[ORAL ARGUMENT NOT SCHEDULED]

No. 20-5331

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITMAN-WALKER CLINIC, INC., et al.,

Plaintiff-Appellees,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Appellants are the United States Department of Health and Human Services, Alex M. Azar, II, in his official capacity as Secretary of the United States Department of Health & Human Services, Roger Severino, in his official capacity as Director, Office for Civil Rights, U.S. Department of Health and Human Services, and Seema Verma, in her official capacity as Administrator for the Centers for Medicare & Medicaid Services.

Appellees are Whitman-Walker Clinic, Inc., Translatin@ Coalition, Los Angeles LGBT Center, Bradbury-Sullivan LGBT Community Center, American Association of Physicians for Human Rights, Inc., AGLP: The Association of LGBTQ Psychiatrists, Sarah Henn, MD, MPH, Randy Pumphrey, D.MIN, LCC, BCC, Robert Bolan, MD, and Ward Carpenter, MD.

No amici or intervenors are currently before this Court.

B. Rulings Under Review

The government seeks review of the district court's September 2, 2020 memorandum opinion and order granting in part plaintiffs' motion for a preliminary

injunction. *See Whitman-Walker Clinic, et al. v. HHS, et al.*, No. 20-1630-JEB (D.D.C. Sept. 2, 2020) (Boasberg, J.).

C. Related Cases

This case has not previously been before this Court. Several cases raising the same or similar issues are pending in other courts. *See Asapansa-Johnson Walker v. Azar*, No. 20-3580 (2d Cir.); *New York v. HHS*, No. 20-cv-05583 (S.D.N.Y.); *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth*, No. 20-cv-11297 (D. Mass).

/s/ Joshua Dos Santos
Joshua Dos Santos

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GLOSSARY

APA	Administrative Procedure Act
HHS	Department of Health and Human Services

INTRODUCTION

Section 1557 of the Patient Protection and Affordable Care Act (Affordable Care Act) prohibits any federally funded health program or activity from discriminating on the basis of several grounds defined in other statutes. One of those statutes is Title IX, which prohibits discrimination "on the basis of sex" but exempts certain religious institutions from this prohibition. In 2016, the Department of Health and Human Services (HHS) adopted a rule interpreting Section 1557's prohibition of sex discrimination to prohibit discrimination on the basis of gender identity, and declined to incorporate Title IX's religious exemption. Those aspects of the 2016 Rule were stayed or enjoined by two courts and partially vacated.

In light of those decisions, HHS adopted a new Rule that paraphrases the statutory text and states that Section 1557 incorporates Title IX's religious exemption. Although HHS agreed with those courts' conclusion that the statute did not cover transgender discrimination, it chose not to adopt any new regulatory definitions of the relevant statutory terms, leaving further interpretation to the courts.

The district court preliminarily enjoined HHS from enforcing the new provision restating the statutory text and the provision incorporating Title IX's religious exemption. The court concluded that plaintiffs had standing to challenge those provisions on the theory that third-party patients would fear increased discrimination and change their behavior in ways that would increase the costs of the plaintiff healthcare providers. Regarding plaintiffs' likelihood of success on the

merits, the court in effect held that the new provision restating the relevant statutory language was arbitrary and capricious because HHS chose to promulgate it before the Supreme Court decided *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). It also concluded that HHS had inadequately explained its incorporation of Title IX's religious exemption. Those conclusions are mistaken for several reasons.

As an initial matter, the plaintiff healthcare providers have failed to establish standing to challenge either provision at issue here. Plaintiffs' theory of standing rests on speculation that the new Rule will cause patients to behave in certain ways out of fear of discrimination. But that theory is unduly speculative. As to the provision of the new Rule that restates the statute, plaintiffs claim that the statute clearly protects patients from such discrimination in light of the Supreme Court's decision in *Bostock*. That argument fatally undermines their assertion that patients will construe the new Rule as a green light for providers to discriminate. In addition, plaintiffs cannot show causation or redressability because the 2016 regulatory provisions that plaintiffs prefer have been vacated by a district court in a different circuit. And plaintiffs cannot establish that patients will behave differently on account of the provision of the new Rule incorporating Title IX's religious exemption because other conscience statutes already protect religious providers.

On the merits, the agency was well within its discretion to restate the statutory text and leave the interpretation of the statute's prohibition of sex discrimination for another day. In light of several ongoing lawsuits, the fact that its prior regulations had

been partially vacated, and the Supreme Court's consideration of similar issues in *Bostock* and two other cases involving Title VII of the Civil Rights Act of 1964, HHS reasonably decided not to adopt any new interpretation of that prohibition by regulation, ensuring that its regulations would be consistent with any future judicial decision on the subject. The district court's holding improperly supplants the discretion of the agency to choose between several reasonable alternatives, and establishes an unprecedented and burdensome new rule that agencies must always await the outcome of judicial proceedings that may be relevant even before issuing new regulations that merely paraphrase the statutory text.

Regarding HHS's decision to incorporate Title IX's religious exemption, HHS explained its agreement with several courts' decisions that Section 1557 incorporates the exemptions for each of the referenced statutes, including Title IX. It then considered conflicting comments regarding access to care, but explained that its understanding of the law required the agency to enforce Title IX's exemptions. That explanation is sufficient under the Administrative Procedure Act (APA).

At a minimum, the district court abused its discretion by issuing nationwide relief. Plaintiffs do not represent a class, and the district court erred in granting injunctive relief beyond what was necessary to remedy their alleged injuries.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1346, and 1361, raising claims under the APA, 5 U.S.C. §§ 701-706, and the

Constitution. Joint Appendix (JA) 9-10. Plaintiffs' standing is contested. *See infra* Part I. The district court entered a preliminary injunction on September 2, 2020. JA1013. The government filed a timely notice of appeal on October 31, 2020. JA1116. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether plaintiffs have standing to challenge HHS's new Rule implementing the anti-discrimination requirements of Section 1557 of the Affordable Care Act.

2. Whether the new Rule is arbitrary or capricious.

3. Whether the district court abused its discretion by granting relief beyond what is necessary to remedy plaintiffs' alleged harm.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory, Regulatory, and Factual Background

1. Section 1557

Section 1557 of the Patient Protection and Affordable Care Act prohibits, as relevant here, "any health program or activity" "receiving Federal financial assistance" from discriminating against an individual based on "ground[s] prohibited under" several other statutes. 42 U.S.C. § 18116(a). One of the specified statutes is Title IX

of the Education Amendments of 1972, *id.*, which prohibits, in part, discrimination "on the basis of sex." 20 U.S.C. § 1681(a).

Title IX does not apply to "educational institutions controlled by a religious organization" or to "any operation of an entity which is controlled by a religious organization" if the application of Title IX "would not be consistent with the religious tenets of such organization." 20 U.S.C. §§ 1681(a)(3), 1687.

The agency "may promulgate regulations to implement" Section 1557, but is not required to do so. 42 U.S.C. § 18116(c).

2. The 2016 Rule and Subsequent Litigation

In 2016, HHS promulgated a rule implementing the anti-discrimination requirements of Section 1557. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016) (2016 Rule). The 2016 Rule defined discrimination "on the basis of sex" to include discrimination on the basis of "gender identity," and did not expressly incorporate Title IX's religious exemption. *See id.* at 31,467, 31,380.

Soon afterward, various plaintiffs filed three lawsuits challenging those aspects of the 2016 Rule. *See Franciscan All., Inc. v. Burwell*, No. 16-cv-00108 (N.D. Tex. Aug. 23, 2016); *Religious Sisters of Mercy v. Burwell*, No. 16-cv-386 (D.N.D. Nov. 7, 2016); *Catholic Benefits Association v. Burwell*, No. 16-cv-432 (D.N.D. Dec. 28, 2016). As relevant here, those plaintiffs alleged that the 2016 Rule violated the Religious Freedom Restoration Act and exceeded statutory authority by defining sex

discrimination to include discrimination based on gender identity and failing to incorporate Title IX's religious exemption.

On December 31, 2016, the Northern District of Texas issued a nationwide preliminary injunction barring enforcement of the challenged parts of the 2016 Rule, concluding that the *Franciscan Alliance* plaintiffs were likely to succeed on their claims. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). The District of North Dakota consolidated the two cases in that district and stayed the challenged aspects of the 2016 Rule. *See* Am. Order Staying Enforcement, *Religious Sisters of Mercy*, No. 16-cv-386 (D.N.D. Jan. 23, 2017), Dkt. No. 36.

