IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI; STATE OF ALABAMA; STATE OF ARKANSAS; COMMONWEALTH OF KENTUCKY; STATE OF LOUISIANA; STATE OF MISSOURI; and STATE OF MONTANA, *Plaintiffs*, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare and Medicaid Services; THE CENTERS FOR MEDICARE AND MEDICAID SERVICES; THE UNITED STATES OF AMERICA, *Defendants*.	Case No. 1:22-cv-113-HSO-RPM **Plaintiffs' Post-Discovery Motion for Summary Judgment**

PLAINTIFFS' POST-DISCOVERY
MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs—the States of Mississippi, Alabama, Arkansas, Louisiana, Missouri, and Montana and the Commonwealth of Kentucky—move for summary judgment on the sole claim of the amended complaint that the Anti-Racism Rule is unlawful and ultra vires. *See* Doc. 28. ¶¶57-65. Plaintiffs' motion is premised on the attached declarations and exhibits, and

the points and authorities set forth in their accompanying Memorandum of Law in Support of Plaintiffs' Post-Discovery Motion for Summary Judgment, filed contemporaneous with this motion. Accordingly, Plaintiffs request an order granting Plaintiffs' motion for summary judgment and entry of judgment granting Plaintiffs all relief requested in the amended complaint. *See* Doc. 28 at 18.

Dated: October 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I e-filed this motion with the Court, which will email everyone requiring service.

Dated: October 15, 2024 *s/ Cameron T. Norris*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI; STATE OF ALABAMA; STATE OF ARKANSAS; COMMONWEALTH OF KENTUCKY; STATE OF LOUISIANA; STATE OF MISSOURI; and STATE OF MONTANA, *Plaintiffs*, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare and Medicaid Services; THE CENTERS FOR MEDICARE AND MEDICAID SERVICES; THE UNITED STATES OF AMERICA, *Defendants*.	Case No. 1:22-cv-113-HSO-RPM

AMENDED OBJECTIONS AND RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES

Below are Plaintiffs' objections and responses to Defendants' first set of ROGs. Plaintiffs' ability to respond to these requests is limited by the fact that they have not yet received responses to their subpoenas to third-party providers or their second batch of discovery to Defendants. Plaintiffs thus reserve the right to update this document once they receive that information.

1. Discussing each State individually, describe in detail how state laws in the Plaintiff States prohibit racial discrimination in the provision of health care, including by identifying all court decisions and other authorities that support your assertion that these laws apply to the provision of health care.

Objections: Plaintiffs object to providing "all" authorities as not proportional. The only arguably relevant question is whether the States prohibit racial discrimination in healthcare, which can be shown with examples and without a burdensome search for "all" authorities. Defendants can research and access publicly available statutes, regulations, caselaw, and other authorities themselves. Plaintiffs have already provided citations in this litigation, and they reproduce sufficient exemplary authorities below.

Response: In Alabama, Ala. Code § 34-24-360(2) provides: "The Medical Licensure Commission shall have the power and duty to suspend, revoke, or restrict any license to practice medicine or osteopathy in the State of Alabama or place on probation or fine any licensee whenever the licensee shall be found guilty on the basis of substantial evidence of any of the following acts or offenses: … Unprofessional conduct as defined herein or in the rules and regulations promulgated by the commission." The Commission, in turn, has defined "unprofessional conduct" to "mean the Commission or omission of any act that is detrimental or harmful to the patient of the physician or detrimental or harmful to the health, safety, and welfare of the public, and which violates the high standards of honesty, diligence, prudence and ethical integrity demanded from physicians and osteopaths licensed to practice in the State of Alabama." Ala. Admin. Code 545-X-4-.06. The Commission provides examples

of unprofessional conduct, including: "Conduct which is immoral and which is willful, shameful, and which shows a moral indifference to the standards and opinions of the community." *Id.* 545-X-4-.06(9). It would be unethical and thus unprofessional conduct for a physician to discriminate against a patient based on his or her race. Other regulations likewise prohibit certain racially discriminatory practices related to healthcare. *E.g.*, Ala. Admin. Code 420-5-4-.03(2)(d) (assisted living facilities); *id.* 420-5-20-.03(2)(d) (specialty care assisted living facilities); *id.* 420-5-10-.03(4) (nursing facilities). And Alabama public hospitals and health institutions ban discrimination based on race. *See, e.g.*, Taylor Hardin Secure Medical Facility, Dep't of Mental Health, perma.cc/22VE-PFBY; UAB Medicine, perma.cc/RXV8-Y4RE; Huntsville Hospital, https://www.huntsvillehospital.org/disclaimer#:~:text=Huntsville%20Hospital%20Health%20System%20complies,expression%20or%20source%20of%20payment.

Arkansas law prohibits racial discrimination in the provision of health care. *See* Ark. Code Ann. §16-123-101 *et seq.* In Arkansas, a place of public accommodation is "any place … or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds." *Id.* §16-123-102(11). Arkansas protects as "a civil right" the right "to be free from discrimination because of race," and includes "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public … accommodation." *Id.* §16-123-107(a). Arkansas recognizes a cause of

action for intentional violations of that right "to recover compensatory and punitive damages" and "to enjoin further violations." *Id.* §16-123-107(b). Additionally, the Arkansas Department of Health Division of Health Protection - Infectious Disease Branch has contracts with providers. Public health service agreements contain this language:

> B. COMPLIANCE WITH NONDISCRIMINATION LAWS: The Provider will comply with all applicable provisions of the following federal regulations related to nondiscrimination, both in service delivery to clients and in employment, including, but not limited to, the following:
>
> - Title 45 Code of Federal Regulations: Part 80 (Nondiscrimination on the Basis of Race or Sex) Part 84 (Nondiscrimination on the Basis of Handicap) Part 90 (Nondiscrimination on the Basis of Age)
> - Americans with Disabilities Act of 1990, U.S.C. Section 12101 et. seq.
> - Title 28 Code of Federal Regulations: Part 35 (Nondiscrimination on the Basis of Disability in State and Local Government Services)
> - Title 41 Code of Federal Regulations: Part 60-741 (OFCCP: Affirmative Action Regulations on Handicapped Workers) The Department will furnish a copy of these regulations to the Provider upon request.

