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
PLAINTIFFS' MOTION FOR A DELAY OF EFFECTIVE DATE
AND FOR PRELIMINARY INJUNCTION

INTRODUCTION

Section 1557 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18116, prohibits recipients of Federal financial assistance from excluding individuals from health programs or activities, denying them benefits, or otherwise discriminating against them, on the basis of race, color, national origin, sex, age, or disability. The U.S. Department of Health and Human Services ("HHS") promulgated a new rule that implements Section 1557's nondiscrimination obligations (the "Rule"). As relevant here, the Rule provides that sex discrimination that violates Section 1557 includes discrimination on the basis of gender identity.

Plaintiff McComb Children's Clinic LTD. ("MCC") filed this lawsuit against HHS challenging the Rule. This suit misapprehends the Rule in multiple ways. For example, MCC alleges that the Rule forces it to ignore sound medical judgment and categorically require the provision of particular treatments, like puberty blockers, hormones, and "lactation training for men." ECF No. 7 at 1, 5, 8. Not so. Contrary to MCC's allegations, the "final rule does not promote any particular medical treatment, require provision of particular procedures, mandate coverage of any particular care, or set any standard of care; rather, the final rule implements the nondiscrimination requirements of section 1557." *Nondiscrimination in Health Programs and Activities*, 89 Fed. Reg. 37,522, 37,533 (May 6, 2024). In fact, nothing in the Rule requires the provision of any particular health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting the service, such as, for example, a clinician's medical judgment. 45 C.F.R. § 92.206(c).[1] And nothing in the Rule mandates that any clinician follow any organization's standards of care or clinical practice guidelines.

MCC's motion for a delay of the Rule's effective date or a preliminary injunction should be denied. First, MCC has failed to establish likelihood of success on the merits. MCC claims that the Rule's statement that prohibited discrimination includes discrimination on the basis of gender identity, 45 C.F.R § 92.101(a)(2)(iv), is contrary to § 1557. But § 1557 precludes discrimination on the basis of sex. Interpreting materially identical language in Title VII, the Supreme Court held

[1] Provisions of the Rule cited in this brief refer to those published at 89 Fed. Reg. at 37,691-703.

that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020). Following that reasoning, the Rule provides that discrimination on the basis of gender identity is prohibited sex discrimination under § 1557 as well. 45 C.F.R. § 92.101(a)(2)(iv). *See* 89 Fed. Reg. at 37,574. MCC's arguments to the contrary ignore the statutory language and are rooted in hypothetical future disagreements with HHS about possible applications of the Rule that do not reflect any decisions HHS made in the Rule itself. MCC also challenges a required Notice of Nondiscrimination under the First Amendment. But MCC's First Amendment claims appear to be based on a misunderstanding of the Rule's provisions governing the required notice, which permit MCC to state that it does not provide abortions and does not provide particular medical services that are inconsistent with its legitimate, nondiscriminatory medical judgments. MCC also raises a "principles of federalism" claim. But it fails because § 1557 represents a valid exercise of Congress's spending power.

In any event, MCC cannot establish imminent irreparable harm because it is protected by the judgment in *Neese v. Becerra*, 640 F. Supp. 3d 668 (N.D. Tex. 2022). There, the court certified a class of "[a]ll health-care providers subject to Section 1557 of the [ACA,]" which includes MCC, and entered a declaratory judgment against HHS stating that "Section 1557 of the ACA does not prohibit discrimination on account of . . . gender identity." Exhibits ("Exs.") A, B to Ex. 1. As long as it remains valid and binding between Defendants and MCC, HHS's Office for Civil Rights ("OCR") will not enforce the Rule against MCC insofar as it its conduct falls within the subject matter of the class action judgment. 89 Fed. Reg. at 37,574 n.118. MCC seeks the same relief here, but, because it is a member of the *Neese* class, it cannot show imminent irreparable harm from the Rule's enforcement. *Neese*—and another lawsuit brought on MCC's behalf—preclude MCC from proceeding here.

Moreover, for reasons apart from *Neese*, MCC has failed to demonstrate imminent irreparable harm. The Rule does not include a determination that any of MCC's particular policies violate § 1557. And § 1557 requires extensive procedures, culminating in judicial review, before

HHS may terminate any entity's federal funding. Thus, even putting aside the class action declaratory judgment in *Neese*, MCC does not face an imminent prospect of losing Federal financial assistance. And MCC has not established that HHS enforces § 1557 or the Rule by way of financial penalties.

Finally, the public interest and the potential harms to third parties outweigh any hypothetical future injuries to MCC from the Rule's enforcement. At its core, the Rule precludes providers from denying patients medically necessary care they typically provide—whether, for *e.g.*, a sore throat, a broken bone, or cancer—because of traits or actions that they would not have questioned in members of a different sex. No amount of money can compensate a patient for the detrimental effect of discrimination on their health. There is a significant public interest in permitting HHS to enforce § 1557 to protect patients from discrimination in all of the programs and activities to which § 1557 applies, as Congress intended. For all these reasons, Defendants respectfully request that the Court deny MCC's motion.

BACKGROUND

I. Statutory and Regulatory Background

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

Through reference to longstanding civil rights statutes, such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, § 1557 prohibits discrimination on the ground of race, color, national origin, sex, age, or disability in any health program or activity any part of which is receiving Federal financial assistance. 42 U.S.C. § 18116(a).[2]

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

[2] 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.

U.S.C. § 2000d-1 (Title VI). HHS's enforcement is typically a complaint-driven process, though 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) (§ 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 § 1557. *Id*. § 80.7(c) (incorporated by § 92.303(a)).

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. 20 U.S.C. § 1682. If that negotiation is unsuccessful, and if it wishes to proceed further, 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*.[3] 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. Accordingly, the ultimate arbiters of any violation of § 1557 and the Rule are Article III courts.

B. HHS's 2024 Rule Implementing § 1557

HHS published the Rule in the Federal Register on May 6, 2024. *See* 89 Fed. Reg. 37,522 (codifying 45 C.F.R. pt. 92). 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).[4]

[3] 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 there has been a determination "that compliance cannot be secured by voluntary means." *Id*.

[4] Because MCC's briefing is limited to whether discrimination on the basis of sex includes discrimination on the basis of gender identity, as well as the Rule's Notice of Nondiscrimination requirement, the discussion that follows is limited accordingly. Although MCC seeks to enjoin 45 C.F.R. § 92.101, ECF No.

In § 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 care providers, and pharmacies. Among other specific provisions, § 92.206(b)(3) precludes providers from "treating individuals differently or separating them on the basis of sex in a manner that subjects any individual to more than de minimis harm[.]" This provision clarifies that the Rule does not prohibit "a covered entity from operating sex separated programs and facilities[.]" 89 Fed. Reg. at 37,593. For example, merely providing separate bathrooms labeled for men and women is not discrimination on the basis of sex. "Not all differential treatment on the basis of sex constitutes unlawful discrimination under Section 1557, and the final rule does not prohibit all differential treatment." *Id.*

Section 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." But § 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

6, most provisions of that section are not meaningfully challenged here, including those concerning discrimination on the basis of race, color, national origin, age, disability, and sexual orientation (as a form of prohibited sex discrimination), 45 C.F.R. § 92.101. MCC's motion, ECF No. 6, also seeks to enjoin enforcement of a number of sections as "applied with respect to 'sex' discrimination encompassing gender identity or sex stereotypes or with respect to notices or speech made by entities pertaining to pregnancy-related conditions encompassing 'termination of pregnancy.'" ECF No. 6 ¶ 1. That "as-applied" relief would apply to § 92.5, which addresses assurances of nondiscrimination; § 92.6, which addresses remedial and voluntary actions by recipients; § 92.7, which addresses a § 1557 coordinator; § 92.8, which requires a written nondiscrimination policy; § 92.9, which governs training; § 92.207, which addresses nondiscrimination in health insurance coverage and other health-related coverage; § 92.208, which addresses sex discrimination related to marital, parental, or family status; § 92.209, which addresses nondiscrimination on the basis of association; § 92.210, which addresses nondiscrimination in the use of patient care decision support tools; § 92.211, which addresses nondiscrimination in the delivery of health programs and activities through telehealth services; § 92.301, which restates the statutory text regarding enforcement mechanisms; and §§ 92.303-04, which clarify procedures for processing complaints and administrative enforcement actions. MCC's briefing does not raise any argument addressing the legality of these provisions, and Defendants therefore do not address them here.

> 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).