3. HHS Proposes a New Rule

HHS began reconsidering the 2016 Rule in light of those courts' reasoning and the pending litigation. *See* Mot. for Voluntary Remand and Stay at 1-2, *Franciscan All.*, No. 16-cv-00108 (N.D. Tex. May 2, 2017), Dkt. No. 92.

In June 2019, HHS issued a notice of proposed rulemaking. *See* Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019).

a. HHS proposed to replace the challenged 2016 provisions defining sex discrimination with a new provision that would paraphrase the statutory text without attempting to interpret how Section 1557 would apply to discrimination on the basis of gender identity. 84 Fed. Reg. at 27,857. The agency explained that it sought to "minimize litigation risk" and "to avoid further litigation and uncertainty regarding the

implementing regulations." *Id.* at 27,849-50. It noted that two district courts had held that the 2016 Rule's provisions on sex discrimination likely exceeded its statutory authority, and that the Department of Justice had taken the position that "the ordinary meaning of the word 'sex' for purposes of Federal nondiscrimination laws does not encompass sexual orientation or gender identity." *Id.* at 27,856. HHS also explained that "the underlying civil rights laws cited in Section 1557," including Title IX, had already been implemented in regulations promulgated by other agencies, and the 2016 Rule's provisions "were inconsistent with (or, at a minimum, unnecessarily duplicated)" those existing regulations. *Id.* at 27,849, 27,873.

In light of conflicting court decisions and pending litigation, the agency also explained that restating the statutory text without adopting a new regulatory definition of statutory terms would "allow the Federal Courts" to resolve the statute's meaning. 84 Fed. Reg. at 27,855, 27,873. HHS observed that the Supreme Court had recently "granted three petitions for writs of certiorari" regarding the proper interpretation of the prohibition of sex discrimination in a different statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). 84 Fed. Reg. at 27,855. HHS explained that "a holding by the U.S. Supreme Court on the definition of 'sex' under Title VII will likely have ramifications for the definition of 'sex' under Title IX." *Id.* at 27,855. For that reason, although the agency agreed with the judicial decisions holding that the 2016 Rule had adopted an incorrect definition of "sex" under Title IX and Section 1557, it

"decline[d], at this time, to propose its own[] definition of 'sex' for purposes of discrimination on the basis of sex in the regulation." *Id.* at 27,849, 27,857.

b. "After further consideration," HHS also proposed to add a provision stating that Title IX's religious exemption would apply under Section 1557. 84 Fed. Reg. at 27,870. The agency noted that the *Franciscan Alliance* court had concluded that the 2016 Rule likely violated Section 1557 by failing to incorporate Title IX's exemptions. *Id.* Consistent with that decision, HHS explained that "any enforcement of Section 1557 to the extent it incorporates Title IX, must be constrained by the statutory contours of Title IX, which include its abortion and religious exemptions." *Id.* It observed that the 2016 Rule had taken that approach with the other statutes cited in Section 1557, and therefore had "incorporated exemptions to Title VI, Section 504, and the Age Act." *Id.* at 27,864. HHS proposed the same approach for Title IX, concluding that it was necessary because "Section 1557 did not override … the exemptions" of the statutes it incorporated. *See id.* at 27,870.

4. The *Franciscan Alliance* Vacatur

Several months later, while HHS was considering comments on its proposed rulemaking, the Northern District of Texas issued a final judgment vacating "the portions of the [2016] Rule that Plaintiffs challenged." Order at 2, *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. Nov. 21, 2019) (No. 16-cv-00108), Dkt. No. 182; *see Franciscan All.*, 414 F. Supp. 3d at 947. The court declined to issue injunctive relief, however, in part because the agency was in the midst of reconsidering the 2016

Rule. *See* 414 F. Supp. 3d at 946. The *Franciscan Alliance* plaintiffs appealed, seeking injunctive relief in addition to the vacatur. *See Franciscan All., Inc. v. Azar*, No. 20-10093 (5th Cir. Jan. 24, 2020). The agency did not appeal the order vacating the challenged 2016 provisions. Meanwhile, the cases in the District of North Dakota were stayed pending HHS's reconsideration of the challenged provisions. *See* Order Granting Mot. to Stay at 2-3, *Religious Sisters of Mercy*, No. 16-cv-386 (D.N.D. Aug. 24, 2017), Dkt. No. 56.

5. The New Rule

a. On June 12, 2020, after three years of consideration and review of nearly 200,000 comments, HHS finalized its new rule implementing Section 1557 and submitted it to the Office of the Federal Register for publication. *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,160, 37,164 (June 19, 2020) (the new Rule). Based on the "policy rationales" explained in its proposed rulemaking and to bring "the provisions of the Code of Federal Regulations … up-to-date as to the effect of the [*Franciscan Alliance*] court's order," HHS adopted its proposed rule without significant change. *See id.* at 37,162-65.

As HHS had proposed, the new Rule restated Section 1557's statutory text without interpreting the statute's prohibition of sex discrimination. *Id.* at 37,178, 37,244; *see id.* at 37,178 ("This final rule repeals the 2016 Rule's definition of 'on the basis of sex,' but declines to replace it with a new regulatory definition. Instead, the

final rule reverts to, and relies upon, the plain meaning of the term in the statute." (citation omitted)). The new provision reads as follows:

> (a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.
>
> (b) The grounds are the grounds prohibited under the following statutes:
>
> … Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (sex); . . . .

45 C.F.R. § 92.2.

In the new Rule's preamble, HHS responded to commenters who argued that the agency should delay its changes until after the Supreme Court decided the pending Title VII cases. *See* 85 Fed. Reg. at 37,168. The agency explained that it did not need to "delay … based on speculation as to what the Supreme Court might say about a case dealing with related issues." *Id.* The new regulations restated statutory text, so "to the extent that a Supreme Court decision is applicable in interpreting the meaning of a statutory term," the new regulations "would not preclude application of the Court's construction." *Id.* In addition, although the Supreme Court's interpretation of Title VII would "likely have ramifications for the definition of 'on the basis of sex' under Title IX" and Section 1557, the agency noted that a decision regarding

employment discrimination under Title VII would not be directly controlling on Section 1557, especially since the "biological character of sex … takes on special importance in the health context." *Id.*

b. HHS also finalized a new provision incorporating Title IX's religious exemption "[f]or the reasons described in the proposed rule and having considered the comments received." 85 Fed. Reg. at 37,209. The provision reads as follows:

> (b) Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section [including Title IX] … such application shall not be imposed or required.

45 C.F.R. § 92.6(b). In the preamble, the agency explained that it believed incorporating the religious exemption would "protect both providers' medical judgment and their consciences" and "help[] to ensure that patients receive the high-quality and conscientious care that they deserve." 85 Fed. Reg. at 37,206. It also considered comments regarding access to care and comments stating that certain religious providers would seek narrow exemptions. *Id.* Ultimately, however, the agency reiterated its view that its new provision would "not … create any new conscience or religious freedom exemptions beyond what Congress has already enacted." *Id.* HHS explained that "the *Franciscan Alliance* court vacated portions of the 2016 Rule for failing to incorporate Title IX's exemption for religious institutions," and the agency agreed that the 2016 Rule had been "in conflict with express exemptions in Title IX," *id.* at 37,162, 37,207. The new provision would

"simply state[] that the Section 1557 regulation will be implemented consistent with those statutes." *Id.* at 37,207.

c. Three days after HHS submitted the new Rule for publication in the Federal Register, but before the Rule was published, the Supreme Court decided the pending Title VII cases. *See Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). The Court held that Title VII's prohibition of discrimination "because of" sex extends to discrimination because of sexual orientation and transgender status. *Id.* at 1737-41. In doing so, the Court stated that its holding did not necessarily "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Id.* at 1753. The Court explained that "none of these other laws [were] before [it]," that it had "not had the benefit of adversarial testing about the meaning of their terms," and that the Court therefore "d[id] not prejudge any such question." *Id.*

HHS's new Rule implementing Section 1557 was formally published in the Federal Register four days later, on June 19, 2020.

B. Prior Proceedings

1. Various individuals, organizations, and States challenged HHS's new Rule in five district courts across the country. *See Asapansa-Johnson Walker v. Azar*, No. 20-cv-2834 (E.D.N.Y.); *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-cv-1630 (D.D.C.); *New York v. HHS*, No. 20-cv-5583 (S.D.N.Y.); *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth*, No. 20-cv-11297 (D. Mass); *Washington v. HHS*, No. 20-cv-1105 (W.D. Wash.).

Plaintiffs in this case are several healthcare facilities and organizations that provide services to LGBTQ persons, two associations of health professionals, and several individual healthcare providers. JA10-11. As relevant here, plaintiffs alleged that the new Rule was arbitrary and capricious because it replaced the partially vacated 2016 regulations regarding sex discrimination with a regulation restating the statute and because it incorporated Title IX's religious exemption.