Kentucky law prohibits racial discrimination in the provision of health care. *See* Ky. Rev. Stat. Ann. §344.010 *et seq.* Kentucky law seeks to "provide for execution within the state of the policies embodied in" federal civil rights statutes, including "the Federal Civil Rights Act of 1964," and "[t]o safeguard all individuals within the state from discrimination because of … race." *Id.* §344.020(a), (b). Places of public accommodation generally include "any place … or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits

or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds." *Id.* §344.130. Kentucky bans denying "an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation … on the ground of … race." *Id.* §344.120. It also bans certain racially discriminatory printed materials. *Id.* §344.140. Civil-rights protections extend to, for example, "clinics." *Lexington Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands on Originals, Inc.*, 2017 WL 2211381, at *5 (Ky. Ct. App.), *aff'd* 592 S.W.3d 291 (Ky. 2019). Regulations also prohibit racial discrimination in the provision of health care. *See* 907 Ky. Admin. Regs. 1:671 §1(40)(l) ("'Unacceptable practice' means conduct by a provider" that can include "[d]iscriminating in the furnishing of medical care, services, or supplies"); *id.* §6(3) ("A provider's participation may be terminated and a period of exclusion imposed, if an administrative determination is made … that the provider engaged in an unacceptable practice."); *id.* 1:672 §2(6)(i)–(k) (prohibiting "unacceptable practice" and requiring compliance with federal and state law); *id.* §2(7)(a)(8) (denying enrollment to providers that engage in unacceptable practices).; *id.* §5(12) (unacceptable practices include "[d]iscriminating in the furnishing of medical care, services, or supplies").

Louisiana law prohibits racial discrimination in the provision of health care. *See* La. Stat. Ann. §51:2231 *et seq.* The Louisiana Commission on Human Rights was established "to safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age, disability, or national origin in connection with

employment and in connection with public accommodations." *Id.* §51:2231(A). A place of public accommodation includes "any place … or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds." *Id.* §2232(10). Discriminatory practices include "any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race." *Id.* §2232(5). Louisiana bans denying "an individual the full and equal enjoyment of the goods, services, privileges, advantages, and accommodations of a place of public accommodation … on the grounds of race." *Id.* §2247. Louisiana also bans certain racially discriminatory printed materials. *Id.* §2248. The Commission has an online portal for citizens to file complaints of discrimination. *See Filing a Complaint with LCHR*, Office of Gov'r Landry, gov.louisiana.gov/page/filing-a-complaint-with-lchr. The Louisiana State Board of Medical Examiners also investigates complaints against healthcare providers and physicians. *See* La. R.S. § 37:1270. The Board has an online portal for citizens to file complaints. *See File a Complaint/Investigations*, La. State Bd. of Med. Examiners, lsbme.la.gov/content/investigations.

Mississippi regulations prohibit certain racially discriminatory practices related to healthcare. *See* 15 Code Miss. R. Pt. 16, Subpt. 1, Ch. 4, R. 4.15.5 (licensed rehabilitation facility cannot deprive clients "of civil or legal rights" or subject them "to discrimination

on the basis of race"); *id.* Ch. 46, R. 46.31.1(8) ("No person shall be refused service because of … race" in home health agencies); *id.* Ch. 1, R. 1.19.9(3) ("The hospice shall insure that the patient has the right to … [r]eceive appropriate and compassionate care, regardless of … race"); *id.* Ch. 40, R. 40.21.2(1) ("The [psychiatric hospital] shall have written policies and procedures that describe the rights of patients," including the "impartial access to treatment, regardless of race."); *id.* Ch. 51, R. 51.29.2(1) ("The [psychiatric treatment] facility shall have written policies and procedures that describe the rights of patients and the means by which these rights are protected and exercised. These rights shall include … impartial access to treatment, regardless of race."); *id.* Pt. 19, Subpt. 60, Ch. 10, R.10.8.1(9) (providing for "disciplinary sanctions" against certain licensees for "[m]aking differential, detrimental treatment against any person because of race"); *id.* Ch. 8, R. 8.8.1(9) (similar); 24 Code Miss. R. Pt. 3, R. 1.8(A) ("The Department of Mental Health promotes nondiscriminatory practices and procedures in all phases of state service administration, as well as in programs funded and/or certified/operated by the Department of Mental Health."); *id.* Pt. 2, R. 10.7(B)(1) ("All agency providers must have policies that include/address … [n]on-discrimination based on … race."); *id.* R. 16.2(A) ("Written policies and procedures must address admission to services and must at a minimum … [a]ssure equal access to treatment and services and non-discrimination based on … race."); *id.* Pt. 3, Ch. 18, R. 18.14(D), (G) ("DMH-credentialed individuals do not discriminate against any individual because of race" and "work to eliminate the effect of bias on any service provision, and they do not

knowingly participate in or condone discriminatory practices."). In addition, Mississippi state hospitals do not allow discrimination based on race. *See, e.g.*, *Discrimination is Against the Law*, Miss. State Hospital, perma.cc/WWM6-Q9NT.

Missouri law prohibits racial discrimination in the provision of health care. *See, e.g.*, Mo. Ann. Stat. §213.010 *et seq.* In Missouri, places of public accommodation include "all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public." *Id.* §213.010(16). Missouri protects the "free and equal use and enjoyment … of any place of public accommodation … without discrimination or segregation because of race." *Id.* §213.065(1). "It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation … or to segregate or discriminate against any such person in the use thereof because of race." *Id.* §213.065(2); *see also* Mo. Code Regs. Ann. tit. 19, §10-2.010 (civil rights compliance requirements for health service providers).

Montana law prohibits racial discrimination in the provision of health care. *See* Mont. Code Ann.§53-6-105 (Medicaid) ("No discrimination shall be practiced or asserted against any applicant for or recipient of care and services … on the basis of race … and the furnishing of care under this part to any applicant or recipient thereof

shall not be delayed or denied on the basis of race."); *id.* §50-5-105 ("All phases of the operation of a health care facility must be without discrimination against anyone on the basis of race."); *id.* §49-2-101, *et seq.*; *id.* 49-3-101, *et seq.* Montana protects as "a civil right" the "right to be free from discrimination because of race." *Id.* §49-1-102(1). Places of public accommodation are any "place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons," including "hospital[s]." *Id.* §49-2-101(20)(a). Montana makes it unlawful "to refuse, withhold from, or deny to a person any … services, goods, facilities, advantages, or privileges because of … race." *Id.* §49-2-304(1)(a). Montana also bans certain racially discriminatory printed materials. *Id.* §49-2-304(1)(b). Willfully engaging in "an unlawful discriminatory practice" is a crime. *Id.* §49-2-601. A person who believes that he or she has been discriminated against based on race can file a complaint with the Department of Labor and Industry's Human Rights Bureau. *Id.* §49-2-504. Moreover, if a healthcare provider or supplier of healthcare services is considered a state or local government entity, including an instrumentality of a state or local government entity, it is unlawful to discriminate based on race in the performance of services. *Id.* §49-3-205. Montana may not consider race in the distribution of governmental funds. *Id.* §49-3-206. And every state or local contract for goods or services "must contain a provision that … there may not be discrimination on the basis of race … by the persons performing the contract." *Id.* §49-3-207; *see also id.* §49-3-205 ("nor may a state or local governmental agency become a

party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices").

Montana's Department of Public Health and Human Services uses contract templates that contain specific anti-discrimination provisions. For example, the current template for general agreements/agreements outside the Medicaid context contains the following provision:

> Civil Rights. The Contractor may not discriminate in any manner against any person on the basis of race, color, national origin, age, physical or mental disability, marital status, religion, creed, sex, sexual orientation, political beliefs, genetic information, veteran's status, culture, social origin or condition, ancestry, or an individual's association with individuals in any of the previously mentioned protected classes in the performance of this Contract or in the delivery of Montana State services or funding on behalf of the State of Montana.