Section 92.10—which is not effective until November 2, 2024, 45 C.F.R. § 92.1(b) (Table 1)—requires covered entities to provide a Notice of Nondiscrimination to participants, beneficiaries, enrollees, and applicants of its health programs and activities, and members of the public. The notice must state that "[t]he covered entity 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." *Id*. § 92.10(a)(1)(i). The notice must also include statements related to serving individuals with disabilities and individuals with limited English proficiency, and must identify how patients can file a complaint with OCR. *Id.* § 92.10(a)(1)(ii)-(iv), (vii). For recipients with more than 15 employees, the notice must also identify a point of contact who is responsible for compliance and must describe any available grievance procedure. *Id.* § 92.10(a)(1)(vi)-(vii). The notice must be provided to patients (1) annually, (2) upon request, (3) at a conspicuous location on the covered entity's website, if it has one, and (4) in clear and prominent physical locations. *Id*. § 92.10(a)(2).

Recipients of Federal financial assistance are also subject to Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973. Longstanding regulations under these statutes already require covered entities to provide notice to patients and other beneficiaries of their right to be free from discrimination. 45 C.F.R. §§ 80.6(d) (Title VI), 84.8 (Section 504), 91.32 (Age Act). The Rule permits covered entities to combine the § 1557 Notice of Nondiscrimination with these notices. *Id.* § 92.10(b).

II. MCC's Incorrect Claims Concerning the Rule

MCC misapprehends the Rule's scope and what it requires. At the outset, Defendants emphasize four general points. First, as HHS repeatedly emphasized in the preamble, the Rule does not set a standard of care or 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 37,595-96 ("There is no part of section 1557 that compels clinicians to provide a service that they do not believe is medically appropriate for a patient or that they are not qualified to provide."); *see also id*. at 37,533.

Second, and relatedly, insofar as MCC suggests that the Rule reflects an HHS determination that gender affirming care is inherently medically necessary, ECF No. 7 at 2, MCC is wrong. The Rule does not displace the judgment of providers as to the medical necessity of gender affirming care, 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 a proposed provision of § 92.206(c), which read: "However, 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. In the Rule, HHS replaced it with "[a] covered entity's determination must not be based on unlawful animus or bias, or constitute a pretext for discrimination." *Id*.; *see also id*. ("the [R]ule does not (and cannot) set a standard of care for gender-affirming care"); *id.* ("OCR understands that a provider may have a legitimate nondiscriminatory reason not to provide a health service, which the newly revised § 92.206(c) makes clear.").

Third, the Rule does not reflect a determination of which pronouns staff at MCC must use when interacting with any patient. ECF No. 7 at 3. Rather, the plain language of the Rule provides that MCC and other covered entities cannot treat people differently on the basis of sex—including preventing an individual from participating in the health program or activity consistent with the individual's gender identity—if it causes more than de minimis harm to an individual. 45 C.F.R. § 92.206(b)(3). Moreover, as the preamble explains:

> OCR takes seriously concerns about, and is fully committed to upholding, the First Amendment, and nothing in these regulations restricts conduct protected by the First Amendment. Whether discrimination is unlawful or considered harassment is necessarily fact-specific. This final rule does not purport to identify all of the circumstances that could constitute unlawful harassment. It is unlikely that an

> isolated incident with no other indications of animus or ill treatment would meet the standards for discriminatory harassment. Conversely, OCR notes that conduct, including verbal harassment, that is so severe or pervasive that it creates a hostile environment on the basis of sex is a form of sex discrimination.

89 Fed. Reg. at 37,956 (footnote omitted).

Fourth, the required Notice of Nondiscrimination does not require MCC to "imply that it would perform, refer for, or affirm gender-transition procedures or elective abortions." ECF No. 7 at 3-4. It instead discloses to patients their right to be free from discrimination at essentially the same level of generality as § 1557 itself. 45 C.F.R. § 92.10. As discussed in further detail below, nothing in the Rule precludes MCC from indicating in its notice that it does not provide gender-affirming care where such care is not clinically appropriate, provided that the statement is based upon a legitimate, nondiscriminatory reason.

Moreover, disclosing that MCC does not discriminate on the basis of sex—consistent with the plain language of § 1557—does not imply that MCC provides abortions. Nothing in the Rule precludes MCC from indicating on its notice that it does not provide abortions. The Rule itself states that "nothing in Section 1557 shall be construed to have any effect on Federal laws regarding . . . willingness or refusal to provide abortion; and discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 C.F.R. § 92.3(c) (citing 42 U.S.C. 18023(c)(2)(A)); *see also* 89 Fed. Reg. at 37,576.

III. Procedural History

MCC filed this lawsuit on May 13, 2024. Compl., ECF No. 1. On June 3, 2024, MCC filed a motion for a delay of effective date and for preliminary injunction. ECF No. 6.

LEGAL STANDARDS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008); *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009) ("Injunctive relief is 'an extraordinary and drastic remedy[]' and should only be granted when the movant has clearly carried the burden of persuasion.") (citation omitted). Plaintiffs must "*by a*

clear showing" establish that (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable harm without an injunction; (3) the balance of equities tips in their favor; and (4) preliminary relief serves the public interest. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). The same standard applies to a plaintiff seeking relief under 5 U.S.C. § 705. *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974); *Va. Petrol. Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Plaintiffs' failure to demonstrate any one of these factors is sufficient to deny injunctive relief, *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989), and "grant[ing] a preliminary injunction" represents "the exception rather than the rule[,]" *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

ARGUMENT

I. MCC Is Not Likely To Succeed on the Merits.

MCC moves this Court to order exceedingly broad relief. MCC is seeking to postpone the effective date of, or enjoin enforcement of all applications of 45 C.F.R. §§ 92.101(a)(2)(iv), 92.206[5] during the pendency of this litigation. ECF No. 6 ¶ 1. That relief would authorize MCC as well as health care providers and insurers around the country to deny health services, whether for a sore throat, a broken bone, or cancer, to transgender Americans on the basis of sex—for example, because of traits or actions the provider would not have questioned in members of different sex—in any conceivable circumstance. 45 C.F.R. § 92.101(a)(2)(iv). But the provisions of the Rule HHS promulgated follow directly from the Supreme Court's reasoning in *Bostock*. Thus, the relief MCC seeks is not warranted by the arguments it raises and is not available under the governing legal standard.

MCC's burden, which is especially demanding, is to "'establish that no set of circumstances exist under which the [Rule] would be valid." *Associated Builders & Contractors*

[5] These sections govern health care providers and include provision addressing discrimination on the basis of gender identity. As described *infra* at 35, it is not necessary to separately enjoin other provisions "as applied with respect to 'sex' discrimination encompassing gender identity" discrimination, ECF No. 6¶ 1, for an injunction against these provisions to have that effect. On top of that, MCC seeks an order enjoining HHS from enforcing a multitude of hypothetical applications of unspecified provisions of the Rule. ECF No. 6 ¶ 2.

of Tex., Inc. v. NLRB, 826 F.3d 215, 220 (5th Cir. 2016) (citation omitted); *see also Reno v. Flores*, 507 U.S. 292, 301 (1993). Rather than attempting to sustain its burden, MCC thrusts hypothetical applications of the Rule before the Court even though "nothing in the [challenged] Rule itself speaks to" any of those applications. *Anderson v. Edwards*¸ 514 U.S. 143, 155 n.6 (1995).

The Court should not entertain entry of a preliminary injunction enjoining HHS from enforcing the Rule as applied to particular policies and practices. ECF No. 6 ¶ 2. MCC has not established a credible threat that § 1557 or the Rule would be enforced in many of those specific ways. And even if it did, HHS has not determined that much of the conduct described in ECF No. 6 ¶ 2 violates Section 1557 or the Rule. The APA requires that the Court review a final agency action reflecting such a determination before it could consider any such relief.

A. Section § 92.101(a)(2)(iv) Is Not Contrary to Section 1557.

MCC's claim that 45 C.F.R. § 92.101(a)(2)(iv) is contrary to § 1557 fails. Again, § 92.101(a)(2)(iv) explains that discrimination on the basis of sex includes discrimination on the basis of gender identity. This provision is lawful because the Supreme Court's reasoning in *Bostock* that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of gender identity applies to prohibitions against sex discrimination in Title IX and § 1557.

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 explained 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 transgender woman because she is transgender, "the employer intentionally penalizes a person identified as male at birth for traits

[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).

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.