2. On September 2, 2020, the district court denied plaintiffs' motion for a preliminary injunction with respect to most of their claims, but granted a preliminary injunction barring (1) the new Rule's replacement of the partially vacated 2016 regulations insofar as those vacated regulations had referenced "sex stereotyping," and (2) the new Rule's incorporation of Title IX's religious exemption. JA1013.

a. The district court first held that plaintiff healthcare providers had standing to challenge these two aspects of the new Rule. JA1032. Although the court found that "[p]laintiffs ha[d] not established" that the new Rule would imminently cause "any future discrimination," JA1056, 1059, it concluded that plaintiffs had standing because the new Rule would likely cause transgender patients to have a "genuine fear of encountering discrimination when seeking care," JA1035-36, 1042, 1049. The court determined that such fear, in turn, would likely cause the plaintiff healthcare providers "financial and operational injuries" because of "increased demand" for their services and because they might need to provide "costlier and more

involved treatment" to patients who "delay[ed] seeking necessary care" or "refrain[ed] from being fully transparent with [other] providers." JA1036-37.

The district court acknowledged that the *Franciscan Alliance* order posed an "unexpected wrinkle" that impaired the court's ability to redress plaintiffs' alleged harms because the court was "powerless to revive" the provisions vacated by that order. JA1044-45. Accordingly, the court concluded that "enjoining or vacating the [new] Rule would not suddenly make gender-identity discrimination illegal under Section 1557—or change how the regulatory text addresses gender-identity discrimination—because the relevant provision of the 2016 Rule [is] no longer in effect following" the *Franciscan Alliance* vacatur. JA1045. Thus, the court explained, "even if [it] were to grant Plaintiffs their desired relief and enjoin HHS from enforcing its repeal of the 2016 definition, the resulting regulation would not contain any language barring gender-identity discrimination." *Id.*

Nonetheless, the district court decided that plaintiffs' claim was "not completely doom[ed]" on the theory that a preliminary injunction could revive the portion of the 2016 definition regarding "sex stereotyping," which the court believed was "not vacate[d]" by the *Franciscan Alliance* order. JA1046 (emphasis omitted). The court asserted that such "relief would clearly redress at least *some* of [plaintiffs'] injury" because "reviving" the sex-stereotyping language of the 2016 Rule would "likely lessen [patients'] fears." *Id.*

b. On the merits, the district court held that plaintiffs were likely to succeed in showing that two aspects of the new Rule were arbitrary and capricious. JA1065.

i. The district court first determined that it was arbitrary for HHS to "plow[] ahead with" adopting a new Rule restating the statute "without even pausing to consider" the "import" of the Supreme Court's decision in *Bostock* for "the meaning of discrimination based on sex under Title IX." JA1070-71. The court "d[id] not adopt" the view that *Bostock*'s interpretation of Title VII, "conclusively" decided the proper interpretation of Section 1557 or Title IX, but held that "it was arbitrary and capricious for HHS to eliminate the 2016 Rule's" provisions "without even acknowledging—let alone considering—the Supreme Court's reasoning or holding." JA1074 (quotation marks omitted). In particular, the court noted that the new Rule's preamble stated "HHS's position that discrimination based on transgender status does not qualify as sex discrimination under Section 1557," and that *Bostock* "called the validity of HHS's legal determinations into serious question." JA1068-69. It further faulted the agency for "fail[ing] entirely to consider the implications of *Bostock* for the agency's reliance on *Franciscan Alliance*." JA1072. Accordingly, the court held that "HHS's explanation" for its new Rule "is plainly insufficient" because *Bostock* "bore direct and undisputed consequences … for the validity and coherence of the reasons HHS provided for its action." JA1074.

ii. The district court also concluded that the agency's incorporation of Title IX's religious exemption was arbitrary and capricious. The court determined that

"[s]everal of the 2016 Rule's primary justifications for declining to incorporate Title IX's religious exemption into Section 1557 focused on the potential negative implications of such an exemption for access to care and ultimate health outcomes" and that the new Rule "said almost nothing about these important issues." JA1077-78 (quotation marks omitted). Although the agency stated that it believed the new Rule would "ensure that patients receive … high-quality and conscientious care," 85 Fed. Reg. at 37,206, the court concluded that the agency's statement "was delivered entirely without elaboration or support," JA1078. Similarly, the court found it insufficient that the agency discussed comments showing that various providers would seek only narrow exemptions for particular procedures. JA1079. In the court's view, that discussion was irrelevant because HHS did not reach a conclusion "that a religious exemption would preserve meaningful access to health care." *Id.*

c. Regarding the remaining preliminary-injunction factors, the district court found that plaintiffs would suffer irreparable harm by way of unrecoverable financial and operational burdens, JA1099-1107, and determined that plaintiffs' harms would outweigh the agency's interest in its new Rule because "HHS cannot invoke the public interest as being in favor of its actions when it promulgated the two relevant provisions in disregard of the APA's procedural mandates," JA1109. The court further found that "denying an injunction would impede the public interest by threatening the health of LGBTQ individuals at large." JA1108.

d. With respect to remedy, the district court determined "that a nationwide injunction is the appropriate remedy here." JA1109. Relying on this Court's decision in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the district court concluded that a nationwide preliminary injunction was appropriate because the ordinary remedy for APA violations is to set aside the agency action. JA1110. The court further stated that "[c]omplete relief will only obtain upon an injunction" affecting "*all* covered entities." JA1111-12. The court stated that the government "never specifically request[ed] an injunction limited in geographic scope," but in any event asserted that "any" geographical limitation "would impair the provision of complete relief to Plaintiffs." JA1112. In support of that conclusion, it noted that one of the plaintiffs served patients from five states and the District of Columbia, and that another served patients from "various parts of California, other states, and even other countries." *Id.*

The district court also determined that "nationwide relief" was "all the more appropriate" because "similarly situated LGBTQ-affirming health-care providers across the country" might "experience comparable harms." JA1113. And although the court acknowledged the "general concern that nationwide relief may truncate the process by which legal challenges percolate through various jurisdictions," it found those concerns "significantly tempered" because two other courts had already addressed these claims. *Id.*

C. Developments in Other Courts

Plaintiffs in two of the several other cases challenging the new Rule also moved for preliminary injunctions. The district court for the Western District of Washington denied the State of Washington's motion for lack of Article III standing because Washington could not show that "the [new] Rule's decision not to define on the basis of sex will yield an increase in discrimination against LGBTQ individuals." *See Washington v. HHS*, No. 20-cv-1105, 2020 WL 5095467, at *1, *8-9 (W.D. Wash. Aug. 28, 2020). Washington voluntarily dismissed its claims shortly after the court's decision. *See* Notice of Voluntary Dismissal, *Washington v. HHS*, No. 20-cv-1105 (W.D. Wash. Sept. 8, 2020), Dkt. No. 73. The Eastern District of New York issued nationwide preliminary injunctions and stays barring HHS from enforcing its repeal of the 2016 regulatory definition of sex discrimination and a related 2016 provision that implemented that definition. *See Walker v. Azar*, No. 20-cv-2834, 2020 WL 4749859, at *10 (E.D.N.Y. Aug. 17, 2020); *Walker*, No. 20-cv-2834, 2020 WL 6363970, at *4 (E.D.N.Y. Oct. 29, 2020). The government has appealed that decision. *See Asapansa-Johnson Walker v. Azar*, Nos. 20-3580, 20-3827 (2d Cir. Oct. 16, 2020).

Litigation against the regulatory provisions of the 2016 Rule is also ongoing. In the Fifth Circuit, the *Franciscan Alliance* plaintiffs seek a "permanent injunction enjoining HHS from construing Section 1557 … to require that Appellants perform or provide insurance coverage for gender-transition procedures or abortions in violation of their religious beliefs." Appellants' Opening Br. at 55, *Franciscan All.*, No.

20-10093 (5th Cir. Sept. 21, 2020). Plaintiffs in the District of North Dakota have filed motions for summary judgment seeking the same. *See* Mots. Summ. J., No. 16-cv-386 (D.N.D. Nov. 23, 2020), Dkt. Nos. 96, 98.

