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

McComb Children's Clinic, LTD.,	)	
	)	
Plaintiff,	)	
	)	**Case No.** 5:24-cv-00048-LG-ASH
v.	)	
	)	
Robert F. Kennedy, Jr., et al.,	)	***ORAL ARGUMENT REQUESTED***
	)	
Defendants.	)	

PLAINTIFF MCCOMB CHILDREN'S CLINIC'S
RESPONSE TO ORDER TO SHOW CAUSE

Plaintiff McComb Children's Clinic, LTD., ("MCC") respectfully submits this brief in response to the Court's December 23, 2025, Order [60] that the parties file responses or briefs demonstrating why this lawsuit should not be dismissed as moot or identifying matters pending that need require resolution. MCC respectfully requests oral argument on the question of mootness if the Court would find it helpful.

INTRODUCTION

This case is not moot. In the states' challenge to the 2024 Rule, this Court granted some but not two aspects of relief that MCC requested here. First, the Court's vacatur did not encompass Defendants' codification of "sex stereotypes" at 45 C.F.R. § 92.101(a)(2)(v). *See Tennessee v. Kennedy*, --- F. Supp. 3d ----, 2025 WL 2982069, at *13 (S.D. Miss. Oct. 22, 2025) (hereinafter "the states' case") (omitting § 92.101(a)(2)(v) from the list of vacated provisions). But Defendants, and courts including the Fifth Circuit, have confirmed that such language encompasses gender identity nondiscrimination. Until the Court's vacatur is expanded to encompass that section, MCC's gender identity claims are not moot. Second, MCC's complaint requested free speech protection from being forced to tell patients and the

government it does not discriminate on the basis of "termination of pregnancy," and requests for injunctive relief. MCC is still subject to this coerced speech.

BACKGROUND

In the 2024 Rule, Defendants codified a gender identity nondiscrimination mandate under several theories. Certainly they imposed the mandate through explicit "gender identity" language in the provisions this Court vacated.

But they did more. As MCC pled in its Complaint, Defendants imposed a gender identity mandate though "sex stereotypes" language. "[T]he rule directly defines 'gender-identity' discrimination to be sex discrimination, but the rule separately defines 'sex stereotypes' discrimination to be sex discrimination, and the rule considers 'sex stereotypes' discrimination to encompass gender-identity discrimination." Complaint [1] ¶ 74. Defendants said this in the rule. See Nondiscrimination in Health Programs and Activities, 89 Fed. Reg 37,522, 37,578 (May 6, 2024) ("2024 Rule") ("discrimination against a person because they are transgender … is also based on requiring persons to conform to stereotypical norms about sex and gender, which can also serve as the basis for impermissible sex discrimination. *See, e.g., Whitaker* [*v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1048–49 (7th Cir. 2017)] (citing *Price Waterhouse* [*v. Hopkins,* 490 U.S. 228, 251 (1989)])."); *id.* at 37,574 (similar). Thus in the 2024 Rule, sex discrimination encompasses gender identity discrimination under *both* the "Gender identity" discrimination provision at § 92.101(a)(2)(iv), and separately under the "Sex stereotypes" discrimination provision at § 92.101(a)(2)(v).

Consequently, in its Complaint MCC specified that "to the extent this Complaint refers to, or asks the Court to issue relief concerning, the rule and Defendants' actions thereunder prohibiting discrimination on the basis of gender identity, MCC intends to encompass any language or alternative theory in the rule that Defendants may use to achieve those same ends." *Id.* ¶ 78. And MCC went on to

ask the Court to "vacate the rule to the extent it prohibits discrimination on the basis of gender identity." *Id.* at 43 (Prayer for Relief A).

Repeating such language, MCC's Motion for Partial Summary Judgment [27] specifically requested relief, not just against paragraph (a)(2)(iv) in § 92.101, but against all of § 92.101 "to the extent it reaches discrimination on the basis of gender identity … any alternative theory under the rule that Defendants may adopt to claim authority to prohibit gender identity discrimination." [27] at 1.