Bostock's reasoning applies with equal force to § 1557. The statute incorporates Title IX's prohibition on discrimination "on the basis of sex," 20 U.S.C. § 1681(a), which employs a causation standard indistinguishable from Title VII's "because of . . . sex" language, 42 U.S.C. § 2000e-2(a)(1); *see also Bostock,* 590 U.S. at 650 (using the phrase "on the basis of" interchangeably with Title VII's "because of" language). Courts, including the Fifth Circuit, consistently look to interpretations of Title VII to inform Title IX because both statutes prohibit discrimination on the basis of sex using nearly identical language. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a Title VII case, in analyzing a Title IX claim); *Cardner v. Continental Airlines, Inc.*, 636 F.3d 172, 180 (5th Cir. 2011) ("[T]his court has interpreted Title IX as being intended to prohibit a wide spectrum of discrimination . . . in the same manner as Title VII."); *Lakoski v. James*, 66 F.3d 751, 756 (5th Cir. 1995) ("Any difference between their prohibitions of sex discrimination is not compelled by statutory language."). Indeed, other courts have concluded that the rationale of *Bostock* applies to § 1557. *E.g.*, *Kadel v. Folwell*, 100 F.4th 122, 164 (4th Cir. 2024); *Doe v. Snyder*, 28 F.4th 103, 144 (9th Cir. 2022). That is because if a medical provider refuses to treat the broken bone of a transgender man because he presents as a man but was assigned female at birth, but would treat the broken bone of a similarly situated cisgender man, the provider is discriminating on the basis of sex.

MCC leans heavily on its view that Title IX "referenced 'sex' in biological binary terms—not gender identity." ECF No. 7 at 11. But, as in *Bostock*, nothing in the Rule turns on whether "sex" is "referring only to biological distinctions between male and female." 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 37,574.

MCC argues that Title IX "allows and often requires sex distinctions." ECF No. 7 at 12-13. But MCC is not seeking to enjoin enforcement of any provision of the Rule precluding it from making distinctions among patients based on sex—no matter how that term is defined—because no such provision exists. As HHS explained, the Rule does not "prohibit[] a covered entity from operating sex separated programs and facilities." 89 Fed. Reg. at 37,593. Under § 92.206(b)(3), described in more detail below, a provider may treat individuals differently or separate individuals based on sex as long as it does not harm those individuals. As in *Bostock*, the plain language of the provisions that Plaintiffs seek to enjoin do not purport to resolve § 1557's application to specific claims involving "bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. The relief that MCC is seeking would preclude HHS from enforcing the Rule against doctors who refuse to treat a patient for a sore throat, a broken bone, or lung cancer, because the patient is transgender. The fact that health care often involves "examination rooms, lactation rooms, [and] patients in undress," ECF No. 7 at 16, has no bearing on MCC's entitlement to that relief.

MCC suggests that § 92.101(a)(2)(iv) is unenforceable under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18 (1981). ECF No. 7 at 18. In *Pennhurst*, a private litigant sought to enforce against a state government a congressional "finding[]" stating that "[p]ersons with developmental disabilities have a right to appropriate treatment.'" 451 U.S. at 13. "Notably absent" from these findings was "any language suggesting that [the provision] is a 'condition' for the receipt of federal funding.'" *Id.* Even assuming *Pennhurst* requires a clear statutory statement,[7]

[7] The *Pennhurst* analysis is most frequently invoked in the context of ascertaining the scope of liability in a private lawsuit (typically for damages). *See, e.g.*, *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 218-19 (2022). In those cases, the *Pennhurst* analysis does not result in an unenforceable statutory or regulatory spending condition, but instead a conclusion that enforcement must be at the hands of the federal government seeking prospective compliance as a condition of continued funding rather than private individuals seeking damages for past conduct. In applying *Pennhurst*, the Supreme Court has explained that the consequence of a statute "not unambiguously confer[ring] an enforceable right upon the Act's beneficiaries" is the unavailability of a private cause of action to enforce the provision either in its entirety or in certain applications. *Suter v. Artist M.*, 503 U.S. 347, 363 (1992). A statute imposing a "generalized

there is no Spending Clause problem because the relevant provision in the Rule merely explains the scope of § 1557's unambiguous prohibition on sex discrimination, based on the statutory language's plain meaning. *Bostock*, 590 U.S. at 674. In *Bostock*¸ the Supreme Court explained that Title VII's "message" on this score was "simple." *Id*. at 660. "Given the similarity in language prohibiting sex discrimination in Titles VII and IX," *Doe*, 28 F.4th at 114, the same clear statement exists in Title IX and § 1557, *see Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018). "[S]o long as a spending condition has a clear and actionable prohibition on discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). 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); *see also Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204, 210 (5th Cir. 2019) (noting that Title IX's conditions have been "broadly" interpreted "to encompass diverse forms of intentional sex discrimination" (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005))).[8]

B. Section § 92.206(b)(3) Is Not Contrary to Section 1557.

Insofar as MCC is seeking to enjoin enforcement of § 92.206(b)(3), MCC has not established that this provision is contrary to § 1557. This provision clarifies that not all practices of sex segregation or differing treatment based on sex—including practices preventing individuals

duty" on a funding recipient is not invalid, but is "to be enforced . . . by the Secretary in the manner [of reducing or eliminating payments]." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 281 (2002) (quoting *Suter*, 503 U.S. at 363).

[8] Contrary to MCC's assertion, ECF No. 7 at 19, nothing in the Rule implicates the major questions doctrine, which is reserved for only "extraordinary" cases, *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (citation omitted). This is not such a case. HHS does not contend that Congress gave it the authority to decide as a matter of policy whether § 1557 prohibits discrimination based on gender identity. Instead, as the Supreme Court explained was the case in *Bostock*, the relevant portions of the Rule reflect "policy decisions" made "by Congress . . . itself" in the unambiguous text of the statute. *Id.* at 723. Accordingly, just as the Supreme Court did not invoke the major questions doctrine when it endorsed EEOC's interpretation of Title VII in *Bostock*, there is no basis for invoking it here.

from participating in a program or activity consistent with the individual's gender identity—violate § 1557. Rather, only those that result in "more than de minimis harm" violate § 1557. *Id*. *See* 89 Fed. Reg. at 37,593-94 & n.162; *see also, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

MCC does not argue that the challenged provision has no valid application under any circumstances, as it must to meet the applicable standard for a facial challenge. Most applications would have nothing to do with gender identity discrimination. There could be any number of ways that MCC could treat its male patients differently than its female patients in the provision of health care that, for example, subjects a male patient to more than de minimis harm, potentially covered by § 92.206(b)(3), without any transgender individual involved. For example, if a clinic only allowed male parents to sign consent forms for children, or consent to treatment for them, and it caused an individual more than de minimus harm, that might violate § 92.206(b)(3). Or consider if a provider only allowed women to accompany their child to an appointment. MCC's arguments about the scope of discrimination on the basis of sex, ECF No. 7 at 10-20, would have no bearing on an overwhelming number of those applications. Indeed, MCC's argument that Title IX prohibits treating members of one sex less favorably than members of a different sex effectively endorses this provision. *Id*. at 11-12.

While MCC is not challenging those applications, the provision's explicit reference to gender identity is intertwined with them and no less valid. A natural reading of the statute precludes providers from engaging in a practice that prevents an individual from participating in a health program or activity consistent with the individual's gender identity if it subjects the individual to more than de minimis harm. 45 C.F.R. § 92.206(b)(3). Consider if MCC had a program for parents and refused to allow transgender parents to participate altogether because it considered those parents to fail to comply with sex stereotypes given their sex assigned at birth, *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2018), and the ban caused an individual more than de minimis harm. MCC has not explained how the injunction they seek precluding enforcement in these circumstances could be justified. *See id*. at 1319; *see also Pederson v. La. State Univ.*, 213 F.3d

858, 880 (5th Cir. 2000) (acting on "stereotypical assumptions" that women should behave differently from men demonstrates intentional sex discrimination violating Title IX).

C. Section 92.206(b)(4) Is Not Contrary to Section 1557.

Insofar as MCC is seeking to enjoin HHS from enforcing § 92.206(b)(4), MCC has not established that this provision is contrary to § 1557. Section 92.206(b)(4), (c) provide a framework for analyzing a patient's claim that a provider's denial of health services sought for the purpose of gender-affirming care denied them the benefits of a health program or activity based on sex. MCC's error lies in viewing this provision as imposing specific demands to provide particular health services, like puberty blockers or gender affirming surgeries, when in fact it only requires MCC to act in a nondiscriminatory manner. *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."). The Rule makes clear that

> [n]othing in this section requires 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.