SUMMARY OF ARGUMENT

I. The district court's preliminary injunction goes far beyond the bounds of Article III. Plaintiff healthcare providers seek relief against a new HHS Rule that merely restates the anti-discrimination provision in Section 1557 of the Affordable Care Act, arguing that HHS's decision to replace prior regulations will likely cause patients to fear discrimination and avoid care in ways that harm plaintiffs. But plaintiffs themselves argue that the statutory text clearly prohibits such discrimination, and all agree that the challenged regulation simply restates the statutory text. Plaintiffs therefore cannot plausibly allege that the new Rule will cause patients to avoid care out of fear of discrimination. In addition, the prior regulations that plaintiffs prefer have already been vacated by a district court in a different circuit, so this lawsuit cannot redress plaintiffs' injuries.

Plaintiffs likewise cannot show that the provision incorporating Title IX's religious exemption is likely to cause patients to change their behavior out of fear that religious healthcare providers will discriminate against them. Other religious exemptions and conscience protections already provide exemptions applicable to religious providers, and the district court offered no plausible basis to conclude that the Title IX exemption's marginal impact is imminently likely to harm plaintiffs.

II. The district court likewise erred in holding that plaintiffs had satisfied the requirements for a preliminary injunction.

A. HHS's decision to replace the 2016 regulatory definition of sex discrimination with a provision restating the statute is not arbitrary or capricious. When faced with multiple reasonable options, an agency is entitled to choose any of those paths so long as it provides a reasonable explanation for its choice. Here, HHS was reconsidering its implementation of the anti-discrimination provision in Section 1557 after years of rulemaking and litigation that led a court to partially vacate its prior regulations on the subject. The agency agreed with the court decision vacating its prior regulations as inconsistent with the statute, but was faced with the prospect that the Supreme Court could decide a case dealing with a similar, though not directly controlling, question of statutory interpretation in the near future. Based in part on the pendency of a Supreme Court decision on a related issue, the agency reasonably chose not to adopt any interpretation of the relevant statutory text by regulation, leaving further interpretation for another day.

The district court in effect concluded that HHS was either required to postpone its years-long rulemaking after the Supreme Court granted certiorari in the Title VII cases, or should have rescinded its final rule when the Court issued a decision a few days after the agency had submitted the rule for publication. No principle of administrative law required either action. To the contrary, as this Court has recognized, agencies have discretion whether to carry out their duties by

rulemaking or instead proceed through case-by-case adjudication. HHS was entitled to leave interpretation of the Supreme Court's decision for a later date, and move forward with a rule that simply restated the relevant statutory text.

B. The district court was likewise mistaken that HHS provided an insufficient explanation for incorporating Title IX's religious exemption. HHS recognized that several courts had held that the best reading of Section 1557 requires the agency to apply Title IX's religious exemption, and concluded that the exemption would help protect healthcare providers' conscience. In addition, the agency considered comments regarding the Title IX exemption's effect on access to care, but explained that its understanding of Section 1557 required it to adopt the exemption regardless of the exemption's effects. That rationale was sufficient under the APA. The district court erred in holding that HHS was required to provide a more thorough analysis about access to care, particularly when HHS explained that it lacked the necessary data for such conclusions.

C. The other preliminary injunction factors also weigh against the district court's orders. For the same reasons that plaintiffs lack standing, they also have not identified any plausible basis for concluding that they are imminently likely to suffer irreparable harm. Plaintiffs' speculative theory of injury does not outweigh the agency's legitimate interest in adopting a rule that directly tracks the text of Section 1557 and accordingly leaves in place the full protection against discrimination afforded by the statute.

III. The district court likewise abused its discretion when it granted a preliminary injunction covering all fifty states to redress injuries asserted by two healthcare providers in Los Angeles and Washington, D.C. It is well-established that equitable relief should extend no further than necessary to remedy injuries to the parties before the court, and the court's nationwide injunction was particularly inappropriate given the pendency of ongoing litigation in other district courts and the fact that a district court in Washington has already decided that the new Rule should not be enjoined.

STANDARD OF REVIEW

This Court "review[s] a district court's weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of discretion, though any legal conclusions upon which the district court relies, including whether [plaintiffs] have demonstrated irreparable injury, are reviewed de novo." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). None of those factors is satisfied here.

Section 1557 of the Affordable Care Act prohibits any federally funded health program or activity from discriminating on the basis of several grounds defined in other statutes. One of the referenced statutes is Title IX, which prohibits discrimination "on the basis of sex," but does not apply to certain religious institutions or activities. In 2016, HHS adopted regulations interpreting Section 1557's prohibition of sex discrimination to prohibit discrimination based on gender identity, and declined to incorporate Title IX's religious exemption. But those aspects of the 2016 Rule were held unlawful by two courts, and its regulatory definition of sex discrimination was partially vacated. In light of those decisions, the agency reasonably adopted a new Rule that paraphrases the statutory text and states that Section 1557 will be applied consistent with all exemptions within the incorporated statutes, including Title IX's religious exemption.

The district court erred in granting a nationwide preliminary injunction barring enforcement of those provisions of the new Rule. Plaintiffs cannot show that the new Rule is likely to cause an imminent injury that can be redressed in this suit, and thus lack standing. Nor are plaintiffs likely to succeed on their APA claims: the agency was not arbitrary and capricious in adopting the enjoined provisions after years of litigation and several court decisions holding that its prior approach was unlawful. At the very least, the district court's injunction is unnecessarily broad.

I. The District Court Erred in Concluding That Plaintiffs Have Standing.

A. Plaintiffs Lack Standing To Challenge the New Rule's Restatement of Section 1557.

As a threshold matter, the district court erred in holding that plaintiffs have standing to challenge HHS's new Rule restating the anti-discrimination requirements of Section 1557. To establish standing, an organization must demonstrate "a concrete and demonstrable injury to [the organizations'] activities" that is more than "a mere setback to [plaintiffs'] abstract social interests." *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) (quotation marks omitted). Organizations "must make the same showing required of individuals: an actual or threatened injury in fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by a favorable court decision." *American Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011).

Plaintiff healthcare providers assert that the new Rule's restatement of the statute will lead patients to fear imminent discrimination, which will cause those hypothetical patients either to use more of plaintiffs' services or avoid necessary care, both of which plaintiffs say will ultimately increase plaintiffs' operational costs. That theory of standing is flawed on several levels.

1. Given plaintiffs' own arguments regarding the Supreme Court's decision in *Bostock*, plaintiffs have not shown any imminent or certainly impending harm flowing from the new Rule's rescission of the 2016 regulatory definition of sex

discrimination. As the Supreme Court has "said many times before," "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). "A threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). And that showing is "substantially more difficult to establish" when "a plaintiff's asserted injury … hinge[s] on the response of [a] third party to the government action or inaction." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks omitted).

No plausible basis exists to conclude that the agency's restatement of the statute will cause LGBTQ persons to avoid care from other providers and seek it from plaintiffs. The provision of the new Rule that plaintiffs challenge merely restates the statute, and plaintiffs themselves contend that the statutory text clearly protects against transgender discrimination. In particular, they assert that the Supreme Court's intervening decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), "definitively answer[s]" that interpretive question and makes clear that Section 1557's text prohibits "discrimination on the basis of sexual orientation or transgender status." JA7, 24 n.7; *see also* JA3, 6, 34, 73 (arguing that *Bostock* settles the interpretation of Section 1557). Given plaintiffs' arguments about the plain meaning of the statute after the highly publicized decision in *Bostock*, they cannot simultaneously make plausible allegations of "imminent" and "certainly impending" fear among LGBTQ patients. Nor can plaintiffs plausibly allege that patients will go out of their way to

avoid seeing their existing medical providers or will endanger their own health by avoiding care. That is particularly true since several courts have already held that *Bostock*'s reasoning applies equally to Title IX. *See, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *Adams ex rel. Kasper v. School Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020); *Clark Cty. Sch. Dist. v. Bryan*, --P.3d---, Nos. 73856, 74566, 2020 WL 7686545, at *4 (Nev. Dec. 24, 2020).

Indeed, it would be especially odd to predict such self-injurious behavior by patients when, as even the district court acknowledged, there is no plausible reason to assume that the new Rule will increase discrimination. The district court held that "[p]laintiffs ha[d] not established that any future discrimination … would be sufficiently 'imminent' to qualify as a valid injury-in-fact." JA1056, 1059. The district court for the Western District of Washington recognized the same. The court there explained that the State of Washington had failed "to show that the 2020 Rule's decision not to define on the basis of sex will yield an increase in discrimination against LGBTQ individuals," especially because "if Washington is correct that *Bostock* means that Title IX and Section 1557 must incorporate protection for gender identity and sexual orientation discrimination, then that means that the 2020 Rule does, in fact, extend protection against discrimination to LGBTQ individuals via the Rule's incorporation of Title IX by reference." *Washington v. HHS*, No. 20-cv-1105, 2020 WL 5095467, at *8-9 (W.D. Wash. Aug. 28, 2020). The district court here offered no reason why patients would not reach the same conclusion.

