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

WESTERN DIVISION

MCCOMB CHILDREN'S CLINIC, LTD., Plaintiff, v. **XAVIER BECERRA,** in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 5:24-cv-00048-LG-ASH

DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

When it enacted Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), Congress guaranteed every American the right to be free from discrimination from any health care provider receiving Federal financial assistance on the basis of race, color, national origin, sex, age, or disability. Plaintiff McComb Children's Clinic ("MCC") now seeks to prevent the United States Department of Health and Human Services ("HHS") from enforcing Congress's command in circumstances where a health care provider discriminates on the basis of gender identity, where sex necessarily plays an unmistakable and impermissible role in the treatment decision. Pl.'s Mot. for Partial Summ. J. at 1-2, ECF No. 27. But Section 1557 includes no such carve-out.

MCC's motion for partial summary judgment should be denied. As is true of Title VII of the Civil Rights Act of 1964, which the Supreme Court examined in *Bostock v. Clayton County*, 590 U.S. 644 (2020), Section 1557 prohibits health care providers from denying care—whether for a broken bone or an ear infection—to their patients on the basis of the patient's gender identity. MCC's argument to the contrary is premised on the notion that Section 1557 and Title IX include a sole-cause causation standard—an argument that is impossible to square with decades of Fifth Circuit and Supreme Court precedent and the plain language of the statutes.

Unable to muster any argument explaining how "abandon[ing] children to broken bones because of gender identity" is anything but prohibited discrimination on the basis of sex under Section 1557, MCC promises the Court that it "would never do this." Pl.'s Mem. in Supp. of its Mot. for Partial Summ. J. at 17, ECF No. 28. But MCC's promises do not determine the scope of Section 1557 nor entitle it to relief preventing HHS enforcement of any violation of 45 C.F.R. § 92.101(a)(2)(iv), which would encompass exactly that type of prohibited discrimination.

Should the Court grant MCC's motion for partial summary judgment, however, it should deny MCC's motion for certification under Fed. R. Civ. P. 54(b). MCC's motion seeks to resolve one portion of one count of its Complaint. But claims that remain to be litigated are different legal theories for seeking the same relief that MCC is seeking now. And MCC has not

established that there is a compelling reason to undermine the historic presumption against piecemeal appeals.

Nor has MCC justified the remedies it seeks. Remedies ordinarily operate with respect to specific parties. Both Article III and traditional equitable principles dictate that no more than party-specific relief would be appropriate if MCC prevails.

BACKGROUND

I. Statutory and Regulatory Background

A. Section 1557 of the ACA and its Statutory Enforcement Mechanisms

Through reference to civil rights statutes such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, Section 1557 provides that individuals shall not—on the basis of race, color, national origin, sex, age, or disability—be excluded from participation in, denied the benefits of, or subjected to discrimination under health programs or activities any part of which is receiving Federal financial assistance. 42 U.S.C. § 18116(a).[1]

Section 1557 incorporates the "enforcement mechanisms provided for and available under" the referenced civil rights statutes. *Id.* For administrative enforcement, those mechanisms provide layers of process and opportunities for congressional and judicial review before any entity faces a potential termination of any Federal financial assistance. *E.g.*, 20 U.S.C. § 1682 (Title IX); 42 U.S.C. § 2000d-1 (Title VI). HHS's enforcement is typically a complaint-driven process, though HHS's Office for Civil Rights ("OCR") has authority to initiate investigations on its own. *See, e.g.*, 45 C.F.R. §§ 80.7 (Title VI), 86.71 (Title IX), 92.303(a) (Section 1557, incorporating by reference § 80.7). As part of an investigation, OCR considers all "factors relevant to a determination as to whether the recipient has failed to comply" with Section 1557. *Id*. § 80.7(c) (incorporated by § 92.303(a)).

[1] Section 1557 also addresses discrimination occurring under any program or activity administered by an Executive Agency or any entity established under Title I of the ACA.

If, following an investigation, OCR finds a "failure to comply," first, HHS must advise the covered entity of a potential violation and make a good faith effort to come to a voluntary resolution without the need for administrative or judicial litigation. *E.g.*, 20 U.S.C. § 1682. If that negotiation is unsuccessful, and if it wishes to proceed further under the administrative process, HHS must initiate the formal agency adjudication procedures of the Administrative Procedure Act ("APA"), which require an opportunity for a hearing and "an express finding on the record" of a failure to comply. *Id.*[2] And if that process results in a determination to withhold federal funding, HHS must submit a "full written report" to congressional committees before any funding withdrawal can take effect. *Id.*

Moreover, the statutory enforcement mechanism makes any HHS decision to terminate or suspend Federal financial assistance subject to judicial review. *Id.* § 1683. Any entity seeking judicial review can invoke the court's power to postpone further the effective date of any termination of funding if such postponement is required to avoid irreparable harm. 5 U.S.C. § 705. The ultimate arbiters of any violation of Section 1557 are thus Article III courts.

B. HHS's 2024 Rule

HHS published the rule implementing Section 1557 of the ACA at issue here in the Federal Register on May 6, 2024. *See* Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) (codified at 45 C.F.R. pt. 92) (the "rule" or the "2024 Rule"). As relevant here, the rule provides that discrimination on the basis of sex includes discrimination on the basis of gender identity. 45 C.F.R. § 92.101(a)(2)(iv).

In 45 C.F.R. § 92.206, addressing equal access to health programs and activities on the basis of sex, the rule includes provisions that primarily relate to covered entities that are directly engaged in the provision of health care services, such as hospitals, physical and mental health

[2] Alternatively, HHS may refer the matter to the Department of Justice to secure compliance "by any other means authorized by law." 20 U.S.C. § 1682. This alternative, however, also cannot take place until HHS has advised the appropriate person or persons of the failure to comply and has determined "that compliance cannot be secured by voluntary means." *Id.*

care providers, and pharmacies. Among other specific provisions, § 92.206(b)(4) precludes providers from denying health services sought for the purpose of gender-affirming care "that the covered entity would provide to an individual for other purposes if the denial or limitation is based on an individual's sex assigned at birth, gender identity, or gender otherwise recorded." At the same time, § 92.206 makes clear that this provision does not require

> the provision of any health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting that service, including where the covered entity typically declines to provide the health service to any individual or where the covered entity reasonably determines that such health service is not clinically appropriate for a particular individual.

Id. § 92.206(c).

As important as what the rule does is what it does not do. The rule does not require the provision of any particular health service. Nothing in the rule overrides a clinician's medical judgment as to whether a service is medically necessary or appropriate for any patient. *See* 89 Fed. Reg. at 37,533, 37,595-96.

Nor does any provision of the rule displace the judgment of providers as to the medical necessity of gender-affirming care for a patient, so long as a refusal of care is not based on animus or bias or a pretext for discrimination. In response to comments, HHS eliminated proposed § 92.206(c), which read: "[H]owever, a provider's belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a State or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate." 89 Fed. Reg. at 37,597.[3] In the final rule, HHS replaced it with language explaining that "[a] covered entity's determination must not be based on unlawful animus or bias, or constitute a pretext for discrimination." *Id.*

Finally, the rule does not reflect a determination that any of MCC's conduct is discriminatory. While the rule provides that discrimination on the basis of sex includes

[3] MCC's brief does not acknowledge that this provision was not included in the final rule. ECF No. 28 at 5. Rather, MCC's briefing misleadingly quotes this language as if it is part of the rule. *Id*. It is not. 45 C.F.R. § 92.206(c).

discrimination on the basis of gender identity, no provision of the rule overrides the standard that courts apply to determine whether a covered entity has created a hostile environment under Title IX. The preamble to the rule confirms that discrimination sounding in the nature of harassment must involve conduct "so severe or pervasive that it creates a hostile environment on the basis of sex" to be actionable. *Id.* at 37,596.

II. Procedural History

MCC filed this lawsuit on May 13, 2024. Compl., ECF No. 1. On June 3, 2024, MCC filed a motion for a preliminary injunction, focusing on its claim that Section 1557's prohibition of discrimination on the basis of sex excludes discrimination on the basis of gender identity. Pl.'s Mot. for a Delay of Effective Date & for Prelim. Inj., ECF No. 6; Pl.'s Mem. in Supp. of its Mot. for a Delay of Effective Date & for Prelim. Inj., ECF No. 7. MCC's motion for a preliminary injunction remains pending.

On August 15, 2024, MCC filed the instant motion for partial summary judgment. Pl.'s Mot. for Partial Summ. J., ECF No. 27. MCC's motion addresses only part of one of the three claims in its Complaint, i.e., First Claim Part (A), which alleges that Section 1557's prohibition of discrimination on the basis of sex excludes discrimination on the basis of gender identity. ECF No. 28. On September 30, 2024, Defendants filed a motion to dismiss the Complaint. Mem. in Supp. of Defs.' Mot. to Dismiss, ECF No. 36.