45 C.F.R. § 92.206(c). The Rule thus establishes a framework for determining whether any particular denial of care violates § 1557. "When OCR investigates claims of discrimination based on the denial of care, [it] will consider the covered entity's rationale for such denial, any supporting information the covered entity offers for its position, and any evidence of unlawful animus, bias, or other discriminatory factors in the case." 89 Fed. Reg. at 37,597. The framework set forth in the Rule is consistent with decades of precedent. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (establishing same framework for analyzing Title VII discrimination claims); *Buckley v. Sec'y of Army*, 97 F.4th 784, 794 (11th Cir. 2024) (*McDonnell Douglas*

framework appropriate for discrimination statutes that include "but-for causation" principles). It is consistent with how the Fifth Circuit has addressed Title IX claims.[9]

Consider a surgeon who routinely provides orchiectomies and will treat a transgender woman seeking an orchiectomy because of testicular cancer but not a transgender woman seeking an orchiectomy because of gender dysphoria. Under § 92.206, whether the surgeon has discriminated on the basis of sex depends on the surgeon's reason(s) for denying treatment. For example, a determination that the service was "not clinically appropriate for [the] particular individual" would likely provide a legitimate, nondiscriminatory rationale for the denial. 45 C.F.R. § 92.206(c). In contrast, if the surgeon instead explained that they denied the orchiectomy because of animus against transgender individuals for their sex-related traits, the surgeon would have engaged in impermissible sex discrimination. *Id*.; *see Glenn*, 663 F.3d at 1317; *Lange v. Houston Cnty.*, 101 F.4th 793, 798-99 (11th Cir. 2024) (holding that a health insurance provider can violate a statutory duty not to discriminate because of sex for denying coverage for gender-affirming care to a transgender employee because the employee is transgender).

MCC's reliance on *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), which is not binding on the court in any event, is misplaced. ECF No. 7 at 18. MCC quotes that case, *id*., but omits the court's entire statement: "the regulation of a course of treatment that only gender nonconforming individuals can undergo" is not unlawful discrimination based on sex "unless the regulation were a pretext for invidious discrimination against such individuals." *Eknes-Tucker*, 80 F.4th at 1229-30. That is consistent with what the Rule provides. 45 C.F.R. § 92.206(c)

[9] *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 585 (5th Cir. 2020) (plaintiff plausibly alleged Title IX claim in reliance on administrative finding that defendant failed to provide legitimate, nondiscriminatory reason for its conduct); *Klocke*¸ 938 at 211 (applying "reasonable and non-discriminatory reasons" test to resolve Title IX sexual orientation-related "gender bias" claim); *Pederson*, 213 F.3d at 881 (applying "legitimate, nondiscriminatory explanation" test to resolve Title IX claim); *see also Arceneaux ex rel. Rebekka A. v. Assumption Parish 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).

("A covered entity's determination must not be based on unlawful animus or bias, or constitute a pretext for discrimination.").[10]

D. MCC Cannot Seek an Injunction Against Hypothetical Applications of the Rule Without Obtaining a Final Agency Action Reflecting an Agency Determination That Those Applications Violate the Statute or the Rule.

MCC is unlikely to succeed on its claim that the APA entitles it to an injunction precluding HHS from enforcing § 1557 or the Rule in particular ways, ECF No. 6 ¶ 2, because MCC cannot identify an "agency action" determining that § 1557 or the Rule is to be enforced in many of those ways. For example, MCC seeks an injunction precluding HHS from enforcing the Rule against MCC for speaking about "the negative impacts of 'gender-transition' efforts." *Id*. ¶ 2(d). But MCC cannot identify a corresponding provision of the Rule determining that it or any other covered entities may not speak about the negative impacts of gender-transition efforts.

Plaintiffs invoke judicial review under 5 U.S.C. § 702. Compl. ¶ 238. That provision requires Plaintiffs to "direct [their] attack against some particular 'agency action[,]'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990), as opposed to "an abstract decision apart from [the] specific agency action" that they challenge, *Biden v. Texas*, 597 U.S. 785, 809 (2022). MCC may not have this Court superintend HHS's administration of the statute by asking the Court to review whether its particular policies violate the Rule before the agency analyzes any legitimate, nondiscriminatory justifications for each policy, as the Rule requires, and generates a reviewable agency action. *See Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). The APA "reflects the legal principle of permitting agencies to deal thoroughly in the first instance with issues" like those identified in ECF No. 6 ¶ 2. *See Cousins v. Sec'y of U.S. Dep't of Transp.*, 880 F.2d 603, 610 (1st Cir. 1989). "It is a tautology that [a plaintiff] may

[10] MCC opines that "[t]here is no serious argument that in 2010 . . . Congress unmistakably required anyone to provide, refer for, or affirm gender-transition procedures." ECF No. 7 at 19. Putting aside whether that is true and the fact that the Rule does not require provision of particular procedures, 45 C.F.R. § 92.206(c), "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command." *Bostock*, 590 U.S. at 674 (citation omitted). It is the provisions of those legislative commands "rather than the principal concerns of our legislators by which we are governed." *Id*. (citation omitted).

not challenge [an agency's] regulations as applied until [the agency] applies the regulations[.]" *Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997); *see also Reno*, 507 U.S. at 300-01 (challenging application of a newly promulgated Rule would be impossible); *Nat'l Wildlife Fed'n v. EPA*, 945 F. Supp. 2d 39, 44-47 (D.D.C. 2013). MCC's "hypothetical examples are not the stuff of ripe APA challenges." *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 196 (D.D.C. 2015). *See Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1185 (D.C. Cir. 2020).[11]

E. MCC Is Unlikely To Succeed on its "Structural Principles of Federalism" Claim.

MCC has not established likelihood of success on its "structural principles of federalism" Tenth Amendment claim. To start, MCC has not established its standing to invoke the interests of a state. Generally, "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). To bring claims on behalf of third parties, MCC must satisfy criteria including "a close relation to the third party" and "some hindrance to the third party's ability to protect his or her own interests." *Id*. at 411. MCC plainly does not meet these criteria. First, MCC does not explain how a children's clinic has a close relationship with any state. Second, there is no hindrance to a state's ability to bring an action to protect its own purported interests. Several states, including MCC's home state, Mississippi, have challenged the Rule in an action pending before this Court.[12]

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[11] Pre-enforcement review of any application of the Rule would also be inconsistent with § 1557 itself. As described above, *supra* at 3-4, § 1557 incorporates the administrative enforcement mechanisms of Title VI, including its detailed judicial review provision, permitting an Article III court to determine whether any application of the Rule is consistent § 1557 and the Rule. 42 U.S.C. § 2000d-2. Permitting pre-enforcement injunctions against hypothetical applications of the Rule would undermine the comprehensive review process established by Congress. *See Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207-18 (1994); *Gardner v. Alabama*, 385 F.2d 804, 810-12 (5th Cir. 1967) (judicial review scheme in Civil Rights Act is "sole and exclusive" including for challenges to regulations).

[12] The "coercion" framework that MCC invokes, ECF No. 7 at 21, addresses how federalism principles inform what conditions Congress may attach on money it grants *to states*. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 579-81 (2012). Those principles protect "the status of the States as independent sovereigns in our federal system." *Id*. at 577. Those federalism-based principles are inapposite in evaluating whether Congress has overstepped its enumerated powers in dealing with private corporations like MCC.

In any event, nothing in the Rule upsets any "structural principles of federalism." ECF No. 7 at 20. The Supreme Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause [or, as here, the Spending Clause] in a manner that displaces the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981). In fact, "[a] Tenth Amendment challenge to a statute necessarily fails if the statute is a valid exercise of a power relegated to Congress." *United States v. Louper-Morris*, 672 F.3d 539, 563 (8th Cir. 2012) (citation omitted). Because § 1557 is a valid exercise of Congress's spending power and the Rule is a valid exercise of HHS's statutory authority, *see supra* at 10-17, MCC is unlikely to succeed on the merits of its Tenth Amendment challenge.[13]

Insofar as MCC asserts that it would exceed Congress's spending power for § 1557 to preempt state law, ECF No. 7 at 21, the Supreme Court has consistently applied ordinary preemption principles to spending legislation even where as here, the State is not the recipient of federal funds. *See, e.g., Coventry Health Care of Mo., Inc. v. Nevilis*, 581 U.S. 87, 95-99 (2017); *Bennett v. Arkansas*, 485 U.S. 395, 396 (1988) (per curium); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 257-258 (1985); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973); *Townsend v. Swank*, 404 U.S. 282, 285 (1971).[14]

See, e.g., *Northport Health Servs. of Ark., LLC v. HHS*, 14 F.4th 856, 869 n.5 (8th Cir. 2021). After all, MCC is not a state and has no equivalent Tenth Amendment interest in being free of direct congressional regulation. *See, e.g.*, *Sabri v. United States*, 541 U.S. 600, 608 (2004).

