure that their staff are vaccinated, subject to medical and religious exemptions, because he found that vaccination is the best way to prevent workers from infecting their patients with a potentially deadly disease. He also found that any delay in implementing that requirement would cause preventable deaths and severe illnesses.

1 The preliminary injunctions in these
2 cases are delaying that urgently needed
3 protection for Medicaid and Medicare patients
4 in half the country. This Court should stay
5 those injunctions for two reasons.

6 First, requiring medical staff
7 vaccination during a pandemic falls squarely
8 within the Secretary's statutory authority to
9 protect the health and safety of Medicare and
10 Medicaid patients. Vaccination requirements
11 are a traditional and common way to curb the
12 spread of infectious disease. Many healthcare
13 workers are already required to be vaccinated
14 against diseases like hepatitis, measles, and
15 the flu. And the medical community
16 overwhelmingly supports COVID-19 vaccination
17 requirements, which have been adopted by
18 providers around the country. Those
19 requirements are, in short, the paradigmatic
20 example of a health and safety measure.

21 Second, the Secretary's decision was
22 thoroughly explained and supported by the
23 record. The states do not seriously deny that
24 requiring vaccination will save lives.
25 Instead, they predict that it will cause

1 staffing shortages, especially in some rural
2 areas.

3 But the Secretary carefully considered
4 that concern. He explained that experience
5 from around the country shows that most workers
6 actually will choose to be vaccinated rather
7 than to leave their jobs in response to
8 vaccination requirements. And he concluded
9 that the risk of some temporary staffing
10 shortages is outweighed by the urgent need to
11 protect all Medicare and Medicaid patients
12 during a deadly pandemic.

13 Congress assigned those quintessential
14 predictive and policy judgments to the
15 Secretary, and the states have identified no
16 basis to disturb his conclusions.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Counsel, are you
19 relying on 1302(a)?

20 MR. FLETCHER: The -- the Secretary
21 invoked -- that's the Secretary's general
22 rulemaking authority under the Social Security
23 Act, and he invoked that general rulemaking
24 authority as he typically does when he makes
25 rules under the Act.

1 But we're not relying primarily or --
2 on that. We're instead relying on specific
3 authorities as to each category of covered
4 providers that allow the Secretary to set
5 standards that set the requirements for their
6 participation in Medicare and Medicaid.

7 JUSTICE THOMAS: I don't understand
8 what you just said.

9 MR. FLETCHER: I'm sorry. The answer
10 is yes, but not only on 1302. We also have
11 specific statutes that speak to each of the
12 covered providers here.

13 JUSTICE THOMAS: So, if I look at the
14 language in 1302, which says that you -- that
15 the Secretary shall make and publish such rules
16 and regulations as may be necessary to the
17 efficient administration of the functions with
18 which each is charged under this chapter, you
19 say there is more than that authorizing the
20 Secretary?

21 MR. FLETCHER: Correct. Yes.

22 JUSTICE THOMAS: What is that more?

23 MR. FLETCHER: So the more is set
24 forth -- it's different as to each category of
25 providers. So take hospitals. There, the

1 additional authority is in section 1395x(e)(9),
2 which authorizes the Secretary to set such
3 requirements as he finds necessary in the
4 interest of the health and safety of patients
5 in Medicare and Medicaid.

6 The Secretary cited other similar
7 requirements that authorize him to set
8 conditions of participation for each of the
9 categories of providers, for nursing homes, for
10 ambulatory surgical centers. All of those
11 categories of providers are subject to similar
12 requirements that say the Secretary gets to
13 determine the requirements for their
14 participation in Medicare and Medicaid. The
15 Secretary has long relied on those specific
16 statutory authorities to set forth detailed
17 conditions of participation that are in the
18 Code of Federal Regulations.

19 And what he did here was say, I'm
20 going to add an additional condition of
21 participation pursuant to those specific
22 authorities for each category of provider
23 requiring vaccination against COVID-19.

24 JUSTICE THOMAS: Has that been used in
25 the past -- the argument or the authority that

1 you just set out, has that been used to require
2 vaccinations in the past?

3 MR. FLETCHER: It has not, no. But
4 the Secretary explained why not. He explained
5 that this is a unique pandemic where we have
6 unique access to effective vaccines. So he
7 explained that, in other settings, healthcare
8 workers are typically vaccinated against
9 communicable diseases because they got them
10 during childhood when all of us did or because
11 state authorities have required vaccinations.

12 But this is a uniquely deadly pandemic
13 that because it is so new, those requirements
14 haven't caught up and ensured the level of
15 staff vaccination that you see in the context
16 of other diseases. And that's why he found it
17 necessary to step in with this requirement.

18 JUSTICE THOMAS: One last -- just a
19 question. Don't you think it's a bit curious
20 that you're placing significant reliance on a
21 provision that speaks about necessary to the
22 efficient administration to administer a
23 vaccine that has -- could have significant
24 health consequences?

25 MR. FLETCHER: Justice Thomas, I

1 don't. So, first of all, I just want to be
2 clear, again, I'm not claiming that that
3 general authority alone would authorize the
4 vaccination requirement. We're resting on the
5 conditions specific to each category of
6 provider, the vast majority of which, the ones
7 covering 97 percent of the workers affected by
8 this rule, specifically reference conditions
9 aimed at health and safety.

10 JUSTICE THOMAS: Thank you.

11 MR. FLETCHER: I think, when you look
12 at it in that context, it's clear that this is
13 a paradigmatic health and safety requirement.

14 CHIEF JUSTICE ROBERTS: Counsel, in
15 which case is the relationship between the
16 agency closer to the COVID-19 danger, in the
17 CMS case that you're arguing before us now or
18 in the OSHA case that your boss just finished
19 arguing?

20 MR. FLETCHER: I think they're both --
21 they're different cases. I think it's hard to
22 say which one is closer. The OSHA case, the
23 OSH Act gives the Secretary of Labor
24 responsibility for workplace safety, and you
25 just heard why the COVID-19 pandemic is a grave

1 threat in the workplace.

2 CMS has authority to protect the
3 health and safety of patients in Medicare and
4 Medicaid and explained at length why the
5 COVID-19 pandemic is an acute danger to
6 patients in that setting. So I -- I -- I think
7 they're both very close directly to this.

8 CHIEF JUSTICE ROBERTS: Well, maybe
9 I'll expand it. Which is a more acute danger,
10 OSHA, CMS, or the federal contractor vaccine
11 mandate?

12 MR. FLETCHER: Well, I think all of
13 them. I think this gets to the question you
14 asked my boss earlier, which is, you know, the
15 government is doing a lot of things in response
16 to the pandemic, and I don't think that's a
17 surprise. This is an unprecedented pandemic
18 that touches virtually every aspect of American
19 life, and so it does affect the authorities of
20 lots of different federal agencies.

21 CHIEF JUSTICE ROBERTS: Do you think
22 the -- the -- that the government has picked
23 the three most pressing areas to address and
24 that they're doing it in order, or why -- why
25 OSHA, why CMS, why federal contractors? Why

1 not any host of other areas --

2 MR. FLETCHER: Well --

3 CHIEF JUSTICE ROBERTS: -- that are
4 also -- you know, where COVID-19 is also a
5 serious problem?

6 MR. FLETCHER: Well, because the
7 federal government is, as some of the questions
8 earlier had suggested, a government with
9 limited powers. The federal agencies have the
10 authorities that Congress has given them.

11 Congress has made OSHA responsible for
12 workplace safety. Congress has made CMS
13 responsible for Medicaid and Medicare patient
14 safety, and those agencies have determined and
15 explained their conclusions why those
16 authorities are called upon here by the sort of
17 unique threat that the COVID-19 pandemic poses
18 in both contexts.

19 CHIEF JUSTICE ROBERTS: I thought you
20 might have said, and it may have been
21 uncomfortable, but I thought you might have
22 said we're dealing here in this case with
23 healthcare, with Medicare and Medicaid.

24 And what could be closer to addressing
25 the COVID-19 problem to health than healthcare?

1 I mean, people already get sick when they go to
2 the hospital. But, if they -- they go and face
3 COVID-19 concerns, well, that's -- that's much
4 worse. On the other hand, OSHA, it's work --
5 it's workplace, yes, COVID is a problem in the
6 workplace, and in some situations, it may be a
7 more serious problem.

8 But it seems to me that if any of the
9 three that I've been talking about anyway
10 present a close connection, it would surely
11 be between a -- be between a health threat like
12 COVID-19 and the government's healthcare.

13 MR. FLETCHER: Mr. Chief Justice, I
14 certainly don't want to disagree with that at
15 all. I think there is an acute threat that
16 COVID-19 poses in healthcare settings. We've
17 seen that throughout the pandemic, especially
18 in nursing homes and other congregate care
19 settings, which are within the scope of this
20 rule.

21 I absolutely agree that Americans
22 shouldn't be forced to choose between getting
23 medical care and exposing themselves
24 unnecessarily to a virus. And as we explained,
25 healthcare workers have long been expected to

1 take extra precautions, including vaccinations,
2 in order to prevent them from infecting their
3 patients.

4 So I don't disagree with any of that,
5 but in making all of those points, I don't want
6 to undersell also everything you heard about in
7 the first case about the grave danger that the
8 pandemic poses for workers as well in a way
9 that implicates OSHA's authority too.

10 JUSTICE SOTOMAYOR: Counsel, there is
11 another significant difference that you haven't
12 talked about. This is a Spending Clause case
13 and not a general powers case.

14 And I always thought that when you're
15 talking about the Spending Clause, that the
16 government has more power to define where it
17 wants to spend its money, correct?

18 MR. FLETCHER: Absolutely.

19 JUSTICE SOTOMAYOR: And to that
20 extent, one of the major arguments raised by
21 the other side here that I want you to address
22 is the -- what they describe as the enormous
23 cost that this will affect on hospitals and the
24 fact that it's affecting so many healthcare
25 providers, et cetera.

1 Could you please tell me whether this
2 is unprecedented in terms of what CMS generally
3 does?

4 MR. FLETCHER: I can. And, first, if
5 I could, I'd like to put it in context with the
6 cost. I think the Secretary's cost estimate
7 was on the order of \$1.3 billion, much of which
8 will be borne by the federal government, which
9 covers the cost of vaccinations.

10 He put that in context by emphasizing
11 that healthcare spending in this country is \$4
12 trillion and that the costs in this case amount
13 to about \$125 per employee. So I don't think
14 the costs of this rule when viewed in context
15 are particularly great.