The 2024 Rule also imposes notice and assurance requirements forcing MCC to speak to patients, employees, and Defendants about termination of pregnancy. MCC must state it "does not discriminate on the basis of race, color, national origin (including limited English proficiency and primary language), sex (consistent with the scope of sex discrimination described at § 92.101(a)(2)), age, or disability." 45 C.F.R. § 92.10(a)(1)(i). In turn, § 92.101(a)(2)(ii) says discrimination on the basis of sex includes "Pregnancy or related conditions." And Defendants emphasized in the final rule that pregnancy or related conditions "encompasses protections afforded for various types of sex discrimination such as pregnancy, including termination of pregnancy." 89 Fed. Reg at 37,556. The rule also forces MCC to provide "assurances" to Defendants that MCC "will be operated in compliance with section 1557 and this part." 45 C.F.R. § 92.5(a). MCC's complaint asserts it does not want to comply with this compelled speech because it undermines MCC's pro-life position, and MCC brought a Free Speech Clause claim against the compelled speech under the First Amendment. Complaint [1] ¶¶ 209, ¶¶ 300–02. The Court's vacatur in the states' case left these speech requirements in place except as to gender identity.

Finally, MCC's Complaint and Motion for Partial Summary Judgment also requested injunctive relief against Defendants beyond vacatur of the relevant language in the rule. [1] at 43; [27] at 1.

STANDARD OF REVIEW

Although the plaintiff has the burden to show standing, it is the defendant who must prove the case has become moot. "[That] burden is a heavy one." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *United States v. Heredia-Holguin*, 823 F.3d 337, 340 (5th Cir. 2016) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)).

When one federal agency action is negated, but other agency action remains that the Court can remedy, the case is not moot. *Jackson v. Noem*, 132 F.4th 790, 794 (5th Cir. 2025) (reversing the district court's dismissal for mootness and remanding to consider the plaintiffs' request for complete relief); *see also Crocker v. Austin*, 115 F.4th 660, 668 (5th Cir. 2024) (reversing and remanding dismissal for mootness because "the district court failed to consider Appellants' broader, ongoing claims").

ARGUMENT

Because the Court's vacatur in the states' case did not encompass the sex stereotypes provision or coerced speech, MCC's claims are not moot.

I. MCC sought relief different from the relief granted in *Tennessee*.

The relief MCC sought is different from the relief the states obtained. A separate ruling does not moot a case if litigants do not "desire precisely the same result." *Space Expl. Techs. Corp. v. Nat'l Lab. Rels. Bd.*, 151 F.4th 761, 767 n.5 (5th Cir. 2025) (quoting *Pool v. City of Houston*, 87 F.4th 733, 734 (5th Cir. 2023)). The Court did not vacate the gender identity mandate in § 92.101(a)(2)(v)'s the sex stereotypes provision, nor did it relieve MCC of the rule's coerced speech concerning termination of pregnancy.

A. The Court did not vacate the rule to the extent it encompasses gender identity in § 92.101(a)(2)(v) ("Sex stereotypes").

MCC has neither sought nor obtained "precisely" the same result the states received on gender identity. *Space Expl. Techs. Corp.*, 151 F.4th at 767 n.5. Although the Court vacated the rule's explicit "gender identity" language, MCC *also* specifically sought relief from gender identity in its sex stereotypes provision at § 92.101(a)(2)(v).

But the Court's vacatur did not provide that relief. The rule's main sex stereotypes provision sits at paragraph (a)(2)(*v*) of 45 C.F.R. § 92.101. Although the Court vacated certain "regulations … to the extent that they expand Title IX's definition of sex discrimination to include gender-identity discrimination," and went on to list those provisions, the vacatur did not encompass paragraph (a)(2)(*v*) ("Sex stereotypes") of § 92.101. As to § 92.101 it encompassed only paragraph (a)(2)(*iv*) ("Gender identity"). *Tennessee*, 2025 WL 2982069, at *13. In contrast, MCC asked for relief against both provisions in its Complaint and Motion for Partial Summary Judgment. See [1] at ¶¶ 74, 78, and page 43; [27] at 1. Since the result desired in the two cases is not "precisely the same," *Space Expl. Techs. Corp.*, 151 F.4th at 767 n.5 the relief in the states' case does not moot MCC's case. And since "mootness results when a party receives *complete* relief in another judicial proceeding," *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 680 (5th Cir. 2022) (emphasis added), this case is not moot because MCC did not receive "complete" relief.