The Department administers Montana's medical assistance programs, and requires health care providers that participate in such programs to execute a provider enrollment agreement. The Montana Healthcare Programs Provider Enrollment Agreement also contains specific anti-discrimination provision: "The Provider may not, on the grounds of race, color, national origin, creed, sex, religion, political ideas, marital status, age, or disability exclude persons from employment in, deny participation in, deny benefits to, or otherwise subject persons to discrimination under the Medicaid program and/or any activity connected with the provision of Medicaid services." The provider enrollment agreements for Healthy Montana Kids/CHIP program (e.g., HMK/CHIP Dental Provider Agreement and Signature Page, CHIP Provider

Agreement and Signature for Extended Mental Health Benefits for Children with a Serious Emotional Disturbance (SED)) contain substantially the same anti-discrimination provisions. Another example is Montana's Passport to Health, the basic care management program for Montana Medicaid and Healthy Montana Kids Plus (HMK+) members. The Passport Provider Agreement includes the following provision: "Must not discriminate against members enrolled on the basis of race … and will not use any policy or practice that has the effect of discriminating on the basis of race. . . ." Other contracts for the provision of certain services to the Medicaid Program or to Medicaid or HMK?CHIP beneficiaries also contain this provision or the civil rights provision from the Department's general contract template.

Until mid-2024, the Department's Developmental Disabilities Program (DDP) entered into contracts with providers for the provision of services to persons with developmental disabilities served by DDP. These contracts were based on the general/non-Medicaid contract template referenced above and contained that Civil Rights provision. On September 20, 2024, the Department published a rule by which it adopted the Developmental Disabilities Program 0208 Comprehensive Waiver Provider Manual (DDP Provider Manual), effective as of July 1, 2024. The DDP Provider Manual requires DDP providers to enroll as a Montana Medicaid provider, pursuant to the Montana Healthcare Programs Provider Enrollment Agreement referenced above.

2. Discussing each State individually, describe in detail all complaints or charges of racial discrimination against health care providers received under state laws that prohibit racial discrimination in the provision of health care since May 1, 2012, whether in administrative or court proceedings, and describe in detail how each complaint or charge was resolved.

Objections: Plaintiffs object to providing information going back to 2012—ten years before this case was filed, ten years before the challenged rule was promulgated, and across multiple administrations with significant personnel turnover—as not proportional. Plaintiffs object to providing and describing "in detail" "all" complaints or charges as not proportional. Additionally, complaints, charges, and resolutions involve confidential information that cannot be publicly disclosed, as explained below.

Response: The Louisiana State Board of Medical Examiners investigates complaints regarding physicians. *See* La. Stat. Ann. §37:1270. The Board has had several cases opened with allegations of physician race-based discrimination in recent years. At least one case is ongoing and active. All details of these cases are confidential and nonpublic but show that the Board actively investigates complaints and charges of racial discrimination against healthcare providers. Under applicable regulations, "failure to provide professional service to a person because of such person's race, creed, color or national origin" is an aggravating circumstance which may be considered in determining whether a complaint disposition is disciplinary (public) or non-disciplinary (non-public). 46 La. Admin. Code Pt. XLV, §9714.

According to Missouri law, "[a]ll … complaints, investigatory reports, and information pertaining to any person who is an applicant or licensee of any agency

assigned to the division of professional registration by statute or by the department are confidential and may not be disclosed to the public or any member of the public, except with the written consent of the person whose records are involved." Mo. Ann. Stat. §324.001.8; *see also id.* §324.017. All complaints or charges identified by the State of Missouri are privileged and will be logged.

The Arkansas State Medical Board has received and examined several complaints against physicians involving racial discrimination. The Board closed all cases for lack of evidence, not because racial discrimination in healthcare is somehow permitted. Likewise, the Arkansas Board of Examiners in Counseling received and examined several complaints against providers involving racial discrimination.

Alabama, Kentucky, and Mississippi have not identified any complaints or charges of racial discrimination against healthcare providers since 2020 that resulted in an investigative action.

Montana has identified at least one case where a health care provider had a finding against them based on racial discrimination. The details of the case and findings are confidential under State law. *See* Admin. R. Mont. 24.8.210.

The absence of complaints or charges does not mean that the States do not prohibit racial discrimination by healthcare providers, or that they do not wish to enforce their anti-discrimination laws when applicable and when they discover racial discrimination.

3. Discussing each State individually, describe in detail all enforcement actions each Plaintiff State has taken against health care providers for racial discrimination since May 1, 2012, including but not limited to enforcement actions against MIPS eligible professionals due to anti-racism plans.

Objections: Plaintiffs object to providing information going back to 2012—ten years before this case was filed, ten years before the challenged rule was promulgated, and across multiple administrations with significant personnel turnover—as not proportional. Plaintiffs object to providing "all" enforcement actions as not proportional. Plaintiffs object to the undefined term "enforcement action" as vague and not proportional, as it could encompass any number of actions by any number of state entities, university, hospitals, employers, and more. Additionally, complaints, charges, and resolutions involve confidential information that cannot be publicly disclosed, as explained below.

Response: To the extent "enforcement action" means a lawsuit brought under a public-accommodation statute by the State itself, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, and Missouri have not identified any enforcement actions against healthcare providers for racial discrimination that the State itself has initiated since 2020. The absence of an enforcement action does not mean that the States do not prohibit racial discrimination by healthcare providers, or that they do not wish to enforce their anti-discrimination laws when applicable and when they discover racial discrimination. Federal laws also ban racial discrimination, and the States rely in part on those laws to police discrimination. But they can't rely on those laws here because the

Anti-Racism Rule—a federal regulation—encourages the kind of discrimination at issue.

Montana has identified at least one case where a health care provider had a finding against them based on racial discrimination. The details of the case and findings are confidential under State law. *See* Admin. R. Mont. 24.8.210.

4. **Discussing each State individually, identify by name and address all MIPS eligible professionals in each Plaintiff State that did not receive a full score in the MIPS clinical practice improvement activity performance category and did not complete an anti-racism plan because of a perceived conflict or dilemma with state law. For each MIPS eligible professional identified, describe (1) how the State learned that the MIPS eligible professional did not complete an anti-racism plan because of a perceived conflict or dilemma with state law, (2) when the State learned this information, and (3) how the MIPS eligible professional's failure to complete an anti-racism plan harmed a substantial segment of the State's population or the state's economy.**

Objections: The request for the "name and address [of] all MIPS eligible professionals in each Plaintiff State that did not receive a full score" is not proportional because Defendants already have—and *only* Defendants can access—this granular information. The request to identify "all" MIPS eligible professionals that acted "because of a perceived conflict or dilemma with state law" is not proportional because Plaintiffs cannot ascertain (at least not without excessive burdens) the reason every provider in their States did not adopt an anti-racism plan.