LEGAL STANDARDS

A motion for partial summary judgment does not seek final judgment but instead seeks "a pre-trial adjudication that certain issues are established for trial of the case." *FDIC v. Massingill*, 24 F.3d 768, 774 (5th Cir. 1994). An order granting a motion for partial summary judgment is "subject to revision by the district court, and has no *res judicata* effect." *Id.* For challenges "to an agency action under the [APA], summary judgment [and not partial summary judgment] is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review." *Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 723 (W.D. Tex. 2019) (cleaned up).

In a facial challenge to an agency rule, the plaintiff "must establish that no set of circumstances exists under which the [rule] would be valid." *Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215, 220 (5th Cir. 2016) (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006)); *see also Reno v. Flores*, 507 U.S. 292, 301 (1993). "That means that to prevail, the Government need only demonstrate that [the rule] is [valid] in some of its applications." *United States v. Rahimi*, 602 U.S. ---, 144 S. Ct. 1889, 1898 (2024), *remanded,* 117 F.4th 331 (5th Cir. 2024). The Court must "consider the circumstances in which" the challenged provision is "most likely" to be valid. *Id.* at 1903. "Where [courts] conclude that a challenged regulatory provision does not exceed [the statute's] limits . . . [they] will uphold the provision and preserve the right of complainants to bring as-applied challenges against any alleged unlawful applications." *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1185 (D.C. Cir. 2020) (citation omitted).

ARGUMENT

I. Section 1557 Does Not Authorize Covered Entities to Subject Individuals to Discrimination on the Basis of Gender Identity.

MCC now seeks prospective declaratory and injunctive relief that would preclude HHS from taking enforcement action against MCC if MCC discriminates against its patients on the basis of their gender identity. ECF No. 27 at 1-2. In other words, the relief MCC seeks would prevent HHS from taking enforcement action if MCC were to, for example, deny a patient medically necessary care that MCC typically provides—whether for a sore throat, a broken bone, or an ear infection—because the patient's gender identity differs from their sex assigned at birth. *Id*. But that relief is not warranted by the arguments MCC raises given that discrimination on the basis of gender identity necessarily involves discrimination on the basis of sex.

MCC's contrary-to-law claim requires MCC to identify the "portions of the Rule that [it] *actually challenges*," *see Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024), and articulate why all applications of each challenged provision are foreclosed by the statutory text. 5 U.S.C. § 706(2); *Reno*, 507 U.S. at 301. MCC's brief fails at this basic

task. Instead, MCC's brief focuses its attacks on agency actions that do not exist, like a purported provision "redefin[ing] sex to mean gender identity" and a purported provision prohibiting covered entities from making "sex distinctions." ECF No. 28 at 8-15.

MCC seeks relief limited to provisions of the rule only "to the extent [they] reach[] discrimination on the basis of gender identity." ECF No. 27 ¶ 1. That relief hinges on a single legal question—namely, whether 45 C.F.R. § 92.101(a)(2)(iv), which provides that discrimination on the basis of sex includes discrimination on the basis of gender identity, is contrary to Section 1557's prohibition of discrimination on the basis of sex. It is not.[4] To the contrary, the Supreme Court's reasoning in *Bostock* that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of gender identity applies as well to Title IX and Section 1557.[5]

The Supreme Court's decision in *Bostock* concerned Title VII's provision making it unlawful for an employer "to discriminate against any individual . . . because of such individual's . . . sex," 590 U.S. at 655 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court explained that "sex is necessarily a but-for cause" of discrimination on the basis of transgender status[6] "because it is impossible" to discriminate against a person for being transgender "without discriminating against that individual based on sex." *Id.* at 660, 661 (emphasis omitted). The Court noted that Title VII's "because of" language "incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* at 656–57 (citation omitted). If an employer fires a

[4] Insofar as MCC raises arguments that are particularized to any other parts of the 2024 Rule for the first time in its reply, those arguments are waived. *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010). At a minimum, Defendants should be given an opportunity to submit a sur-reply explaining why any such newly-raised provisions are consistent with Section 1557.

[5] MCC's motion for partial summary judgment should independently be denied for the reasons described in Defendants' memorandum in support of its motion to dismiss. ECF No. 36.

[6] The terms "gender identity" and "transgender status" "are often used interchangeably." 89 Fed. Reg. at 37,556. *See Bostock*, 590 U.S. at 686 n.6 (Alito, J., dissenting). "Transgender" is an umbrella term for people whose gender identity is different from the sex they were assigned at birth.

transgender woman because she is transgender, "the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id*. at 600. Thus, "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.* That is so even if "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id*. at 655.

Courts have concluded that the rationale of *Bostock* applies to Section 1557. *E.g.*, *Kadel v. Folwell*, 100 F.4th 122, 164 (4th Cir. 2024); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022). That is because "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 590 U.S. at 660.

MCC leans heavily on its view that Congress "used 'sex' throughout Title IX to denote the male-female biological binary." ECF No. 28 at 9. But no provision of the rule defines the term "sex" and § 92.101(a)(2)(iv) is not premised on whether "sex" is "referring only to biological distinctions between male and female." *See Bostock*, 590 U.S. at 655. Rather, as HHS explained in the preamble, the agency "determined it is not necessary to define 'sex' in this rule." 89 Fed. Reg. at 37,575. Even if "sex" refers to "biological distinctions between male and female," HHS's inclusion of "'gender identity' in § 92.101(a)(2) is consistent with the Supreme Court's reasoning in *Bostock*." *Id*. at 37,573-74. The question is not "what 'sex' meant, but what [Section 1557] says about it." *See Bostock*, 590 U.S. at 656. And under Section 1557, if a health care provider refuses to treat a transgender patient "for traits or actions [the provider] would not have questioned in members of a different sex," the provider violates Section 1557 for the same reasons articulated by the Supreme Court in *Bostock*. *Id*. at 651-52.

In *Tennessee v. Becerra*, this Court determined that plaintiffs were substantially likely to succeed on their claim that § 92.101(a)(2)(iv) is contrary to Section 1557, finding that *Bostock*'s logic "does not apply to Title IX because Congress used different causation language in Title IX ('on the basis of sex') and Title VII ('because of . . . sex')." --- F. Supp. 3d ----, 2024 WL 3283887, at *8 (S.D. Miss. July 3, 2024) (citation omitted). But the Court did not identify the causation standard that applies to prohibited exclusions, denials of benefits, or discrimination

under Section 1557 on the basis of sex. Nor did it explain why, under that causal standard, *Bostock*'s reasoning is inapplicable. Seeking to fill that gap, MCC argues that Congress enacted a sole-cause causation standard in Section 1557 and Title IX. ECF No. 28 at 15. That argument is wrong for several reasons.

First, it is inconsistent with binding Fifth Circuit precedent. Title IX imposes a causation standard no more stringent than but-for causation under Title VII. Indeed, the Fifth Circuit has held that the causation standard under Title IX is whether "sex was a motivating factor" in the challenged decision. *Doe v. William Marsh Rice Univ.*, 67 F.4th 702, 709 (5th Cir. 2023) (quoting *Doe v. Purdue Univ.*, 928 F.3d 652, 667 (7th Cir. 2019) (Barrett, J.)). Under the "motivating factor" standard, "liability can sometimes follow even if sex *wasn't* a but-for cause of the . . . challenged decision." *Bostock*, 590 U.S. at 657. Because the motivating factor standard is at least as beneficial to Section 1557 claimants as the but-for standard analyzed by the Supreme Court in *Bostock*, *see id.*, MCC does not explain how sex is not an unmistakable and impermissible motivating factor when a provider makes a treatment or coverage decision not because of medical judgment but instead "for traits or actions [the covered entity] would not have questioned in members of a different sex," *id*. at 652.

Second, even if the Court were to look beyond this precedent and focus on the plain language of either Section 1557 or Title IX, neither statute includes the sole-cause causation standard. Had Congress intended that standard, "it knew how to say so." *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 216 (2018). For example, in another antidiscrimination statute, Congress provided that a qualified individual with a disability shall not be subject to the same conduct proscribed under Section 1557 "*solely by reason of* her or his disability." 29 U.S.C. § 794(a) (emphasis added); *see also Bostock*, 590 U.S. at 656 ("add[ing] 'solely' [typically] indicate[s] that actions taken 'because of' the confluence of multiple factors do not violate the law") (citing 11 U.S.C. § 525; 16 U.S.C. § 511); *see also McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073 (11th Cir. 1996) (concluding it is "a simple case" not to apply sole-cause causation standard when antidiscrimination provisions "do not contain the word 'solely,' or any

other similar restrictive term"). In *Bostock*, the Court used the phrases "because of" and "on the basis of" interchangeably, and in contrast to language like "*primarily* because of," which indicates a more stringent causal standard. 590 U.S. at 656-57 (emphasis added).[7]

MCC marshals little authority for its theory that either Section 1557 or Title IX incorporate a sole-cause causation standard. MCC relies on only one recent district court opinion, ECF No. 28 at 15, which is currently on appeal, even though Title IX has been on the books for over fifty years.