There is no reason in principle that the Court's reasoning could not encompass § 92.101(a)(2)(v) *if* the Court chooses to grant MCC such relief. Indeed, beyond § 92.101, the 2024 Rule also codified "sex stereotypes" into textual provisions governing clinics at: 42 C.F.R. § 438.3(d)(4); 42 C.F.R. § 438.206(c)(2); 42 C.F.R. § 440.262; 42 C.F.R. § 460.98(b)(3); and 42 C.F.R. § 460.112(a). In those provisions, the phrases "gender identity" and "sex stereotypes" reside in the same paragraph. Consequently, when the Court vacated those *entire* paragraphs "to the extent that

they expand Title IX's definition of sex discrimination to include gender-identity discrimination," *Tennessee*, 2025 WL 2982069, at *13, the vacatur encompassed both the "gender identity" and the "sex stereotypes" language in those paragraphs. Unfortunately, the Court did not say that its order covered all of § 92.101 nor even all of paragraph (a)(2). Instead, the Court specified that its vacatur encompassed only paragraph (a)(2)(iv) ("Gender identity"), which does not include paragraph (a)(2)(v) ("Sex stereotypes"). 2025 WL 2982069, at *13. As a result, even after the Court's vacatur, MCC is not shielded from the 2024 Rule's gender identity mandate residing in the sex stereotypes provision at § 92.101(a)(2)(v).

B. The Court did not give MCC relief under its Free Speech Clause claim against the 2024 Rule's mandatory notices and assurances concerning "termination of pregnancy."

The Court's order did not provide the relief MCC requested on its free speech claim. Complaint [1] ¶¶ 281–303. As noted above, the 2024 Rule requires MCC to tell patients and employees that it "does not discriminate on the basis of race, color, national origin (including limited English proficiency and primary language), sex (consistent with the scope of sex discrimination described at § 92.101(a)(2)), age, or disability." 45 C.F.R. § 92.10(a)(1)(i). By reference, § 92.101(a)(2)(ii) says this includes "[p]regnancy or related conditions," and in the final rule preamble Defendants insisted it "encompasses protections afforded for various types of sex discrimination such as pregnancy, including termination of pregnancy." 89 Fed. Reg at 37,556. The rule similarly compels "assurances" to Defendants that MCC "will be operated in compliance with section 1557 and this part." 45 C.F.R. § 92.5(a).

These are requirements that MCC speak words MCC does not want to speak. MCC does not want to tell patients, employees, or Defendants that it does not discriminate on the basis of termination of pregnancy. Complaint [1] ¶ 209. Termination of pregnancy is abortion, and MCC has taken a firm stance against not

just performing, but also against promoting or affirming the legitimacy of abortion. See Complaint [1] ¶¶ 300–02. But the rule, as left in place by the Court, still forces MCC to provide notices and assurances that it does not discriminate in violation of the rule, which Defendants have stated definitively and publicly in the Federal Register means that MCC is not discriminating on the basis of abortion. Those mandates coerce MCC's speech in violation of the Free Speech Clause of the First Amendment, as alleged by Claim II. Complaint [1] ¶¶ ¶¶ 281–303.

In the Court's Order to Show Cause, it noted that in the rule Defendants specified that the rule "does not ban physicians and faith-based or other health care entities from refusing to participate in pregnancy termination procedures." Order [60] at 2 (quoting 89 Fed. Reg. at 37527–28). But MCC's claim is not that the rule forces it to perform abortions. MCC *also* does not want to *speak* by telling patients, employees, or the federal government that it is complying with a rule prohibiting discrimination on the basis of "termination of pregnancy." Termination of pregnancy is abortion. Interpreting pregnancy to mean "termination of pregnancy" improperly legitimizes abortion as healthcare which is equivalent to pregnancy itself. *See, e.g., Louisiana v. Equal Emp. Opportunity Comm'n*, 784 F. Supp. 3d 886, 909 (W.D. La. 2025) (vacating and remanding EEOC's 2024 rule that interpreted a "pregnancy" nondiscrimination statute as prohibiting "termination of pregnancy" discrimination).

Forcing a clinic that has taken a stance against abortion to speak about that politically charged issue is unlawful coercion of speech under the First Amendment. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 773–75 (2018). This is especially true where the rule forces MCC to assure the public and government officials that it complies with a regulation that Defendants say in the Federal Register prohibits MCC from discriminating on the basis of "termination of pregnancy." The First Amendment puts MCC in charge of how it will or will not speak about abortion. MCC's freedom of speech rights apply no less because the coerced

speech is a condition on MCC's federal funding to care for sick kids. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 217–21 (2013).

