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

REBUTTAL IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

As the Supreme Court has long held, the mere existence of a legal code alone is insufficient to establish standing to challenge it, even if a challenged provision "commands" a plaintiff to act or refrain from acting. *California v. Texas*, 593 U.S. 659, 669 (2021). Rather, the plaintiff must show that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement," *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), "as of the time he brought th[e] lawsuit," *Carney v. Adams*, 592 U.S. 53, 59 (2020).

Plaintiff McComb Children's Clinic ("MCC")—a class member in a class action certified under Federal Rule of Civil Procedure 23(b)(2) consisting of all health care providers subject to Section 1557 of the Affordable Care Act—has not made that showing. At the time it filed this suit, it was already protected by its class judgment against the United States Department of Health and Human Services ("HHS"), which declares that "Section 1557 of the [Affordable Care Act] does not prohibit discrimination on account of . . . gender identity." Final Judgment at 1, *Neese v. Becerra*, No. 2:21-cv-00163-Z ("*Neese*") (N.D. Tex. Nov. 22, 2022), ECF No. 71 ("*Neese* Final Judgment"). Because the *Neese* Final Judgment precludes HHS from enforcing Section 1557

against MCC to "prohibit discrimination on account of . . . gender identity," *id.*, MCC faced no imminent enforcement of the codification of that principle in the Final Rule, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) (the "Rule" or "2024 Rule"), at the outset of the litigation. *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023).

In opposing this motion, MCC principally argues that it has faced imminent HHS enforcement of the gender identity discrimination provisions codified in the Rule because the *Neese* court did not issue an injunction and because the *Neese* Final Judgment was issued after HHS promulgated a Notification of Interpretation and Enforcement in 2021. Resp. in Opp'n to Defs.' Mot. to Dismiss at 1, ECF No. 43. Those arguments provide no basis for this Court to ignore the preclusive implications of the *Neese* Final Judgment, which includes a declaration about the interpretation of Section 1557 itself. Nor is MCC correct to argue that the Rule is somehow enforced independently of Section 1557. "An agency's regulation cannot 'operate independently of' the statute that authorized it." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) (quoting *California*, 593 U.S. at 679). Because MCC was protected from enforcement by HHS at the outset of the litigation, it lacks standing to challenge the provisions of the Rule to the extent they address discrimination on the basis of gender identity under Section 1557. To conclude otherwise would mean that any plaintiff or class member could repeatedly sue a defendant and obtain multiple overlapping judgments precluding the same conduct.

MCC's opposition also fails to show that this case should not be dismissed as a duplicative challenge to an agency rule under *Abbott Laboratories v. Gardner*, 387 U.S. 136, 155 (1967). MCC principally argues that no such doctrine exists, but its argument ignores the Supreme Court's pronouncements on this issue in *Gardner*. *See id.* The Court should dismiss this action without prejudice.

I. MCC Lacks Standing Because It Was Already Protected by the *Neese* Final Judgment at the Outset of this Litigation.

As Defendants explained in their opening brief, MCC lacks standing because it faced no actual or imminent enforcement of the challenged provisions of the Rule at the outset of this case. Mem. in Supp. of Defs.' Mot. to Dismiss at 6-11, ECF No. 36. MCC's opposition attempts to cast doubt on that fact. MCC suggests that the *Neese* Final Judgment did not include a declaration about Section 1557 itself. ECF No. 43 at 8. And by claiming that—notwithstanding that judgment—MCC has faced imminent enforcement of the 2024 Rule's provisions addressing discrimination on the basis of gender identity under Section 1557, MCC argues that the Rule somehow operates independently of Section 1557. *Id.* It asserts that declaratory judgments are meaningless advisory opinions that do "not stop HHS from doing anything." *Id.* at 7. It asks the Court to ignore precedent and base its jurisdiction on speculation that the Fifth Circuit will overturn *Neese*. *Id*. at 10. And it argues that it is not a *Neese* class member despite alleging in its Complaint that it is a health care provider subject to Section 1557. *Id*. at 8-9. All of these arguments are without merit.[1]

A. Because An Agency's Regulation Cannot Operate Independently of the Statute that Authorized It, the *Neese* Final Judgment Precluded HHS From Enforcing the Challenged Aspects of the Rule Against Class Members at the Outset of the Litigation.