MCC's theory is contrary to myriad cases applying Title IX. For example, in *Sewell v. Monroe City School Board*, 974 F.3d 577 (5th Cir. 2020), a student had experienced verbal abuse that was plausibly actionable under Title IX. *Id.* at 584-85. The school dean had commented about the student's hair, asking him if he "was gay with that mess in his head," which the court found "could imply animus toward males who do not conform to stereotypical notions of masculinity" because "epithets targeting homosexuals can support [an] inference of gender-based stereotyping[.]" *Id*. at 584. The school district did not avoid liability based on MCC's theory that discrimination on the basis of sexual orientation or discrimination on the basis of gender identity can somehow be divorced from discrimination on the basis of sex. As the *Sewell* facts help clarify, sexual orientation and sex are not distinct causes of discrimination at all. Rather, discrimination on the basis of sexual orientation and discrimination on the basis of gender identity necessarily involve discrimination on the basis of sex. *Bostock*, 590 U.S. at 665; *see also, e.g.*, *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011) ("Same-sex sexual harassment is actionable under title IX").

[7] Outside the Fifth Circuit, "[s]everal circuits have concluded that th[e] . . . language—'on the basis of' invokes but-for causation." *Akridge v. Alfa Ins. Cos.*, 93 F.4th 1181, 1192 (11th Cir. 2024). Indeed, "the Supreme Court has instructed that '[t]his ancient and simple but for common law causation test . . . supplies the default or background rule against which Congress is normally presumed to have legislated,' including for 'federal antidiscrimination laws . . . .'" *Id*. (quoting *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 332 (2020)). "And the particular phrase '*on the basis of*' is 'strongly suggestive of a but-for causation standard.'" *Id*. (quoting *Comcast Corp.*, 589 U.S. at 335).

Also untethered from the statutory text is MCC's contention that § 92.101(a)(2)(iv) is contrary to Section 1557 because the statute only concerns itself with comparisons of how a covered entity treats women and men as groups, ECF No. 28 at 15, a distinction the *Bostock* Court deemed essential to its holding, *Bostock*, 590 U.S. at 658-60. Section 1557 resolves that question directly. Its focus is on individuals, not groups: "*an individual* shall not" be subject to the specified conduct based on sex. 42 U.S.C. § 18116(a) (emphasis added). And the meaning of "individual" is "uncontroversial[:]" "A particular being as distinguished from a class, species, or collection." *Bostock*, 590 U.S. at 658 (citation omitted). Section 1557 does not say it is unlawful for covered entities to "prefer one sex to the other." *See id*.

Properly construed, Section 1557 precludes covered entities from discriminating on the basis of gender identity—i.e., from discriminating against a person identified as one sex "at birth for traits or actions that" the covered entity would tolerate in a patient "identified as [another sex] at birth." *Id*. at 660. To support its argument that Section 1557 authorizes that discriminatory conduct, MCC asserts that Section 1557 does not provide it with sufficient notice that discrimination on the basis of gender identity is prohibited, which it claims is required by *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and its progeny. ECF No. 28 at 19-20. But those cases do not bear the weight MCC places on them. Section 1557 is unambiguous in its application to discrimination on the basis of gender identity, but even if the Court disagreed, *Pennhurst*'s clear statement rule does not curb prospective administrative enforcement of a statutory spending condition.

First, even if a clear statement rule applied here in the manner MCC suggests, it would be satisfied because Section 1557 unambiguously prohibits discrimination on the basis of gender identity. *Bostock*, 590 U.S. at 660, 674. To find this issue ambiguous when the Supreme Court determined that Title VII was clear on the same issue would require interpretative acrobatics. *Id.* at 674. "[N]o ambiguity exists" about the fact that discrimination on the basis of gender identity necessarily involves discrimination on the basis of sex. *Id*. Again, in *Bostock*, the Supreme Court

held that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* at 660.

Principles governing how courts must apply *Pennhurst*'s clear statement rule confirm that § 92.101(a)(2)(iv) is not unenforceable. Section 1557 makes clear to covered entities that they incur an obligation not to subject an individual to discrimination on the basis of sex. "The precise scope of that obligation, however, need not be spelled out to an extent specifying every factual scenario in which it will apply." *See Pierre-Noel on behalf of K.N. v. Bridges Pub. Charter Sch.*, 113 F.4th 970, 979 (D.C. Cir. 2024); *see also Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of [Spending Clause statute]."); *Benning v. Georgia,* 391 F.3d 1299, 1306 (11th Cir. 2004) ("[S]o long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely."). To conclude otherwise would be directly contrary to the Supreme Court's repeated holdings that, even in retrospective damages cases, Title IX includes terms covering "a wide range of intentional unequal treatment; by using such . . . broad term[s], Congress gave the statute a broad reach." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), for example, the Supreme Court held that Title IX provided adequate notice to federal funding recipients that sexual harassment was actionable in suits for money damages, even though "the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships.'" *Id*. (citation omitted).

Even if this Court believed that circumstances where a health care provider discriminates on the basis of gender identity in violation of Section 1557 present a *Pennhurst* clear statement rule issue, the Supreme Court has never relied on that principle to curb prospective administrative enforcement of a statutory spending condition. The Supreme Court has repeatedly identified the "central concern" as "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award'" for *past* conduct taken after accepting federal

money—which is not at issue in this lawsuit. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (citation omitted). Thus, the *Pennhurst* cases limit retrospective liability in lawsuits against Federal funding recipients seeking damages for actions taken in the past but after "the time [the recipient] 'engaged in the process of deciding whether [to] accept' federal dollars." *Cummings v. Premier Rehab Keller, PLLC.*, 596 U.S. 212, 220 (2022) (citation omitted), *reh'g denied*, 142 S. Ct. 2853 (2022).

In contrast, the Supreme Court has held that a statute imposing a "generalized duty" on a funding recipient is not invalid if purportedly ambiguous, but is "to be enforced . . . by the Secretary in the manner [of reducing or eliminating payments]" in the future. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 281 (2002) (quoting *Suter v. Artist M.*, 503 U.S. 347, 363 (1992)). As long as Congress made clear to the funding recipient that funding was conditioned on a duty that includes a process permitting recipients to ascertain what is required before deciding whether to receive or reject federal funds *in the future*, generalized duties in Spending Clause legislation do not prevent prospective enforcement. And prospective enforcement is the explicit administrative enforcement scheme that Congress established in Title VI and Title IX, and incorporated in Section 1557. *See* 42 U.S.C. § 18116(a). The condition of any offer of *future* federal funding remains premised on knowing and voluntary consent, even if the duty is generalized and the recipient misunderstands the statute not to encompass a particular factual circumstance based on an actual or claimed ambiguity. *See Gebser*, 524 U.S. at 289. Indeed, the Supreme Court has already rejected MCC's contention that any "ambiguity" in a Spending Clause program should be resolved in the spending recipient's favor:

> [T]he fact that [a Spending Clause statute is] an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements. Accordingly, we do not believe that ambiguities in the requirements should invariably be resolved against the Federal Government as the drafter of the grant agreement.