Whether forcing MCC to speak in this way is a First Amendment violation has not been briefed due to the case being stayed, and because it is a merits question it is "inappropriate" to rule the case is moot by rejecting the viability of MCC's claim. *Chafin v. Chafin*, 568 U.S. 165, 174 (2013) (quoting *Powell v. McCormack*, 395 U.S. 486, 500 (1969)). Mootness concerns whether the requirements to speak MCC challenged are still in place, and they are. Because the rule forces MCC to engage in notices and assurances, MCC has brought a Free Speech Clause claim against those requirements, and the Court's vacatur did not lift them (except as to gender identity), MCC's free speech claim is not moot.

II. The sex stereotypes and notice provisions still exist, so MCC's challenges to them cannot be dismissed as moot.

MCC's claims are also not moot because the rules it challenged have not been repealed. "[A] case challenging a [law] usually becomes moot if the challenged law has expired or been repealed." *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 464 (5th Cir. 2021) (quoting *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020)).

MCC challenged not just the explicit "gender identity" language in the 2024 Rule, but also the sex stereotypes language to the extent it prohibits gender identity discrimination. [1] ¶¶ 74, 78, page 43. The Court vacated the former, but not the latter. In *Big Tyme Investments*, the circuit rejected a mootness argument even though the order the plaintiffs challenged was actually replaced by another order, because the second order caused the "same differential treatment" complained of. *Id.* at 464. This is even more true here. The sex stereotypes provision both causes the same differential treatment MCC challenged—gender identity nondiscrimination—*and* it has not even been vacated or replaced. The Court did not vacate the sex stereotypes provision to the extent it prohibits gender identity. So MCC's challenge

to the sex stereotypes provision is not moot. The same is true for the notice and assurance requirements MCC challenged on speech grounds.

Defendants might argue that the sex stereotypes provision does not in fact prohibit gender identity discrimination, but holding the case moot on those grounds would improperly "confuse[ ] mootness with the merits," which is "inappropriate." *Chafin*, 568 U.S. at 174 (quoting *Powell*, 395 U.S. at 500). MCC's position cannot be "dismissed as so implausible that it is insufficient to preserve jurisdiction." *Id.* Instead, other courts have confirmed the plausibility of MCC's concern about the sex stereotypes provision encompassing gender identity.

In separate cases, the U.S. District Courts for both the Eastern District of New York and the District of the District of Columbia have held that, under the parallel 2016 Rule prohibiting gender identity and sex stereotypes discrimination, the rule's "sex stereotypes" provision continues to prohibit gender identity nondiscrimination *even after* the explicit "gender identity" language was vacated. *Walker v. Azar*, 480 F. Supp. 3d 417, 420 (E.D.N.Y. 2020); *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 60 (D.D.C. 2020). Subsequently, the Fifth Circuit confirmed this interpretation. In *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 372–73 (5th Cir. 2022), the circuit concluded that "[b]oth courts [i.e., *Walker* and *Whitman-Walker Clinic*] reasoned that, in light of *Bostock [v. Clayton County*, 590 U.S. 644 (2020)], sex-stereotyping discrimination encompasses gender identity discrimination." So MCC's assertion that the sex stereotypes provision continues to impose a gender identity mandate is supported by multiple courts and circuit precedent.

As noted above, Defendants themselves also took the position in the 2024 Rule that their sex stereotypes provision encompasses gender identity. See 89 Fed. Reg at 37,574, 37,578. Defendants might maintain that they have reversed their legal view in the new administration. But they have not done so by rulemaking. The sex stereotypes provision was issued by notice and comment rulemaking. It cannot be

negated by an Executive Order or a statement from HHS that does not itself undergo notice and comment. Notably, when Defendants repealed the 2016 Rule in 2020—through notice and comment rulemaking—they *did* repeal the sex stereotypes provision. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,244–45 (June 19, 2020) (repealing § 92.4, which included sex stereotypes in the definition of sex discrimination, and replacing it with a simple prohibition on "sex" discrimination at § 92.1). They knew then that the repeal needed to occur through rulemaking. Mere statements and guidance from the new administration cannot vacate a gender identity mandate codified through the 2024 Rule's notice and comment rulemaking.