MCC emphasizes that the *Neese* class action was litigated to final judgment before HHS issued the Rule. *See* ECF No. 43 at 8 ("*Neese* challenged a different action, not this Rule. This Rule did not exist either when *Neese* was filed or when the case concluded."). But the *Neese* Final Judgment declares that Section 1557 itself "does not prohibit discrimination on account of . . .

[1] Defendants acknowledge that the Court has issued interlocutory opinions that include reasoning contrary to Defendants' argument in support of this motion. *See*, *e.g.*, *Tennessee v. Becerra*, --- F. Supp. 3d -----, 2024 WL 3283887, at *11-12 (S.D. Miss. July 3, 2024). This Court is now in a position to reconsider this earlier, contrary reasoning with the benefit of additional briefing and without the need to issue an opinion on a short fuse. *See, e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

gender identity." *Neese* Final Judgment at 1. Specifically, the *Neese* Final Judgment includes two declaratory paragraphs:

- 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 second paragraph clearly includes a declaration by the *Neese* court about the meaning of Section 1557 itself, and does not mention, let alone limit its application to, the specific Notification challenged in *Neese*. *Id*.[2]

Because the *Neese* declaratory judgment resolves the issue of whether Section 1557 itself may be enforced to prohibit discrimination on the basis of gender identity as between HHS and *Neese* class members, *Haaland*, 599 U.S. at 293, HHS's promulgation of the 2024 Rule does not authorize HHS to take enforcement actions that are precluded by the *Neese* Final Judgment. The Supreme Court addressed a similar problem in *Federal Election Commission v. Cruz*, 596 U.S. 289 (2022). In that case, the Court explained that "[a]n agency's regulation cannot 'operate independently of' the statute that authorized it." *Id*. at 301 (citation omitted). Thus, if a rule is promulgated to implement a certain statute and "the statute were declared invalid, . . . the regulation would . . . cease to be enforceable" as well. *Id*. (citation omitted). In the same way, a judgment against an agency declaring that a statute must be read in a limited way precludes the agency from enforcing against the plaintiff provisions of a rule that construe the same statute inconsistently with the judgment. *Id*.

[2] Furthermore, the first paragraph states that members of the *Neese* class, like MCC, need not comply with the interpretation of "sex" discrimination adopted by Defendant Becerra in the Notification. That interpretation is the same one identified in the second paragraph; namely, that Section 1557's prohibition on discrimination on the basis of sex includes discrimination on the basis of gender identity.

Moreover, in the context of this case, it is irrelevant that the 2024 Rule includes provisions requiring covered entities to have written policies, provide notices to patients, and submit assurances of compliance. ECF No. 43 at 8. The Complaint does not challenge HHS's authority to promulgate Section 1557 regulations that include these types of requirements generally. Rather, the Complaint states claims for relief focused only on the validity of the Rule's provisions "to the extent [they] prohibit[] discrimination on the basis of gender identity." *See, e.g.*, Compl., Prayer for Relief (A), ECF No. 1. At the outset of the litigation, the *Neese* Final Judgment had a "preclusive effect" on HHS's power to enforce any of those provisions against *Neese* class members insofar as the class members do not have a written policy prohibiting discrimination on the basis of gender identity, do not notify the public about such policies, and do not submit assurances that they do not discriminate on the basis of gender identity. *See Haaland*, 599 U.S. at 293.