Bennett, 470 U.S. at 669.[8]

Insofar as MCC relies on *Texas v. Yellen*, 105 F.4th 755 (5th Cir. 2024), that case has no bearing here. *See Tennessee*, 2024 WL 3283887, at *8 (citing *Yellen*, 105 F.4th at 771). *Yellen* involved a statute that imposed "potentially ambiguous spending conditions on state governments" alone. 105 F.4th at 771. For that reason, the *Yellen* court explained that its clear statement rule could not be applied to render unenforceable or limit the meaning of a statute authorizing HHS "to promulgate 'as a condition of a facility's participation in [Medicare and Medicaid] . . . requirements [as the Secretary of HHS] finds necessary in the interest of the health and safety of individuals who are furnished services.'" *Id*. (quoting *Biden v. Missouri*, 595 U.S. 87, 90 (2022)). The principles invoked by the *Yellen* court to affirm the district court's injunction stem from cases that protect "the status of the States as independent sovereigns in our federal system." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012). Those federalism-based principles are inapposite in evaluating the meaning of a statute not focused on States and encompassing private corporations like MCC. *Yellen*, 105 F.4th at 771.[9]

[8] Moreover, in the Title IX context, the Supreme Court has consistently concluded that agency regulations interpreting the Act's ban on discrimination based on sex can, without running afoul of *Pennhurst*, give state recipients of federal funds notice of the conditions with which they must comply. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) ("the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents"); *Gebser*, 524 U.S. at 288, 292-93 (relying on Department of Education regulations); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 633-34 (1984) (holding that the Rehabilitation Act entitles a private employee to bring suit even if federal aid received by the employer was not primarily intended to promote employment, by reference to agency regulations); *Grove City Coll. v. Bell*, 465 U.S. 555, 569, 575 (1984) (crediting agency's interpretation of the statutory phrase "receiving Federal financial assistance" and holding that the Department of Education "may properly condition federal financial assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations"); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982) (holding that Title IX prohibits sex discrimination in employment relationships in educational programs and recognizing a framework of deference); *cf. Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 279, 286 n.15 (1987) (relying in part on HHS regulations in defining "handicapped individual" within the meaning of the Rehabilitation Act).

[9] And insofar as anything in *Yellen* or any other Fifth Circuit authority contradicts prior Supreme Court holdings in this area, the Fifth Circuit's rule of orderliness requires this Court to follow the Supreme Court's precedents. That rule "commands adherence to Supreme Court precedent . . . not to circuit

MCC's arguments repeatedly misunderstand the Court's role in examining MCC's facial challenge to a regulation. ECF No. 28 at 15-16. "To prevail in such a facial challenge, [MCC] 'must establish that no set of circumstances exists under which the [regulation] would be valid.'" *Reno*, 507 U.S. at 301 (citation omitted). "Rather than consider the circumstances in which [§ 92.101(a)(2)(iv) is] most likely to be [valid],"—like when a doctor refuses to treat a patient's ear infection because of their gender identity—MCC instead "focuse[s] on hypothetical scenarios," in which the rule has not been applied, *Rahimi*, 144 S. Ct. at 1903, like "exam rooms, lactation rooms, undressed patients, and discussions of intimate biological functions," ECF No. 28 at 16. "That error [leaves MCC] slaying a straw man." *Rahimi*, 144 S. Ct. at 1903. MCC "do[es] not challenge [§ 92.101(a)(2)(iv)'s] application in a particular instance" involving an exam room, a lactation room, or an undressed-patient policy of some kind, nor can MCC point to a particular provision of the rule resolving whether Section 1557 prohibits policies under these particular factual scenarios. *See Reno*, 507 U.S. at 300. "Whether [specific] policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of [Section 1557 or Title IX] are questions for future cases" should the statute or rule, hypothetically, be applied against a specific policy or practice. *See Bostock*, 590 U.S. at 681. *See also Reno*, 507 U.S. at 300-301.

Unable to muster any argument explaining how "abandon[ing] children to broken bones because of gender identity" is anything but prohibited discrimination on the basis of sex under Section 1557 and § 92.101(a)(2)(iv), MCC promises the Court that it "would never do this." ECF No. 28 at 17. But MCC's promises do not determine the scope of Section 1557 nor entitle it to relief precluding HHS enforcement of any violation of § 92.101(a)(2)(iv), which would encompass exactly that type of prohibited discrimination.

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decisions disregarding that precedent." *Thompson v. Dall. City Att'y's Off.*, 913 F.3d 464, 466 (5th Cir. 2019).

MCC's effort to invoke the major questions doctrine is no more effective. ECF No. 28 at 18-19. That doctrine applies only when an agency "read[s] into ambiguous statutory text [a] delegation claimed to be lurking there." *Mayfield v. U.S. Dep't of Lab.*, --- F.4th ----, 2024 WL 4142760, at *2 (5th Cir. Sept. 11, 2024) (citation omitted). But § 92.101(a)(2)(iv) is not rooted in a statutory delegation of power to HHS to determine the scope of discrimination on the basis of sex prohibited by Section 1557. Rather, again, § 92.101(a)(2)(iv) follows directly from the text of Title IX and Section 1557 and adheres to *Bostock*'s holding. For similar reasons, § 92.101(a)(2)(iv) does not represent an HHS decision to resolve a matter of great political significance, to regulate a significant portion of the American economy, or to intrude into areas of state law. *Mayfield*, 2024 WL 4142760, at *2. With or without § 92.101(a)(2)(iv), Congress refused to fund health programs and activities that subject individuals to discrimination on the basis of sex, 42 U.S.C. § 18116(a), and "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex," *Bostock*, 590 U.S. at 660. So § 92.101(a)(2)(iv) does not impose a new obligation not already existing under the statute's plain language and meaning.[10]

MCC's briefing is littered with references to "transition procedures." *See* ECF No. 28. But only one provision of the rule that applies to health care providers even mentions the term "transition." 45 C.F.R. § 92.206(b)(4). MCC's briefing does not engage with the text of that provision or demonstrate how it is contrary to Section 1557. And paragraph (b)(4) and subsection (c) of § 92.206—which address certain denials or limitations of health services sought for the purpose of gender transition—are plainly consistent with Section 1557's unambiguous text, which provides that "an individual shall not" on the basis of race, color, national origin, sex, age, or disability, "be denied the benefits of . . . any health program or activity, any part of which is receiving Federal financial assistance[.]" 42 U.S.C. § 18116(a). Consistent with the plain

[10] MCC gestures toward a constitutional avoidance argument without identifying the nature of the constitutional issue. ECF No. 28 at 20. Insofar as MCC is reframing its *Pennhurst* Spending Clause points, those arguments are without merit. *Supra* at 11-14.

language of the statute, "[t]o state a claim under Section 1557," a claimant must allege that she "was excluded from participation in or denied the benefit of the program; and . . . the exclusion [or denial of the benefit] was on a ground prohibited by Title IX, that is—it was on the basis of sex." *See Scott v. St. Louis Univ. Hosp.*, 600 F. Supp. 3d 956, 964 (E.D. Mo. 2022).

Paragraph (b)(4) and subsection (c) of § 92.206 mirror those elements. By "[d]eny[ing] or limit[ing] health services," 45 C.F.R § 92.206(b)(4), a covered entity denies an individual the benefits of a program. And by denying those benefits "based on an individual's sex assigned at birth, gender identity, or gender otherwise recorded," *id*., a but-for cause of or a motivating factor for the denial is sex. *See supra* at 7-11. And by permitting denials that are based on a "legitimate, nondiscriminatory reason for denying or limiting [a health] service," including medical judgment, 45 C.F.R. § 92.206(c) (the challenged provision) ensures that any prohibited denial of benefits is made on a ground prohibited under Section 1557. Section 1557 does not interfere with a provider's nondiscriminatory medical judgments.

The standard that § 92.206(c) identifies for rooting out the basis of challenged provider conduct—"legitimate, nondiscriminatory reason"—is not novel. It is the same tool used by courts applying antidiscrimination laws to ascertain the basis of a defendant's actions under decades of precedent. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (establishing same standard for analyzing Title VII claims); *Buckley v. Sec'y of Army*, 97 F.4th 784, 794 (11th Cir. 2024) (*McDonnell Douglas* framework is often appropriate for discrimination statutes that include "but-for causation" principles). The "legitimate nondiscriminatory reason" standard is also consistent with the test that the Fifth Circuit uses to determine whether challenged conduct is based on sex or based on a permissible ground when analyzing Title IX claims.[11]

[11] *Sewell*, 974 F.3d at 585 (plaintiff plausibly alleged Title IX claim in reliance on administrative finding that defendant failed to provide legitimate, nondiscriminatory reason for its conduct); *Klocke v. Univ. of Tex.*, 938 F.3d 204, 211 (5th Cir. 2019) (applying "reasonable and non-discriminatory reasons" test to resolve Title IX sexual orientation-related "gender bias" claim); *Pederson v. La. State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) (applying "legitimate, nondiscriminatory explanation" test to resolve Title IX

In arguing that paragraph (b)(4) and subsection (c) of § 92.206 are contrary to Section 1557, MCC mischaracterizes the provisions as imposing specific demands to provide particular health services, like puberty blockers or gender-affirming surgeries, when in fact they only require MCC to comply with the plain language of the statute and not deny health services on a prohibited ground. *See* 89 Fed. Reg. at 37,607 ("We . . . decline to state that any denial of gender-affirming care will necessarily be discriminatory regardless of context or rationale."). 45 C.F.R. § 92.206(c).