At the very least, plaintiffs' arguments about *Bostock* (and those of plaintiffs in several other pending lawsuits against the new Rule) cast severe doubt on their assertion that LGBTQ patients will react in some uniform way that is likely to impact the plaintiff healthcare providers' operations. That uncertainty, added to uncertainty regarding whether such patients are likely to seek substitute healthcare from the plaintiffs in particular (and have a measurable impact on plaintiffs' costs), makes the lack of an imminent injury all the more evident. Speculation that patients will react in the way plaintiffs assert—despite *Bostock,* other court decisions, and the new Rule's explicit statement that it only restates the statute—is insufficient to meet plaintiffs' "substantially more difficult" burden to establish an imminent injury "hing[ing] on the response of [a] third party to the government action or inaction." *Lujan*, 504 U.S. at 562.

For those reasons, plaintiffs cannot overcome the general rule that standing may not be based on the speculative fears of third parties. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 n.7 (2013) (rejecting standing theory "based on third parties' subjective fear of surveillance"). Nor have plaintiffs shown the kind of "predictable effect of Government action on the decisions of third parties" that sufficed in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). There, the plaintiff States relied on the Census Bureau's analysis of past census data to show that aliens were predictably less likely to respond to the census if they were asked about their citizenship, "even if they [did] so unlawfully and despite the requirement that the

Government keep individual answers confidential." *Id.* Plaintiffs have no similar empirical support for their allegations about likely third-party conduct in response to the new Rule.

2. Plaintiffs also failed to show that any asserted injury is "fairly traceable" to the new Rule's rescission of the 2016 regulatory definition of sex discrimination, or that such injury could be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (alterations and quotation marks omitted).

Insofar as plaintiffs allege that patients will fear discrimination based on sexual orientation, such fear cannot possibly result from the new Rule because the 2016 Rule that plaintiffs prefer had also declined to state that Section 1557 prohibits such discrimination. *See* 81 Fed. Reg. at 31,390 ("OCR has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557."). The new Rule thus made no change in that regard. *See* 85 Fed. Reg. at 37,182 (noting this fact).

Plaintiffs' allegation that patients will fear transgender discrimination is also not an injury traceable to the new Rule or redressable in this suit. That is primarily because the 2016 provisions have been vacated by the district court for the Northern District of Texas. *See Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 947 (N.D. Tex. 2019). In that litigation, a group of providers and states challenged the portion of the 2016 Rule that plaintiffs here seek to enjoin HHS from repealing. *See* Am. Compl. at 11-21, *Franciscan All.*, 414 F. Supp. 3d 928 (No. 16-cv-00108) (N.D. Tex. Oct. 17,

2016), Dkt. No. 21. And the *Franciscan Alliance* court entered a final judgment vacating "the portions of the [2016] Rule that Plaintiffs challenged." Order at 2, *Franciscan Alliance*, 414 F. Supp. 3d 928 (No. 16-cv-00108), Dkt. No. 182; *see Franciscan All.*, 414 F. Supp. 3d at 947.

That vacatur means plaintiffs cannot show causation or redressability. The Northern District of Texas's vacatur, not HHS's new Rule, eliminated the provisions of the 2016 Rule that plaintiffs say they need to avoid injury. *See* 85 Fed. Reg. at 37,225 (explaining that the new Rule's "effects will be minimal, again due to the fact that the gender identity provisions were vacated from the 2016 Rule by the *Franciscan Alliance* court"). The new Rule's formal rescission of those provisions merely brought the Code of Federal Regulations "up-to-date as to the effect of the [*Franciscan Alliance*] court's order." *See id.* at 37,162-65. To the extent that plaintiffs would suffer injury from the fact that certain provisions of the 2016 Rule are no longer on the books, that injury could not be traced to the new Rule.

For the same reason, this lawsuit cannot redress any such injury. As the district court acknowledged, it is "powerless" to overturn the Northern District of Texas's vacatur, and therefore "enjoining or vacating the [new] Rule would not suddenly make gender-identity discrimination illegal under Section 1557—or change how the regulatory text addresses gender-identity discrimination—because the relevant provision of the 2016 Rule [is] no longer in effect." JA1045. Accordingly, "even if [the court] were to grant Plaintiffs their desired relief and enjoin HHS from enforcing

its repeal of the 2016 definition, the resulting regulation would not contain any language barring gender-identity discrimination." *Id.*

The district court theorized that plaintiffs' standing was "not completely doom[ed]" because its injunction could reinstate regulatory language regarding "sex stereotyping," which the court concluded had not been vacated in *Franciscan Alliance* and could redress "at least *some* of [plaintiffs'] injury." *See* JA1046-47. Such conjecture provides an insufficient basis for the entry of a preliminary injunction. As the Supreme Court has frequently admonished, it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (quotation marks omitted). And when "a plaintiff's asserted injury … hinge[s] on the response of [a] third party to the government action or inaction," plaintiffs bear a "more difficult" "burden" "to adduce facts showing that [a third party's] choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* at 562 (quotation marks omitted).

Here there is no reason to think that restoring the 2016 regulatory language regarding "sex stereotyping" would redress plaintiffs' alleged injuries. For one thing, it is not at all clear that such an application of the "sex stereotyping" language in the 2016 Rule would be consistent with the *Franciscan Alliance* court's order vacating the 2016 Rule's provisions "insofar as the [2016] Rule define[d] 'on the basis of sex' to include gender identity." Order at 2, *Franciscan All.*, 414 F. Supp. 3d 928 (No. 16-cv-00108), Dkt. No. 182 (quotation marks omitted). In any event, as the agency

explained in the preamble to the new Rule, "[t]o the extent sex stereotyping is a recognized category of sex discrimination under longstanding Supreme Court precedent," whether or not the regulation explicitly mentions "sex stereotyping" "will not have any material effect on the scope of sex stereotyping claims." 85 Fed. Reg. at 37,239.

The district court's assertion that restoring the 2016 language about "sex stereotyping" might redress "at least *some*" of plaintiffs' alleged injuries is far too speculative to support plaintiffs' standing (much less injunctive relief). JA1046. Indeed, even accepting the district court's view that transgender discrimination is a form of discrimination based on sex stereotypes, the court offered no reason to assume that reinstating the "sex stereotyping" language alone would actually lead any patients to stop fearing discrimination. Under plaintiffs' theory, patients will avoid other healthcare providers to the detriment of their own health merely because the new Rule does not explicitly state that Section 1557 prohibits discrimination on the basis of sexual orientation or gender identity—despite the fact that the new Rule paraphrases Section 1557's text, and despite plaintiffs' view that Section 1557 itself clearly prohibits transgender discrimination after *Bostock*. In short, plaintiffs' theory of injury is fundamentally incompatible with the district court's theory of redressability: it is simply implausible that patients who fear discrimination from the new Rule would change their minds just because the district court restored regulatory language that reiterates existing case law about sex stereotyping.

B. Plaintiffs Lack Standing To Challenge The New Rule's Incorporation of Title IX's Religious Exemption.

The district court's conclusion that plaintiffs have standing to challenge the new Rule's incorporation of Title IX's religious exemption is flawed for similar reasons. As with the new Rule's restatement of the statute, the district court simply accepted plaintiffs' theory that "HHS's newly and explicitly incorporated religious exemption will cause patients to fear discrimination at the hands of religiously affiliated providers." JA1048. But as the district court recognized, "independent statutory safeguards" such as the Religious Freedom Restoration Act are already available to protect religious providers. JA1081. Indeed, for that reason many commenters objected that the religious exemption was unnecessary because existing conscience protections already protect religious healthcare providers. *See* 85 Fed. Reg. at 37,205-06; *see id.* at 37,204-05 (listing statutory conscience protections). And the 2016 Rule, which plaintiffs prefer, had already stated that "[i]nosfar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required." *See* 81 Fed. Reg. at 31,466 (§ 92.2(b)(2)); *see* 84 Fed. Reg. at 27,864 (explaining that the new Rule's provision regarding exemptions would merely "incorporate by reference statutory exemptions and protections concerning religious and abortion exemptions with greater clarity than the [2016] Rule's § 92.2(b)(2)").

In light of existing exemptions for religious providers, and the 2016 Rule's recognition of those exemptions, plaintiffs have not shown that the new Rule's express incorporation of Title IX's religious exemption is likely to increase fear of discrimination. And even if some increase in fear were established, plaintiffs' assertions regarding causation are insufficient to show that any patients are likely to change their behavior if they had not already done so in response to other existing conscience protections. *See* JA1048 (quoting plaintiffs' declarations).