The error in MCC's claim that the *Neese* Final Judgment is limited to a declaration that the 2021 Notification itself was invalidly promulgated is underscored by the filings in *Neese*. The district court ordered the parties to submit competing proposed judgments, *see Neese v. Becerra*, 640 F. Supp. 3d 668, 687 (N.D. Tex. 2022), and the Government's Proposed Judgment limited relief to the 2021 Notification in exactly the manner MCC claims. Defendants' Proposed Judgment at 2, *Neese*, No. 2:21-cv-00163-Z (N.D. Tex. Nov. 21, 2022), ECF No. 68. But the *Neese* court rejected the Government's Proposed Judgment and entered a different judgment declaring the meaning of Section 1557 itself. *Neese* Final Judgment at 1.

MCC's arguments that the *Neese* declaratory judgment is illusory are without merit. First, MCC wrongly asserts that only an injunction would preclude HHS from taking enforcement actions that are inconsistent with the law as declared by the *Neese* court. ECF No. 43 at 7. Not so. "The very purpose of [the declaratory judgment] remedy is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by res judicata." 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4446 (3d ed. updated 2024).

See Haaland, 599 U.S. at 293; Restatement (Second) of Judgments § 33 (Am. L. Inst. 1982) ("A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared").

Likewise incorrect is MCC's argument that the *Neese* Final Judgment "does not stop HHS from doing anything." ECF No. 43 at 7. In fact, declaratory judgments are not advisory opinions precisely because of their preclusive effect. *See* 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4446 (3d ed. updated 2024) ("Denial of any preclusive effect, indeed, would leave [the] procedure difficult to distinguish from the mere advisory opinions prohibited by Article III."). The *Neese* Final Judgment precludes HHS from taking enforcement actions against class members inconsistent with the law as declared by the *Neese* court. *Id*.

For the same reasons, MCC's contention that HHS insufficiently "disavow[ed]" any intention to take enforcement actions against *Neese* class members inconsistent with the matters declared in the *Neese* Final Judgment, ECF No. 43 at 10, is baseless. HHS explicitly referenced the judgment, and its intent to comply with it, in the preamble to the 2024 Rule. 89 Fed. Reg. at 37,574 n.118. And, in any event, no such reference was required to operationalize the *Neese* Final Judgment as having a preclusive effect between HHS and the *Neese* class. On the contrary, once a court issues a declaratory judgment telling an executive official that certain conduct is required or forbidden, it is presumed that the official will comply. *See, e.g.*, *Republic Nat'l Bank of Mia. v. United States*, 506 U.S. 80, 97–98 (1992) (White, J., concurring) (stating that "[t]here is nothing new about expecting governments to satisfy their obligations" and giving as an example the expectation that government officials will comply with a declaratory judgment); *Poe v. Gerstein*, 417 U.S. 281, 281 (1974) (per curiam) (affirming a three-judge district court's denial of an injunction—even though it had granted a declaratory judgment—because there was no reason to think the public officials in question would fail to "acquiesce in the decision" (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 165 (1943))); *Roe v. Wade*, 410 U.S. 113, 166 (1973) (noting the Court's confidence that state officials would comply with the declaratory judgment); *Comm. on*

the Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam) ("[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction."). MCC has not cited a single enforcement action HHS has taken inconsistent with the *Neese* judgment.

Finally, insofar as MCC argues that it might face enforcement someday if the *Neese* Final Judgment is reversed on appeal, *see* ECF No. 43 at 10, that argument is inconsistent with the requirement that MCC establish that it faced imminent enforcement "as of the time [it] brought this lawsuit[.]" *Carney*, 592 U.S. at 59. *See Texas v. Yellen*, 105 F.4th 755, 766 (5th Cir. 2024) ("standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed" (citation omitted)); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005) ("The party invoking the jurisdiction of the court cannot rely on events that unfold[] after the filing of the complaint to establish its standing."); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413-14 (2013) ("[I]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in [a] case." (citation omitted)).