Consider a surgeon who routinely provides orchiectomies to treat testicular cancer but denies an orchiectomy to a transgender woman seeking the procedure to treat gender dysphoria. Under § 92.206(c), whether the surgeon has denied a benefit or subjected an individual to discrimination on the basis of sex depends on the surgeon's reason(s) for denying treatment. For example, a non-pretextual determination that the service was "not clinically appropriate for [the] particular individual" would provide a legitimate, nondiscriminatory rationale for the denial. 45 C.F.R. § 92.206(c). In contrast, if the surgeon instead explained that he denied the orchiectomy because of animus against transgender individuals because they are transgender, the surgeon would have engaged in impermissible sex discrimination. *Id.*; *see Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

MCC's reliance on *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), to undermine paragraph (b)(4) and subsection (c) of § 92.206 fails. ECF No. 28 at 17. *Eknes-Tucker* held that "the regulation of a course of treatment that only gender nonconforming individuals can undergo" is not unlawful "unless the regulation were a pretext for invidious discrimination against such individuals." 80 F.4th at 1229-30. That holding is entirely consistent with 45 C.F.R. § 92.206(c), which states that a "coverage denial or limitation must not be based

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claim); *see also Arceneaux ex rel. Rebekka A. v. Assumption Par. Sch. Bd.*, 242 F. Supp. 3d 486, 494 (E.D. La. 2017) (applying framework to Title IX claim); *Bowers v. Bd. of Regents of Univ. Sys. of Ga.*, 509 F. App'x 906, 910 (11th Cir. 2013) (same), *cert. denied*, 570 U.S. 919 (2013).

on unlawful animus or bias, or constitute a pretext for discrimination."

MCC also argues that paragraph (b)(4) and subsection (c) of § 92.206 are contrary to Section 1557 because, at least in some circumstances, denying certain health services based on sex involves "treat[ing] similarly situated individuals evenhandedly." ECF No. 28 at 16 (citation omitted). It is far from clear that a provider would be treating similarly situated individuals evenhandedly if it denies or limits benefits to some of its patients but not others. But resolution of that fact-specific issue—which would be improper in a facial challenge to the rule—is unnecessary to conclude that paragraph (b)(4) and subsection (c) are consistent with Section 1557. Section 1557 prohibits an individual from being "excluded from participation in" or "denied the benefits of . . . the provision of healthcare services . . . on the basis of sex." *C.P. by and through Prtichard v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791, 796 (W.D. Wash. 2021). MCC does not explain why these elements require a similarly situated comparator. Rather than basing its arguments on Section 1557, MCC invokes a case construing the Equal Protection Clause. ECF No. 28 at 16 (citing *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 479 (6th Cir. 2023)). In any event, a similarly situated comparator is not a necessary predicate to prove intentional discrimination. *See Lewis v. Union City*, 918 F.3d 1213, 1220 n.6 (11th Cir. 2019).

II. MCC Fails to Challenge a Final Agency Action Defining the Term "Sex" in Section 1557 or Prohibiting Covered Entities from Making Distinctions Based on Sex.

MCC devotes nearly all of its briefing to a series of straw men. For example, MCC argues that "[r]edefining 'sex' to mean gender identity negates the ACA's text," ECF No. 28 at 9, and "Title IX and Section 1557 allow and sometimes require sex distinctions," *id*. at 10. The problem with these arguments is that they do not attack any provision of 45 C.F.R. part 92 that the 2024 Rule codifies—the agency action that MCC purportedly challenges in this case.

"Under the terms of the APA, [MCC] must direct its attack against some particular 'agency action' that causes it harm." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). While MCC purportedly challenges provisions of 45 C.F.R. part 92 that HHS codified in the 2024 Rule, Compl. ¶ 242**,** MCC's briefing errs insofar as it instead "underst[ands the Court] to

be reviewing an abstract decision apart from [the] specific agency action[]" that it challenges. *Biden v. Texas*, 597 U.S. 785, 809 (2022).

No provision of the 2024 Rule purports to define the statutory term "sex." *See, e.g.*, 45 C.F.R. § 92.4 (definitions). Indeed, in *Tennessee*, this Court recognized that the 2024 Rule does not include "a definition of the term 'sex.'" 2024 WL 3283887, at *6 n.7. MCC's argument about the definition of the term "sex" either in the rule, in Title IX, or in Section 1557, as meaning "gender identity" is therefore not properly before the Court in this APA case.

Nor does the absence of a provision in the 2024 Rule defining the term "sex" somehow render any portion of the rule unlawful. The Supreme Court did not find it necessary to finally resolve the meaning of "sex" in Title VII to determine that the statute prohibited discrimination on the basis of gender identity. *Bostock*, 590 U.S. at 655 ("we proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female"). The agency took the same, lawful approach here of not defining "sex." 89 Fed. Reg. at 37,575 ("OCR has determined it is not necessary to define 'sex' in this rule").[12]

MCC also fails to challenge agency action in its pages of argument asserting that Title IX allows and sometimes requires sex distinctions. ECF No. 28 at 12-13. MCC does not refer to a provision of the 2024 Rule in any of these pages, and no provision of the Rule states that covered entities may not make sex distinctions.[13]

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[12] In *Tennessee*, the Court noted that "[t]he lack of a definition of the term 'sex' in the May 2024 Rule results in ambiguity." 2024 WL 3283887, at *6 n.7. Even assuming that to be true, the rule is no different than Section 1557 and Title IX inasmuch as Congress did not explicitly define the term in those statutes. If the lack of a statutory or regulatory definition of the term "sex" creates an ambiguity, a court is well-equipped to resolve it using the traditional tools of statutory construction, as the Supreme Court did in *Bostock*. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) ("[c]ourts, after all, routinely confront statutory ambiguities"); *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (courts apply traditional tools of construction to resolve typical ambiguities in agency rules).

[13] Some of the relief requested in MCC's motion is similarly inconsistent with the APA's requirement that the plaintiff challenge an identifiable agency action. The APA provides that the reviewing court shall "hold unlawful and set aside [certain] agency action, findings, and conclusions." 5 U.S.C. § 706(2). But "any alternative theory under the rule that Defendants may adopt to claim authority to prohibit gender identity discrimination using the rule" is none of those things. *See* ECF No. 27 ¶ 1. Rather, any such

III. MCC's Motion for Partial Summary Judgment Should Be Denied Without Prejudice.

In any event, the Court should not reach the merits of MCC's motion for partial summary judgment at this stage and should instead deny the motion without prejudice. A motion for partial summary judgment does not seek final judgment but instead seeks "a pre-trial adjudication that certain issues are established for trial of the case." *Massingill*, 24 F.3d at 774. But there is no basis for a trial in an APA case. "In APA cases such as this one, . . . 'the district court sits as an appellate tribunal. The 'entire case' on review is a question of law.'" *FirstHealth Moore Reg'l Hosp. v. Becerra*, 560 F. Supp. 3d 295, 303 (D.D.C. 2021) (citation omitted). It is thus standard practice to resolve APA cases on cross-motions for summary judgment that address all the plaintiff's claims. *See, e.g., id.*

This practice is standard for a reason. After production of the administrative record, the parties can narrow the universe of contested issues and then submit briefing as they would before an appellate court addressing the entire universe of plaintiff's claims, based on a complete record, at one time. Adjudicating MCC's motion for partial summary judgment risks this case devolving into piecemeal summary judgment motions. Litigating each component of each count in the complaint separately would result in multiple rounds of summary judgment briefing, which would be inefficient and time consuming for the Court and the parties.

Despite MCC's unorthodox request for bifurcated briefing in this APA case, it provides no justification for the request in its motion, merely arguing in a conclusory fashion that the Court can enter partial summary judgment on this claim, citing Fed. R. Civ. P. 54(b). ECF No. 28 at 8. But whether MCC would be entitled to Rule 54(b) certification of any decision granting or denying this motion is a separate issue from whether the Court should be entertaining a partial summary judgment motion at all. There is in fact no reason to brief the issue of whether certain

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future "alternative theory" addresses "actions yet to be taken" that "cannot be laid before the courts for wholesale correction under the APA[.]" *Lujan*, 497 U.S. at 893. (Defendants understand the language "gender-identity nondiscrimination mandate" in paragraph 2, while ambiguous, to be 45 C.F.R. § 92.101(a)(2)(iv).)

provisions of the 2024 Rule are contrary to Section 1557 ahead of briefing on MCC's claims that the same provisions are arbitrary and capricious, or contrary to constitutional right, Compl. ¶¶ 268-323. The mere fact that MCC wants to litigate one portion of one count of its Complaint is not a sufficient reason for bifurcated briefing in an APA case, since any APA plaintiff could make that argument, and the exception would swallow the rule. In short, MCC has provided no reason, and there is no reason, for bifurcated briefing. The Court thus should deny MCC's motion as premature, consistent with standard APA practice to litigate all claims in an APA case at once, following production of the administrative record.