Response: Interpreting this interrogatory to ask whether Plaintiffs have been told by a provider that the provider would adopt an antiracism plan if not for state law, no provider has told Plaintiffs that yet.

5. Discussing each State individually, describe in detail the nature and amount of all increased costs incurred by each Plaintiff State due to MIPS eligible professionals who did not complete an anti-racism plan.

Objections: Plaintiffs object to this request as not proportional because "costs" is vague and not defined, because the "amount" of all the various monetary and nonmonetary costs cannot be described (at least without excessive burden) "in detail," and because the nature and amount are not relevant to any question in the case.

Response: To resolve the parties' dispute over this request, Plaintiffs will not advance a theory of standing based on increased costs incurred from MIPS eligible professionals not completing an anti-racism plan.

Dated: May 29, 2024
Amended: June 17, 2024
Amended: October 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Plaintiffs emailed everyone requiring service.

Dated: May 29, 2024 *s/ Cameron T. Norris*

Amended: June 17, 2024

Amended: October 15, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Civil Action No. 1:22-cv-00113-HSO-RPM

DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 26 and 33, and pursuant to the Court's March 28, 2024 Memorandum Opinion and Order and April 10, 2024 Scheduling Order, Defendants hereby submit the following response to Plaintiffs' First Set of Interrogatories.

RESPONSE TO INTERROGATORY

1. Identify by name and address every person in the Plaintiff States who declared to Defendants completion of an anti-racism plan as a clinical practice improvement activity in performance year 2022.

RESPONSE:

The following natural or artificial persons attested to Defendants that they completed MIPS clinical practice improvement activity IA_AHE_8 in performance year 2022 by creating and implementing an anti-racism plan for a minimum of 90 continuous days in 2022:

ALABAMA POST-ACUTE MEDICAL SERVICE 1 PC
2500 RIVER HAVEN DR
HOOVER, AL 35244-1226

EMERGENCY SERVICES OF MONTGOMERY PC
400 TAYLOR RD
MONTGOMERY, AL 36117-3512

HOSPITAL MEDICINE ASSOCIATES LLC
50 MEDICAL PARK DR E
BIRMINGHAM, AL 35235-3401

HOSPITAL PHYSICIAN SERVICES - SOUTHEAST PROFESSIONAL CORPORATION
1000 1ST ST N
ALABASTER, AL 35007-8703

INPATIENT CONSULTANTS OF ALABAMA, INC
2435 COLUMBIANA RD
BIRMINGHAM, AL 35216-2569

LIFESTYLE MANAGEMENT OF BIRMINGHAM, INC
10 OLD MONTGOMERY HWY
BIRMINGHAM, AL 35209-8401

PARAGON CONTRACTING SERVICES LLC
2105 E SOUTH BLVD
MONTGOMERY, AL 36116-2409

SOUTHEAST PHYSICIAN NETWORK, P.C.
1400 AFFLINK PL
TUSCALOOSA, AL 35406-2452

THOMASVILLE REGIONAL MEDICAL ASSOCIATES LLC
300 MED PARK DR
THOMASVILLE, AL 36784-5760

SOUTHEASTERN EMERGENCY PHYSICIANS LLC
211 CRAWFORD MEMORIAL DR
VAN BUREN, AR 72956-5322

ACS PRIMARY CARE PHYSICIANS-MIDWEST
150 N EAGLE CREEK DR
LEXINGTON, KY 40509-1805

HOSPITAL MEDICINE SERVICES OF TENNESSEE PC
1099 MEDICAL CENTER CIR
MAYFIELD, KY 42066-1159

KENTUCKY POST-ACUTE MEDICAL SERVICES 1 PSC
571 WESTPORT RD
ELIZABETHTOWN, KY 42701-2949

BODY-MIND-SPIRIT PODIATRIC CENTER, PLLC
BRIAN K. BAILEY, DPM, MS
500 14TH ST
ASHLAND, KY 41101-2622

ACS PRIMARY CARE PHYSICIANS LOUISIANA PC
211 4TH ST
ALEXANDRIA, LA 71301-8421

ACS EMERGENCY SERVICES OF MISSISSIPPI PROFESSIONAL ASSOCIATION
901 E SUNFLOWER RD
CLEVELAND, MS 38732-2833

CLINICAL RADIOLOGISTS SC
51 GODWIN LN
SAINT LOUIS, MO 63124-1541

IPC PAC HEALTHCARE SERVICES OF MISSOURI INC
1800 S SWOPE DR
INDEPENDENCE, MO 64057-1084

SOUTHEASTERN EMERGENCY PHYSICIANS OF MEMPHIS LLC
1225 GRAHAM ROAD
FLORISSANT, MO 63031-8012

Dated: April 17, 2024

Respectfully submitted,

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Principal Deputy Assistant Attorney General
Civil Division

MICHELLE BENNETT
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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Civil Action No. 1:22-cv-00113-HSO-RPM

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' SECOND SET OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 26 and 33, and pursuant to the court's March 28, 2024 Memorandum Opinion and Order and April 10, 2024 Scheduling Order, Defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services; Chiquita Brooks-LaSure, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services; the Centers for Medicare & Medicaid Services; and the United States of America (collectively, "Defendants"), hereby submit these objections and responses to Plaintiffs' Second Set of Interrogatories.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

8. "Large practice" means any medical practice and/or provider consisting of more than one eligible clinician/person during the MIPS determination period that is not a small practice.

OBJECTION: Defendants object to the definition of "large practice" as inconsistent with the practice size definition used by the Centers for Medicare & Medicaid Services (CMS) in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are defined as groupings of clinicians billing under a practice's Tax Identification Number (TIN) of 2-15

clinicians, 16-99 clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022. Adopting Plaintiffs' definition of "large practice" would require Defendants to incur additional burden disproportionate to any evidentiary need in this case by re-classifying, in a less precise manner, the size of the group to which a clinician belongs.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

> **INTERROGATORY NO. 1:** Identify every person who declared to Defendants completion of an anti-racism plan as a clinical practice improvement activity in performance years 2022 and/or 2023 and state their (a) names and addresses, (b) scores in each of the four performance categories by year, (c) composite scores by year, and (d) status as a solo, small, or large practice. List persons with addresses in the Plaintiff States first.

OBJECTIONS TO INTERROGATORY NO. 1:

Defendants object to this Interrogatory on the grounds that the requirement to identify "every person," including those outside the Plaintiff States, is overly broad, unduly burdensome, and not proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b). Whether clinicians outside the Plaintiff States completed an anti-racism plan as a clinical practice improvement activity in performance years 2022 and/or 2023 has no relevance to Plaintiffs' standing, and therefore exceeds the "limited discovery on the question of standing" that this Court authorized, *see* ECF No. 135 at 45.

Defendants further object to this Interrogatory on the grounds that the categories of "solo, small, or large" are not the categories of "Practice Size" used by CMS in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are defined as groupings of clinicians billing under a practice's Tax Identification Number (TIN) of 2-15 clinicians, 16-99 clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID

SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022.