B. MCC is a Member of the *Neese* Class, and Even if There Was Any Doubt, that Issue Is Not for This Court to Decide.

There is no "significant doubt whether the class certified in *Neese* covers MCC." ECF No. 43 at 8. The *Neese* class consists of "[a]ll health-care providers subject to Section 1557 of the [ACA.]" Order at 1, *Neese*, No. 2:21-cv-00163-Z (N.D. Tex. Nov. 22, 2022), ECF No. 70 ("*Neese* Class Cert. Order"). And MCC alleges that its "primary purpose is to provide healthcare." Compl. ¶ 20.

The Declaration of Michael Artigues, M.D., F.C.P., confirms that MCC is a health care provider. Decl. of Michael Artigues, M.D., F.C.P. ¶¶ 7, 9-10, 14, 28, 30, 60, ECF No. 1-2. As Dr. Artigues has declared, "the clinic provides . . . high-quality medical care to . . . all patients, whether it is for a wellness exam, acute illness, or any other medical condition." *Id.* ¶ 28. "The patients of

McComb Children's Clinic rely on it for general pediatric care." *Id.* ¶ 60. And it "bills Medicaid and [the Children's Health Insurance Program] for patient care[.]" *Id.* ¶ 30.

MCC's attempt to undermine the plain language of the *Neese* Class Certification Order should be rejected. ECF No. 43 at 8-9. As an initial matter, MCC cites no authority to show that this Court should look beyond the four corners of that order to disregard its plain language. Doing so would be inconsistent with the Federal Rules of Civil Procedure, which requires that "[a]n order that certifies a class action must [itself] define the class[.]" Fed. R. Civ. P. 23(c)(1)(B). If the *Neese* court intended the class to be limited to non-institutional health care providers, it would have said so in the class definition, which "must be precise." 3 William Rubenstein, Newberg and Rubenstein on Class Actions § 7:28 (6th ed. updated 2024) (quoting Manual for Complex Litigation § 21.222 (4th ed. updated 2024)).

In any event, MCC's argument is wrong on its own terms. When analyzing the Rule 23 criteria in its memorandum opinion, the *Neese* court referred to a statistic including non-institutional providers only to show that Rule 23's numerosity requirement was satisfied. *Neese v. Becerra*, 342 F.R.D. 399, 407 (N.D. Tex. 2022). The *Neese* court was analyzing whether the plaintiffs had shown that the "class consists of more than 40 members." *Id.* A dataset showing that a subset of the class exceeded that number was sufficient to make that showing; use of the dataset for that purpose does not imply that the class was limited to that subset of healthcare providers. *Id.*

Even if any ambiguity existed as to MCC's membership in the *Neese* class, the *Neese* court, and not this Court, is responsible for construing its order. This Court must "avoid[] trenching on the authority of its sister court" to construe its orders. *See Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999). And insofar as there is any ambiguity, the *Neese* district court "possesses the authority to clarify the class definition[.]" 3 William Rubenstein, Newberg and Rubenstein on Class Actions § 7:28 (6th ed. updated 2024).

II. MCC Provides No Basis for the Court to Retain This Duplicative Case.

MCC fails to justify moving forward with this case while the same issues are pending in challenges to the same rule elsewhere. MCC first disputes the Court's authority to dismiss this case on this basis altogether. ECF No. 43 at 11. But the Court's authority is well settled. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court expanded the circumstances in which plaintiffs could bring pre-enforcement challenges to agency rules. In opposing that expansion, the Government argued that "nothing will prevent a multiplicity of suits in various jurisdictions challenging . . . regulations." *Id.* at 154. In response, the Court explained:

> The short answer to this contention is that the courts are well equipped to deal with such eventualities. The venue transfer provision, 28 U.S.C. s 1404(a), may be invoked by the Government to consolidate separate actions. Or, actions in all but one jurisdiction might be stayed pending the conclusion of one proceeding. . . . *A court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere.*

