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

McComb Children's Clinic, LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.** 5:24-cv-00048-LG-ASH
	)	
Xavier Becerra, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF MCCOMB CHILDREN'S CLINIC'S OPPOSITION TO DEFENDANTS' MOTION TO STAY

Plaintiff McComb Children's Clinic ("MCC") respectfully opposes Defendants' [29] Motion to Stay Proceedings or, in the Alternative, to Enter a Briefing Schedule for Dispositive Motions. MCC opposes the stay motion because (1) Defendants' requests would engage the Court in months of unnecessary effort, (2) there is no reason to delay ruling for MCC on an issue the Court has already resolved, and (3) Defendants are not prejudiced by hearing MCC's motion.

I. Further delay burdens the Court's docket.

At each stage of this case, Defendants have delayed. When MCC sought a preliminary injunction, Defendants asked to delay the briefing schedule *beyond* when the Rule would be effective on MCC, and asked the Court to not consider the motion based on Defendants' theory surrounding *Neese v. Becerra*, No. 2:21-cv-00163-Z (N.D. Tex. Nov. 22, 2022), a case in which MCC had no involvement. After a status conference with Judge Harris, the Court appropriately set the briefing to occur before the Rule's effective date. And the Court rejected Defendants' theory that *Neese* undermines standing or injury concerning this new Rule. *See Tennessee v. Becerra*, No. 1:24cv161-LG-BWR, 2024 WL 3283887, at *12 & n.11 (S.D. Miss. July 3, 2024).

Neese concerned a prior guidance, not this Rule; it issued no injunctive relief to stop HHS from enforcing anything; and the Rule's passing footnote on *Neese* does not somehow negate its plain nationwide gender identity mandates. *See id.*

After the Court's ruling in *Tennessee v. Becerra*, Defendants again asked for delay on MCC's preliminary injunction motion. In the discussion with Judge Harris, counsel for Defendants suggested that one reason delay could be appropriate is because some of MCC's claims are purely legal and the Court can hear them expeditiously without need to submit an administrative record. MCC agrees, and thus sought to resolve this case fully by asking the Court to rule on its excess of statutory of authority claim, the crux of which this Court has already resolved, and the relief from which would make a ruling on MCC's other claims unnecessary.

Rather than accepting this expeditious resolution of the dispositive issue here, Defendants responded asking to stay the case indefinitely. In the alternative, they asked to set a schedule to brief all of MCC's claims over the next six months, produce an administrative record that is likely hundreds of thousands of pages long, and produce portions of that record in appendices with this Court. In the meantime Defendants have delayed their decision to appeal *Tennessee v. Becerra* until the last day of their deadline under the rules.

Defendants' delays have added to the Court's workload and this request would exacerbate it further. Granting Defendants' motion would, in its primary request, deny MCC any ability to obtain relief while the case sits on the Court's docket indefinitely. Alternatively, Defendants would involve the Court and parties in six months of iterative briefing, exchange of an administrative record so massive it cannot be filed with this Court, and submission of extensive appendices of excerpts from that record, after which the Court would need to undertake its analysis, hear argument, and issue a ruling.

All of that is unnecessary if MCC's motion for partial summary judgment is resolved consistent with *Tennessee v. Becerra*. Granting MCC's motion would be based on legal analysis this Court already conducted, would not require the administrative record, and would preclude any need to rule on MCC's other claims.

II. There is no reason to delay ruling on MCC's motion.

This Court's injunction in *Tennessee v. Becerra* is a reason to grant MCC's motion, not, as Defendants suggest, a reason to negate it. Under Rule 56, MCC's entitlement to summary judgment is not precluded or undermined by the existence of preliminary injunctive relief—much less when MCC has received no preliminary relief, and is only the secondary beneficiary of relief issued in another case headed to appeal. Instead, MCC is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). MCC has done so.

This Court has already performed the work needed to fully resolve MCC's claim by concluding that the Rule exceeds Defendants' statutory authority. That ruling resolves the question presented in MCC's partial summary judgment motion, and requires holding the Rule unlawful and setting it aside under 5 U.S.C § 706.

There is no need to wait for the behemoth administrative record to resolve this claim, and Defendants cite no such need. The claim does not depend on the arguments or evidence that HHS received or relied on. It turns solely on the legal question of whether the Rule's mandates are within the statutory authority granted HHS by Congress. The APA *limits* the evidentiary baseline to the administrative, but it does not *require* delaying a case to produce a record that is not needed to resolve a purely legal claim. As HHS itself has admitted, "'it is unnecessary for the Court to consider the administrative record in evaluating Plaintiffs' claim, since the claims present pure questions of statutory interpretation.'" *Am. Hosp. Ass'n v. Azar*, 348 F. Supp. 3d

62, 84 (D.D.C. 2018) (quoting HHS's motion to dismiss in that case), *rev'd on other grounds by* 967 F.3d 818, 823 (D.C. Cir. 2020). Here, it is not speculative that the Rule exceeds HHS's statutory authority—the Court already said as much. There is no reason to wait for the administrative record to say it again.