IV. MCC Seeks Unwarranted Remedies.

A. MCC Is Not Entitled to Declaratory or Injunctive Relief.

MCC has not shown that it is entitled to declaratory or injunctive relief. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*. MCC has not satisfied any of these requirements.[14]

[14] "[T]he discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court. Such equivalence of effect dictates an equivalence of criteria for issuance." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) (citing *Samuels v. Mackell*, 401 U.S. 66, 73 (1971)); *see also Bradley Lumber Co. of Ark. v. NLRB*, 84 F.2d 97, 100 (5th Cir. 1936) (The "power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin.").

1. MCC has Failed to Show Imminent Irreparable Injury.

MCC's conclusory allegations of possible future harm do not establish imminent irreparable injury. "An injunction is appropriate only if the anticipated injury is imminent and irreparable." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). The mere existence of a statute or rule on the books cannot itself be irreparable injury; the injury must derive from "actual or threatened *enforcement*." *California v. Texas*, 593 U.S. 659, 670 (2021). And MCC has adduced no evidence showing imminent enforcement and irreparable injury here.

First, MCC is foreclosed from showing imminent irreparable injury due to the *Neese* Final Judgment, which protects MCC from any enforcement action by HHS by declaring that Section 1557 "does not prohibit discrimination on account of . . . gender identity," Final Judgment at 1, *Neese v. Becerra*, No. 2:21-cv-163 (N.D. Tex. Nov. 22, 2022), ECF No. 71 ("*Neese* Final Judgment"). *See* ECF No. 36 at 6-11.

Even notwithstanding the *Neese* Final Judgment,[15] MCC would still face no imminent irreparable injury. MCC asserts that the rule "forces [it] to perform or refer for transition procedures, self-censor, use self-selected pronouns, and remove [certain] signs" from its "lactation rooms." ECF No. 28 at 21. But MCC's speculation that it will be subject to enforcement action based on that "fuzzily defined range" of behavior is insufficient to show certainly impending irreparable injury. *See Google, Inc. v. Hood*, 822 F.3d 212, 227 (5th Cir. 2016). And even if enforcement was certainly impending, the nature of the enforcement scheme that Congress chose means that MCC faces no imminent irreparable injury.

Consider first MCC's mistaken assertion that the rule requires it to perform "transition procedures[.]" ECF No. 28 at 21. MCC is not required to perform any health service if it "has a legitimate, nondiscriminatory reason for denying or limiting that service," including where MCC "determines that such health service is not clinically appropriate for a particular individual." 45 C.F.R. § 92.206(c). And MCC claims that its conduct in this area is "[b]ased on medical

[15] The Government's appeal of the *Neese* Final Judgment is pending before the Fifth Circuit.

judgment[.]" Decl. of Michael Artigues, M.D. F.C.P ¶ 26, ECF No. 1-2 ("Artigues Decl."). Given that claimed basis—presumably made in good faith—"the prospect of [an enforcement action] is not sufficiently imminent or defined to justify an injunction." *Google, Inc.*, 822 F.3d at 228.

MCC's conclusory assertions purportedly related to enforcement of 45 C.F.R. § 92.101(a)(2)(iv) fare no better at establishing imminent irreparable injury. *See* ECF No. 28 at 21. First, MCC's unexplained assertion that § 92.101(a)(2)(iv) instructs it to "self-censor" by preventing it "from expressing its medical judgment[]" is wrong. *See* ECF No. 28 at 5, 21. As HHS repeatedly noted in the preamble, no provision "compels clinicians to provide a service that they do not believe is medically appropriate for a patient[,]" let alone compels them to speak in some way that is contrary to their medical judgment. 89 Fed. Reg. at 37,595-96. In a facial challenge, MMC cannot rely on speculation about how an antidiscrimination statute will be applied when it has not "been applied in this case for the purpose of hampering the organization's ability to express its views." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

MCC's remaining fears of enforcement, which relate to claims of hostile environment harassment, are just as speculative. *See* ECF No. 28 at 21 ("use self-selected pronouns" and "remove its 'Breastfeeding Moms Only' signs"). Section 92.101(a)(2)(iv) does nothing to override longstanding standards used to determine when creation of a hostile environment constitutes actionable discrimination. And those type of claims typically require "severe, pervasive, and objectively offensive" harassment. *See Davis*, 526 U.S. at 633. Under *Davis*'s standard, for example, a claimant must establish harassment of patients "that so undermines and detracts from the victims' [health-care] experience, that the victim-[patients] are effectively denied equal access to an institution's resources and opportunities." *Id*. at 651. And in the preamble, HHS confirmed that it intends to apply that standard when investigating complaints under Section 1557. 89 Fed. Reg. at 37,595 ("if the conduct is so severe or pervasive that it denies a patient access to medical care, it would no longer be permissible"). MCC does not explain how its conduct rises to that level because, for example, it has a sign that says,

"Breastfeeding Moms Only." At the very least, "the prospect of [an enforcement action]" based on such a sign "is not sufficiently imminent or defined to justify an injunction." *Google, Inc.*, 822 F.3d at 228.

MCC's assertions that the rule itself imposes imminent irreparable injury ignores the statutory enforcement procedures established by Congress, which, even assuming HHS pursued enforcement against MCC, would begin with a request for compliance by "voluntary means." 20 U.S.C. § 1682. *See supra* at 3. MCC has not identified any "irremediable adverse consequences [that would] flow from requiring a later challenge to this regulation" if HHS ever made such a hypothetical future request. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967). Indeed, the Fifth Circuit has held that failure to adduce a similar "formal notice of intent" to enforce a generalized statutory duty precludes a plaintiff from showing imminent irreparable injury. *See Google, Inc.*, 822 F.3d at 227. What is more, courts have been "unable to conclude that plaintiffs will suffer irreparable harm if they are required to present their constitutional claims to the courts following the completion of [the same] administrative proceedings" incorporated into Section 1557. *See Sch. Dist. of City of Saginaw v. U.S. Dep't of Health, Educ. & Welfare*, 431 F. Supp. 147, 154 (E.D. Mich. 1977); *see also FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (holding that the plaintiff's "expense" of "defending itself in" "adjudicatory proceedings" does not constitute irreparable harm).[16]

[16] Importantly, MCC has not shown that it would suffer any "retroactive penalty" at the hands of HHS for relying on a belief that its current conduct does not violate Section 1557. *Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006). To the contrary, in Section 1557, Congress did "not wish to use punitive measures[.]" 110 Cong. Rec. 7045, 7059 (1964). Indeed, one reason that Congress precluded any funding termination decision from taking effect until after a review process by congressional committees, *supra* at 3, was to provide a "further opportunity to end the discrimination without the necessity of cutting off Federal funds." 110 Cong. Rec. at 7060. Compliance at any point during any putative enforcement process would thus preclude HHS from terminating funding. 45 C.F.R. § 80.7(d) (no funding loss proceedings if compliance can be achieved voluntarily after OCR investigation); *id.* § 80.10(f) (permitting recipient to "correct[] its noncompliance" to preclude future funding loss after decision by hearing examiner but before decision takes effect); *see also id.* § 80.10(g) (recipient "shall be restored to full eligibility" as soon as "it brings itself into compliance"). In other words, if, hypothetically, HHS were to one day disagree with MCC about whether one of its policies violates Section 1557, MCC could then change its policy upon HHS's request or after an adjudication,

MCC fares no better in asserting that it suffers irreparable "compliance costs." Mr. Artigues asserts that the rule will cost MCC about $3,000 due to the requirements to have a written nondiscrimination policy and to train MCC employees. Artigues Decl. ¶¶ 32-49. At least two issues preclude MCC from relying on those alleged costs. First, these requirements are imposed by other provisions of Part 92 that require MCC to adopt a general nondiscrimination policy, *see* §§ 92.8, 92.9, not §§ 92.101(a)(2)(iv) or 92.206(b)(4), (c). And §§ 92.8, 92.9 cover all forms of discrimination prohibited by Section 1557—including discrimination on the basis of race, disability, and sex (even aside from gender identity). In other words, MCC would have to undertake those costs even if the rule did not cover discrimination on the basis of gender identity. Moreover, "[n]othing in the text of these [policies and training] provisions suggest they would not operate without [§§ 92.101(a)(2)(iv), 92.206(b)(4), (c)]." *See California*, 593 U.S. at 678. And MCC has not submitted any evidence showing or explaining why having a written policy or training that includes "gender identity" along with "race" and all other forms of discrimination prohibited by Section 1557 imposes incremental costs.[17]

Second, the relief MCC seeks does not issue "to restrain an act the injurious consequences of which are merely trifling." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citation omitted). And it is implausible that about $3,000 "is disproportionate to the business" of MCC, *Petrol. Expl. v. Pub. Serv. Comm'n of Ky.*, 304 U.S. 209, 220 (1938); MCC

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without any loss of federal funds. And at any "point in any putative enforcement process, [MCC] would be able to raise the same claims [it] now raise[s]." *Am. Coll. of Pediatricians v. Becerra*, No. 1:21-cv-195, 2022 WL 17084365, at *15 (E.D. Tenn. Nov. 18, 2022), *appeal dismissed*, No. 23-5053, 2024 WL 3206579 (6th Cir. June 27, 2024).