16 And I think the -- it is not at all
17 unprecedented for the Secretary to exercise the
18 same authorities that I was discussing with
19 Justice Thomas here: the authorities to set
20 conditions of participation for hospitals and
21 other providers in Medicare and Medicaid, to
22 impose very detailed, very prescriptive
23 requirements that would have very high
24 compliance costs.

25 This is not a place where it's

1 unfamiliar to have the Secretary involved in
2 the details of the management of healthcare
3 organizations.

4 JUSTICE ALITO: Did the states have
5 clear notice that by accepting Medicaid funds
6 they would be subject to vaccination
7 requirements for staff at their state-run
8 facilities?

9 MR. FLETCHER: So the facilities --
10 and this applies to all facilities in Medicaid
11 and Medicare, not to the states as the
12 administrators of -- of their own Medicaid
13 programs, but I acknowledge states do have
14 state-run facilities.

15 All of them are notice that they're
16 subject to the health and safety requirements
17 that the Secretary may adopt from time to time.
18 Obviously, they didn't have specific notice of
19 the vaccination requirement because it didn't
20 exist until the pandemic came about, but the
21 way that the program operates is that all
22 providers are on notice that they have to
23 comply with the Secretary's regulations which
24 could change.

25 JUSTICE ALITO: So, if they read the

1 statutes that you are now relying on primarily,
2 that would provide them clear notice that they
3 might be subject to something like this
4 vaccination requirement?

5 MR. FLETCHER: It would sub -- put
6 them on clear notice that they are subject to
7 such requirements as the Secretary finds
8 necessary in the interest of patient health and
9 safety, which have long included infection
10 control. In the past, that's been general.
11 It's been requiring infection control plans
12 that meet national guidelines, fire
13 preparedness, emergency safety, things of that
14 nature.

15 So they've long been on notice that
16 they are subject to requirements by the
17 Secretary in the interest of patient health and
18 safety, and I think this is a sort of heartland
19 case of a measure to protect patient health and
20 safety in the midst of a pandemic.

21 JUSTICE ALITO: I -- I don't have
22 before me the particular statutory provision
23 that you spoke of earlier, but is it the case
24 that some -- some of many, if not all, of these
25 additional statutory provisions on which you

1 are now placing your principal reliance are
2 definitional provisions rather than provisions
3 that expressly authorize the Secretary to
4 promulgate regulations?

5 Is that correct or incorrect?

6 MR. FLETCHER: They are both. So they
7 are definitions. The provision I quoted
8 earlier, 1395x(e), is the definition of a
9 hospital --

10 JUSTICE ALITO: Right.

11 MR. FLETCHER: -- for purposes of the
12 statute.

13 JUSTICE ALITO: Right.

14 MR. FLETCHER: But, in that
15 definition, it says a hospital, and what that
16 -- it means to be a hospital is to eligible for
17 Medicare reimbursement.

18 What it means to be a hospital is to
19 meet the following specified requirements,
20 including such other requirements as the
21 Secretary finds necessary. So --

22 JUSTICE ALITO: Right. But it
23 isn't -- it doesn't say the Secretary is
24 authorized to promulgate any regulations that
25 protect the health and welfare of people in a

1 hospital or in any of these other facilities.

2 It says that the definition of a
3 hospital and the definitions of these other
4 facilities, by definition, they -- they are
5 facilities that are required to comply with
6 regulations.

7 MR. FLETCHER: As the Secretary finds
8 necessary in the interest of patient health and
9 safety, yes.

10 JUSTICE ALITO: Is there any limit to
11 that power? What could the Secretary -- what,
12 if anything, could the Secretary not do if the
13 Secretary finds that something is necessary to
14 protect the health and safety of people in
15 those facilities?

16 MR. FLETCHER: Well, I think the
17 Secretary -- the major limit is the one in the
18 text of the statute itself. The Secretary has
19 to find that it's a requirement that's in the
20 interest of patient health and safety, as the
21 Secretary did here.

22 I think the other constraints on that
23 authority are the types of health and safety
24 measures that you see in healthcare providers.
25 So the way you know that this provision is

1 within the Secretary's authority is that you
2 see providers adopting it on their own. You
3 see medical societies, like the American
4 Hospital Association, the AMA, the American
5 Nurses Association, recommending this policy.
6 You see some states adopting this policy.

7 I think all of those things are
8 powerful confirmations that this is a routine,
9 common, effective measure for protecting
10 patient health and safety.

11 JUSTICE ALITO: One of the arguments
12 on the other side is that you were required by
13 statute to consult with the states before you
14 did this. What is your response to that?

15 MR. FLETCHER: There is a provision of
16 the statute that says that when the Secretary
17 sets conditions of participation for some of
18 the providers at issue here, in carrying out
19 that function, he shall consult with the
20 states.

21 The statute doesn't say that that
22 consultation has to happen before a rulemaking.
23 And the way that the Secretary has long
24 understood that to function is to require
25 consultation in conjunction with the notice-and

1 comment process.

2 JUSTICE ALITO: I mean, isn't that --
3 isn't that an odd understanding of -- of the
4 consultation requirement? We're -- we're going
5 to tell you to do something, and then, after
6 we've told you to do it, we're going to consult
7 with you about what we've already said you have
8 to do?

9 MR. FLETCHER: I don't think so,
10 Justice Alito, in the context of the provisions
11 of the statute that also contemplate, as the
12 APA does, that in some circumstances the
13 Secretary will have good cause to act without
14 notice and comment.

15 So, in the ordinary case, there's
16 going to be notice and public comment, which
17 has the benefits that Justice Barrett referred
18 to earlier. When that happens, you should also
19 be sure you consult with the states and with
20 accrediting boards. But, when there's good
21 cause to skip that, the agency has long
22 interpreted that to mean that it can defer
23 consultation with the states to the parallel
24 public comment process.

25 JUSTICE ALITO: But is there -- is

1 there a good cause exception in the provision
2 that requires consultation?

3 MR. FLETCHER: There isn't, but
4 there's no temporal requirement at all. So
5 it's actually the other side that's asking you
6 to read into that a requirement that it happen
7 before rulemaking and to make that requirement
8 apply even when the good cause exception is
9 satisfied. And we don't think there's any
10 basis to do that, certainly not in the
11 Secretary's past practice.

12 This has long been the way that the
13 Secretary has interpreted this provision in
14 conjunction with the good cause exception --

15 JUSTICE BARRETT: Mister --

16 MR. FLETCHER: -- to notice and
17 comment.

18 JUSTICE BARRETT: -- Mr. Fletcher, can
19 I follow up on the questions that Justice
20 Thomas and Justice Alito have been asking you
21 about the facility-specific statutes?

22 MR. FLETCHER: Yes.

23 JUSTICE BARRETT: I think it was wise
24 to shift your focus to those because of their
25 references to health and safety, but I find it

1 difficult because the language of each of those
2 statutes is different, and not all of them
3 reference health or safety.

4 MR. FLETCHER: That's right.

5 JUSTICE BARRETT: So, for example, I
6 think the one on long-term care facilities is
7 your best because that's the one that also
8 refers to or requires skilled nursing
9 facilities to establish and maintain an
10 infection control program.

11 That one, I think, gives you a
12 stronger case than the ones that don't mention
13 health and safety at all, or, for example, for
14 ambulatory surgical centers, you know, the
15 provision on which you rely describes the
16 benefits provided to an individual, and then it
17 lists the kind of services that would be
18 covered, right, and then, parenthetically, it
19 says "performed at an ambulatory surgical
20 center (that meets health and safety and other
21 standards specified by the Secretary)," it
22 seems to me a heavier lift to say that that
23 kind of aside in a parenthetical is a grant of
24 authority to CMS to impose this kind of
25 vaccination requirement on those who work at

1 the ambulatory surgical centers.

2 So I guess my question is this: One,
3 you know, the government here is seeking the
4 stay of the injunction and has the burden of
5 showing likelihood of success on the merits,
6 and -- and I understand because of space limits
7 and the number of statutes on which you're now
8 relying, it would be hard to make the specific
9 case for each of these provisions, but what if
10 I think some of the provisions might support
11 you and others don't?

12 This was an omnibus rule, and even
13 though the Secretary, in a chart, identified
14 all these, you know, specific provisions, we
15 don't really have before us the structural and
16 textual arguments directed at each of these
17 provisions. So what if I think some do and
18 some don't? In an omnibus rule, what am I
19 supposed to do?

20 MR. FLETCHER: Well, so we agree
21 entirely that the focus ought to be on the
22 statutory text, and one of our complaints with
23 the district court decisions in these cases is
24 that they blew past all of those distinctions
25 and didn't focus on the text at all. So we

1 absolutely agree the text of these provisions
2 should be the Court's focus.

3 In terms of how to think about them, I
4 understand it's unwieldy. There are 15
5 different provisions. I would group them into
6 two categories. There are 11 or so that we
7 cite at pages 5 to 6 of our reply brief that
8 include that health -- that specific health and
9 safety language, in different formulations, but
10 all of them specifically referring to
11 requirements in the interest of patient health
12 and safety.

13 And as we've explained, we think that
14 this is the paradigmatic health and safety
15 regulation, and that's reinforced by the
16 consensus of the medical community, by other
17 regulators, by practices of providers.

18 Now there are a few statutes that we
19 cite at page 9 of our reply brief that don't
20 include that specific language. Those statutes
21 are the ones applicable to providers that
22 employ about 3 percent of all of the workers
23 covered by the rule.

24 Now our view is that those -- all of
25 those statutes still give the Secretary the

1 authority to set standards or requirements for
2 participating providers. And if you look at
3 those provisions, what you find is that
4 Congress was a little bit less detailed. In
5 the hospital provision, the 1395x(e)(9), the
6 preceding eight sections all detail relatively
7 nuanced, very specific requirements for
8 hospitals. And then the (e)(9) adds "and such
9 other requirements as may be necessary to
10 patient health and safety."

11 JUSTICE BARRETT: But what if I
12 disagree? So I understand that your position
13 is that all of these granted the Secretary
14 authority, but what if I disagree? What if I
15 say, for example -- you suggested in a footnote
16 in your reply brief that because such a small
17 percentage of employees are covered by the
18 statutes that don't reference health and
19 safety, that we should just allow the
20 injunction to remain in place only as to those.

21 And let's say that I disagree with you
22 that every single one of the statutes that
23 references health and safety could be
24 interpreted as a grant of rulemaking authority
25 for the reason I suggested with ambulatory

1 surgical centers.

2 The rule is an omnibus rule. You
3 know, it wasn't adopted on a
4 facility-by-facility basis. So, if I assume
5 the premise that I disagree with you that every
6 single statute grants this authority, why
7 shouldn't then we just leave the Fifth
8 Circuit's injunction in place?