For the same reasons, the district court was incorrect to conclude that its injunction is likely to redress plaintiffs' alleged injuries. There is no good reason to assume that patients who fear discrimination by religious providers will suddenly stop fearing such discrimination as a result of an injunction that addresses only one of several overlapping conscience protections for religious providers. *See National Wrestling Coaches Ass'n v. Department of Educ.*, 366 F.3d 930, 939-40 (D.C. Cir. 2004) (plaintiffs lacked standing because "[e]ven if [they] prevailed" in their challenge to agency action, a statute and other regulations could lead third parties to take the same action, and therefore "nothing but speculation suggests that [third parties] would act any differently").

II. The District Court Erred in Concluding That Plaintiffs Satisfied the Requirements for a Preliminary Injunction.

A. HHS Did Not Act Arbitrarily by Adopting a New Rule That Merely Paraphrases the Statutory Text.

Plaintiffs are unlikely to succeed on the merits because HHS's decision to eliminate the prior regulatory definition of "discrimination on the basis of sex" and instead rely solely on the statutory language in Section 1557 was reasonable and fully consistent with the statute.

Section 1557 of the Affordable Care Act prohibits federally funded programs and activities from discriminating on the basis of several statutory grounds, including Title IX's prohibition of sex discrimination. In 2016, HHS interpreted Section 1557's prohibition of sex discrimination to prohibit transgender discrimination, and adopted regulatory provisions in accordance with that view. But those provisions were enjoined by two courts, and later vacated by one of them. In light of that litigation and vacatur, the agency reasonably chose to formally rescind those already-vacated provisions. And although the new Rule's preamble contained statements agreeing with those courts that these provisions of the 2016 Rule were unlawful, HHS noted that the Supreme Court's resolution of several cases raising the question whether Title VII's prohibition of employment discrimination "on the basis of sex" encompasses discrimination on the basis of sexual orientation or transgender status could inform the future interpretation of Section 1557. For that reason, the agency opted not to address whether Section 1557 prohibits such discrimination. Instead, the agency

chose to have its regulations paraphrase the statutory language, deferring the question whether the Court's resolution of this question under Title VII would apply equally to Title IX, and in turn to Section 1557.

1. a. HHS's decision to replace the prior (partially vacated) regulatory definition of sex discrimination with a provision restating the statute was not "arbitrary" or "capricious" under the APA. 5 U.S.C. § 706. The standard of review for arbitrary-and-capricious claims "is narrow" and courts need only "confirm that the agency" has "articulate[d] a satisfactory explanation," "including a rational connection between the facts found and the choice made." *Ark. Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) (quotation marks omitted). That deferential standard continues to apply when an agency changes course, so the agency needs only to "display awareness that it is changing position" and "provide reasoned explanation for its action." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (quotation marks and emphasis omitted).

The provision of the new Rule restating the statute readily satisfies this deferential standard. After two courts held that certain provisions of the 2016 Rule interpreting Section 1557 were contrary to the statute, the agency carefully considered its options and, after significant deliberations in protracted notice-and-comment rulemaking, reasonably adopted a new Rule that simply paraphrases the statute. In proposing the new Rule, the agency explained that doing so would "ultimately allow the Federal courts … to resolve any dispute about the proper legal interpretation of [Title

IX and] Section 1557 of the Affordable Care Act." *See* 84 Fed. Reg. at 27,873. In that way, the agency would "minimize litigation risk" and "avoid further litigation and uncertainty regarding the implementing regulations." *Id.* at 27,849-50.

HHS also considered and addressed the fact that the Supreme Court had recently "granted three petitions for writs of certiorari" regarding the proper interpretation of the prohibition of sex discrimination in a different statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). 84 Fed. Reg. at 27,855. HHS acknowledged that "a holding by the U.S. Supreme Court on the definition of 'sex' under Title VII will likely have ramifications for the definition of 'sex' under Title IX." *Id.* But the agency viewed that pending Supreme Court case as yet another reason to "decline[], at this time, to propose its own, definition of 'sex' for purposes of discrimination on the basis of sex in the regulation." *Id.* at 27,849, 27,857.

In the meantime, HHS noted that its new Rule would eliminate the confusion caused by the inconsistencies between the 2016 Rule and the views of other agencies. The Department of Justice had taken the position that "the ordinary meaning of the word 'sex' for purposes of Federal nondiscrimination laws does not encompass sexual orientation or gender identity." 84 Fed. Reg. at 27,856. Moreover, the 2016 Rule's provisions "were inconsistent with (or, at a minimum, unnecessarily duplicated)" HHS's other regulations regarding sex discrimination, as well as regulations promulgated by other agencies. *Id.* at 27,849, 27,873. Repealing the 2016 provisions would therefore

"ensure that [the agency's] civil rights regulations are consistent with the views of the Department of Justice, other Federal agencies, and internally." *Id.* at 27,857.

When HHS finalized its new Rule in 2020, its rationales had only grown stronger. While the agency was considering the new Rule, a court had partially vacated the provision in the 2016 Rule that had interpreted Section 1557 to prohibit transgender discrimination. The agency thus adopted the new Rule based on the "policy rationales" explained in its proposed rulemaking a year earlier, and to bring "the provisions of the Code of Federal Regulations … up-to-date as to the effect of the [*Franciscan Alliance*] court's order." *See* 85 Fed. Reg. at 37,162-65.

Again, HHS acknowledged that the Supreme Court was considering several cases raising a related issue regarding the interpretation of Title VII, and addressed comments arguing that the agency should delay its changes until after the Supreme Court decided those cases. *See* 85 Fed. Reg. at 37,168. The agency reasonably explained that it did not need to "delay … based on speculation as to what the Supreme Court might say about a case dealing with related issues." *Id.* The new regulations restated statutory text, so the new regulations "would not preclude application of the Court's construction." *Id.* In addition, although the Supreme Court's interpretation of Title VII would "likely have ramifications for the definition of 'on the basis of sex' under Title IX" and Section 1557, the agency noted that a decision about Title VII would not be directly controlling on Section 1557. *See id.* at 37,168, 37,183-86.

The agency's extensive consideration of competing concerns and its explanation for the policy choices it ultimately made easily satisfy the requirements for "logical and rational" decisionmaking. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) (quotation marks omitted). On the one hand, HHS was faced with pending legal challenges against its 2016 Rule interpreting Section 1557, a court stay of those regulations, and a court decision that partially vacated them nationwide. On the other hand, HHS knew that the Supreme Court would likely decide several cases raising a related, though not directly controlling, legal issue in the near future. Under those circumstances, it was entirely reasonable for HHS to adopt a new Rule that simply restated the statute, without attempting to further delineate the statute's potential application to transgender discrimination. *See PDK Labs. Inc. v. DEA*, 438 F.3d 1184, 1194 (D.C. Cir. 2006) ("[A]n agency is not necessarily required to define an open-ended term in its initial general regulation—or indeed obliged to issue a comprehensive definition all at once." (quotation marks and alterations omitted)). *Hercules Inc. v. EPA*, 938 F.2d 276, 283 (D.C. Cir. 1991) (agency had "discretion in declining to provide any definition" of statutory terms). That approach was consistent with the court decisions holding that the 2016 regulations were unlawful, and at the same time ensured that HHS's regulations would be consistent with any future judicial interpretation of Section 1557, including any interpretation following the Supreme Court's decision in *Bostock*.

2. The district court nonetheless held that it was arbitrary for HHS to "plow[] ahead with" adopting a new Rule restating the statute "without even pausing to consider" the "import" of the Supreme Court's decision in *Bostock* for "the validity and coherence of the reasons HHS provided for its action"—particularly the preamble's statements that Section 1557 and Title IX are best read not to prohibit discrimination on the basis of gender identity. JA1068-75. But given that the Supreme Court decided *Bostock* several days after the agency adopted the new Rule and submitted it to the Office of the Federal Register for publication, that conclusion reduces to the proposition that the agency was required to postpone its rulemaking for the Supreme Court to decide *Bostock*, or was required to withdraw its new Rule from publication in the Federal Register immediately after the Court decided *Bostock*.

Such a rule is fundamentally inconsistent with the APA. A cardinal principle of administrative law is that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); *cf. Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015) (even under strict scrutiny, the government "need not address all aspects of a problem in one fell swoop"). After acknowledging that *Bostock* was pending, HHS was well within its discretion to restate the statute and leave interpretation of Section 1557, and the application of *Bostock* to the healthcare

context, to the courts. Under the APA, HHS was only required to acknowledge the "important aspect[s] of the problem" and provide a "logical and rational" explanation for its decision, which it did here. *Mingo Logan Coal Co.*, 829 F.3d at 718.