Defendants further object to this Interrogatory on the grounds that final scoring information, including "scores in each of the four performance categories" and "composite scores by year," for performance year 2023 will not be available until after the Targeted Review period has ended following the release of payment adjustments, which Defendants expect based on historical practice to occur by November 2024.

RESPONSE TO INTERROGATORY NO. 1:

Subject to the foregoing objections, Defendants have produced as HHS_00000511 an Excel spreadsheet listing: (a) the names of individual clinicians who have attested to, or have otherwise obtained credit for, the creation and implementation of an anti-racism plan as a clinical practice improvement activity in the performance years 2022 and/or 2023; (b) the addresses of those individual clinicians, where available; (c) those individual clinician's scores in each of the four performance categories by year; (d) those individual clinician's composite scores by year; and (e) the practice size of the group to which the individual clinician belongs, categorized as solo, small (2-15 clinicians), medium (16-99 clinicians), or large (100 or more clinicians). Defendants further note that the scoring information for performance year 2023 contained in HHS_00000511, including "scores in each of the four performance categories" and "composite scores by year," is not yet final. Defendants further note that the list includes clinicians who did not themselves attest to the creation and implementation of an anti-racism plan as a clinical practice improvement activity in the performance years 2022 and/or 2023 but nonetheless are receiving credit for the activity by billing for a continuous 90-day period within the same performance year under the TIN of a group within which at least 50% of the clinicians completed the activity.

INTERROGATORY NO. 2: For every person in the Plaintiff States who did not obtain a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023 and did not declare or attest to Defendants that they created and implemented an anti-racism plan, identify and state their (a) names and addresses, (b) scores in each of the four performance categories by year, (c) composite scores by year, and (d) status as a solo, small, or large practice.

OBJECTIONS TO INTERROGATORY NO. 2:

Defendants object to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and not proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b). Whether clinicians inside the Plaintiff States did not obtain a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023 and did not declare or attest to Defendants that they created and implemented an anti-racism plan has no relevance to Plaintiffs' standing, and therefore exceeds the "limited discovery on the question of standing" that this Court authorized, ECF No. 135 at 45.

Defendants further object to this Interrogatory on the grounds that the categories of "solo, small, or large" are not the categories of "Practice Size" used by CMS in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are defined as groupings of clinicians billing under a practice's Tax Identification Number (TIN) of 2-15 clinicians, 16-99 clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022.

Defendants further object to this Interrogatory on the grounds that final scoring information, including "scores in each of the four performance categories" and "composite scores by year," for performance year 2023 will not be available until after the Targeted Review period has ended following the release of payment adjustments, which Defendants expect based on historical practice to occur by November 2024.

RESPONSE TO INTERROGATORY NO. 2:

Subject to the foregoing objections, Defendants have produced as HHS_00000511 an Excel spreadsheet listing: (a) the names of individual clinicians in the Plaintiffs States who did not obtain a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023 and did not declare or attest to Defendants that they created and implemented an anti-racism plan; (b) the addresses of those individual clinicians, where available; (c) those individual clinician's scores in each of the four performance categories by year; (d) those individual clinician's composite scores by year; and (e) the practice size of the group to which the individual clinician belongs, categorized as solo, small (2-15 clinicians), medium (16-99 clinicians), or large (100 or more clinicians). Defendants further note that the scoring information for performance year 2023 contained in HHS_00000511, including "scores in each of the four performance categories" and "composite scores by year," is not yet final.

> **INTERROGATORY NO. 3:** Identify every person who made an inquiry to or sought guidance from Defendants about anti-racism plans or the Disparities Impact Statement for performance year 2022 and/or performance year 2023 and state (a) the names and addresses of such persons, (b) the substance of the communication to Defendants, and (c) the substance of Defendants' response, if any.

OBJECTIONS TO INTERROGATORY NO. 3:

Defendants object to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and not proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b). Whether clinicians made an inquiry to or sought guidance from Defendants about anti-racism plans or the Disparities Impact Statement has no relevance to Plaintiffs' standing, and therefore exceeds the "limited discovery on the question of standing" that this Court authorized, ECF No. 135 at 45.

RESPONSE TO INTERROGATORY NO. 3:

Subject to the foregoing objection and pursuant to Federal Rule of Civil Procedure 33(d), which permits Defendants the option to produce documents where the burden of ascertaining the

answer will be substantially the same for either party, Defendants refer Plaintiffs to the records produced as HHS_00000204 to HHS_00000233, HHS_00000240 to HHS_00000382, and HHS_00000509. The records produced as HHS_00000204 to HHS_00000233, HHS_00000240 to HHS_00000382, and HHS_00000509 contain all information that HHS and CMS possess concerning inquiries to or requests for guidance from HHS and CMS regarding anti-racism plans or the Disparities Impact Statement received during performance year 2022 and/or performance year 2023.

> **INTERROGATORY NO. 4:** Describe (a) how Defendants verify that persons completed anti-racism plans as clinical practice improvement activities and (b) the documentation Defendants request of such persons.

OBJECTIONS TO INTERROGATORY NO. 4:

Defendants object to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and not proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b). Whether and how Defendants verify that persons completed anti-racism plans as clinical improvement activities and the documentation that Defendants request of such persons has no relevance to Plaintiffs' standing, and therefore exceeds the "limited discovery on the question of standing" that this Court authorized, ECF No. 135 at 45.

RESPONSE TO INTERROGATORY NO. 4:

Subject to the foregoing objection, Defendants state that there is no process to verify that persons completed anti-racism plans as clinical practice improvement activities for the performance years 2022 and 2023, which are the only two performance years for which the anti-racism plan clinical practice improvement activity has existed.

Defendants further state that Defendants do not require that clinicians maintain any documentation pertaining to the completion of anti-racism plans as clinical practice improvement activities for the performance years 2022 and 2023. As with any clinical practice improvement

activity, clinicians attest that they have undertaken the anti-racism plan improvement activity but do not otherwise submit documentation at the time of certification to verify completion of the improvement activity. While completion of certain clinical practice improvement activities can be audited to verify completion, Defendants state that the anti-racism plan improvement activity was not an audited clinical practice improvement activity for the performance years 2022 and 2023.

Defendants further state that Defendants encourage clinicians to reference CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2024 MIPS Data Validation – Improvement Activities Performance Category Criteria," *available at*: https://qpp.cms.gov/mips/improvement-activities, to determine what documentation clinicians should retain. That resource specifies the following as "Validation Documentation" for MIPS IA_AHE_8:

> Evidence of a practice-wide review and implementation of an anti-racism plan. Please note that, although the CMS Disparities Statement does not mention racism, it can be effectively used to facilitate the completion of the requirements of this activity. Include all of the following elements:
> 1) **Review** – Documentation of a practice-wide review of existing tools and policies; AND
> 2) **Assessment memo** – Completion of an assessment memo summarizing the results of the above review; AND
> 3) **Anti-Racism Plan** – A new or updated anti-racism plan, which includes actions, intended outcomes, and timeline for completion for the eligible clinician's practice; this plan must identify ways in which issues and gaps identified in the review can be addressed and should include target goals and milestones, and the eligible clinician or practice should also consider including training on anti-racism to support identifying explicit and implicit biases in patient care and addressing historic health inequities experienced by people of color; AND
> 4) **Plan Implementation** – Report with results from implementing the new or updated anti-racism plan.