9 MR. FLETCHER: Well, because I think,
10 to the extent you're looking at likelihood of
11 success -- that's the factor that this would be
12 relevant to -- I think that does depend, as you
13 say, on the authorities as to each category of
14 providers, and the Secretary included -- in
15 some sense, it's an omnibus regulation, he did
16 it all at once, but he included specific
17 severability language that we cite in that
18 footnote -- it's at page 61608 -- and said if
19 any of these provisions are no good, then the
20 rest ought to stand.

21 And so I think, if you disagree with
22 us on either the provisions that lack health
23 and safety language or if you disagree with us
24 on the ones that have it, although I want to
25 talk about both of those things to hopefully

1 persuade you otherwise, I think the result
2 would be we don't have a likelihood of success
3 at obtaining -- prevailing on those provisions.

4 But that wouldn't justify allowing the
5 injunctions to remain in place as to all of the
6 other provisions, you know, especially those
7 that cover the vast majority of workers. So I
8 -- I think that's the -- the approach we'd
9 suggest if that's where you find yourself.

10 JUSTICE SOTOMAYOR: Mr. Fletcher, I --
11 I -- I'm not -- I do understand that we could
12 go provision by provision, but I thought in
13 reading your brief that the general authority
14 to pass regulations to -- with respect to the
15 Secretary's functions, that all that you were
16 saying is that generalized authority is well
17 documented by the fact that in the vast
18 majority of these at least 11, if not 12, of
19 these specific rules, they referenced health
20 and safety directly.

21 Isn't that your point?

22 MR. FLETCHER: That's our point. And,
23 in addition, that even as to the ones that
24 don't reference health and safety, so the
25 end-stage renal disease providers or the

1 psychiatric residential treatment facilities,
2 those categories, Justice Barrett and -- and
3 Justice Sotomayor, they still give the
4 Secretary even broader authority to set
5 conditions for participation.

6 And our view is that when the
7 Secretary is authorized to set conditions for
8 participation in Medicare and Medicaid, that
9 has to include the authority to set patient
10 health and safety requirements. And, in fact,
11 that's the way the Secretary has long
12 interpreted them.

13 If you look at the regulations that
14 are being amended by the provisions addressing
15 those categories of providers, there are
16 existing bodies of patient health and safety
17 measures, in many cases addressing infection
18 control already, in other cases addressing
19 other matters directed at patient health and
20 safety.

21 So the Secretary has long interpreted
22 those more general grants of authority to
23 include the authority to impose patient health
24 and safety conditions, and we think that's the
25 right way to read them in the context of the

1 statute.

2 JUSTICE SOTOMAYOR: I dare say that I
3 looked at some of the regulations at issue
4 here, not the ones you passed with respect to
5 COVID but other regulations. Is it fair to say
6 that the vast majority of the regulations
7 across all facilities relate to health and
8 safety?

9 MR. FLETCHER: I think that's fair,
10 yes. That's certainly consistent with my
11 reading of the regulations applicable to the
12 facility providers at issue here.

13 JUSTICE SOTOMAYOR: It does seem that
14 since it's a program to serve ill people,
15 people with conditions like renal failure,
16 psychiatric conditions, other conditions, that
17 that would be the primary focus of contracting
18 with places that are safe for those people,
19 correct?

20 MR. FLETCHER: Absolutely. And that's
21 the way the Secretary has always understood
22 those more general authorities.

23 JUSTICE SOTOMAYOR: Thank you.

24 MR. FLETCHER: If I -- I could say
25 just a word about the other argument that the

1 other side has pressed heavily in this case,
2 and that's the concern about staffing
3 shortages, that is a concern that the Secretary
4 acknowledged and considered in the regulation,
5 and he explained nonetheless that he was
6 adopting a vaccination requirement for several
7 reasons.

8 First, he explained that experience
9 from around the country has shown that even
10 workers who express hesitancy or even strong
11 objections to becoming vaccinated don't
12 actually end up leaving their jobs in those
13 large numbers when vaccination requirements are
14 imposed, when their employers can help
15 facilitate vaccination, can counsel them, that
16 across the economy, including in the healthcare
17 sector, including in rural areas, including
18 healthcare systems in North Carolina and
19 Indiana, the Secretary found that vaccination
20 requirements achieved very high levels of
21 compliance.

22 He sought comment on the issue. He
23 welcomed input from stakeholders about the
24 particular challenges faced by rural hospitals,
25 but he also explained that any temporary

1 staffing shortages are likely to be relatively
2 minor in the context of this industry, which
3 already faces enormous staff turnover every
4 year. He said the rate of staff turnover in
5 the healthcare industry generally is about
6 25 percent in normal conditions and that in
7 those circumstances, any marginal additional
8 turnover attributable to the vaccination
9 requirement does not outweigh the need to
10 impose this health and safety measure that,
11 again, is supported by the medical community
12 and has already been adopted by providers
13 around the country.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Breyer, anything further?

18 Justice Alito?

19 Justice Kagan?

20 JUSTICE KAGAN: Mr. Fletcher, the
21 states talk quite a bit about the time that it
22 took the administration to get out the good
23 cause rule and suggest that, in that amount of
24 time, it could have done a full
25 notice-and-comment proceeding.

1 I guess I would like you to comment on
2 that. Is that true?

3 MR. FLETCHER: It's not for a number
4 of reasons. I think the clearest is the
5 provision governing notice-and-comment
6 regulations that applies when good cause isn't
7 found for the Secretary. 1395hh says that the
8 Secretary has to allow a 60-day comment period.
9 So that right there is more than two months.

10 You know, in addition to that, the
11 Secretary has to write the rule, which involves
12 not just developing the regulation and fitting
13 it into the existing conditions of
14 participation for 15 different categories of
15 providers but also writing the sort of detailed
16 cost benefit analysis and Paperwork Reduction
17 Act analysis that are required by statutes and
18 executive orders and that occupy dozens of
19 pages at the back end of the rule.

20 So I think the suggestion that in two
21 months the agency could have completed
22 notice-and-comment rulemaking is inconsistent
23 with both the applicable legal requirements and
24 just experience with regulatory process more
25 generally.

1 JUSTICE KAGAN: Yeah. I guess, sort
2 of for an ordinary person, an ordinary person
3 might say, well, if it's really important, why
4 don't you just work faster?

5 MR. FLETCHER: I -- I understand that.
6 I mean, that doesn't get you around the 60-day
7 time limit. And what I can tell you is that
8 the Secretary did work extremely fast, produced
9 a 73-page rule in two months, and explained why
10 the rule was necessary, satisfied all of the
11 legal requirements.

12 And I think -- you know, I don't want
13 to fault my friends on the other side, but I
14 think, if the Secretary had rushed something
15 out with a less thorough explanation, I think
16 we'd be hearing legal challenges that he hadn't
17 adequately explained things or considered
18 things or calculated out the cost benefits.

19 I think agencies that are trying to
20 make policies that will stick have to make sure
21 that they engage in the kind of robust analysis
22 and document that analysis in the way that the
23 Secretary did here.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor? Anything further?

1 Back to you, Justice Gorsuch.

2 JUSTICE GORSUCH: This statute, unlike
3 the -- the OSHA statute, actually contains an
4 express limitation on the Secretary's authority
5 that we haven't yet discussed and that I know
6 you're familiar with. Among other things, it
7 says, you know, the Secretary shall not control
8 the tenure of -- of employees at covered
9 healthcare facilities or their compensation or
10 their selection.

11 And -- and this regulation, arguably,
12 the other side will say -- I'm sure we're going
13 to hear it, so I didn't want you to not have a
14 chance -- is going to say this effectively
15 controls the employment of individuals at these
16 healthcare facilities in a way that Congress
17 specifically prohibited.

18 As I understand your response, it is
19 we're just providing money or not providing
20 money, and by withholding money, we're not
21 controlling who you hire.

22 And I might understand that in some
23 circumstances, but in a statute where
24 everything is about spending, it's a Spending
25 Clause statute, I would have thought that

1 Congress would have understood and we should
2 interpret this language in that light, that you
3 cannot use the money as a weapon to control
4 these things.

5 And, in fact, of course, as you know,
6 the Court has some anti-commandeering law.
7 That's doctrinal speak for you can't always use
8 money without -- and claim you're not
9 controlling what's going on.

10 And I wonder whether we should take
11 particular cognizance of that here given that
12 these statutes sometimes constitute, we're
13 told, 10 percent of all the funding that state
14 governments receive. This regulation affects,
15 we're told, 10 million healthcare workers and
16 will cost over a billion dollars for employers
17 to comply with.

18 So what's your reaction to that? Why
19 isn't this a regulation that effectively
20 controls the employment and tenure of -- of --
21 of healthcare workers at hospitals, an issue
22 Congress said the agency didn't have the
23 authority, that should be left to states to
24 regulate?

25 MR. FLETCHER: So, Justice Gorsuch,

1 you're talking about section 1395, and that
2 says that nothing in the Medicaid Act shall
3 be -- or Medicare Act shall be interpreted to
4 authorize any federal official to control, as
5 you say, tenure, staffing, the practice of
6 medicine, or the administration of entities.

7 We read, as the Secretary has long
8 read, that to mean that he can't dictate
9 particular decisions, hire this person, don't
10 hire that person, you know, treat this patient
11 this way, not that way, that that's what
12 control and supervision means and that the --

13 JUSTICE GORSUCH: Can it -- can it --
14 can it mean, though -- could it mean, should it
15 mean, have we in other cases interpreted
16 similar language to mean you can't use money in
17 a way that commandeers a state or private
18 entity?

19 MR. FLETCHER: So I -- I think the
20 most direct answer is that that's not -- it
21 can't mean that in this context because you
22 have to read --

23 JUSTICE GORSUCH: Could -- could it
24 mean it and do you agree that it means that in
25 other contexts?

1 MR. FLETCHER: I -- I -- control and
2 supervision can mean different things in
3 different contexts, but I just -- I do want to
4 get out that they have to mean something that's
5 within --

6 JUSTICE GORSUCH: So -- fine. I'll
7 let you do it, I promise. But you'd agree that
8 in some contexts, in some circumstances, that's
9 a possible meaning?