Nor is there any support for the extraordinary suggestion that an agency must always (or even normally) update a rule's preamble after it was submitted for publication when the Supreme Court decides a case that may bear on issues addressed in the rule. The question whether withdrawal and reconsideration are appropriate under the circumstances is a matter of degree that is largely subject to the informed judgment of the agency. The district court erred in effectively concluding that those actions were required here. *Cf. National Ass'n of Home Builders*, 682 F.3d at 1042 ("[C]ourts may not, under the guise of the APA's arbitrary-and-capricious review standard, impose procedural requirements" that the APA does not "impose.").

As discussed, *Bostock* and the related Title VII cases the Supreme Court decided on the same day did not address Section 1557. Indeed, the Supreme Court went out of its way to emphasize that "other federal or state laws that prohibit sex discrimination," such as Section 1557 and Title IX, were not "before [it]." *Bostock*, 140 S. Ct. at 1737, 1753. Moreover, as HHS explained in promulgating the new Rule, no matter how *Bostock*'s reasoning might apply to Section 1557, the new Rule is consistent with *Bostock* because it merely restates the statute. And *Bostock* did not affect the agency's stated policy reasons for adopting the new Rule—including its desire to avoid confusion and duplication of other regulations, as well as valid

concerns that a court had already vacated HHS's prior regulations and that HHS was facing litigation over its interpretation of Section 1557 in the *Franciscan Alliance* and *Religious Sisters of Mercy* cases (litigation that continues even now).

At bottom, the district court's ruling reduces to a disagreement with the agency's choice between reasonable alternatives: on the one hand, declining to adopt new regulatory definitions of statutory terms and leaving statutory interpretation to the courts; on the other hand, continuing to wait for a potentially relevant Supreme Court decision and adopting a new interpretation of the statute by regulation in light of that decision. Both of those options were reasonable, but "the choice between reasonable policy alternatives in the face of uncertainty" is for the agency "to make." *Department of Commerce*, 139 S. Ct. at 2569-70. Although the district court believed that HHS's choice was not "the best one possible," *id.* at 2570-71 (quotation marks omitted), the court had no license to "substitute [its] judgment for that of the agency," *Mingo Logan Coal Co.*, 829 F.3d at 718 (D.C. Cir. 2016) (quotation marks omitted); *see id.* ("Whether we would have done what the agency did is immaterial.").

The district court's decision also would lead to incongruous results. Under its reasoning, an agency is barred from taking any action—even as minimal as merely restating a controlling statute—whenever a pending court case might have "ramifications" for the interpretation of that statute. Such a theory would tie an agency's hands whenever any relevant litigation was pending—even if that litigation is not directly controlling on the issue at hand. And it would make it nearly impossible

for an agency to react appropriately to claims of illegality, reasonably re-assess its interpretation of controlling statutes on an ongoing basis, and eliminate regulations that it concludes are unnecessary. Such results are fundamentally incompatible with the limited scope of judicial review under the APA. *See Catawba County. v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009) ("The agency was not obliged to stop the entire process because a new piece of evidence emerged. If this were true then the administrative process could never be completed.").

B. The New Rule's Incorporation of Title IX's Religious Exemption Is Not Arbitrary and Capricious.

1. HHS's decision to incorporate Title IX's religious exemption likewise was not arbitrary and capricious. The agency repeatedly and reasonably explained that it believed the best reading of Section 1557's reference to "the ground prohibited under" Title IX also incorporated the limits on Title IX itself, which expressly states that it does not apply to objecting religious institutions. 42 U.S.C. § 18116(a); 20 U.S.C. §§ 1681(a)(3), 1687; *see* 85 Fed. Reg. at 37,162, 37,206-07; 84 Fed. Reg. at 27,870, 27,864. HHS noted the *Franciscan Alliance* court's conclusion that "Congress intended to incorporate the entire statutory structure, including the abortion and religious exemptions" and that the 2016 Rule "unlawfully 'expanded the "ground prohibited under" Title IX"' "by failing to include these exemptions." 85 Fed. Reg. at 37,193 (quoting *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 690-91 (N.D. Tex. 2016)). Consistent with that court's interpretation, HHS concluded that "any

enforcement of Section 1557 to the extent it incorporates Title IX, must be constrained by the statutory contours of Title IX, which include its abortion and religious exemptions." 84 Fed. Reg. at 27,870. The agency noted that the 2016 Rule had taken that same approach with the other statutes cited in Section 1557, and therefore had "incorporated exemptions to Title VI, Section 504, and the Age Act." *Id.* at 27,864. Upon "further consideration," it adopted the same approach with Title IX because "Section 1557 did not override … the exemptions" of the statutes it incorporated. *Id.* at 27,864, 27,870; 85 Fed. Reg. at 37,162, 37,207.

The agency also addressed the policy implications of its rulemaking. It explained that it believed incorporating the religious exemption would "protect both providers' medical judgment and their consciences" and "help[] to ensure that patients receive the high-quality and conscientious care that they deserve." 85 Fed. Reg. at 37,206. HHS further considered comments both that conscience protections could decrease access to care and permit discrimination based on "animus against LGBT individuals," and that various religious providers would seek only limited exemptions that would not prevent them from providing general care. *Id.* Responding to those conflicting comments, HHS "recognize[d] that members of the public hold different opinions concerning conscience and religious freedom laws and their interplay with various health contexts, including with respect to LGBT concerns." *Id.* But the agency explained that the new Rule did "not … create any new conscience or religious freedom exemptions beyond what Congress has already enacted." *Id.* The new

provision would "simply state[] that the Section 1557 regulation will be implemented consistent with those statutes." *Id.* at 37,207.

That analysis meets the APA's requirements. The Supreme Court has made clear that "an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016)) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)). And courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Coburn v. McHugh*, 679 F.3d 924, 934 (D.C. Cir. 2012). Here the agency's path is clear. It acknowledged contested evidence regarding the exemption's effects on access to care, but determined that, consistent with several recent court decisions, the best reading of "Congress's directives" compelled it to enforce Title IX's religious exemption. 84 Fed. Reg. at 27,870; 85 Fed. Reg. at 37,206.

2. The district court erred in requiring more from the agency. The court held that HHS had acted arbitrarily because "[s]everal of the 2016 Rule's primary justifications for declining to incorporate Title IX's religious exemption into Section 1557 focused on the potential negative implications of such an exemption for access to care and ultimate health outcomes" and the preamble "said almost nothing about these important issues." JA1077-78 (quotation marks omitted). As explained, however, HHS specifically addressed comments raising those same general concerns, but made clear that regardless of the conflicting comments citing evidence

"concerning conscience and religious freedom laws and their interplay with various health contexts," the law compelled HHS to adopt Title IX's exemptions. 85 Fed. Reg. at 37,206. That rationale is sufficient. *See Encino Motorcars*, 136 S. Ct. at 2127; *Coburn*, 679 F.3d at 934 ("An agency's decision need not be a model of analytic precision to survive a challenge." (quotation marks omitted)).

That is especially true since the 2016 Rule's preamble did not purport to make the kind of formal "finding" that an agency must address when changing course. *Cf. Fox*, 556 U.S. at 515. It simply mentioned that "a blanket religious exemption *could* result in a denial or delay in the provision of health care to individuals," without citing evidence. 81 Fed. Reg. at 31,380 (emphasis added). HHS had no special burden to quote prior statements that merely noted possible effects, particularly since it was already addressing comments that raised the same general concerns. *See National Ass'n of Home Builders*, 682 F.3d at 1037 (a "policy change" does not need to be "justified by reasons more substantial than those required to adopt a policy in [the] first instance").

For the same reason, the district court was incorrect to suggest that HHS needed to provide more "elaboration or support" for its policy statements regarding the Title IX exemption's effects. JA1078-79; 85 Fed. Reg. at 37,206. HHS explained that it "lack[ed] the data necessary to estimate the number of individuals who currently benefit from covered entities' policies governing discrimination on the basis of gender identity who would no longer receive those benefits." 85 Fed. Reg. at 37,225, 37,238. Just as in the 2016 Rule, the agency did not need to make any

additional statements about the new Rule's possible effects under those "conditions of uncertainty." *Department of Commerce*, 139 S. Ct. at 2571. And given HHS's clear explanation that it would have adopted Title IX's exemptions regardless of its effects, any such error would provide no basis to enjoin the new provision. *See Casino Airlines, Inc. v. NTSB*, 439 F.3d 715, 717-18 (D.C. Cir. 2006) ("We have consistently held that when an agency relies on multiple grounds for its decision, some of which are invalid, we may nonetheless sustain the decision as long as one is valid and the agency would clearly have acted on that ground even if the other were unavailable." (quotation marks omitted)).