Dated: May 29, 2024

Respectfully submitted,

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Civil Division

MICHELLE BENNETT
Assistant Director, Federal Programs Branch

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Civil Action No. 1:22-cv-00113-HSO-RPM

CONTACT SUMMARY

As a courtesy, Defendants provide the following contact information for the natural or artificial persons that attested to Defendants that they completed MIPS clinical practice improvement activity IA_AHE_8 in performance year 2023 by creating and implementing an anti-racism plan for a minimum of 90 continuous days in 2023.

HOSPITAL MEDICINE ASSOCIATES LLC
2030 LAY DAM RD
CLANTON, AL 35045

JOHN C SIMMONS M.D.
100E CAHABA AVE
LINDEN, AL 36748

PARAGON CONTRACTING SERVICES LLC
6670 GREEN DR
TRUSSVILLE, AL 35173

SCOTT D PARKER MD LLC
250 CHATEAU DRIVE STE 115
HUNTSVILLE, AL 35801

FAMILY MEDICINE CLINIC P. A.
100 HOLLYWOOD AVE
HOT SPRINGS, AR 71901

NORTHWEST ARKANSAS UROLOGY ASSOCIATES, PLLC
5401 WILLOW CREEK DR
SPRINGDALE, AR 72762

BELLEFONTE MEDICAL CENTER INC
401 US 23
GREENUP, KY 41144

HEARTLAND CARES, INC
1903 BROADWAY ST
PADUCAH, KY 42001

REHABILITATION INSTITUTE PLLC
3103 BRECKENRIDGE LN STE 1
LOUISVILLE, KY 40220

DEER CREEK MEDICAL CENTER
301 W FERTITTA BLVD SUITE 1
LEESVILLE, LA 71446

JAY P JAIKISHEN MD PC
155 HOSPITAL DRIVE SUITE 406
LAFAYETTE, LA 70503

STUART A. BEGNAUD,MD APMC
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LAFAYETTE, LA. 70508

Dated: July 2, 2024

Respectfully submitted,

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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Civil Action No. 1:22-cv-00113-HSO-RPM

DEFENDANTS' AMENDED OBJECTIONS AND RESPONSES TO PLAINTIFFS' SECOND SET OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 26 and 33, and pursuant to the court's March 28, 2024 Memorandum Opinion and Order and April 10, 2024 Scheduling Order, Defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services; Chiquita Brooks-LaSure, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services; the Centers for Medicare & Medicaid Services; and the United States of America (collectively, "Defendants"), hereby submit these amended objections and responses to Plaintiffs' Second Set of Interrogatories. Defendants amend only those responses to the Interrogatories included herein.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

8. "Large practice" means any medical practice and/or provider consisting of more than one eligible clinician/person during the MIPS determination period that is not a small practice.

OBJECTION: Defendants object to the definition of "large practice" as inconsistent with the practice size definition used by the Centers for Medicare & Medicaid Services (CMS) in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are defined as

groupings of clinicians billing under a practice's Tax Identification Number (TIN) of 2-15 clinicians, 16-99 clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022. Adopting Plaintiffs' definition of "large practice" would require Defendants to incur additional burden disproportionate to any evidentiary need in this case by re-classifying, in a less precise manner, the size of the group to which a clinician belongs.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

> **INTERROGATORY NO. 1:** Identify every person who declared to Defendants completion of an anti-racism plan as a clinical practice improvement activity in performance years 2022 and/or 2023 and state their (a) names and addresses, (b) scores in each of the four performance categories by year, (c) composite scores by year, and (d) status as a solo, small, or large practice. List persons with addresses in the Plaintiff States first.

OBJECTIONS TO INTERROGATORY NO. 1:

Defendants object to this Interrogatory on the grounds that the requirement to identify "every person," including those outside the Plaintiff States, is overly broad, unduly burdensome, and not proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b). Whether clinicians outside the Plaintiff States completed an anti-racism plan as a clinical practice improvement activity in performance years 2022 and/or 2023 has no relevance to Plaintiffs' standing, and therefore exceeds the "limited discovery on the question of standing" that this Court authorized, *see* ECF No. 135 at 45.

Defendants further object to this Interrogatory on the grounds that the categories of "solo, small, or large" are not the categories of "Practice Size" used by CMS in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are defined as groupings of clinicians billing under a practice's Tax Identification Number (TIN) of 2-15 clinicians, 16-99

clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022.

Defendants further object to this Interrogatory on the grounds that final scoring information, including "scores in each of the four performance categories" and "composite scores by year," for performance year 2023 will not be available until after the Targeted Review period has ended following the release of payment adjustments, which Defendants expect based on historical practice to occur by November 2024.

AMENDED RESPONSE TO INTERROGATORY NO. 1:

Subject to the foregoing objections, Defendants have produced as HHS_00000511 an Excel spreadsheet listing: (a) the names of individual clinicians who have attested to, or have otherwise obtained credit for, the creation and implementation of an anti-racism plan as a clinical practice improvement activity in the performance years 2022 and/or 2023; (b) the addresses of those individual clinicians, where available; (c) those individual clinician's scores in each of the four performance categories by year; (d) those individual clinician's composite scores by year; and (e) the practice size of the group to which the individual clinician belongs, categorized as solo, small (2-15 clinicians), medium (16-99 clinicians), or large (100 or more clinicians). Defendants previously noted that the scoring information for performance year 2023 contained in HHS_00000511, including "scores in each of the four performance categories" and "composite scores by year," is not yet final. As Defendants have now received updated information for performance year 2023, Defendants will produce as HHS_00000512 an Excel spreadsheet listing: (a) the names of individual clinicians who have attested to, or have otherwise obtained credit for, the creation and implementation of an anti-racism plan as a clinical practice improvement activity in the performance year 2023; (b) the addresses of those individual clinicians, where available; (c)

those individual clinician's scores in each of the four performance categories by year; (d) those individual clinician's composite scores by year; and (e) the practice size of the group to which the individual clinician belongs, categorized as solo, small (2-15 clinicians), medium (16-99 clinicians), or large (100 or more clinicians). Defendants reiterate, however, that the scoring information for performance year 2023 contained in HHS_00000512, including "scores in each of the four performance categories" and "composite scores by year," is not yet final. Defendants further note that the list contained in both HHS_00000511 and HHS_00000512 includes clinicians who did not themselves attest to the creation and implementation of an anti-racism plan as a clinical practice improvement activity in the performance years 2022 and/or 2023 but nonetheless are receiving credit for the activity by billing for a continuous 90-day period within the same performance year under the TIN of a group within which at least 50% of the clinicians completed the activity.