10 MR. FLETCHER: I think it may be a
11 possible meaning. I don't think it's the most
12 natural reading.

13 JUSTICE GORSUCH: All right.

14 MR. FLETCHER: And -- and --

15 JUSTICE GORSUCH: Now you get to go
16 ahead. Got it.

17 MR. FLETCHER: Thank you. I
18 appreciate it. So the reason why it can't mean
19 that here is that succeeding provisions of the
20 Medicare statute authorize the Secretary to do
21 or actually do directly by Congress exactly
22 that sort of standard-setting that the
23 Secretary is engaged in here.

24 So just take the hospital statute that
25 we've talked about a bunch, 1396x(e), there's a

1 provision before we talked about, (e)(9), which
2 was health and safety. The preceding
3 provisions say things like you have to be
4 staffed by doctors and the doctors have to have
5 particular licenses. You have to have a
6 certified nurse on duty 24 hours a day. You
7 have to have a budget plan that meets the
8 requirements of another subsection that I gave.

9 JUSTICE GORSUCH: Okay. So that
10 doesn't control. But somewhere along the line
11 you move from general regulations that outline
12 things you -- you, the hospital, have to do to
13 somewhere more directly where you are
14 controlling or supervising. We agree?

15 MR. FLETCHER: Yes.

16 JUSTICE GORSUCH: There's a sliding
17 scale in there?

18 MR. FLETCHER: I -- I'm not sure about
19 sliding scale. I would say standard-setting we
20 can tell from that context.

21 JUSTICE GORSUCH: There's a range?
22 Can we agree on that?

23 MR. FLETCHER: Sure.

24 JUSTICE GORSUCH: Okay. Where is the
25 line?

1 MR. FLETCHER: I think that, as is
2 often the case with ranges, the line may be
3 hard to draw when you get out towards the more
4 granular controls.

5 I think what I can be confident about
6 is that this standard is on the right side of
7 the line because it's consistent with standards
8 in the statute itself that say you have to hire
9 physicians and nurses that meet these
10 qualifications or with other provisions that
11 say you have to train -- your staff must be
12 trained in this way.

13 JUSTICE GORSUCH: I understand -- I
14 understand that. What do we do about the fact
15 with -- that Congress has never before --
16 sorry, that CMS -- not Congress, we don't have
17 Congress here -- CMS has never before said
18 among its standards a vaccination requirement
19 or any other health standard with respect to
20 employees and actions they must take outside
21 the work environment?

22 So, for example, could Congress --
23 sorry, CMS, also implement regulations about
24 exercise regimes, sleep habits, medicines and
25 supplements that must be ingested by hospital

1 employees in the name of health and safety, and
2 would -- would the government argue that does
3 not control the tenure of those employees?

4 MR. FLETCHER: You know, I'm not sure
5 that there would be a problem with those
6 requirements. I don't think it would be the
7 section 1395 control. I think it would be that
8 it's very hard to characterize those as
9 requirements for the health and safety of
10 patients.

11 JUSTICE GORSUCH: But -- but, in your
12 argument -- in your view, that would not
13 control the tenure of employees?

14 MR. FLETCHER: I think that does
15 not -- setting standards, even if they're
16 outlandish standards that we think couldn't be
17 set for other reasons, wouldn't be controlling
18 in the standard.

19 JUSTICE GORSUCH: Still doesn't
20 control? Doesn't control, even though they
21 have to take these medications, they have to
22 get this much sleep, they have to do this much
23 exercise every day?

24 MR. FLETCHER: In any more -- again, I
25 want to be clear, I'm not suggesting the

1 Secretary can do any of those things. I'm just
2 suggesting that the reason he can't is not
3 1395.

4 JUSTICE GORSUCH: Is that because it
5 doesn't constitute control of an employee's
6 tenure or compensation?

7 MR. FLETCHER: Correct. Because
8 setting --

9 JUSTICE GORSUCH: Thank you.

10 MR. FLETCHER: -- standards for
11 employees does not exercise control.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: You -- you
15 mentioned at the beginning that the -- over a
16 billion dollar in costs would be borne mostly
17 by the federal government, I think you said.

18 Can you explain that?

19 MR. FLETCHER: Sure. I think in large
20 part by the federal government. So the -- the
21 Secretary, in estimating the costs, said a big
22 driver of the cost was going to be the cost of
23 the vaccinations themselves, the shots, and the
24 cost of administering the shots.

25 The Secretary explained that he was

1 including that in the cost/benefit analysis to
2 be comprehensive about the effects of the rule,
3 even though the federal government covers the
4 costs of vaccines for most employees and would
5 cover them here.

6 JUSTICE KAVANAUGH: Okay. And then,
7 on the question to follow up on Justice
8 Gorsuch's question, what is the story as you
9 understand it for why CMS has not previously
10 required flu shots for healthcare workers or
11 some of the other vaccines that, as you pointed
12 out, the states still insist upon for
13 healthcare workers? Is there a story there or
14 explanation there for why CMS has not
15 previously done that?

16 MR. FLETCHER: I think the Secretary
17 laid this out and sort of identified different
18 reasons as to different categories of vaccines.

19 So, as to some, where state
20 vaccination requirements mean that everyone is
21 basically vaccinated against those diseases
22 already, there was no need for the Secretary to
23 do that.

24 The Secretary also hasn't acted with
25 respect to flu vaccines. Some states have done

1 that. Not every state has done that. But the
2 Secretary explained that this is a pandemic
3 that is a much graver threat than the seasonal
4 flu is and also that these are uniquely
5 effective vaccines and explained that it's that
6 combination, the sort of unique pandemic
7 situation that we haven't seen before and the
8 uniquely effective vaccines, that led him to
9 choose to adopt that here.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: Are you arguing with
14 respect to the facility-specific grants -- and
15 this goes back to the questions that Justice
16 Sotomayor asked you after we last talked -- are
17 you arguing that those facility-specific grants
18 inform the general grants in 1302(a) and 1395hh
19 such that we should interpret the general
20 grants as encompassing the authority to impose
21 health and safety measures, or are you arguing
22 that even if we pretend that these two general
23 grants don't exist, that the facility-specific
24 grants would nonetheless equip the Secretary
25 with this authority?

1 MR. FLETCHER: I think the latter. I
2 think I'd be making the same argument even if
3 we didn't have the general grant. I think the
4 general grant, you know, reinforces the idea
5 that when the Secretary sets standards, he has
6 the power to do that through regulations. But
7 we're relying primarily on the specific grants,
8 and I think those would be sufficient even if
9 you set aside 1302.

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Osete.

14 ORAL ARGUMENT OF JESUS A. OSETE
15 ON BEHALF OF THE RESPONDENTS IN NO. 21A240

16 MR. OSETE: Mr. Chief Justice, and may
17 it please the Court:

18 In early 2020, while millions stayed
19 at home, millions of healthcare workers
20 heroically stayed at their -- at work. These
21 same workers are now forced to choose between
22 losing their jobs and complying with the
23 government's vaccine mandate.

24 The Secretary claim -- the Secretary's
25 claim of authority to impose this mandate is

1 expansive, unprecedented, and unlawful for two
2 principal reasons.

3 First, the Secretary believes a series
4 of vague catch-all provisions scattered
5 throughout the Social Security Act authorize
6 this sweeping mandate. But the relevant text,
7 structure, and context say otherwise.

8 For example, the Secretary ignores
9 eight provisions that precede the catch-all
10 prime -- provision he primarily invokes, all of
11 which are materially unlike a permanent medical
12 procedure that cannot be undone after a shift
13 is over. Exceedingly clear language is
14 required here because the mandate regulates
15 matters that have traditionally been within the
16 province of the states.

17 Second, the rule is arbitrary and
18 capricious under the APA. The Secretary
19 impermissibly extrapolated evidence for one
20 category of facilities to justify regulating
21 all 15 and failed to adequately explain his
22 sudden shift from encouraging vaccination to
23 mandating it.

24 But, more fundamentally, the Secretary
25 overlooked the critical perspective of rural

1 healthcare facilities in the states and the
2 devastating consequences the mandate will have
3 on rural Americans' access to healthcare.
4 Categorically excluding an entire class from
5 employment will mean that patients in rural
6 Nebraska will have to seek primary and
7 emergency care two to three hours away and
8 cannot undergo surgery.

9 This represents vast stretches of this
10 country where healthcare is not provided by
11 massive institutional providers with tens of
12 thousands of employees but by smaller
13 healthcare facilities run by local communities.
14 While a 1 percent loss of staff may be
15 insignificant to the former, it is fatal to the
16 latter.

17 Without the injunction, rural America
18 will face an imminent crisis. The government's
19 stay application should be denied.

20 And I welcome the Court's questions.

21 JUSTICE THOMAS: Counsel, would you
22 discuss the preemption issue just briefly?

23 MR. OSETE: Yes, Your Honor. This
24 regulation -- the Secretary says in this
25 regulation that it is intended to preempt

1 arguably any inconsistent state laws with
2 respect to vaccination requirements.

3 And, for example, in this case, the
4 most direct example I can point to, Your Honor,
5 is at 20-7-134 of the Arkansas Code that
6 prohibits as a condition of employment any sort
7 of vaccination requirement.

8 JUSTICE THOMAS: But that's somewhat
9 ironic since he -- the government relies on --
10 on those other vaccinations to argue for this
11 vaccination. But are all of the party states
12 in the same position with respect to
13 preemption?

14 MR. OSETE: Your Honor, certainly, the
15 district court in this case at the very least
16 cited that Arkansas, Wyoming, and Missouri are
17 similarly situated with that respect, and,
18 certainly, there are other states in our -- in
19 the Missouri-led coalition that also have laws
20 that are going to be preempted by this
21 regulation.

22 The key point here, Your Honor, just
23 like in *Mass v. EPA*, is so long as one of us
24 has one of these laws that would affect our
25 duly enacted legislation through an unlawful

1 mandate, we are -- it is -- it does present an
2 issue on preemption.

3 Now that's independent, obviously,
4 from other interests that the states have in
5 this case, which is the states are the
6 administrator. It's our providers with respect
7 to Medicaid, with Medicare. We're being asked
8 to facilitate this program for the federal
9 government. We have compliance costs. We have
10 surveyors who have to go out and enforce this
11 rule. All of that are -- are the states'
12 interests, Your Honor.

13 JUSTICE THOMAS: Well, the one final
14 point has to go to standing. You seem to rely
15 on *parens patriae* a bit. And would you discuss
16 that standing and why we should apply that?

17 MR. OSETE: Well, sure, Your Honor.
18 And just to be clear, we -- we do have various
19 capacities here. We mention sovereign
20 interests, we mention proprietary -- a whole
21 plethora of them, and, certainly, we did invoke
22 also a quasi-sovereign interest in the health
23 and well-being of our citizens. For example,
24 this mandate will close the doors of many of
25 these rural facilities. That will effectively

1 deprive our citizens of healthcare. And we
2 also are asserting rights under federal law
3 with respect to the APA on many of these
4 claims.