There is also no need for the Court to resolve the equitable injunctive relief factors to grant MCC's request to vacate the Rule. *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 952 (5th Cir. 2024) ("contrary to what the Government and the amici represent, we do not read our precedent to require consideration of the various equities at stake before determining whether a party is entitled to vacatur"). MCC's motion enables the Court to vacate the Rule based on resolving the purely legal question of Defendants' statutory authority.

Defendants suggest that the possible appeal in *Tennessee v. Becerra* is a reason to delay this case. That is incorrect for two reasons. First, as a matter of principle, Defendants' position undermines judicial independence. Defendants regularly argue against injunctions that have a broad or nationwide scope of relief. One important purpose of seeking a narrower scope of relief is so multiple courts can rule on a legal issue in different factual circumstances considering different affected parties. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). In *Tennessee* itself, Defendants argued against issuing relief beyond the parties in the case. But here Defendants argue the Court should not rule for MCC because a case with different kinds of plaintiffs (States) is sufficient to encompass MCC, even as it asks the Fifth Circuit to cut MCC out of that injunction. In fact, ruling for MCC will contribute to the proper function of the appeals process by showing that a private plaintiff is also entitled to relief from this Rule.

Second, as a practical matter, there is no appeal in *Tennessee v. Becerra* to wait for. Assuming, as Defendants seem to assume, they will appeal, that appeal can easily take a year or more to resolve, denying MCC a just resolution of a claim on which

they are entitled judgment. It is also speculative whether that appeal will resolve this case. It could be affirmed on the statutory question but narrowed in the injunction, excluding MCC and causing a scramble for relief before this Court. It could be reversed based on arguments Defendants are making about the States' standing that do not apply here at all, like the argument that states cannot seek relief for their citizens. There is no just reason to delay MCC's final relief indefinitely based on separate litigation that may not resolve this case and could last years.

Several district courts have taken a different approach than Defendants request here. Having granted preliminary injunctions to plaintiffs challenging the government's recent Title IX rule, they are entertaining summary judgment motions even while those or similar rulings are appealed. *See Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, No. 4:24-cv-00461, ECF No. 57 (Order, N.D. Tex. Aug. 8, 2024) (setting expedited summary judgment schedule); *Tennessee v. Cardona*, Civil Action No. 2:24-072, 2024 WL 3584361, at *2 (E.D. Ky. July 16, 2024) (denying defendants' motion to stay the proceedings pending appeal and issuing summary judgment schedule); *Kansas v. U.S. Dep't of Educ.*, No. 24-4041, ECF No. 77 (Order, D. Kan. Aug. 13, 2024) (setting dispositive motions schedule).

III. Proceeding with MCC's motion does not prejudice Defendants.

Defendants cite no grounds on which they would be prejudiced by proceeding on MCC's partial summary judgment motion. The need to file a response brief is not prejudice. On the contrary, as described above, MCC's motion could preclude a tremendous amount of litigation effort on Defendants' part. They assert the generic claim that litigation should not be piecemeal. MCC agrees: once its motion is granted this case will not be piecemeal, it will be all but resolved. Partial summary judgment is a common tool where, as here, it resolves a central narrowing issue that may preclude the need to litigate other claims or delve into a complex factual record. *See,*

e.g., *Rushton v. Taylor-Seidenbach, Inc.*, 2023 WL 1965109, at *2 (E.D. La. Feb. 13, 2023) ("a partial final judgment will serve the interest of judicial economy, and the Court finds that there is no just reason for delay"); *Morales v. Anco Insulations, Inc.*, 2022 WL 2867094, at *2 (E.D. La. July 21, 2022) ("issuing a partial final judgment will serve the interest of judicial economy"); *Lusher Site Remediation Grp. v. Godfrey Conveyor Co.*, 2023 WL 4295304, at *2 (N.D. Ind. June 28, 2023) ("Judicial economy therefore favors granting partial final judgment"); *AKF, Inc. v. W. Foot & Ankle Ctr.*, 632 F. Supp. 3d 66, 73 n.4 (E.D.N.Y. 2022) ("the Court finds fanciful the argument that judicial economy is offended by the common device of partial summary judgment"). And because this Court has already ruled on that central issue, there is even greater reason to expect the Court will save resources by resolving MCC's claim.

Defendants understandably do not want to lose this case on the issue they lost in *Tennessee v. Becerra*. But in reality, the Court's holding there resolves this case. Defendants are not entitled to deny MCC its day in court just to delay their loss and hope to win a different appeal. MCC should be allowed to proceed, and if Defendants lose they may appeal that ruling, where the Fifth Circuit is likely to resolve the various cases efficiently and in due course.

Respectfully submitted this 27th day of August, 2024.

/s/ Nash E. Gilmore

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