[17] Other facts cast doubt on the plausibility of Mr. Artigues' assertions about compliance costs. For example, MCC must "adopt antidiscrimination policies and . . . educate [its] personnel" to avoid liability under Title VII. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). And MCC does not dispute that those Title VII trainings must cover gender identity discrimination. *See Bostock*, 590 U.S. at 680. Moreover, insofar as Mr. Artigues's claimed "compliance costs" are nothing more than the labor hours associated with reading the rule or obtaining legal advice on how to comply with Section 1557, Artigues Decl. ¶ 31, they provide no basis for equitable relief. These costs are "part of the social burden of living under government" and therefore do not constitute irreparable injury. *Standard Oil*, 449 U.S. 244 (quoting *Petroleum Expl., Inc. v. Pub. Serv. Comm'n of Ky.*, 304 U.S. 209, 222 (1938)).

"fails to provide any information placing the alleged [costs] in the context of [MCC's] overall finances." *Nat'l Council of Agric. Emps. v. U.S. Dep't of Lab.*, No. 22-3569, 2023 WL 2043149, at *7 (D.D.C. Feb. 16, 2023).

2. MCC Has Not Shown Inadequate Alternative Remedies at Law.

MCC has made no showing that it lacks an adequate remedy at law. To the extent that MCC alleges that termination of future federal funding for any of its conduct would violate Section 1557, ECF No. 28 at 21, MCC can raise those claims in a district court proceeding seeking judicial review of any hypothetical future decision to terminate federal funding. *See* 20 U.S.C. § 1683. "Before any agency decision to terminate funds can become effective, [MCC] will be able to seek judicial review as provided for in Tile VI." *Sch. Dist. of City of Saginaw*, 431 F. Supp. at 154. MCC "can have a recognition of all [its] just rights under the scheme of procedure set up by the act." *Bradley Lumber Co.*, 84 F.2d at 100; *see also FTC v. Claire Furnace Co.*, 274 U.S. 160, 173-74 (1927) (plaintiff may "adequately . . . present[] every ground of objection" to agency action in the event it is enforced and thus district court "should have refused to entertain" an injunction).

3. The Equities and the Public Interest Weigh Against Declaratory and Injunctive Relief.

The balance of harms and public interest considerations "merge when the Government is the opposing party" and tilt decisively against granting an injunction here. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Even if MCC established that it faces about $3,000 in costs, against that sum weighs the significant public interest in permitting HHS to enforce Congress's command to combat discrimination in health programs and activities receiving federal funds. It is well established that violations of federal civil rights statutes constitute irreparable harm. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969). A patient denied care for a sore throat just because a provider wants to intentionally penalize them for their sex-related traits suffers irreparable injury. No amount of money can compensate a patient for the detrimental effect of discrimination on their health. Moreover, when a 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) (citation omitted).[18]

B. The Court Should Not Enter Relief for Nonparties and Must Limit Relief to Provisions Implementing Section 1557.

If the Court concludes that HHS's promulgation of any portion of the 2024 Rule was unlawful, and even if the APA authorizes vacatur of against action,[19] the Court should decline as a matter of equitable discretion to enter a universal vacatur of any provision of the rule. Text and precedent both make clear that whether to enter vacatur—and the scope of any such relief—is constrained by equitable principles. And those principles limit proper relief redressing the injuries of the named plaintiff, thus foreclosing universal vacatur in this case.

The APA is not properly read to require vacatur—much less universal vacatur—of challenged action, in light of traditional equitable principles generally restricting relief beyond the parties. Congress enacted the APA against a background rule that statutory remedies must be construed in accordance with "traditions of equity practice[.]" *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The Supreme Court has recently reinforced this principle of interpretation, instructing that, "[w]hen Congress empowers courts to grant equitable relief, there is a strong presumption that courts will exercise that authority in a manner consistent with traditional principles of equity." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024). And the Court

[18] MCC devotes much of its briefing to claimed medical harms from puberty blockers and cross-sex hormones. ECF No. 28 at 23-24. But medical providers are expected to consider relevant studies and data in their field of practice when making treatment decisions, including determining whether to provide hormone therapy to an adolescent with gender dysphoria. Consistent with the statutory language, the rule precludes denials of treatment or coverage that are based on unlawful animus or bias, or constitute a pretext for discrimination, while permitting denials that are based on legitimate nondiscriminatory reasons, such as medical judgment. 45 C.F.R. § 92.206(c). Insofar as MCC understands the rule to require a clinician to provide a health service to an individual that is contrary to the clinician's medical judgment, MCC is mistaken. *See supra* at 4, 17-18, 23-24.

[19] Defendants preserve for further review the argument that the APA's provision for the courts to "set aside" unlawful agency actions, 5 U.S.C. § 706(2), does not authorize the type of universal vacatur that MCC seeks. *But see Tex. Med. Ass'n v. HHS*, 110 F.4th 762, 779 (5th Cir. 2024) (rejecting the argument that the APA does not authorize vacatur).

explained that even seemingly mandatory statutory language—such as a directive "that an injunction 'shall be granted' if" certain conditions are met—will not "supplant the traditional equitable principles" governing relief. *Id.* at 1577. "[S]uch an abrupt departure from traditional equity practice" as requiring relief no matter the equities requires "plain[er]" language than that. *Id.*; *see also Hecht Co.*, 321 U.S. at 329 (Congress's authorization for courts to issue a remedy "hardly suggests an absolute duty" to grant such relief "under any and all circumstances.").

So too with the APA. As an initial matter, the APA itself provides for traditional forms of equitable actions and relief, such as "declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. § 703, and explicitly preserves "the power or duty of the court to . . . deny relief on any . . . equitable ground[,]" *id.* § 702. In light of the traditional equitable principles against which the statute was enacted—and which are explicitly incorporated into the statute—there is no sound reason to conclude that Congress did not merely authorize but compelled courts to abandon the "bedrock practice of case-by-case judgments with respect to the parties in each case" by adopting the unremarkable "set aside" language in § 706. *United States v. Texas*, 599 U.S. 670, 695 (2023) (Gorsuch, J., concurring in the judgment) (quotation omitted).

Finally, this construction of the APA—as permitting, but not requiring, universal vacatur—is consistent with Fifth Circuit precedent. The Fifth Circuit has treated universal vacatur as a discretionary equitable remedy, not one that is automatic or compelled in every case. *See Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality opinion) (concluding without contradiction from any other member of the Court that the district court could consider on remand "a more limited remedy" than universal vacatur, and instructing the district court to "determine what remedy . . . is appropriate to effectuate" the judgment), *aff'd*, 602 U.S. 406 (2024); *see Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 952 n.102 (5th Cir. 2024) (noting that the en banc *Cargill* court remanded the case to district court for briefing on the appropriate scope of any relief under the APA). And the Fifth Circuit has sometimes declined

to enter vacatur in favor of a remedy termed "remand without vacatur" when equitable principles so directed. *E.g.*, *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).[20]

In this case, the Court could afford complete relief to MCC by ordering that any vacatur (as well as injunction or declaration) be limited to MCC. In light of the traditional equitable principles incorporated by the APA, the Court should therefore limit any relief to MCC and "deny relief" that is universal in scope, 5 U.S.C. § 702(1), which is "the norm," *see Mock v. Garland*, 75 F.4th 563, 587 (5th Cir. 2023) (citation omitted).

This case starkly illustrates some practical problems with universal relief. *See Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, C.J., concurring). In addition to the two cases before this Court, other lawsuits challenging the rule have been filed in other courts. Issuing nationwide relief here would intrude into the province of other judges to adjudicate the cases and controversies before them and deprive the judicial system of the benefits that accrue when different courts grapple with complex legal questions in a careful, considered dialogue. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring in the grant of stay).