5 That -- that is -- but that is not the
6 only basis that we're seeking standing in this
7 case. We have various other capacities that
8 we're suing under, just like the ones I
9 mentioned, Your Honor.

10 JUSTICE THOMAS: Is that true of all
11 of the parties?

12 MR. OSETE: I -- I -- I believe so,
13 Your Honor, yes.

14 JUSTICE THOMAS: Thank you.

15 MR. OSETE: There was a -- there was a
16 question -- sorry, Chief.

17 CHIEF JUSTICE ROBERTS: No, I was just
18 going to ask you about the -- the Spending
19 Clause context. In other words, we're not just
20 dealing with federal law in the abstract; we're
21 dealing with a provision that says Congress
22 authorized it -- well, the Secretary to ensure
23 compliance with requirements that the Secretary
24 finds necessary in the interest of the health
25 and safety of patients.

1 That's very broad, and I think --
2 well, you agree that you -- they have broader
3 authority because it's in a Spending Clause
4 provision? I mean, you signed the -- you
5 signed the contract.

6 MR. OSETE: Well, sure. And even in
7 the Spending Clause context -- I would say two
8 responses to that, Your Honor.

9 First, even in the Spending Clause
10 context, as Justice Alito mentioned earlier,
11 the states are entitled to clear notice. So
12 there is -- whatever conditions the Secretary
13 does state, they have to derive from
14 unambiguous grants of statutory authority.

15 In this case, Your Honor, we -- we
16 respectfully disagree with my friend, Mr.
17 Fletcher, because he only cites certain parts
18 of these provisions. For example, with respect
19 to the hospital in this application, he ignores
20 the "such other requirements" language that
21 precedes the Secretary's authority to regulate
22 health and safety.

23 And many of those provisions, for
24 example, (e)(1) through (8), none of those talk
25 about immunization. They talk about

1 recordkeeping. They talk about discharge
2 procedures. They talk about many --

3 JUSTICE KAGAN: Mr. Osete, really? Do
4 you think that the CMS head and that the
5 Secretary of HHS are bookkeepers with respect
6 to this statute? Do you think that they don't
7 have responsibility to protect the safety of
8 these two incredibly vulnerable patient
9 populations? Isn't that their principal
10 responsibility in these laws? Isn't that the
11 most important thing that both of them do?

12 MR. OSETE: Your Honor, certainly, the
13 Secretary does have authority to set
14 requirements in the interest of health and
15 safety. All I'm saying is you have to look at
16 the statute in context.

17 I'm not saying that HHS is somehow
18 just this recordkeeping function. I mean,
19 certainly, it is important for these facilities
20 to have adequate recordkeeping. You're dealing
21 with vital records, health records, other
22 things. The context here --

23 JUSTICE KAGAN: Well, I wasn't saying
24 that they don't have to concern -- be concerned
25 about records either. I'm just saying, in

1 addition to being concerned about records, this
2 statute clearly gives them, by reference to the
3 health and safety delegations, by reference
4 even to the idea of administering efficiently
5 programs like this, their principal job is to
6 look after the health and safety of Medicare
7 and Medicaid recipients.

8 And -- and with the understanding that
9 those two groups of patients are pretty much
10 the most vulnerable patients there are, either
11 elderly patients or the -- in the -- in the
12 case of Medicaid, unfortunately, poverty has a
13 great deal to do with medical outcomes.

14 So, you know, with respect to these
15 two vulnerable populations and especially
16 vulnerable when it comes to COVID, how can it
17 not be the principal, prime responsibility of
18 the CMS head and the Secretary of HHS to look
19 out for their health and safety?

20 MR. OSETE: Because that
21 responsibility that falls in (e)(9) with
22 respect to the hospitals, which is what the
23 Secretary has before it in this application,
24 that authority is informed -- the grant of
25 authority in that section is informed by the

1 other provisions in that statute.

2 Doubly so here, Your Honor, where you
3 have a situation where this Court has said that
4 ordinarily compulsory vaccination is not
5 something that ordinarily concerns the federal
6 government. That was in Jacobson at page 38.

7 Doubly so here, Your Honor, because,
8 when you're going to alter, significantly
9 alter, the balance between state and federal
10 powers, something that has traditionally been
11 in the province of the states, you have to do
12 so with exceedingly clear language. The Court
13 said that in Alabama Realtors recently. The
14 Court said that also in U.S. Forest in 2020.
15 That is the kind of language we're asking here.
16 It's not that the Secretary --

17 JUSTICE KAGAN: Do you think that the
18 Secretary can require the adoption of various
19 infection prevention and control measures? You
20 know, can they say to hospitals, you have to
21 sterilize your instruments, you have to wash
22 your hands in a certain way? One of the things
23 we understand about settings like this one is
24 the way that infections spread.

25 MR. OSETE: Sure.

1 JUSTICE KAGAN: And you have to do a
2 variety of things to make sure that you prevent
3 the spread of infection. Can they do that?

4 MR. OSETE: Your Honor, absolutely.

5 JUSTICE KAGAN: Because that's their
6 job, right?

7 MR. OSETE: Your Honor, certainly,
8 with respect to 1395i-3(d)(3), which goes to
9 skilled nursing facilities, there's express
10 language that the -- the Secretary can adopt
11 infection control measures to --

12 JUSTICE KAGAN: Yeah. Well --

13 MR. OSETE: -- prevent the spread of
14 diseases and --

15 JUSTICE KAGAN: -- whether there's
16 express language of that kind or not, the
17 responsibility to look after the health and
18 safety of vulnerable populations includes
19 requiring infection prevention measures, isn't
20 that right?

21 MR. OSETE: Well, certainly, Your
22 Honor, if -- if -- if Congress -- Congress
23 decided to write statutes in very express terms
24 with respect to skilled nursing facilities, and
25 I will submit --

1 JUSTICE KAGAN: I think you're
2 ignoring the question. Put that aside.
3 Suppose there was -- it didn't say infection at
4 all, but it says you have to look after the
5 health and safety of your patients. Does that
6 include infection prevention?

7 MR. OSETE: It -- it -- it may very
8 well include infection prevention. I guess all
9 I'm saying is that, in this case, Your Honor,
10 where there is express language that talks
11 about that, Congress knows how to do that and
12 chose not to regulate with such specificity.

13 JUSTICE KAGAN: I -- I --

14 JUSTICE BREYER: Your view is that --
15 what you're saying is they don't have authority
16 under this? Is that what -- in response to
17 Justice Kagan?

18 MR. OSETE: Your Honor --

19 JUSTICE BREYER: They can't say wash
20 your hands. Can they say, if there's a
21 diphtheria -- we don't want anybody with
22 diphtheria walking into the hospital because
23 everybody will get it. You're saying they
24 can't say that, is that right?

25 MR. OSETE: Your Honor, there are

1 various -- there are various measures that --

2 JUSTICE BREYER: Are you saying that
3 or not? Take -- take the example --

4 MR. OSETE: I'm saying they can --

5 JUSTICE BREYER: -- that Justice Kagan
6 gave of the washing hands or -- or sterilizing
7 instruments or the one I just gave you of
8 diphtheria. Can they say it or not?

9 MR. OSETE: Yes, they can regulate all
10 kinds of --

11 JUSTICE BREYER: All right. If they
12 can say that, then why can't they say in the
13 same breath, and, by the way, we don't want you
14 walking in here in crowds that will spread
15 COVID and this is how you stop it?

16 MR. OSETE: Because --

17 JUSTICE BREYER: Why can they say the
18 one and not the other?

19 MR. OSETE: Because gloves -- taking
20 off gloves and masks -- a vaccine cannot --

21 JUSTICE BREYER: I didn't say that. I
22 said diphtheria.

23 MR. OSETE: Your Honor, the Secretary
24 certainly has authority to implement all kind
25 of infection control measures at these

1 facilities. I am not disputing that, Your
2 Honor. All we're saying --

3 JUSTICE KAGAN: Well, all the
4 Secretary is doing here is to say to providers,
5 you know what, like, basically, the -- the one
6 thing you can't do is to kill your patients.
7 So you have to get -- you have to get
8 vaccinated so that you're not transmitting the
9 disease that can kill elderly Medicare
10 patients, that can kill sick Medicaid patients.

11 I mean, that seems like a pretty basic
12 infection prevention measure. You can't be the
13 carrier of disease.

14 MR. OSETE: But, Your Honor, here,
15 you're -- we're dealing specifically with a
16 vaccine requirement that, again, has
17 historically been in the states' province. And
18 if Congress wants to give that authority to
19 CMS, the federal agency here, it has to do so
20 in exceedingly clear language.

21 JUSTICE BREYER: All right. What do I
22 do with this? If you want my real -- perhaps
23 you can tell me I'm way off base, and I -- I
24 don't mind if you do, but, I mean, here we are,
25 ask for a stay, okay?

1 MR. OSETE: Mm-hmm.

2 JUSTICE BREYER: And in the one case,
3 either this will go ahead or it won't. In the
4 case earlier, it'll go ahead or it won't. And
5 to what extent can we take account of what I
6 think would be relevant with stays or not stays
7 or how we act in the interim and da, da, da,
8 da, da, okay, but there are 750,000 people got
9 this yesterday, but the hospitals are full to
10 overflowing, that -- there is a problem, worse
11 than diphtheria, that people all over the world
12 are getting this, and they are here too, and
13 they're dying, that's what we're trying to ask
14 you, or they're filling up hospital beds and
15 others are dying because they can't get in.

16 Okay? Now public interest call it.
17 Call it something else. Call it what you
18 might. But it seems to me it's hard for me to
19 believe -- look, it seems to me that every
20 minute that these things are not in effect,
21 thousands of more people are getting this
22 disease, okay?

23 And we have some discretionary power.
24 And, therefore, well, you tell me I can't take
25 that into account. To me, that's fairly

1 unbelievable, but I want to hear it.

2 MR. OSETE: Your -- Your Honor, the
3 public interest is flexible, and you can take
4 all that account. All I'm saying is the two
5 statutes, the provisions that the Secretary has
6 put forward in this case, we do not believe
7 that they have met their burden of showing a
8 likelihood of success that on the merits those
9 were lawful exercises of authority.

10 Even in situations where the Secretary
11 desires to prevent the spread of COVID, it
12 cannot act unlawfully. Doubly so here, again,
13 because this is exactly the kind of requirement
14 that historically has been in the province of
15 the states.