[13] *Pennhurst*, 451 U.S. 1, upon which MCC again relies, does not render any provisions of the Rule unenforceable. *See supra* at 12-13.

[14] MCC does not explain how the Rule directs it to violate Mississippi law. And in any event, the Rule makes clear that OCR will consider "whether any covered entity that is taking discriminatory actions under the rule is doing so because it believes in good faith it is obligated to do so by State or local law" when enforcing the Rule. 89 Fed. Reg. at 37,598. MCC's reliance on *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023), is peculiar. That case reaffirmed the principles described *supra* n.7.

F. MCC Is Unlikely To Succeed on Its Claim that the Notice of Nondiscrimination Provision at 45 C.F.R. § 92.10 Violates Its First Amendment Interests.

(1) Section 92.10 Survives Applicable First Amendment Scrutiny.

The Notice of Nondiscrimination provision at 45 C.F.R. § 92.10 imposes a straightforward requirement on MCC that it disclose purely factual information to its patients and potential patients about the terms under which its federally funded health services will be available. Specifically, this provision requires MCC to post a notice informing patients of its nondiscrimination obligations under § 1557 in a manner that accurately describes Congress's directive. 45 C.F.R. § 92.10; Ex. G to Ex. 1. MCC's contention that § 92.10 violates the First Amendment does not withstand scrutiny. Typically, courts evaluate a prohibition on commercial speech under the intermediate scrutiny standard set forth in *Central Hudson Gas & Electric Corp. v. PSC of N.Y.*, 447 U.S. 557 (1980). But a more lenient standard applies where, as here, a commercial speech regulation "impose[s] a disclosure requirement," *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010), and the disclosure involves "(1) purely factual and (2) uncontroversial" speech, *R.J. Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 877 (5th Cir. 2024). In those circumstances, the standard set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) applies. To survive *Zauderer* scrutiny, the notice must "be justified by a legitimate state interest" and "not [be] unduly burdensome." *R.J. Reynolds Tobacco*, 96 F.4th at 877.

The Notice provision is purely factual and uncontroversial, and thus, at most,[15] *Zauderer* scrutiny applies. As relevant here, whether the Notice of Nondiscrimination provides factual and

[15] MCC's obligation to comply with 45 C.F.R. § 92.10 is not mandatory; it is a condition on federal funding that MCC may choose to accept or decline. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court rejected a First Amendment challenge to a federal funding condition for family planning services that denied funds to any program providing abortion counseling. *Id*. at 192. The Court explained that the Government can, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way." *Id*. at 193. *Rust* indicates that a more deferential standard than *Zauderer* scrutiny applies. But "Congress's choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on" health care providers. *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 58-59 (2006).

uncontroversial information, in this context, turns on whether the disclosure provides "an accurate statement" of the statutory funding condition it discloses to patients. *See Milavetz, Gallop & Milavetz, PA*, 559 U.S. at 250 (*Zauderer* applied because disclosures provided "an accurate statement identifying the advertiser's legal status"). Because the compelled disclosure statement under § 92.10 (as relevant to MCC's challenge) merely restates MCC's nondiscrimination duties under § 1557, *Zauderer* scrutiny applies. *See id*.

The Notice provision is plainly permissible under *Zauderer*. Section 92.10 directly advances the Government's "compelling interest" in eliminating discrimination in health programs and activities of recipients of Federal financial assistance, *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).[16] by providing patients with information "posted in a place that would be obvious to the intended beneficiaries of the statute," *Lake Butler Apparel Co. v. Sec'y of Lab.*, 519 F.2d 84, 89 (5th Cir. 1975). An "informational interest, specifically focusing on raising consumer awareness . . . suffices under *Zauderer*." *R.J. Reynolds Tobacco*, 96 F.4th at 884. That information is particularly important here, where it is "part of a proactive civil rights compliance structure that functions—in part—through grievances and complaints raised by individuals." 89 Fed. Reg. at 37,565. The Supreme Court has "not question[ed] the propriety of requirements that medical professionals alert patients to laws that affect medical choices." *Doe No. 1 v. Rokita*, 54 F.4th 518, 521 (7th Cir. 2022). And as the administrative record will show, many commenters explained that "such notices are needed to help people know their rights and will reduce health disparities, especially for persons" who have limited English proficiency "and persons with disabilities." 89 Fed. Reg. at 37,565.

The undue burden prong instructs courts to consider whether the disclosure requirement "burdens [plaintiff's] speech [or] drowns out [its] message." *Chamber of Com. of U.S. v. SEC*, 85 F.4th 760, 772 (5th Cir. 2023). MCC's message is that it does not perform, refer for, facilitate, or

[16] Given that compelling interest, the notice provision would withstand scrutiny even if a more demanding test, such as *Central Hudson*, applied.

affirm abortion (as opposed to refusing to treat patients because they are pregnant or because they have, in the past, had an abortion). ECF No. 7 at 22. MCC has not established that § 92.10 chills its ability to convey its commercial message. Contrary to MCC's suggestion, nothing in the Rule requires the provision or referral for abortions. 42 C.F.R. § 92.3(c) (citing 42 U.S.C. 18023(c)(2)(A)); *see also* 89 Fed. Reg. at 37,576-77. MCC is free to convey that it does not perform, refer for, facilitate, or affirm abortion both outside of the Notice, *see Chamber of Com. of U.S.*, 85 F.4th at 772, and even with respect to the Notice itself—provided that the Notice satisfies the requirements of § 92.10—the Rule does not prevent MCC from "conveying any additional information." *Milavetz, Gallop, & Milavetz, P.A.*, 559 U.S. at 250. MCC is "free to draw up another [Notice] in which the wording would, perhaps, be more acceptable" to MCC (as long as it satisfies the criteria in § 92.10). *See Gardner*, 385 F.2d at 817. The same is true for MCC's commercial message regarding gender-affirming care. Nothing in § 92.10 precludes MCC from conveying in its Notice that it does not provide gender-affirming care, provided that the statement is based upon a legitimate, nondiscriminatory reason.[17]

(2) Any First Amendment Overbreadth Challenge Fails.

MCC's remaining First Amendment arguments are seemingly unrelated to 45 C.F.R. § 92.10. MCC does not identify which other provision(s) of the Rule generates these purported First Amendment concerns. On its face, the Rule "does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license [HHS] to administer [§ 1557] on the basis of such constitutionally impermissible criteria." *See U.S. Jaycees*, 468 U.S. at 623.

Insofar as MCC is concerned about hypothetical applications of unspecified provisions that do not explicitly "target speech," *see Rowles v. Curators of Univ. of Mo.*, 983 F.3d 345, 358 (8th

[17] HHS will not enforce the Notice of Nondiscrimination provisions until after November 2, 2024. 45 C.F.R. § 92.1(b) (Table 1). Even after that date, as long as the *Neese* judgment remains valid and binding in its current form, OCR will not enforce the Rule against *Neese* class members in their capacity as health-care providers alleged to have not complied with § 92.10 insofar as their Notice of Nondiscrimination declines to indicate that they will not discriminate against patients on the basis of gender identity.

Cir. 2020), the Court may only enjoin HHS from enforcing them against MCC in all of their applications insofar as MCC can establish that "'a substantial number of [any of their] applications are unconstitutional, judged in relation to [their] plainly legitimate sweep.'" *NetChoice, LLC v. Paxton*, 49 F.4th 439, 449-50 (5th Cir. 2022) (citation omitted).[18] MCC cannot meet that burden as antidiscrimination laws like § 1557 and the Rule's provisions have "many lawful applications," *303 Creative LLC v. Elenis*, 600 U.S. 570, 592 (2023), and MCC "fail[s] to allege that [the Rule has] *ever* been impermissibly applied to protected speech . . . , let alone that such an application constitutes a 'substantial number' of enforcement actions," *see Rowles*, 983 F.3d at 358 (citation omitted). That showing would be impossible because the Rule has "not yet been applied in a particular instance—because it was not yet [effective]—when [MCC's] suit was brought." *Reno*, 507 U.S. at 300. MCC does not contend that the Rule "has been applied in this case for the purpose of hampering the organization's ability to express its views." *U.S. Jaycees*, 468 U.S. at 624.

Instead, MCC provides a series of speculative "extreme hypothetical applications" of provisions of the Rule. *NetChoice*, 49 F.4th at 451-52. ECF No. 7 at 21-22.[19] But at its core, § 1557's bar on discrimination on the basis of gender identity means that providers may not deny patients medically necessary care they typically provide—whether, for *e.g.*, a sore throat, a broken bone, or cancer—just because a patient exhibits traits or actions that the provider would not have questioned in members of a different sex. *Bostock*, 590 U.S. at 652. Given this plainly legitimate sweep, MCC's challenge fails. MCC's "whataboutisms . . . exemplify why it's inappropriate to hold [any provision of the Rule] facially unconstitutional in a pre-enforcement posture." *NetChoice*, 49 F.4th at 451-52.