Moreover, the scope of any relief ordered by the Court should be limited to provisions of the rule that implement Section 1557. MCC's proposed relief focuses on the entirety of "HHS's rule, Nondiscrimination in Health Programs and Activities 89 FR 35522 (May 6, 2024), to the extent it reaches discrimination on the basis of gender identity." ECF No. 27 ¶ 1. But that document includes amendments to portions of the code of federal regulations that MCC does not actually challenge in its briefing and that are authorized by statutes other than Section 1557. MCC nowhere addresses those statutes, which have little to do with MCC's arguments. *See* 89

[20] In addressing the scope of relief under 5 U.S.C. § 705, the Fifth Circuit recently observed that, "[w]hen a reviewing court determines that agency regulations are unlawful, the *ordinary* result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Career Colls. & Schs. of Tex.*, 98 F.4th at 255 (emphasis added) (citation omitted). But "ordinary," of course, does not mean "mandatory."

Fed. Reg. at 37,691-703. The Fifth Circuit has made clear that any relief should only involve "portions of the Rule" that a plaintiff "*actually challenges*." *Career Colleges*, 98 F.4th at 255. And although Defendants believe that that MCC's arguments are tailored to 45 C.F.R. § 92.101(a)(2)(iv), there is no way that MCC's arguments could be construed to encompass provisions of the code of federal regulations falling outside of Title 45 Part 92, which includes the entirety of HHS's regulations promulgated under Section 1557 authority. *See* 89 Fed. Reg. at 37,693-702.[21] Nor should the Court consider relief that is broader in scope than what MCC has requested.

V. There is no Basis to Grant MCC's Motion for Certification Under Rule 54(b).

MCC has provided no basis to grant its motion to certify under Rule 54(b) an interlocutory decision that this Court has not even entered. Rule 54(b), which must be applied in a manner that effectively preserves "the historic federal policy against piecemeal appeals," *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980) (citation omitted), permits, in limited circumstances, a court to direct entry of final judgment of interlocutory decisions. Fed. R. Civ P. 54(b). This rule requires a two-step analysis. *Curtiss-Wright Corp.*, 446 U.S. at 7-10; *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435-38 (1956). First, a district court must determine that it has rendered a final "'judgment' in the sense that it is a decision on a cognizable claim for relief[.]" *Curtiss-Wright*, 446 U.S. at 7 (citation omitted). Next, the district court must determine whether there is any just reason for delay. *Id.* at 8. MCC has satisfied neither step.

At the first step, MCC has not shown that the Court has entered a judgment on a single claim for relief, within the meaning of Rule 54(b). The Fifth Circuit "has not announced a single test for" addressing this step, *Johnson v. Ocwen Loan Servicing LLC*, 916 F.3d 505, 508 (5th Cir.

[21] Separately, MCC lacks standing to seek vacatur of, or an injunction against enforcement of, or any other relief with respect to, any application of 45 C.F.R. § 92.207, which address nondiscrimination in health insurance coverage. MCC is not a health insurance issuer and does not otherwise allege that it provides health-related coverage within the meaning of the Rule. *See Walker v. Azar*, No 20-cv-2834, 2020 WL 6363970, at *3 (E.D.N.Y. Oct. 29, 2020). The Rule does "not apply to any employer or other plan sponsor of a group health plan, including . . . the provision of employee health benefits." 45 C.F.R. § 92.2(b).

2019), and instead looks to the "competing methods" from other circuits to provide "guideposts." *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000). "One approach 'focuse[s] upon the possibility of separate recoveries under arguably separate claims.'" *Id*. (citation omitted). "If the alleged claims for relief do not permit more than one possible recovery, then they are not separately enforceable nor appropriate for Rule 54(b) certification." *Id*. "Another approach 'concentrate[s] on the facts underlying the putatively separate claims.'" *Id*. (citation omitted). "[I]f there is a great deal of factual overlap between the decided and the retained claims they are not separate[.]" *Id*. Finally, "claims are not distinct when they are 'so closely related that they would fall afoul of the rule against splitting claims if brought separately.'" *Id*. (citation omitted).

MCC has not shown that the claim it pursues in its motion for partial summary judgment is appropriate for Rule 54(b) certification under any of these methods. Vacatur, or an injunction against enforcement, of 45 C.F.R. § 92.101(a)(2)(iv) is the same relief that MCC is seeking for the claims that would remain to be litigated in this case if this Court entered final judgment for MCC on the claim at issue in the present motion, Compl. Prayer for Relief; thus, MCC has not satisfied the separate recoveries test. *See Lloyd Noland Found, Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 780 (11th Cir. 2007) ("Resolution of one theory [does] not constitute a 'final judgment' conferring appellate jurisdiction while the alternate theory for the same relief remain[s] outstanding."). MCC cannot explain, for example, what separate and different relief it would still be seeking if later in the litigation it succeeds in showing that the same challenged provisions are arbitrary and capricious or violate "structural principles of federalism." Compl. ¶¶ 268-80, 305-23.

There is also a great deal of factual overlap between the legal theory at issue in the present motion and the claims that remain. For example, it is not clear why MCC's aforementioned claim regarding the structural principles of federalism, *id.*, would be based on different facts. MCC alleges that it brings those claims "as to the rule's gender-identity nondiscrimination requirements." *Id*. ¶ 306.

And if MCC were to bring remaining claims in the Complaint in separate litigation, that would violate the rule against claim splitting. The rule against claim splitting applies "if the claims involve[] the same parties and arises out of the same transaction or series of transactions as the first claim." *Hearn v. Bd of Supervisors of Hinds Cnty.*, No. 3:12-CV-417-CWR-FKB, 2013 WL 1305586, at *2 (S.D. Miss. Mar. 27, 2013) (citation omitted). Take, for example, MCC's claim that "the rule's gender identity nondiscrimination requirements . . . transgress[] on the reserved powers of the States." Compl. ¶¶ 306, 309. Whether the alleged single wrong is HHS's promulgation of 45 C.F.R. § 92.101(a)(2)(iv) or MCC's feared future enforcement of that provision, either case involves the same parties and the same transaction as the theories MCC has briefed in the present motion.

MCC has also failed to satisfy the second step required for Rule 54(b) certification—showing that there is no just reason for delay. The function of the district court at step two is to act as a "dispatcher" exercising sound judicial discretion to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. *Curtiss-Wright*, 446 U.S. at 7-8 (quoting *Mackey*, 351 U.S. at 435, 437). Because this second step must be exercised "in the interest of sound judicial administration" in order "to assure that application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals[,]'" *id.* at 8 (citation omitted), MCC must establish that this is the infrequent case that presents it with "some danger of hardship or injustice through delay which would be alleviated by immediate appeal; it should not be entered routinely as a courtesy to counsel[,]" *PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996).

But MCC presents no argument to rebut. It has not shown, for example, that it would be "many months, if not years" to resolve the remaining claims without certification. *See Curtiss-Wright*, 446 U.S. at 6. To the contrary, APA claims are resolved without trial using cross-motions for summary judgment. *See supra* at 21. Nor is there a financial judgment at issue causing MCC to "suffer severe daily financial loss" due to "current interest rates." *Curtiss-Wright*, 446 U.S. at 6. MCC seeks only prospective relief against future HHS administrative

enforcement. But HHS is already precluded from enforcing Section 1557's prohibition on gender identity discrimination against MCC by the class-wide declaratory judgment in *Neese, Neese* Final Judgment at 2, as well as the nationwide stay order and preliminary injunction issued by this Court in *Tennessee*, 2024 WL 3283887, at *14, and the nationwide stay order issued by the district court in *Texas*, Order Modifying Stay at 4, *Texas v. Becerra*, No. 6:24-cv-211 (E.D. Tex. Aug. 30, 2024), ECF No. 41. *See* ECF No. 36. "It will be a rare case where Rule 54(b) can appropriately be applied when the contestants on appeal remain, simultaneously, contestants below." *Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 44 (1st Cir. 1988). This is not that rare case.

If the Court grants MCC's motion for partial summary judgment but does not certify the order under Rule 54(b), the Court should provide Defendants with clear notice of whether it intends any relief to take immediate effect. Unless the Court makes clear that it is entering an immediately effective and appealable interlocutory injunction, relief entered upon entry of an order granting a motion for partial summary judgment would be interlocutory and thus ineffective until the Court enters final judgment. *Gerardi v. Pelullo*, 16 F.3d 1363, 1371 n.13 (3d Cir. 1994); *Int'l Controls Corp. v. Vesco*, 535 F.2d 742, 744-46 (2d Cir. 1976); *Redding & Co. v. Russwine Const. Corp.*, 417 F.2d 721, 727 (D.C. Cir. 1969); *Gauthier v. Crosby Marine Serv., Inc.*, 590 F. Supp. 171, 175 (E.D. La. 1984).

CONCLUSION

Plaintiff's Motion for Partial Summary Judgment should be denied.

Dated: October 22, 2024

Respectfully submitted,

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