16 And if Congress wants to take that
17 away and give it to CMS or give it to a federal
18 agency, it has to do so in exceeding clarity.
19 Now I will point out too, in the public
20 interest, Your Honor, keeping -- doing away
21 with the injunction as we said so is going to
22 be devastating to vulnerable patients in rural
23 America, in rural Nebraska.

24 No surgeries. The only
25 anesthesiologist in a rural Nebraska hospital,

1 he is not going to be able to go to work. That
2 means no surgeries. Emergency C-sections.

3 JUSTICE BREYER: All right. I have --
4 on that one, I have a question too. I take
5 what you say as correct. All right? I don't
6 know if it is correct, but I'll assume it.

7 Well, if these states -- if we act in
8 such a way that over the next two weeks or the
9 next week these rules go ahead as planned and
10 people do get inoculated because they have to
11 or -- now, if the bad thing that you are
12 talking about then occurs, we'll know it,
13 because what they're saying at the moment on
14 the other side is there is another bad thing,
15 which is the bad thing that I mentioned at the
16 beginning, that hundreds of thousands of people
17 more get this disease.

18 And we know what happens from
19 Massachusetts and in New York in the old
20 people's homes. Okay? So they're saying there
21 are two bad things, And you're saying the one
22 and the agency the other is the more
23 predominant.

24 So suppose you're faced with that
25 division. We let it go ahead. And then, if

1 you're right, everybody will know it, and we
2 can draw back. That's not perfect for you, but
3 that's at least something, and it helps protect
4 the people who might otherwise get very sick.

5 MR. OSETE: And -- and, unfortunately,
6 Your Honor, it's going to -- Mr. Chief Justice,
7 may I?

8 CHIEF JUSTICE ROBERTS: Please.

9 MR. OSETE: Unfortunately, Your Honor,
10 in this case, it's going to devastate local
11 economies. It's going to decimate these local
12 towns that don't draw their pool of applicants
13 from the coast, Your Honor. These are local
14 communities. They run these hospitals.

15 And that is the problem, Your Honor,
16 is those kind of interests, that perspective
17 was not heard in this context, and that is
18 going to be devastating, Your Honor.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas, anything further? All right. No?

21 Justice Alito? No?

22 Justice Kagan?

23 JUSTICE KAGAN: Mr. Osete, this rural
24 hospital question, you've presented some
25 declarations that suggest that there would be

1 labor disruptions. The Secretary took that
2 into account specifically, basically has a
3 different view of the size of the disruptions
4 based on the data that he had and then, in
5 addition to that, said that there are
6 countervailing things, there's countervailing
7 things with respect to the labor force, and the
8 -- and the Secretary said some people might
9 come back because they won't have to deal with
10 unvaccinated colleagues.

11 Some people -- you know, that there
12 will -- there will be savings in terms of fewer
13 people out sick and so forth. And then the
14 Secretary has an important job to do, and
15 that's to balance, whatever disruptions there
16 are, the Secretary says they're much less than
17 you say they are, but then to balance those
18 disruptions against the safety of the Medicare
19 and Medicaid recipients, whom he is statutorily
20 obligated to protect.

21 And -- and, you know, it just seems
22 pretty basic to me, as I said, that the first
23 thing that that means in the context of this
24 pandemic is that providers can't be carriers of
25 the disease itself. And then, in addition,

1 there are other health benefits. You know,
2 people are not showing up to hospitals because
3 they're afraid of getting COVID from staff, and
4 so they're not coming for their mammograms and
5 they're not coming for their colonoscopies and
6 so forth. So he has to balance all those
7 health benefits against what you say are these
8 labor disruptions.

9 And the question is, I mean, you might
10 have a point. I don't know. I don't know very
11 much about the rural market, the -- you know,
12 but the Secretary, that's his job.

13 Should it be that we decide, you know,
14 as against what the Secretary has decided, in
15 performing his important function of evaluating
16 these potential disruptions and -- and weighing
17 those disruptions against the health benefits
18 that he sees in that rule? Should we say we
19 think that the -- that the disruptions are more
20 -- greater than the Secretary thought and we
21 further would weigh them differently against
22 the health benefits of the rural? Is that for
23 courts to decide?

24 MR. OSETE: Your Honor, there is a lot
25 there, and I -- I think the -- the -- the

1 simplest way I can answer that directly is, in
2 this case, it's this critical perspective of
3 these tiny communities that, again, he did cite
4 to one example in North Carolina with 35,000 --
5 I think it was Novant Health, 35,000 employees
6 as this is going to be insignificant to them.

7 But I think that critical perspective
8 of these tiny hospitals that, again, are 100 or
9 less, these numerous facilities that are going
10 to be devastated by this, that sort of relevant
11 factor, that important aspect of the problem,
12 we don't see how the Secretary could have
13 properly weighed everything properly when that
14 sort of critical perspective was ignored, and
15 these folks did not have a chance to be heard.

16 And in this case, it's almost as if
17 the Secretary put a rock on one side of the
18 scale and a feather on the other. What -- what
19 may work in Detroit and Houston may actually be
20 counterproductive in Memphis, Missouri, or, for
21 that matter, in El Dorado, Arkansas.

22 All of those places have different
23 considerations, which is why this historically
24 has been a local and state matter, and the
25 states, again, are free to require it or not

1 require it --

2 JUSTICE SOTOMAYOR: So why is this --

3 MR. OSETE: -- or the local

4 government.

5 JUSTICE SOTOMAYOR: -- an issue for
6 the states to require or not require? I mean,
7 this is the federal government paying for
8 services, and why doesn't it have a right as
9 the payer for services to specify what services
10 it wants to pay for?

11 I mean, that's -- now, in terms of
12 clear rules, I -- I'm having a very hard time
13 understanding how you can say, yes, they could
14 pass a rule that requires people to wear gloves
15 or they can pass a rule that requires them to
16 isolate individuals who are -- are infected by
17 something, but they can't pass this rule, and
18 you say because it wasn't clear?

19 If it's clear enough that they can
20 consider safety and health regulations, why is
21 this particular rule subject to us saying no?

22 MR. OSETE: Because, Your Honor, this
23 Court in Jacobson and various cases has drawn
24 the line at compulsory vaccination being
25 something that the states do. And when

1 Congress enacts laws --

2 JUSTICE SOTOMAYOR: Well, wait a
3 minute. That's what they do with respect to
4 other issues, but this is with respect to, if
5 you want my money, your facility has to do
6 this.

7 MR. OSETE: Sure.

8 JUSTICE SOTOMAYOR: It has to have --
9 it has to serve certain food. It has to serve
10 certain meals a day. It has to give snacks.

11 These are all state issues usually,
12 but, under the Spending Clause, we're the
13 buyer. The federal government says what it
14 wants to spend its money on. This is not a --
15 an issue of power between the states and
16 federal government. This is an issue of what
17 do -- what does the federal -- what right has
18 the federal government to dictate what it wants
19 to buy.

20 MR. OSETE: Your Honor, it is a
21 vaccine requirement -- requirement masquerading
22 as a condition of participation. And if
23 Congress intended that, this Court has made it
24 very clear that something like compulsory
25 vaccination, even in the Spending Clause

1 context, which itself demands Congress speak
2 with a clear voice, it requires --

3 JUSTICE SOTOMAYOR: How much clearer
4 do you need for Congress to say than pass
5 regulations that protect the health and welfare
6 of ill people?

7 MR. OSETE: Perhaps the -- the one
8 example I can think of right away, Your Honor,
9 is in (e)(7) of 1395x(e), where Congress
10 acknowledged or spoke with a very clear voice
11 that when it comes to licensing at the state
12 level, that is something that the states do.
13 And that's exactly -- I mean, Congress knows
14 how to directly speak to issues that invade
15 into the state -- into state areas --

16 JUSTICE SOTOMAYOR: And it hasn't --

17 MR. OSETE: -- like that.

18 JUSTICE SOTOMAYOR: -- done it with
19 health and safety. It has given that right to
20 the Commissioner. Thank you, counsel.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: A couple
25 questions.

1 MR. OSETE: Sure.

2 JUSTICE KAVANAUGH: First, this is an
3 unusual administrative law situation from my
4 experience because the people who are regulated
5 are not here complaining about the regulation,
6 the -- the hospitals and healthcare
7 organizations. It's a very unusual situation.
8 They, in fact, overwhelmingly appear to support
9 the Secretary's -- the CMS regulation. So I
10 want -- and the government makes something of
11 that.

12 What -- what are we to make of that?

13 MR. OSETE: Your Honor, certainly,
14 there are large institutional providers that
15 may have no problem with this. Obviously,
16 there are smaller ones, very small community
17 hospitals, that do have a problem with that.

18 But -- but, here, the states have
19 their facilities. They --

20 JUSTICE KAVANAUGH: The states have a
21 very small percentage of the facilities. Most
22 of the facilities are private-run facilities,
23 right? This picks up on Justice Thomas's
24 question. Like, where -- where are the
25 regulated parties complaining about the

1 regulation? That's how we usually have -- the
2 last case is a good example, obviously.

3 MR. OSETE: Sure.

4 JUSTICE KAVANAUGH: There's a missing
5 element here.

6 MR. OSETE: Well, they're not --
7 they're not -- certainly, these sort of
8 entities that would be subject to this rule,
9 like small private facilities that receive
10 Medicaid funding, certainly are not plaintiffs
11 per se, but the states do represent the
12 citizens of our -- our constituencies, like
13 these places that run these facilities, these
14 small community hospitals. We speak on their
15 behalves.

16 And all I would say here is we have --
17 we have made value judgments through our
18 policies to not require vaccination because a
19 one-size-fits-all requirement does not help.
20 And that kind of policy judgment, as expressed
21 through our laws, our duly enacted laws, that
22 would be applicable both to state-run
23 facilities and private facilities, that is
24 what's being preempted here, Your Honor, by
25 this unlawful mandate.

1 And that's how we're -- we're speaking
2 in that capacity here, Your Honor, is the folks
3 whose voices were ignored throughout this
4 entire process and shouldn't have been ignored,
5 especially with these devastating consequences.

6 JUSTICE KAVANAUGH: And then, second,
7 just -- I think you've alluded to this, but how
8 is a vaccine different in kind, from your
9 perspective, from, say, the requirement to wear
10 gloves or the requirement to wash your hands or
11 the other kinds of requirements? Because I
12 think, if you acknowledge that there's
13 authority to require the latter, then you need
14 to explain why the -- the vaccine is different.