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[18] The Fifth Circuit has not always applied this standard to First Amendment challenges. *Netchoice*, 49 F.4th at 449-52 (applying no-set-of-circumstances test). The provisions of the Rule "survive[] under either standard[.]" *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

[19] MCC also asserts, without citation to any provision of the Rule, that the Rule "forces" MCC to "adopt and speak government policy statements that violate its sound medical judgment." ECF No. 7 at 21. That is plainly wrong. "There is no part of section 1557 that compels clinicians to provide a service that they do not believe is medically appropriate for a patient[,]" let alone speak in some way that is contrary to medical judgment. 89 Fed. Reg. at 37,595-96.

II. MCC Has Not Shown Imminent Irreparable Harm.

MCC cannot satisfy its "heavy burden of clearly establishing to the Court irreparable harm." *Watchguard Techs., Inc. v. Valentine*, 433 F. Supp. 2d 792, 794 (N.D. Tex. 2006). Whether for a preliminary injunction, *Google, Inc. v. Hood*, 822 F.3d 212, 227 (5th Cir. 2016), or Article III standing, injunctive relief requires a future "injury [that] proceed[s] with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). Mere fear of future injury—even if "not fanciful, irrational, or clearly unreasonable"—is insufficient. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (citation omitted). Rather, a plaintiff alleging injury due to a legal code must "assert an injury that is the result of a [code's] actual or threatened"—not merely feared—"*enforcement*, whether today or in the future." *California v. Texas*, 593 U.S. 659, 670 (2021). Consistent with the "characterization" of injunctive relief as "extraordinary[,]" *Winter*, 555 U.S. at 22, not all Article III injuries constitute irreparable harm, even if irremediable in damages, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

Here, MCC's allegations of possible future harm do not establish imminent injury. This Court thus lacks jurisdiction whether analyzed as a matter of standing, *Gonzales*, 468 F.3d at 829-31, ripeness, *Colwell v. HHS*, 558 F.3d 1112, 1123-29 (9th Cir. 2009), or statutory preclusion of pre-enforcement jurisdiction, *Thunder Basin*, 510 U.S. at 207-18. But for purposes of the present motion, it is most speculative that MCC will experience an irreparable injury "before a decision on the merits can be rendered," *Winter*, 555 U.S. at 22 (citation omitted)—which is the purpose of a preliminary injunction.

The only imminent irreparable injury MCC alleges in its memorandum is "financial penalties." ECF No. 7 at 22. But MCC fails to provide any meaningful argument as to what "financial penalties" it is as risk of incurring.[20] The Court should deny MCC's motion on this basis

[20] Insofar as MCC is concerned about penalties stemming from private actions under Section 1557, the Supreme Court has made clear that Section 1557 does not permit private parties to obtain punitive damages. *Cummings*, 596 U.S. at 220-22 (citing *Barnes v. Gorman*, 536 U.S. 181, 187-88 (2002)). In any event, MCC

alone. Insofar as MCC is arguing that it faces a loss of Federal financial assistance, MCC has not established that any federal funding loss is imminent. MCC's failure to show an irreparable injury associated with a threatened loss of any such assistance before the Court decides this case is premised on a combination of three points: (1) MCC's insistence in its briefing that it has legitimate, nondiscriminatory reasons for its policies, (2) MCC's failure to show that "good-faith" reliance on a belief that policies are nondiscriminatory "would trigger" irreparable consequences, like "an immediate funding cut-off, much less the sort of retroactive penalty that was involved in *Abbott* [*Lab'ys v. Gardner*, 387 U.S. 136 (1967)]," *Gonzales*, 468 F.3d at 829, and relatedly (3) the extensive procedures required before any loss of Federal financial assistance. *See supra* at 3-4 (describing procedures).

First, MCC does not allege that its policies are "based on unlawful animus or bias, or constitute a pretext for discrimination." *E.g.*, 45 C.F.R. § 92.206(c). For example, even if the *Neese* judgment is vacated tomorrow, although MCC would have to comply with the Rule, MCC is pre-judging that its policies are noncompliant while simultaneously arguing that it has legitimate, nondiscriminatory reasons for those policies. If OCR concluded that MCC's asserted legitimate, nondiscriminatory reasons were valid, it would not bring an enforcement action *See id.* For example, MCC does not contend that it refuses to serve patients because of their gender identity or because they are transgender. Rather, MCC's President declares that it "cares for *all* patients with respect, and without unlawful discrimination" and that MCC is "honored that *any* parent or guardian chooses [them] as their child's medical providers[.]" Decl. of Michael Artigues M.D. ¶ 9-10, ECF No. 1-2 ("Artigues Decl.") (emphasis added). And Mr. Artigues states that MCC declines to "refer[] patients for puberty blockers or sex hormones for 'gender transition' purposes" not because of animus or bias, but "[b]ased on medical judgment." *Id.* ¶ 26. Finally, MCC provides no

cannot parlay Defendants' enforcement authority "into an injunction against any and all unnamed private persons who might seek to bring their own [Section 1557] suits." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021).

evidence that any of its sex-segregated programs have caused more than de minimis harm to anyone in violation of § 92.206(b)(3).

Second, if MCC were to stand on its good-faith representations about the bases for its policies (or even on a good-faith belief that a provision of the Rule as applied would be invalid), it does not establish that it would suffer a "retroactive penalty" at the hands of HHS, *Gonzales*, 468 F.3d at 829, for reliance on those representations or views after the Rule's effective date. To the contrary, in § 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 4, was to provide a "further opportunity to end the discrimination without the necessity of cutting off Federal funds[.]" 110 Cong. Rec. 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, MCC has not established that it will lose any funding if it makes no change to its behavior now and, in the hypothetical that HHS were to one day disagree with MCC about whether one of its policies violates § 1557, MCC then changes its policy upon HHS's request or after an adjudication. And at any "point in any putative enforcement process, [MCC] would be able to raise the same claims [it] now raise[s]." *Am. College of Pediatricians v. Becerra ("ACP")*, No. 1:21-cv-195, 2022 WL 17084365, at *15 (E.D. Tenn. Nov. 18, 2022).

Finally, the extensive procedures, culminating in judicial review, required by § 1557 before HHS could terminate any Federal financial assistance for noncompliance make any such harm practically impossible "before a decision on the merits can be rendered[,]" *see Winter*, 555 U.S. at

22 (citation omitted); *see also supra* at 3-4 (describing steps). Previously, the required steps have taken years.[21]

Together, all of this means that MCC cannot show imminent irreparable harm due to the Rule's enforcement. *See Sch. Dist. of City of Saginaw v. HEW*, 431 F. Supp. 147, 154 (E.D. Mich. 1977) (no irreparable harm from being required to present claims following administrative proceedings). MCC does not face any choice to change any of its policies or stop receiving Federal financial assistance until long after MCC is "requested" to "correct [any charge of noncompliance], and thus hopefully achieve 'voluntary compliance[,]'" *see Cook*, 1979 U.S. Dist. LEXIS 14572, at *3. In *Cook*, for example, it took HHS's predecessor agency over two years of investigation before even a preliminary finding of noncompliance. *Id*. And "[a]t the moment it also remains speculative whether such an [investigation] may be forthcoming" at all. *See Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000). Moreover, cooperation with HHS during that process would not itself constitute irreparable injury. *Standard Oil*, 449 U.S. at 244; *Petrol. Expl., Inc. v. PSC of Ky*, 304 U.S. 209, 220-21 (1938). And "[b]efore any agency decision to terminate funds can become effective," even speculating that such a decision would result from any putative administrative process, MCC "will be able to seek judicial review," and "the reviewing court has the power to postpone further the date of termination of funding[.]" *Sch. Dist. of Saginaw*, 431 F. Supp. at 154.