> **INTERROGATORY NO. 2:** For every person in the Plaintiff States who did not obtain a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023 and did not declare or attest to Defendants that they created and implemented an anti-racism plan, identify and state their (a) names and addresses, (b) scores in each of the four performance categories by year, (c) composite scores by year, and (d) status as a solo, small, or large practice.

OBJECTIONS TO INTERROGATORY NO. 2:

Defendants object to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and not proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b). Whether clinicians inside the Plaintiff States did not obtain a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023 and did not declare or attest to Defendants that they created and implemented an anti-racism plan has no relevance to Plaintiffs' standing, and therefore exceeds the "limited discovery on the question of standing" that this Court authorized, ECF No. 135 at 45.

Defendants further object to this Interrogatory on the grounds that the categories of "solo, small, or large" are not the categories of "Practice Size" used by CMS in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are defined as groupings of clinicians billing under a practice's Tax Identification Number (TIN) of 2-15 clinicians, 16-99 clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022.

Defendants further object to this Interrogatory on the grounds that final scoring information, including "scores in each of the four performance categories" and "composite scores by year," for performance year 2023 will not be available until after the Targeted Review period has ended following the release of payment adjustments, which Defendants expect based on historical practice to occur by November 2024.

AMENDED RESPONSE TO INTERROGATORY NO. 2:

Subject to the foregoing objections, Defendants have produced as HHS_00000511 an Excel spreadsheet listing: (a) the names of individual clinicians in the Plaintiffs States who did not obtain a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023 and did not declare or attest to Defendants that they created and implemented an anti-racism plan; (b) the addresses of those individual clinicians, where available; (c) those individual clinician's scores in each of the four performance categories by year; (d) those individual clinician's composite scores by year; and (e) the practice size of the group to which the individual clinician belongs, categorized as solo, small (2-15 clinicians), medium (16-99 clinicians), or large (100 or more clinicians). Defendants further note that the scoring information for performance year 2023 contained in as HHS_00000511, including "scores in each of the four performance categories" and "composite scores by year," is not yet final.

Defendants determined, however, that the information contained in HHS_00000511 responsive to this interrogatory was over-inclusive because HHS_00000511 included clinicians who did not participate in the Merit-based Incentive Payment System and therefore did not satisfy Plaintiffs' definition of "Person" and clinicians who claimed a hardship exemption, including those pertaining to the COVID-19 public health emergency, to avoid submitting data pertaining to and being scored on the clinical practice improvement activity category. Defendants also determined that the information contained in HHS_00000511 responsive to this interrogatory was under-inclusive because HHS_00000511 omitted clinicians who did not obtain a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023 and did not declare or attest to Defendants that they created or implemented an anti-racism plan. Accordingly, Defendants are producing in HHS_00000513 a spreadsheet containing a list of all clinicians in the Plaintiff States (1) whose composite score was impacted by the clinical practice improvement activities category score and (2) who did not receive a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023. Because Defendants lack any non-disproportionally-burdensome means to filter this information to omit the clinicians who received credit for the anti-racism plan clinical practice improvement activity, Defendants note that the list contained in HHS_00000513 is still potentially over-inclusive in that it would include, if any exist, clinicians (1) who received credit for the anti-racism plan clinical practice improvement category; (2) whose composite score was impacted by the clinical practice improvement activities category score; and (3) who did not receive a full score for clinical practice improvement activities for performance year 2022 and/or performance year 2023.

Dated: July 17, 2024

Respectfully submitted,

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Principal Deputy Assistant Attorney General
Civil Division

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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Civil Action No. 1:22-cv-00113-HSO-RPM

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION

Pursuant to Federal Rules of Civil Procedure 26 and 36, and pursuant to the court's March 28, 2024 Memorandum Opinion and Order and April 10, 2024 Scheduling Order, Defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services; Chiquita Brooks-LaSure, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services; the Centers for Medicare & Medicaid Services; and the United States of America (collectively, "Defendants"), hereby submit these objections and responses to Plaintiffs' Requests for Admission.

OBJECTIONS TO DEFINITIONS

8. "Large practice" means any medical practice and/or provider consisting of more than one eligible clinician/person during the MIPS determination period that is not a small practice.

OBJECTION: Defendants object to the definition of "large practice" as inconsistent with the practice size definition used by the Centers for Medicare & Medicaid Services (CMS) in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are defined as groupings of clinicians billing under a practice's Tax Identification Number (TIN) of

2-15 clinicians, 16-99 clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022. Adopting Plaintiffs' definition of "large practice" would require Defendants to incur additional burden disproportionate to any evidentiary need in this case by re-classifying, in a less precise manner, the size of the group to which a clinician belongs.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1: Admit that, when the Anti-Racism Rule was promulgated, Defendants expected persons to create and implement anti-racism plans.

RESPONSE TO REQUEST NO. 1:

Admit that Defendants expected some persons would likely select the improvement activity MIPS IA_AHE_8 and would create and implement anti-racism plans. Otherwise deny.

REQUEST NO. 2: Admit that, when the Anti-Racism Rule was promulgated, Defendants expected that persons would use the Disparities Impact Statements when creating and implementing anti-racism plans.

RESPONSE TO REQUEST NO. 2:

Deny. Defendants refer Plaintiffs to the final rule in DEPARTMENT OF HEALTH AND HUMAN SERVICES, "Medicare Program; CY 2022 Payment Policies Under the Physician Fee Schedule and Other Changes to Part B Payment Policies; Medicare Shared Savings Program Requirements; Provider Enrollment Regulation Updates; and Provider and Supplier Prepayment and Post-Payment Medical Review Requirements," 86 Fed. Reg. 64,996, 65,970 (Nov. 19, 2021), in which the MIPS IA_AHE_8 description states: "Create and implement an anti-racism plan using the CMS Disparities Impact Statement *or other anti-racism planning tools*." (Emphasis added).

REQUEST NO. 3: Admit that Defendants encouraged and/or encourage persons to create and implement anti-racism plans.

RESPONSE TO REQUEST NO. 3:

Admit to the extent that Defendants encourage clinicians to review the full list of clinical practice improvement activities and select which improvement activities their practice wants to complete, if any. Defendants further admit that they issued materials that discussed all new improvement activities for performance year 2022. Otherwise deny.

REQUEST NO. 4: Admit that Defendants encouraged and/or encourage persons to use Disparities Impact Statements when creating and implementing anti-racism plans.

RESPONSE TO REQUEST NO. 4:

Deny. Defendants refer Plaintiffs to the final rule in DEPARTMENT OF HEALTH AND HUMAN SERVICES, "Medicare Program; CY 2022 Payment Policies Under the Physician Fee Schedule and Other Changes to Part B Payment Policies; Medicare Shared Savings Program Requirements; Provider Enrollment Regulation Updates; and Provider and Supplier Prepayment and Post-Payment Medical Review Requirements," 86 Fed. Reg. 64,996, 65,970 (Nov. 19, 2021), in which the MIPS IA_AHE_8 description states: "Create and implement an anti-racism plan using the CMS Disparities Impact Statement *or other anti-racism planning tools*." (Emphasis added).