15 MR. OSETE: I don't think I could say
16 it any better than Chief Judge Sutton did at
17 page 12 of his dissent in the OSHA case, which
18 is masks can come off, gloves can come off. A
19 vaccine requirement, the taking a vaccine is a
20 permanent medical procedure that cannot come
21 off after work is over. That is, there are --
22 there are materially different conditions,
23 materially different procedures at stake.

24 And when you look at the context, for
25 example, in the hospital requirement, 1395x(e),

1 nothing in that statute comes close to
2 authorizing this precise mandate in this case,
3 which is going to have devastating consequences
4 for vast swaths of this country, Your Honor.

5 JUSTICE KAVANAUGH: Thank you very
6 much.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: No questions.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 General Murrill, are you still on the
13 line?

14 MS. MURRILL: I am, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: You may
16 proceed.

17 ORAL ARGUMENT OF ELIZABETH MURRILL
18 ON BEHALF OF THE RESPONDENTS IN NO. 21A241

19 MS. MURRILL: Thank you, Mr. Chief
20 Justice, and may it please the Court:

21 This case is not about whether
22 vaccines are effective, useful, or a good idea.
23 It's about whether this federal executive
24 branch agency has the power to force millions
25 of people working for or with a Medicare or

1 Medicaid provider to undergo an invasive,
2 irrevocable, forced medical treatment, a COVID
3 shot. It's a bureaucratic power move that is
4 unprecedented.

5 If it can do that, the question still
6 remains as to whether it properly exercised
7 that power here. The district court answered
8 no to both questions at the preliminary
9 injunction stage, and the court below supported
10 its ruling with a number of well-reasoned
11 conclusions.

12 Now, without even addressing all the
13 underlying bases for the ruling, the government
14 asks this Court to jump ahead of the Fifth
15 Circuit and dissolve the injunction,
16 irrevocably changing the status quo in a way
17 that will effectively give the federal
18 government all the relief it seeks. This will
19 create chaos in state provider networks, limit
20 access to care for the poor and needy, and
21 eviscerate informed consent for millions of
22 people.

23 The Court should reject the
24 government's request and maintain the status
25 quo because the district court's holdings were

1 correct on all counts.

2 I'm happy to take questions or speak
3 to some of the questions that have already been
4 asked by the Court.

5 JUSTICE THOMAS: Just briefly,
6 counsel. The -- I'd like you to address
7 whether or not or at least to what extent this
8 rule preempts rules of your state.

9 MS. MURRILL: Justice Thomas, it does
10 preempt rules of some of the states in our
11 coalition. I don't know that it preempts rules
12 in every state, but it affects Alabama,
13 Louisiana, and Montana in different ways,
14 different laws.

15 JUSTICE THOMAS: Could you address, as
16 I asked earlier, the *parens patriae* standing?
17 I think that's going to be an important matter,
18 and I'd like you to address it.

19 MS. MURRILL: So I think we have
20 *parens patriae* standing to protect the
21 interests of our citizens, but that is not the
22 sole basis on which we appear in these cases.
23 And there's been, you know, some questions
24 about Medicare and Medicaid. I think the
25 government has conflated those two programs in

1 -- in an enormous way because just in Louisiana
2 alone, I can tell you that 41 percent of our
3 budget is Medicaid funding. So we have
4 enormous, enormous interests in the way these
5 programs operate, and that's one of the reasons
6 why there are express consultation requirements
7 built into the statute.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: General, do
10 you agree with the district court's statement
11 that "COVID" -- this is a quote -- "COVID no
12 longer poses the dire emergency it once did"?

13 MS. MURRILL: Your Honor, I -- I think
14 that that is a shifting -- those are shifting
15 sands. Obviously, COVID conditions can change
16 at any given time, and they have.

17 JUSTICE BREYER: What is your other
18 basis for standing?

19 MS. MURRILL: Our basis for standing
20 is that we are being regulated directly by this
21 rule. We have to implement it, and it affects
22 our provider networks. It directly affects
23 Medicaid funding, and that is a program that is
24 implemented entirely by the state.

25 I don't think I could underestimate

1 enough the impact on the states and their
2 provider networks. That's precisely what the
3 -- the -- the declarations that we submitted
4 and I think many that were submitted in the
5 Missouri case also go to, is the effect on our
6 ability to actually provide access to care,
7 which is the actual primary goal of this
8 program.

9 CHIEF JUSTICE ROBERTS: I'd like to
10 touch on the Spending Clause issue just a bit.
11 It was a broad provision that you agreed to,
12 which authorized the Secretary to impose
13 requirements that are -- that the Secretary
14 finds are necessary in the interest of the
15 health and safety of -- of patients.

16 Why did that not give you adequate
17 notice that something like this could be
18 enacted?

19 MS. MURRILL: I don't think that gave
20 us any more notice that that could be enacted
21 than -- I mean, no one even expected COVID, so
22 how could we possibly have expected to have the
23 federal government, through a spending
24 condition imposed upon us years after this
25 program was created, co-opt a quintessential

1 police -- state police power for deciding
2 whether the -- its citizens should be
3 vaccinated or not?

4 That's just not something that we
5 could have reasonably anticipated given the
6 general broad language that is put into the
7 statute. And -- and, again, I don't think that
8 their primary role is to -- is to actually
9 provide directly for the health and safety of
10 the people. It is to provide funding to the
11 states to implement these programs or through
12 Medicare to reimburse for healthcare to
13 individuals.

14 I -- I could -- I mean, I would also
15 point just to the secondary aspect of any
16 Spending Clause argument, also turns on the
17 voluntarily and knowingly accepting the terms.
18 And so I think that goes straight to your
19 question, that that -- respecting that
20 limitation is absolutely critical to main --
21 respecting the balance of the states'
22 sovereignty in this program.

23 CHIEF JUSTICE ROBERTS: Well, it's --

24 JUSTICE SOTOMAYOR: So how does that
25 --

1 CHIEF JUSTICE ROBERTS: -- not in
2 respect of a determination as what the
3 Secretary finds and it's what the Secretary
4 finds necessary. So I'm not saying there's not
5 some limit there, but I don't know why a
6 provision addressing a -- an infectious disease
7 of this scope is beyond the Secretary's
8 determination that the -- the -- the mandated
9 issue here is -- is necessary.

10 MS. MURRILL: Well, we've never taken
11 the position that the Secretary has no
12 authority to address it in any given -- in any
13 -- at all. We're saying that the -- that they
14 can't do this. And they've never, ever, ever
15 done anything like this, which they
16 acknowledge.

17 And -- and the Solicitor General in
18 the argument that preceded this one also
19 pointed and conceded that where there are other
20 textual and structural cues in a statute that
21 may be inconsistent with the -- with the
22 agency's jurisdiction, that you should be
23 looking at that in terms of the discretion
24 that -- that you give and whether -- when you
25 evaluate whether this is a question or an issue

1 that falls within the general discretion and
2 scope that was granted earlier by Congress.

3 And -- and, here, there are multiple
4 cues that conflict directly with the broad,
5 broad scope and grant of authority that they're
6 claiming here.

7 JUSTICE ALITO: Do you think we need
8 to find that you have *parens patriae* standing
9 in order to take into account the interests of
10 employees within your state who do not want to
11 be vaccinated? Is that a standing question, or
12 is it a question that can be taken into account
13 in the context of determining what the statute
14 means and whether it satisfies whatever
15 requirements there may be under the Spending
16 Clause?

17 MS. MURRILL: I -- I think it's both.
18 I mean, I -- I certainly believe that you can
19 take it into account as part of our standing.
20 We have independent grounds for standing. When
21 you get past that question, I think it also
22 relates to the -- the -- the question
23 of whether it's actually controlling the tenure
24 of -- of employees.

25 I think it directly conflicts with

1 that. I mean, Justice Alito, there's --
2 there's really no question, I think, in our
3 mind that this was a -- a pretext that the
4 entire -- as the Chief Justice alluded to, that
5 this was a workaround.

6 This was an intent -- that the
7 government intended to tether all of these
8 restrictions together, all of these -- these
9 mandates together to vaccinate as many -- as
10 much of the American public as they could
11 touch.

12 And in this particular rule, at -- at
13 the Federal Register 61607, the government even
14 acknowledged that the most important inducement
15 here was the fear of job loss.

16 This is targeted at people. It's not
17 targeted at facilities. And they've never done
18 anything like this before, precisely because
19 there are structural prohibitions against it in
20 the statute. And where we are in this
21 procedure is -- is extraordinary.

22 They want a -- to -- you to dissolve
23 an injunction, parts of which have not even
24 been contested, so that they can upend the
25 status quo, which will disturb enormously our

1 provider networks.

2 JUSTICE BREYER: Well, all that's
3 true, but I'd like to get your response -- I
4 mean, there's some truth to what you say, but
5 there -- I'd like to get your response to what
6 I asked previously twice already.

7 We sit in both these cases something,
8 as the inheritor of a court of equity and we do
9 that particularly in respect to stays, whether
10 you call them administrative or not. And it
11 may be, both sides, and in the other case, you
12 know, as -- that's why I say there's a side in
13 each case that is predicting harm if the agency
14 rule goes into effect.

15 And the other side predicts serious
16 harm if the agency rule does not go into
17 effect. And as you heard in the OSHA case at
18 the last minute, on the one hand, if they have
19 to start complying with this, they have to get
20 plans and the employers are hurt.

21 On the other hand, if they don't start
22 to get those plans ready, people might -- well,
23 it looks like a lot of people will get sick and
24 take up hospital beds or worse.

25 So, in weighing those equities, why

1 don't we have to take and put quite a lot of
2 weight on avoiding even by a minute or a
3 second, because, if you divide 750,000 by the
4 number of seconds in a day, you get a lot of
5 people.

6 And why do we not have to take those
7 things into account, see how the government
8 would balance them, see if that is reasonable,
9 and be very weary at the least of interfering
10 with rules that will, in fact, save people's
11 lives or hospital beds or from getting the
12 disease?

13 Do you see what I am --

14 MS. MURRILL: Justice --

15 JUSTICE BREYER: -- saying? I'm
16 asking -- I'm putting a burden on you to say,
17 yeah, that's what I'm getting to.

18 MS. MURRILL: I -- I do.

19 JUSTICE BREYER: And I want to know
20 why.

21 MS. MURRILL: I understand the
22 question.

23 JUSTICE BREYER: Yeah.

24 MS. MURRILL: I think -- I -- I think,
25 first of all, these aren't just plans. But,

1 here, this rule is different. There -- there's
2 no test-and-mask exception. There's this is a
3 vaccinate, and it's a short, short shot clock.