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*, 593 U.S. at 670. And as explained, irreparable injury from enforcement is not imminent. MCC's evidence therefore does not connect the dots so as to demonstrate that its ostensible irreparable injury from the Rule's

[21] *See, e.g.*, *Civ. Remedies Div. the Gen. Couns. v. San Agustin*, DAB No. CR2580 (2012) (H.H.S. Aug. 2, 2012) (terminating funding in 2012 after 3 years of investigation, 2 months of ignored repeated attempts to secure voluntary compliance, and more than 2 additional years had passed); *Freeman v. Cavazos*, 939 F.2d 1527, 1528 n.1, 1530 (11th Cir. 1991) (terminating funding in 1990 after investigating for 2 years and beginning funding termination procedures in 1986); *Cook v. Ochsner Found. Hosp.*, Civ.A. No. 70-1969, 1979 U.S. Dist. LEXIS 14572, at *3 (E.D. La. Feb. 7, 1979) (3 years and 5 months between initiation of investigation and initiation of formal administrative adjudication proceeding); *Bd. of Pub. Instruction of Taylor Cnty., Fla. v. Finch*, 414 F.2d 1068 (5th Cir. 1969) (19 months between initiation of mandatory voluntary mediation efforts (after completion of investigation) and final order terminating funds).

enforcement will occur before a decision on the merits. Any chilling effect on MCC's interests associated with a potentially invalid rule being on the books is insufficient. *Whole Woman's Health*, 595 U.S. at 50.

MCC is not entitled to a preliminary injunction for many of the reasons described in *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016). In *Google*, the Fifth Circuit vacated a preliminary injunction enjoining a state from investigating a company on First Amendment grounds. Not unlike the range of enforcement actions described in MCC's motion, ECF No. 6 ¶ 2, the *Google* "injunction cover[ed] a fuzzily defined range of enforcement actions that do not appear imminent," 822 F.3d at 227. And, as in *Google*, "adjudicating whether federal law would allow an enforcement action here would require [the Court] to determine the legality of [OCR action] 'in hypothetical situations.'" *Id*. (citation omitted). Because OCR would have "to gather considerable information" from MCC about its legitimate, nondiscriminatory bases for its policies "before [it could] determine whether an enforcement action is warranted," MCC's "invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury." *Id*. at 228. And as in *Google* and as described above, MCC can "raise its objections" if OCR "ever brings an enforcement proceeding." *Id* at 225-26.

Mr. Artigues says that MCC will have to spend $2,715 if a preliminary injunction is not issued before this case can be resolved on the merits. Artigues Decl. ¶ 49. At least two issues preclude MCC from relying on those alleged costs as a basis for finding irreparable harm. First, Mr. Artigues does not attest that this compliance cost is tailored to obligations arising from MCC's duty not to discriminate against patients on the basis of gender identity. In other words, even if MCC succeeds on its claim that § 1557 does not prohibit discrimination on the basis of gender identity, MCC provided no concrete evidence showing that the training requirement under 45 C.F.R. § 92.9 would not still apply to require a trained staff to ensure that patients aren't discriminated against on other grounds, like race or national origin. MCC has thus failed to show that it will incur incremental compliance costs arising because of the gender-identity provisions alone. Relatedly, many antidiscrimination laws already prompt MCC "to adopt antidiscrimination

policies and to educate [its] personnel." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). MCC fails to explain why § 1557 trainings cannot be provided at the same time as other training, meaning that there is no net increase in cost. And because MCC is potentially subject to liability in private damages actions for violating § 1557 or Title VII that cannot be prevented by seeking relief against Defendants in this suit, MCC does not explain why it would nonetheless not need to provide training to protect against possible liability. *See id*. In any event, insofar as the $2,715 sum reflects MCC's plans to incur costs to train staff in ways that have not been determined required by the Rule, MCC is "inflicting harm on [itself] based on [its] fears of hypothetical future harm that is not certainly impending" in a manner that does not provide an injury due to the Rule's enforcement itself. *Clapper*, 568 U.S. at 416.

Second, an injunction is not a remedy that issues "to restrain an act the injurious consequences of which are merely trifling." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citation omitted). MCC does not suggest that $2,715 "is disproportionate to the business" of MCC, *Petrol. Expl.*, 304 U.S. at 220; MCC "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); *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989) ("preliminary injunction is an inappropriate remedy where the potential harm to the movant is strictly financial" unless "the potential economic loss is so great as to threaten the existence of the movant's business").

III. The Equities and the Public Interest Weigh Against a Preliminary Injunction.

The balance of harms and public interest considerations "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors tilt decisively against granting an injunction here. Even if MCC established that it faces $2,715 in costs, against that approximately three-thousand-dollar sum weighs the significant public interest in permitting enforcement of the Rule 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

who is denied care for a broken bone, a sore throat, or for cancer just because a provider wants to intentionally penalize them for their sex-related traits suffers "irreparable injury." *Lange*, 101 F.4th at 801. No amount of money can compensate a patient for the detrimental effect of discrimination on their health. Moreover, "[a]ny time 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).

IV. *Neese* Precludes a Finding of Imminent Irreparable Harm and Related Actions Preclude MCC from Proceeding Here.

The Court encouraged the parties to "address what effect, if any, the district court decision in *Neese v. Becerra*, 640 F. Supp. 3d 668 (N.D. Tex. 2022)" has "on the relief requested by MCC in the pending motion." ECF No. 12 at 2. *Neese* began as a challenge, under the APA, to a 2021 Notice of Interpretation issued by HHS.[22] In late 2022, the *Neese* court certified the following class under Federal Rule of Civil Procedure 23(b)(2): "All health-care providers subject to Section 1557 of the Affordable Care Act." Ex. A to Ex. 1 On November 11, 2022, the *Neese* court entered final judgment. Ex. B to Ex. 1. The *Neese* judgment declares:

- Plaintiffs and members of the certified class need not comply with the interpretation of "sex" discrimination adopted by Defendant Becerra in his Notification of Interpretation and Enforcement of May 10, 2021; and

- Section 1557 of the ACA does not prohibit discrimination on account of sexual orientation and gender identity, and the interpretation of "sex" discrimination that the Supreme Court of the United States adopted in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), is inapplicable to the prohibitions on "sex" discrimination in Title IX of the Education Amendments of 1972 and in Section 1557 of the ACA.

Id. The *Neese* court declined to enter injunctive relief and instead granted summary judgment for defendants insofar as the certified class sought injunctive relief. *Id*. The *Neese* class judgment means that MCC cannot show imminent irreparable injury from the Rule's enforcement because

[22] *See Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972*, 86 Fed. Reg. 27,984 (May 25, 2021).

MCC is a member of the *Neese* class. Moreover, *Neese* and another earlier-filed related action preclude MCC from proceeding in this case at this time.

First, the *Neese* class judgment precludes a finding of imminent irreparable harm. MCC must show imminent irreparable injury that is the result of the Rule's "actual or threatened *enforcement*[.]" *California*, 593 U.S. at 670 (emphasis in original). But the *Neese* class judgment precludes any fear of imminent enforcement. As long as that judgment remains valid and binding between Defendants and MCC, OCR will not enforce the Rule against MCC insofar as it is alleged to have engaged in conduct within the subject matter of the class action judgment. 89 Fed. Reg. at 37,574 n.118. Courts have declined to find imminent irreparable harm in similar contexts. *See Bongiovanni v. Austin*, No. 3:22-cv-237-MMH-MCR, 2022 WL 1642158, at *10 (M.D. Fla. May 24, 2022) (plaintiffs cannot show irreparable harm due to classwide relief in another case); *Faust v. Vilsack*, No. 21-C-548, 2021 WL 2806204, at *3 (E.D. Wis. July 6, 2021) (same and collecting cases); *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of . . . injunction").

Second, *Neese* forecloses MCC from prosecuting this action. An "individual class member should be barred from pursuing his own individual lawsuit that seeks equitable relief within the subject matter of the class action." *Green v. McKaskle*, 770 F.2d 445, 447 (5th Cir. 1985). "[C]laim preclusion is the core idea of the class action: the procedural form exists precisely to liquidate the claims of many common stakeholders through litigation by a representative few of them." William B. Rubenstein, Newberg and Rubenstein on Class Actions § 18:14 (6th ed. 2024). If the "representatives prevail, the class members may take advantage of that victory" but "are then barred from litigating again themselves." *Id.* "The effect of a judgment in an action under Rule 23(b)(2) is . . . that all class members generally will be bound." Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1775 (3d ed. 2024); *see also Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982).

That the *Neese* judgment is pending appeal before the Fifth Circuit is immaterial. Members of a certified class "should not be allowed to litigate the same issue at the same time in more than one federal court." *Roth v. Austin*, 62 F.4th 1114, 1117 (8th Cir. 2023) (citation omitted). A plaintiff is precluded from prosecuting a separate equitable-in-nature action beginning "once his or her class has been certified." *Wynn v. Vilsack*, No. 3:21-cv-514, 2021 WL 7501821, at *3 (M.D. Fla. Dec. 7, 2021) (quoting *Goff*, 672 F.2d at 704 and collecting cases).