REQUEST NO. 5: Admit that the Anti-Racism Rule incentivizes persons to create and implement anti-racism plans.

RESPONSE TO REQUEST NO. 5:

Admit that the Merit-based Incentive Payment System (MIPS) incentivizes eligible clinicians to meet a series of requirements that includes completing clinical practice improvement activities, and MIPS IA_AHE_8 is an available activity from the inventory of activities from which to choose. Otherwise deny.

REQUEST NO. 6: Admit that persons can create and implement anti-racism plans that, among other things, identify priority populations by race or ethnicity.

OBJECTIONS TO REQUEST NO. 6:

Defendants object because "can" and "among other things" are vague and ambiguous terms.

Defendants further object based on relevance. To the extent "can" means "to be able to do something," *see* CAN, Black's Law Dictionary (11th ed. 2019) (definition 1), persons are "able to" create anti-racism plans that do any number of things, which has no bearing on whether such plans appropriately implement the anti-racism plan clinical practice improvement activity.

Defendants further object as calling for legal conclusions and application of law to fact without specifying the relevant legal principles to be applied. To the extent "can" means "to have permission (as often interpreted by courts)," CAN, Black's Law Dictionary (11th ed. 2019) (definition 2), Defendants require additional information regarding the relevant legal "permission (as often interpreted by courts)."

RESPONSE TO REQUEST NO. 6:

In light of these objections, Defendants are unable to either admit or deny this request.

REQUEST NO. 7: Admit that persons have used the Disparities Impact Statement to create and implement anti-racism plans for performance years 2022 and/or 2023.

RESPONSE TO REQUEST NO. 7:

After making reasonable inquiry and determining that the information Defendants know or can readily obtain is insufficient to enable Defendants to admit or deny this request for admission, Defendants state that they lack knowledge or information sufficient to truthfully admit or deny, and on this basis, deny.

REQUEST NO. 8: Admit that large practices have created and implemented an anti-racism plan in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and/or Montana for performance years 2022 and/or 2023.

RESPONSE TO REQUEST NO. 8:

For performance year 2022, Defendants admit that at least one practice of more than 15 clinicians attested to creating and implementing an anti-racism plan in Alabama, Arkansas, Kentucky, Louisiana, and Missouri. For performance year 2022, Defendants deny that any practices of more than 15 clinicians attested to creating and implementing an anti-racism plan in Mississippi or Montana.

For performance year 2023, Defendants admit that at least one practice of more than 15 clinicians attested to creating and implementing an anti-racism plan in Alabama, Kentucky, Louisiana, and Missouri. For performance year 2023, Defendants deny that any practices of more than 15 clinicians attested to creating and implementing an anti-racism plan in Arkansas, Mississippi, or Montana.

REQUEST NO. 9: Admit that at least one person in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and/or Montana created and implemented an anti-racism plan in performance year 2022 and/or performance year 2023.

RESPONSE TO REQUEST NO. 9:

For performance year 2022, Defendants admit that at least one person attested to creating and implementing an anti-racism plan in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, and Missouri. For performance year 2022, Defendants deny that at least one person attested to creating and implementing an anti-racism plan in Montana.

For performance year 2023, Defendants admit that at least one person attested to creating and implementing an anti-racism plan in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, and Missouri. For performance year 2023, Defendants deny that at least one person attested to creating and implementing an anti-racism plan in Montana.

Dated: May 29, 2024

Respectfully submitted,

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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF MISSISSIPPI, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Civil Action No. 1:22-cv-00113-HSO-RPM

DEFENDANTS' AMENDED RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION

Pursuant to Federal Rules of Civil Procedure 26 and 36, and pursuant to the court's March 28, 2024 Memorandum Opinion and Order and April 10, 2024 Scheduling Order, Defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services; Chiquita Brooks-LaSure, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services; the Centers for Medicare & Medicaid Services; and the United States of America (collectively, "Defendants"), hereby submit the following amended objections and responses to Plaintiffs' Requests for Admission. Defendants amend only those responses to the Requests for Admission included herein.

OBJECTIONS TO DEFINITIONS

8. "Large practice" means any medical practice and/or provider consisting of more than one eligible clinician/person during the MIPS determination period that is not a small practice.

OBJECTION: Defendants object to the definition of "large practice" as inconsistent with the practice size definition used by the Centers for Medicare & Medicaid Services (CMS) in collecting clinician data for purposes of MIPS. In CMS performance year reports, practices are

defined as groupings of clinicians billing under a practice's Tax Identification Number (TIN) of 2-15 clinicians, 16-99 clinicians, and 100 or more clinicians. *See, e.g.*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, "2022 Quality Payment Program (QPP) Data Use Guide," *available at*: https://qpp.cms.gov/resources/performance-data#public-data-files-2022. Adopting Plaintiffs' definition of "large practice" would require Defendants to incur additional burden disproportionate to any evidentiary need in this case by re-classifying, in a less precise manner, the size of the group to which a clinician belongs.

SPECIFIC AMENDED OBJECTIONS AND RESPONSES

REQUEST NO. 6: Admit that persons can create and implement anti-racism plans that, among other things, identify priority populations by race or ethnicity.

OBJECTIONS TO REQUEST NO. 6:

Defendants object because "can" and "among other things" are vague and ambiguous terms.

Defendants further object based on relevance. To the extent "can" means "to be able to do something," *see* CAN, Black's Law Dictionary (11th ed. 2019) (definition 1), persons are "able to" create anti-racism plans that do any number of things, which has no bearing on whether such plans appropriately implement the anti-racism plan clinical practice improvement activity.

Defendants further object as calling for legal conclusions and application of law to fact without specifying the relevant legal principles to be applied. To the extent "can" means "to have permission (as often interpreted by courts)," CAN, Black's Law Dictionary (11th ed. 2019) (definition 2), Defendants require additional information regarding the relevant legal "permission (as often interpreted by courts)."

AMENDED RESPONSE TO REQUEST NO. 6:

Admit that a valid anti-racism plan under what Plaintiffs refer to as the Anti-Racism Rule could include the identification of a health disparity that affects individuals of a particular race or ethnicity. Further admit that addressing disparities experienced by some individuals or some populations does not mean discriminating against or lessening treatment afforded to other individuals or populations. Otherwise deny.

> **REQUEST NO. 8:** Admit that large practices have created and implemented an anti-racism plan in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and/or Montana for performance years 2022 and/or 2023.

AMENDED RESPONSE TO REQUEST NO. 8:

For performance year 2022, Defendants admit that at least one practice of more than 15 clinicians attested to creating and implementing an anti-racism plan in Alabama, Arkansas, Kentucky, Louisiana, and Missouri. For performance year 2022, Defendants deny that any practice of more than 15 clinicians attested to creating and implementing an anti-racism plan in Mississippi or Montana.

For performance year 2023, Defendants deny that any practice of more than 15 clinicians attested to creating and implementing an anti-racism plan in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, or Montana.

Dated: July 18, 2024

Respectfully submitted,

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