Id. at 154-55 (emphasis added). MCC's assertion that "there is no doctrine dismissing a plaintiff's case because other people sued elsewhere," ECF No. 43 at 11, is thus contrary to this authority. And *Gardner*'s determination that a case may properly be dismissed as duplicative when it is one of many challenges to an agency rule undermines MCC's suggestion that dismissal is appropriate only if MCC is already a "party to any of the other cases challenging the new Rule." *Id.* at 12. It would make little sense for the "multiplicity of suits" challenging an agency's regulations as contemplated in *Gardner* to be brought by the same party. 387 U.S. at 154.[3]

MCC argues that the pendency of other cases "does not negate MCC's harm from the Rule." ECF No. 43 at 11. But the point of this doctrine is not to deny MCC the ability to raise its claims regarding the Rule. Rather, the doctrine encourages dismissal without prejudice "with the

[3] In any event, Defendants dispute MCC's assertion that it "is not party to any of the other cases challenging the new Rule." ECF No. 43 at 12. American College of Pediatricians ("ACP") is a plaintiff in one of the other challenges to the 2024 Rule, bringing suit on behalf of its members. Complaint ¶¶ 50-54, *Missouri v. Becerra*, No. 4:24-cv-00937 (E.D. Mo. July 10, 2024), ECF No. 1. MCC holds itself out on its website as a member of ACP. ECF No. 18-5 (ACP logo on MCC website). MCC and ACP are thus "in privity" at least for purposes of the law of duplicative litigation. *W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 731 n.5 (5th Cir. 1985) (local union party considered "in privity" with associational party in separate action when applying duplicative litigation principles).

suggestion that the plaintiff intervene in a pending action elsewhere" for efficiency and judicial and party economy reasons. *Gardner*, 387 U.S. at 155. *See also Chamber of Com. of U.S. v. FTC*, --- F. Supp. 3d ----, 2024 WL 1954139, at *8 (E.D. Tex. May 3, 2024) ("steering plaintiffs to intervene in [related action challenging same regulation] tracks the Supreme Court's acceptance of such a course in *Gardner*"). Those reasons apply with compelling force here because the judicial and party effort would undoubtedly be duplicated were this case and *Tennessee* to continue to "proceed in parallel." *Chamber of Com. of U.S.*, 2024 WL 1954139, at *4.

Nor is MCC helped by the truism that "federal courts have a 'virtually unflagging' duty 'to exercise the jurisdiction given them.'" ECF No. 43 at 11 (citation omitted). MCC seeks to invoke the jurisdiction of this Court to review the Rule under the Administrative Procedure Act ("APA"). Compl. ¶ 12. And one element of an APA cause of action is that there be no "appropriate legal or equitable ground" under which to "dismiss any action or deny relief." 5 U.S.C. § 702(1). The Court thus may appropriately dismiss this action without prejudice on the equitable ground described in *Gardner*.

MCC correctly notes that it "filed its case before the States filed their [*Tennessee*] case," and thus, MCC asserts, "compelling circumstances" must "justify" dismissal of this case instead of *Tennessee*. ECF No. 43 at 12. But "where such 'compelling circumstances' exist, dismissal of a first-filed declaratory judgment action may be appropriate." *Pontchartrain Partners, LLC v. Tierra de Los Lagos, LLC*, 48 F.4th 603, 606 (5th Cir. 2022). Compelling circumstances exist here because this Court issued a nationwide preliminary injunction in *Tennessee* and not in this action, and Defendants have appealed the *Tennessee* order to the Fifth Circuit. Dismissal of *Tennessee* on duplicative grounds would dissolve that injunction and divest the Fifth Circuit of jurisdiction over the appeal. The first-filed rule does not require the Court to dismiss *Tennessee*, instead of this case, under these circumstances.

CONCLUSION

For the reasons provided above and in Defendants' opening brief, the Court should dismiss the Complaint without prejudice.

Dated: November 1, 2024

Respectfully submitted,

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