UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

STATE OF TEXAS,
STATE OF MONTANA,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; MELANIE FONTES RAINER, in her official capacity as Director of the Office for Civil Rights; CENTERS FOR MEDICARE & MEDICAID SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

Case No. 6:24-cv-211-JDK

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER

The Fifth Circuit made clear in *Career Colleges & Schools of Texas v. U.S. Department of Education*, 98 F.4th 220 (5th Cir. 2024), that relief under 5 U.S.C. § 705 should extend only to the parts of a regulation that a plaintiff "*actually challenges* and for which it has shown a likelihood of success on the merits." 98 F.4th at 255. Accordingly, in their Motion to Reconsider ("Motion"), ECF No. 21, Defendants respectfully requested that the Court revise its July 3, 2024 Memorandum Opinion and Order ("Order"), ECF No. 18, to stay only those portions of the Final Rule at issue in this case ("Rule") that specifically implicate the provision of or coverage for gender-affirming care or, at most, only those portions of the Rule that address discrimination on the basis of gender identity. *See* Motion at 1-2. As Defendants' Motion reiterated, those particular provisions were the only ones whose lawfulness Plaintiffs meaningfully challenged in their motion for preliminary relief ("PI Motion"), ECF No. 2, and they were likewise the only provisions to which Plaintiffs traced any alleged irreparable harm. *See* Motion at 3-6; *see also* Defs.' Opp'n ("Opposition") at 6-8, 17-23, ECF No. 15. In responding to Defendants' Motion, Plaintiffs could have attempted to demonstrate why the much broader relief the Court granted is nonetheless "necessary to prevent" the "irreparable injur[ies]" they asserted in their PI Motion. 5 U.S.C. § 705. But their Response, ECF No. 31, instead raises inapt and contradictory arguments about severability and suggests that it is somehow now Defendants' burden to demonstrate that the equities weigh in favor of revising a § 705 stay that was "improper" in the first place, *Career Colleges*, 98 F.4th at 255-56. Because Plaintiffs do not come close to clearly showing that they were entitled to a stay of the entire Rule, Defendants' Motion to Reconsider should be granted.

ARGUMENT

I. Plaintiffs Were Not Entitled To a Stay of the Entire Rule In the First Place

Defendants argued in their Motion that the Court should "narrow[] its Order to stay only those portions of the Rule that Plaintiffs actually challenged" in their PI Motion. Motion at 4. And the basis for that request was straightforward: (1) § 705 authorizes courts to "postpone the effective date of an agency action" only "to the extent necessary to prevent irreparable injury," 5 U.S.C. § 705; (2) the Fifth Circuit has confirmed that, pursuant to that statutory language, relief under § 705 "should only involve . . . the portions of [a] Rule" that a plaintiff "*actually challenges* and for which it has shown

a likelihood of success on the merits," *Career Colleges*, 98 F.4th at 255; (3) in their PI Motion, Plaintiffs only meaningfully challenged the lawfulness of the Rule's prohibition against gender identity discrimination, and only then to the extent that prohibition would allegedly require them to "perform and pay for harmful 'gender-transition' procedures," PI Motion at 1; and (4) as the Court itself acknowledged, the irreparable injuries Plaintiffs asserted were likewise tied exclusively to the provisions of the Rule concerning gender-affirming care, *see* Order at 20-23 (concluding that Plaintiffs were likely to suffer irreparable financial and sovereign injuries for refusing to comply with the Rule's gender-affirming care provisions). Consequently, any relief the Court decided to grant under § 705 should have been limited to those provisions alone. *See Career Colleges*, 98 F.4th at 255-56; *see also* Motion at 2 (listing the provisions of the Rule appropriately subject to a stay).