4 And -- and so they do not have a
5 choice. They have to be fired or they cannot
6 be hired, and so it handcuffs our providers in
7 a way that is -- that is extraordinary and
8 immediate. And that, the status quo right now
9 is that they still comply with all the other
10 rules of Medicaid and Medicare, which means
11 they have infectious disease control measures
12 in place, they are doing the very best job that
13 they can, they need all the boots on the ground
14 that they can get, and this rule will actually
15 change that.

16 That will -- it will immediately
17 change that. So I think it is extraordinarily
18 different, and it also comes up in a different
19 context. It comes up in the context of a
20 preliminary injunction, multiple injunctions,
21 but specifically in ours, where they did not
22 even contest certain aspects of it, so they --
23 they present to you a request for a stay that
24 does not even contest certain aspects of an
25 injunction that they want you to overturn.

1 JUSTICE BREYER: Thank you.

2 JUSTICE SOTOMAYOR: Counsel, I -- I'm
3 having a very hard time trying to do the state
4 power argument with respect to a Spending
5 Clause program that doesn't affect the states
6 directly except as proprietors, because, as
7 proprietors of state-run facilities, those are
8 the ones that are affected by this rule. The
9 private facilities are, and, as one of my
10 colleagues noted, Justice Kavanaugh, we don't
11 have many amici of them complaining.

12 But putting that aside, I am having a
13 hard time understanding how and why a rule like
14 this is so substantially different than
15 the volumes of rules that CMS has with respect
16 to so many issues involving health and welfare.
17 They tell you how high the bed has to be. They
18 tell you how close hand sanitizers have to be.
19 This is before COVID.

20 They have so many different rules that
21 one could arguably say belonged within the
22 states' rights that -- that -- give me a
23 working principle that says to the federal
24 agency charged with the health and safety of --
25 of patients who believes that the only way to

1 protect these vulnerable patients is by this
2 one tactic, by this one step, why that should
3 tie their hands.

4 You may argue otherwise, that the
5 other ways of doing it are effective, but
6 they've decided in this particular context,
7 with the vulnerability of this -- of these
8 particular populations, that the other steps
9 are inadequate.

10 MS. MURRILL: Your Honor, there --
11 there's two aspects to your question, and I'd
12 like to speak to both of them.

13 One is the issue of whether we're just
14 proprietors. We are not just proprietors. And
15 I think the Court effectively discussed that in
16 NFIB versus Sebelius. Medicaid is an enormous
17 program where states are contracted with the
18 federal government, not providers. The
19 providers are contracted with the states. So
20 it is -- it is important, I think, to keep that
21 distinction between these two programs.

22 But, to -- to your question about the
23 -- the dividing line, the dividing line here is
24 -- is precisely why we are in a question of --
25 major questions doctrine land, because they

1 have never done this for at least since the
2 Jacobson case.

3 And -- and -- and, before that,
4 predominantly, this has been a question --
5 protecting the health and safety of individuals
6 and exercising this kind of -- of -- of power
7 to force the individual to submit to a medical
8 treatment has never ever been something that
9 has been authorized by Congress or done by an
10 agency on an emergency basis without
11 consulting --

12 JUSTICE SOTOMAYOR: Counsel, I don't
13 mean to interrupt you, but we've never had a
14 situation like this one before.

15 MS. MURRILL: We haven't.

16 JUSTICE SOTOMAYOR: It's
17 unprecedented.

18 MS. MURRILL: But I don't think in
19 this case that justifies them co-opting a
20 quintessential state police power. In fact,
21 the opposite is true. It only points up the
22 need to evaluate this in the larger context of
23 whether Congress -- I mean, Congress didn't do
24 this, by the way.

25 I mean, the Congress just as recently

1 as last summer changed some of the discrete
2 statutes specifically related to skilled
3 nursing and nursing homes and authorized
4 certain measures for strike teams to augment
5 staff in those facilities due to COVID
6 outbreaks, but they didn't authorize vaccines,
7 so -- for staff.

8 I think there are cues. There are
9 cues in the statute. There are cues in the --
10 in the -- the -- the history and structure and
11 the precedents of this Court that -- that
12 support waiting and maintaining the status quo,
13 as the district court below did and the Fifth
14 Circuit did.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas, anything further?

17 JUSTICE THOMAS: Nothing further,
18 Chief.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer?

21 Justice Alito?

22 Anything further, Justice Sotomayor?

23 JUSTICE SOTOMAYOR: I just want to say
24 the Sixth Circuit didn't, correct?

25 MS. MURRILL: The Sixth Circuit in the

1 OSHA case --

2 JUSTICE SOTOMAYOR: I'm sorry, I
3 confused --

4 MS. MURRILL: -- operated differently.

5 JUSTICE SOTOMAYOR: Yes.

6 MS. MURRILL: Yes.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 Justice Gorsuch?

9 Justice Barrett?

10 Thank you, counsel.

11 Rebuttal, Mr. Fletcher?

12 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

13 ON BEHALF OF THE APPLICANTS

14 MR. FLETCHER: Thank you, Mr. Chief
15 Justice. Just three quick points.

16 I'd like to start with the
17 interpretation of the statutes before you that
18 the other side is offering because I don't hear
19 them to contest that the Secretary's authority
20 to set conditions for participating in the
21 federal Medicare and Medicaid programs includes
22 the authority to protect patient health and
23 safety, even in the statutes that don't include
24 that language.

25 I don't hear them to be disputing that

1 the Secretary can adopt infection control
2 mechanisms or require people to wear gloves or
3 do other things of that nature. Instead, their
4 submission seems to be that vaccines are
5 different. And I think the problem with that
6 is that they haven't really given you a basis
7 to ground that in the statute.

8 The first thing that they've said is
9 vaccination is typically the prerogative of the
10 states. And, of course, that's true in some
11 sense, but we're talking here about a federal
12 spending program.

13 And the regulation of medicine is
14 typically the prerogative of the states.
15 Usually it's the states who require hospitals
16 to make sure their employees wear gloves or
17 they follow the Fire Code or they have
18 sprinklers, things like that.

19 But no one disputes that Congress has
20 given the Secretary the authority to make sure
21 that providers who are providing care under the
22 aegis of the federal Medicare and Medicaid
23 program live up to standards set by the
24 Secretary. That's what the Secretary has done
25 here.

1 The other thing that I've heard them
2 say about why vaccines are different is that
3 you can't take them off, that vaccines are
4 somehow different than gloves or other safety
5 measures and so some special specific
6 authorization ought to be required. And I just
7 don't think that can be squared with the
8 context of the healthcare industry.

9 Vaccination requirements are common
10 throughout our society. They're particularly
11 common for healthcare workers. They've been
12 adopted voluntarily by providers around the
13 country. You have virtually the uniform view
14 of the medical community telling you that this
15 is the best way to protect patient health and
16 safety.

17 If anything, I think it would be
18 bizarre to say that the Secretary's authority
19 to protect the health and safety of Medicare
20 and Medicaid patients does not include the
21 authority to adopt a measure that you see other
22 regulators adopting, the medical community
23 urging, and other providers adopting
24 voluntarily.

25 The whole point of the statute is to

1 let the Secretary make sure that the standards
2 of care for Medicare and Medicaid patients meet
3 best practices, and that's what he has done
4 here.

5 The second point I want to make,
6 Justice Barrett, goes back to the colloquy that
7 you and I had earlier about some of the
8 different statutes. I hope we persuaded you
9 that we're right about all of them, but in case
10 we have not, I just want to make the case that
11 it actually is worth the candle in the stay
12 posture to go provision by provision.

13 So, as we explained, 97 percent of the
14 employees affected by this regulation are
15 covered by statutes that include the express
16 health and safety language.

17 Even if you just narrow it down beyond
18 that, three categories, the largest three
19 categories of providers -- hospitals, home
20 health agencies, and long-term care facilities
21 -- account for more than 90 percent of the
22 covered workers. This is shown at the table at
23 page 61603.

24 All of those provisions have express
25 health and safety language of the sort that

1 we've been discussing, and two of them,
2 long-term care facilities or nursing homes and
3 home health providers, actually include the
4 extra provisions that we cite at page 6 of our
5 reply that says the Secretary has not just the
6 authority to ensure health and safety but also
7 the duty to do so. And I think, at an absolute
8 minimum, it's worth letting the rule go into
9 effect as to them.

10 And, finally, Justice Breyer, I want
11 to come back to a point that you have raised a
12 few times about the equities because we are
13 here on a stay. And I think a couple of
14 observations to make about the equities.

15 The first is a point that Justice
16 Kavanaugh raised. You don't have providers
17 before you here. You don't have workers before
18 you here. Instead, providers and workers
19 overwhelmingly support the vaccination
20 requirement. Instead, you have before you
21 states who do operate some facilities covered
22 by the rule but only a tiny fraction of them.

23 The second thing I'd say is that even
24 as to the providers and the workers who are
25 covered by the regulation, some of my friend's

1 presentation has suggested that if the stays
2 are lifted or if the preliminary injunctions
3 are stayed and the rule goes into effect, that
4 means that tomorrow people are going to be out
5 of a job, and that is not true.

6 The Secretary has put out guidance
7 after the Fifth Circuit narrowed the previously
8 nationwide injunction to cover only the
9 plaintiff states here, put out guidance giving
10 regulated entities 30 days to come into
11 compliance as to the first shot, 60 days to
12 come into compliance as to the second shot, and
13 making clear that even if a regulated entity
14 has not met full compliance by that 60-day
15 deadline, if the entity is at 90 percent
16 compliance and has a plan to come into full
17 compliance within 30 days, the Secretary won't
18 take enforcement action.

19 Even if that isn't met, even if at the
20 end of 90 days there is still not full
21 compliance, the Secretary has always exercised
22 enforcement discretion before terminating a
23 provider from the program, and one of the
24 things the Secretary has considered is access
25 to care issues of the sort that the other side

1 has raised. So there are ways to address some
2 of the problems that my friends have relied on
3 even if the rule goes into effect.

4 On the other side of the ledger, and
5 this is where I'll close, if the preliminary
6 injunctions remain stayed, then we know what
7 the consequence is. We know that this urgently
8 needed measure is not going to be in effect to
9 protect Medicare and Medicaid patients in half
10 of the country during a pandemic.

11 And I think the Secretary found, and I
12 don't think anyone seriously disputes, that any
13 delay in the operation of the rule will cost
14 lives and cause unnecessary serious illnesses.

15 We'd ask that the preliminary
16 injunctions be stayed.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The applications are submitted.

19 (Whereupon, at 1:38 p.m., the
20 applications were submitted.)

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