C. Plaintiffs Have Failed To Show Irreparable Harm, and the Balance of Equities and Public Interest Favor the Government.

The rest of the preliminary injunction factors also weigh against the district court's injunctions and stays. Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not just that it would be "possib[le]." *Winter*, 555 U.S. at 22. For the same reasons that plaintiffs have failed to show an imminent or redressable injury for purposes of Article III standing, they cannot show likely irreparable injury that an injunction could redress.

The balance of equities and the public interest weigh in the government's favor for related reasons. "These factors merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009), and plaintiffs' hypothetical assertion of injury cannot outweigh the harm to the government. "Any time [the government]

is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration and quotation marks omitted). HHS determined that its new Rule was the best way to implement Section 1557 during a time of legal uncertainty, and that its prior regulations had led to confusion. *See* 84 Fed. Reg. at 27,849, 27,857, 27,873. Plaintiffs' hypothetical theory of irreparable harm does not outweigh the government's legitimate interest in adopting the new Rule.

III. The District Court Abused Its Discretion by Issuing a Nationwide Injunction That Was Not Necessary to Remedy Injuries to the Two Plaintiffs.

The scope of the district court's relief also violates Article III and well-established equitable principles.

1. The Article III "judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). It is thus an "elementary principle" of standing that, absent class certification, plaintiffs are "not entitled to relief for people whom they do not represent." *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 730 n.1 (9th Cir. 1983); *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (same). Instead, Article III requires that a "plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quotation marks omitted).

Equitable principles also require that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (same). It is well established that the scope of a court's statutory authority to enter injunctive relief is circumscribed by the type of relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). And the tradition of equity inherited from English law was premised on "providing equitable relief only to parties." *Trump v. Hawaii*, 138 S. Ct. 2392, 2427-28 (2018) (Thomas, J., concurring).

Other equitable principles reinforce this rule when government action is enjoined. As several Supreme Court Justices have recognized, overbroad injunctions create an inequitable "asymmetr[y]" whereby non-parties can claim the benefit of a favorable ruling, but are not bound by a loss. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring in the grant of a stay). That means that "a single successful challenge is enough to stay [a] challenged [agency] rule across the country," and "the government's hope of implementing any new policy could face the long odds of a straight sweep." *Id.* Moreover, such injunctions undermine the rule that non-parties cannot assert collateral estoppel as plaintiffs "against the government." *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *see Virginia Soc'y for Human Life Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001).

Other courts have highlighted that overbroad relief harms the judicial system as a whole. The Second Circuit, for example, has expressed "concern that a district judge issuing a nationwide injunction may in effect override contrary decisions from co-equal and appellate courts, imposing its view of the law within the geographic jurisdiction of courts that have reached contrary conclusions." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020). The Ninth Circuit has also noted that geographically overbroad relief necessarily "deprive[s]" other parties of "the right to litigate in other forums," *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018), causing a "detrimental effect" on the law's development "by foreclosing adjudication by a number of different courts and judges," *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Yamasaki*, 442 U.S. at 702); *see East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (noting similar concerns). And the Fourth Circuit has concluded the same. *See Virginia Soc'y for Human Life*, 263 F.3d at 393.

2. The district court's order is inconsistent with the foregoing constitutional and equitable principles. The court only found that the healthcare provider plaintiffs, Whitman Walker Health and the Los Angeles LGBT Center, had standing. JA1032. Those plaintiffs operate in Washington D.C. and Los Angeles, *see* JA12, 15, so nationwide relief is unnecessary to redress their asserted harms. The district court asserted that "[c]omplete relief will only obtain upon an injunction" affecting "*all* covered entities" and that "any" geographical limitation "would impair the provision of complete relief to Plaintiffs." JA1112. But the court failed to

articulate any plausible basis for the remarkable assertion that clinics in Los Angeles and Washington, D.C. require relief stretching to all fifty states.

The district court noted that one of the plaintiffs served patients from five states and the District of Columbia, and that another served patients from "various parts of California, other states, and even other countries." JA1112. The mere fact that those providers sometimes serve out-of-state clients, however, does not show that a nationwide injunction is necessary to redress any harms that plaintiffs are likely to incur during the pendency of this suit. At the very least, Article III and equitable principles should have led the court to limit its injunction only to those states in which plaintiffs had shown a substantial clientele—even if, as the court noted, the government's objection to nationwide relief did not specifically address possible geographical limits. *Id.* It is entirely speculative to assume that the new Rule will cause new patients from distant states to seek out the services of plaintiffs in Los Angeles and D.C. when few, if any, persons from those states have visited plaintiffs' facilities.

The over-breadth of the district court's relief is especially pronounced in light of related litigation completed or pending in courts all across the country. The Western District of Washington, for example, denied a preliminary injunction on the ground that the new Rule does not seem likely to cause medical providers to discriminate, and therefore the plaintiff in that case lacked standing. Yet the district court here effectively awarded relief to the entire State of Washington, making a co-

equal district court's ruling a nullity. The same issues are also pending in the Second Circuit and the District of Massachusetts, and litigation concerning HHS's 2016 regulations is pending in the Fifth Circuit and the District of North Dakota, where other plaintiffs seek to enjoin HHS from adopting the interpretation of Section 1557 that plaintiffs in this case desire. "When confronted with such a volatile litigation landscape," equitable principles require district courts to avoid needlessly overbroad injunctions. *New York*, 969 F.3d at 88.

The other rationales on which the district court relied are equally flawed. The court asserted that "nationwide relief" was "all the more appropriate" because "similarly situated LGBTQ-affirming health-care providers across the country" might "experience comparable harms." JA1113. But the healthcare provider plaintiffs do not represent a class, and the Supreme Court has made clear that relief to the complaining parties marks the outer bounds of a remedy under Article III and established principles of equity. *See Whitford*, 138 S. Ct. at 1930, 1933-34.

The district court also assumed that nationwide preliminary injunctions are as a general matter justified because the "ordinary" relief for an APA claim is to set aside the agency action. JA1110 (quoting *National Mining Ass'n v. U.S. Army Corps of Eng's*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). The proper scope of relief at the final judgment stage, however, does not control the scope of preliminary relief, which is meant only "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Indeed, the

National Mining Association decision on which the district court relied expressly made that distinction, noting that the court in that case had held the agency action to be illegal and "not merely that the plaintiffs had a reasonable probability of success on the merits, as would be necessary for a preliminary injunction." 145 F.3d at 1409. And in light of the temporary nature of a preliminary injunction, this is also not a case where granting appropriately limited relief will lead to "a flood of duplicative litigation" in this Circuit—a concern central to the decision in *National Mining Association*. *See id.*

Moreover, although the APA provides that an unlawful agency action be "set aside," 5 U.S.C. § 706(2), that relief must be limited to those applications that actually injure plaintiffs. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[W]e do not lightly assume that Congress has intended to depart from established [equitable] principles.").

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction should be vacated, or at a minimum narrowed in scope.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,982 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Joshua Dos Santos
Joshua Dos Santos

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Joshua Dos Santos
Joshua Dos Santos

ADDENDUM

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42 U.S.C. § 18116

§ 18116. Nondiscrimination

(a) In general

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

(b) Continued application of laws

Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of Title 29, or the Age Discrimination Act of 1975, or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

(c) Regulations

The Secretary may promulgate regulations to implement this section.

20 U.S.C. § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal

appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. § 1687

§ 1687. Interpretation of "program or activity"

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of--

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section section1 7801 of this title), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

45 C.F.R. § 92.2

§ 92.2. Nondiscrimination requirements.

(a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.

(b) The grounds are the grounds prohibited under the following statutes:

(1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (race, color, national origin);

(2) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (sex);

(3) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) (age); or

(4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (disability).

45 C.F.R. § 92.6

§ 92.6. Relationship to other laws.

(a) Nothing in this part shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or to supersede State laws that provide additional protections against discrimination on any basis described in § 92.2 of this part.

(b) Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section or provided by the Architectural Barriers Act of 1968 (42 U.S.C. 4151 et seq.); the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Act Amendments Act of 2008 (42 U.S.C. 12181 et seq.), Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), the Coats–Snowe Amendment (42 U.S.C. 238n), the Church Amendments (42 U.S.C. 300a–7), the Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), the Weldon Amendment (Consolidated Appropriations Act, 2019, Pub.L. 115–245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)), or any related, successor, or similar Federal laws or regulations, such application shall not be imposed or required.