Nor can there be any dispute that MCC's claims in this action are foreclosed by *Neese*. The issue is whether there is a "likelihood of substantial overlap between the two suits." *Mann Mfg. Inc. v. Hortex, Inc.*, 439 F.2d 403, 408 (5th Cir. 1971); *accord Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999) (second-filed court should determine only whether "the issues might substantially overlap"). It is not "require[d] that the cases be identical." *Jesco Constr. of Del., Inc. v. Clark*, No. 1:10CV-453, 2011 WL 2460872, at *3 (S.D. Miss June 17, 2011). Here, MCC seeks a "declaratory judgment that Section 1557 of the ACA . . . do[es] not prohibit discrimination on the basis of gender identity[,]" Compl., Prayer for Relief ¶ E, which is the exact judgment that MCC has already obtained from the *Neese* court, Ex. B to Ex 1, based on essentially the same legal theory. *Compare* ECF No. 7 at 10-20, *with Neese*, 640 F. Supp. 3d at 675-84.[23] The *Neese* judgment thus "conclusively resolves" MCC's rights against HHS on this issue. *See Haaland v. Brackeen*, 599 U.S. 255, 293 (2023). That HHS has since promulgated a regulation stating that discrimination on the basis of sex includes discrimination on the basis of gender identity is immaterial. MCC has no cognizable legal interest in a regulation that OCR will not enforce against MCC given a binding declaratory judgment. *California*, 593 U.S. at 670-71. "[I]t must be presumed that federal officers will adhere to the law as declared by the court." *Sanchez-Espinoza*, 770 F.2d at 208 n.8.

If that were not enough, yet another lawsuit precludes MCC from proceeding with its claims here. In *ACP*, No. 1:21-cv-195 (E.D. Tenn.), the organization "American College of

[23] Indeed, MCC relies on *Neese* throughout its briefing in support of its request for duplicative relief. ECF No. 7 at 11, 16.

Pediatricians" brought an action against HHS on behalf of its members challenging a purported "Section 1557 gender identity mandate." First Am. Compl., *ACP*, No. 1:21-cv-195 (E.D. Tenn. Nov. 10, 2021), ECF No. 15 ("*ACP* First Am. Compl."). MCC appears to be a member of ACP. Ex. D to Ex 1 (ACP logo on MCC website).[24] In *ACP*, ACP, on behalf of MCC and other members, raised "object[ions]" to "twenty-two medical services related to gender interventions," *ACP*, 2022 WL 17084365, at *10—essentially the same as MCC's alleged objections here, Compl. ¶ 179. And in *ACP*, ACP—on MCC's and others' behalf—sought substantially overlapping declaratory and injunctive relief. *Compare*, *e.g.*, *id*., Prayer for Relief ¶ E, *with* Am. Compl., *ACP* First Am. Compl. Prayer for Relief, ¶ A(5). The *ACP* court dismissed the complaint, explaining that the plaintiffs lacked standing to seek the type of injunctive relief sought because the plaintiffs did not show that there was a credible threat that HHS would enforce § 1557 to preclude the plaintiffs or their members from engaging in the particular objected to practices. *ACP*, 2022 WL 17084365, at *13-18. ACP appealed that decision. Although ACP has asked the Sixth Circuit to vacate the decision, the Sixth Circuit has not resolved that request.

As ACP acknowledged in recent briefing before the Sixth Circuit, the *ACP* court's decision on standing "constitute[s] a binding determination on the jurisdictional question, which is not subject to collateral attack." Supplemental Brief of Appellants, *ACP v. Becerra*, No. 23-5053, 2024 WL 2874919, at *8 (6th Cir. May 29, 2024) (citation omitted). Nothing in the Rule has any bearing on the *ACP* court's reasoning because the Rule does not itself determine that any of MCC's policies violate § 1557. But the point is that any relief this Court may award to MCC would give it the proverbial "two bites at the apple" and raise the specter of (additional) inconsistent judgments. Because the same "core issue" is involved in both cases, this later-filed action cannot proceed

[24] Insofar as there is any uncertainty with respect to MCC's membership in ACP, the Court may consider directing MCC to disclose whether it is a member of ACP or has been a member of ACP at any time since the Complaint in ACP was filed. *See* Scheduling Order at 2, *Chamber of Commerce v. Federal Trade Commission*, No. 6:24-cv-148, (E.D. Tex. Apr. 26, 2024), ECF No. 20 (requiring membership organization to disclose to the Court "whether any party in a related case is a member of any plaintiff association here, thus creating the possibility of two bites at the apple or inconsistent judgments"). In addition to indicia of membership on MCC's website, Ex. D to Ex. 1, the President of MCC is the President of ACP. Artigues Decl. ¶ 3; Exs. E, F, to Ex. 1

under Fifth Circuit precedent. *W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 730 (5th Cir. 1985); *see also id*. at 731 n.5 (holding first-filed rule applied because local union party was "in privity" with associational party in the first-filed suit and "could be bound by any injunction the [first-filed] court . . . might issue").

V. The Court Should Not Enjoin Defendants from Enforcing Any Provision of the Rule against Nonparties.

Any injunction or other relief under 5 U.S.C. § 705 should be limited. "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018). Equitable principles similarly require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Consistent with these principles, any preliminary relief should be limited to MCC and extend no further than necessary to resolve any imminent irreparable injury to MCC.

MCC wrongly suggests that 5 U.S.C. § 705 requires a universal remedy. ECF No. 7 at 24.[25] "When 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*, --- S. Ct. ---, 2024 WL 2964141, at *4 (U.S. June 13, 2014). Courts must "not lightly assume that Congress has intended to depart from [those] established principles." *Id*. (citation omitted). Nothing in § 705's text overcomes this presumption. Its plain language requires the Court to consider relief that merely "preserve[s] status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. In tailoring any relief only "to the extent necessary to prevent irreparable injury[,]" *id*., the statute plainly "invokes the [same rules of applying] discretion that courts have traditionally exercised when faced with requests for equitable relief,"

[25] MCC relies on *Alliance for Hippocratic Medicine v. FDA*, 78 F.4th 210, 254 (5th Cir. 2023) for the notion that § 705 authorizes universal relief. ECF No. 7 at 24. That opinion—which is no longer binding on this Court, *see FDA v. All. for Hippocratic Med.*, 602 U.S. ---, 2024 WL 2964140 (U.S. June 13, 2024)—is unpersuasive because it does not engage with the text, context, structure, or history of § 705, or applicable Supreme Court caselaw discussed above. The Supreme Court has explained, in the context of agency rules, a § 705 stay operates to "stay enforcement" of the stayed provisions, which can be limited to the plaintiff. *Abbott Lab'ys*, 387 U.S. at 156.

see Starbucks, 2024 WL 2964141, at *4, rather than universal remedies that "impede the proper functioning of our federal court system," *Georgia v. President of the U.S.*, 46 F.4th 1283, 1303 (11th Cir. 2022). Indeed, the Supreme Court has stated that § 705 is intended only "to reflect existing law" and "not to fashion new rules of intervention for District Courts." *Sampson*, 415 U.S. at 68 n.15. In case any doubt remains, the House Report for the APA explicitly confirms that relief under § 705 should "normally, if not always, be limited to the parties complainant." H.R. Rep. No. 79-1980, at 43 (1946).

MCC invokes § 705 to ask this Court to stay or enjoin enforcement of many provisions, ECF No. 6 ¶ 1, as "applied with respect to 'sex' discrimination encompassing gender identity or sex stereotypes, or with respect to notices or speech made by entities pertaining to pregnancy-related conditions encompassing 'termination of pregnancy' (i.e. abortion)." Those provisions address issues ranging from assurances to trainings. *E.g.,* 45 C.F.R. §§ 92.5, 92.9. But such relief is unnecessary if MCC prevails on its claim that § 1557 does not encompass gender identity discrimination. Staying or enjoining enforcement of § 92.101(a)(2)(iv) would be all that is necessary to preclude OCR from enforcing other provisions in a manner that would violate the Court's order. The provisions of the Rule are severable, 45 C.F.R. § 92.2, and courts should only "sever [any] problematic portions [of a rule] while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006).[26]

CONCLUSION

The motion for a delay of effective date and for preliminary injunction should be denied.

Dated: June 19, 2024

Respectfully submitted,

BRIAN M. BOYNTON

[26] Although § 92.207—which address nondiscrimination in health insurance coverage—includes provisions that may bear relationship to some of MCC's arguments, because MCC is not a health insurance issuer and does not otherwise allege that it provides health-related coverage within the meaning of the Rule, it lacks standing to seek an injunction against enforcement of that section. *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).

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