Likewise, the Court suggests that it does not see "termination of pregnancy" in § 92.10. Order [60] at 2. But this is because Defendants' rule is arcane, imposing its requirements in a stepwise manner. The notice provision at § 92.10 references § 92.101(a)(2)(ii), which uses "pregnancy and related conditions" language, which Defendants said at page 37,556 encompass abortion. Together, those binding conclusions stack to coerce MCC to speak about abortion. As noted above, other courts have recently held it is legally improper to impose "termination of pregnancy" nondiscrimination on covered entities based on statutory prohibitions of discrimination on the basis of pregnancy. *Louisiana*, 784 F. Supp. 3d at 903–07. This supports MCC's free speech claim. The Court should consider MCC's claim on the merits since the rule's speech coercion requirements are still in place.

III. The Fifth Circuit has confirmed the gender identity mandate threat posed by sex stereotypes provisions in the 1557 rules.

In *Franciscan Alliance*, the Fifth Circuit held that the mere *threat* of the "district court injunctions" in *Walker* and *Whitman-Walker Clinic* reimposing the sex-stereotypes gender identity mandate supported standing for those plaintiffs to obtain further relief against Defendants. 47 F.4th at 376–77. Here, MCC's threat is more

dire. While reimposition of sex-stereotypes gender identity was a mere possibility in *Franciscan Alliance*, after 2024 the sex stereotypes provision is now recodified into the rule governing MCC. And under this Court's vacatur in the states' case, that provision remains with no vacatur to the extent it prohibits gender identity discrimination (which MCC requested).[1] This is partly why MCC has respectfully opposed Defendants' repeated requests to stay this case, and has asked to participate in proceedings so that MCC would receive the full and proper relief it requested.

Defendants might maintain that vacatur of the gender identity language sufficiently reduces the threat to MCC so that granting the full relief it requested against the sex stereotypes provision would not be effectual. But when "injuries remain even if their magnitude is reduced," a case is not moot. *Texas v. Yellen*, 105 F.4th 755, 766 (5th Cir. 2024). That the Court provided a "lesser remedy" does not moot a "request for a more substantial remedy." *Id.* (quoting *West Virginia ex rel. Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1139 (11th Cir. 2023)). And where the parties "vigorously dispute[ ]" whether the partial remedy actually suffices, holding the case moot is not appropriate. *Id.* at 767. Because the Court's vacatur "did not simply rescind the [ ] mandate and *all* related enforcement measures"—leaving the sex stereotypes portion of the gender identity mandate in place—the case should not be held moot. *Abbott v. Biden*, 70 F.4th 817, 825 (5th Cir. 2023).

CONCLUSION

For these reasons, MCC's case is not moot. The Court's excellent ruling in the states' case unfortunately left in place a gender identity mandate under the sex

[1] This distinguishes the portion of *Franciscan Alliance* that held the district court "gave" those plaintiffs "the remedy" they requested, and that since they "sought nothing more" no further relief was available under their APA claim. 47 F.4th at 374–75. Here MCC has sought "more" than the vacatur granted the states—MCC sought vacatur of the sex stereotypes provision to the extent it encompasses gender identity, and the Court did not provide that relief.

stereotypes provision of the 2024 Rule. MCC challenged that provision (and requested partial summary judgment). Other district courts and the Fifth Circuit have confirmed that such a provision encompasses gender identity discrimination. The relief this Court gave the states did not block that mandate. MCC also challenged the rule's requirement that it make statements that it does not discriminate on the basis of abortion. Those speech mandates persist. Because the states' relief was not the precise or complete relief MCC requested, this case is not moot.

Thus, MCC respectfully requests that the Court lift the stay in this case, grant MCC's Motion for Partial Summary Judgment [27] for the reasons set forth there and in this Court's ruling in the states' case, and vacate § 92.101(a)(2)(v) "to the extent that [it] expand[s] Title IX's definition of sex discrimination to include gender-identity discrimination." *Tennessee*, 2025 WL 2982069, at *13. Upon lifting the stay, MCC would expeditiously pursue summary judgment on its free speech claim and other requests for relief that remain.

Respectfully submitted this 13th day of January, 2026.

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