One might have expected that Plaintiffs would try to counter these propositions in their Response. But their Response touches on only one (and unpersuasively so) and leaves the others largely unaddressed. For instance, Plaintiffs do not contest—indeed, they acknowledge outright—that § 705 authorizes preliminary relief only "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705; *see* Response at 6-7. Yet Plaintiffs, revealingly, make no effort to demonstrate why a stay of the *entire* Rule is "necessary to prevent" the specific "irreparable injur[ies]" they asserted in their PI Motion. As noted in Defendants' Opposition and Motion, those asserted injuries flowed exclusively from the Rule's provisions concerning gender-affirming care. *See, e.g.*, PI Motion at 1-2 (contending that the Rule's purported requirement that Plaintiffs "perform and pay for" certain gender-affirming care presented Plaintiffs with the "impossible choice" of "abandon[ing] state law or risk[ing] devastating financial loss"). Naturally, then, nowhere in their PI Motion did Plaintiffs indicate that such injuries could be avoided only by staying the Rule in its entirety. And Plaintiffs' Response establishes nothing to the contrary. It asserts that the "provisions" that would supposedly "compel [Plaintiffs] to perform and subsidize gender transitions" are "among the most egregious applications" of the Rule, without so much as mentioning what other "provisions" or "applications" *unrelated to gender-affirming care* (whether allegedly egregious or not) also purportedly cause Plaintiffs irreparable harm. Response at 6. It also claims that the narrower stay proposed in Defendants' Motion is

"insufficient," but then fails to explain why that is so. *Id.*[1]

Plaintiffs likewise have little to say about *Career Colleges*'s express limits on the substantive scope of § 705 relief. *See* 98 F.4th at 255-56 ("[I]t would be improper to enjoin portions of the Rule that are unchallenged . . . ."). They suggest that Defendants' Motion is instead governed by a more recent unpublished (and divided) Fifth Circuit opinion. *See, e.g.*, Response at 3 n.2 (citing *Louisiana ex rel. Murrill v. U.S. Dep't of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024) (per curiam)). *Murrill*, however, addressed whether the defendant-appellants in that case had met their "heavy burden" of showing that a stay of a preliminary injunction pending appeal was warranted. 2024 WL 3452887, at *1. What that non-precedential opinion has to say about Defendants' Motion here—which concerns whether *Plaintiffs* met *their burden* of clearly showing that they were entitled to a stay of the entire Rule—is thus far from apparent.

The only proposition Plaintiffs attempt to contest in their Response is the "premise" that they "only challenged the Final Rule to the extent that it would require [them] to perform and subsidize harmful gender-transition procedures." Response at 6. And they do so by citing to allegations in their Complaint addressing other provisions unrelated to gender-affirming care. *Id.* But such allegations are irrelevant to the question of whether Plaintiffs "*actually challenge[d]*" those other provisions in their PI Motion and clearly showed that the provisions (1) were likely unlawful and (2) posed a "substantial threat of irreparable harm." *Career Colleges*, 98 F.4th at 233, 255; *see Anibowei v. Morgan*, 70 F.4th 898, 904 (5th Cir. 2023) (explaining that "conclusory" allegations are "insufficient" to establish irreparable harm for purposes of preliminary relief).

Rather than responding directly to the arguments made in Defendants' Motion, Plaintiffs contend that "the equitable factors that govern preliminary relief counsel against amending" the Court's Order. Response at 8. But that gets things backwards. Plaintiffs were entitled to a § 705 stay

[1] Indeed, Defendants' Motion highlighted a number of Rule provisions that have nothing to do with gender-affirming care or gender identity discrimination more broadly, *see* Motion at 5-6—none of which Plaintiffs have argued are unlawful or cause them harm in any way, and all of which Defendants have an interest in enforcing. *See E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021) (noting that a government "necessarily suffers . . . irreparable harm" when one of its laws, including executive orders, is enjoined).

only if they established the four prerequisites for a preliminary injunction, *see Career Colleges*, 98 F.4th at 233, which include the "equitable factors" Plaintiffs cite in their Response. And even then, any relief granted under § 705 should have "involve[d]" only those portions of the Rule that Plaintiffs "*actually challenge[d]*" in their PI Motion. *Id.* at 255. Defendants' Motion accepts (yet respectfully disagrees with) the Court's conclusion regarding the first standard (i.e., the preliminary injunction factors); argues that the Court erred under the second standard by staying the entire Rule in the first instance; and requests that the Court reconsider the scope of its stay anew. But Plaintiffs now suggest that it is somehow Defendants' burden to also demonstrate that the equities weigh in favor of revising an improperly broad stay that should not have been issued in the first place. Unsurprisingly, they cite no authority supporting such a burden shift at the motion-for-reconsideration stage. Their arguments about "equitable factors" should thus be rejected outright.

II. Defendants Have Not Waived Any Severability Arguments

Plaintiffs devote the bulk of their Response to making jumbled arguments about severability. They contend, for instance, that Defendants' Motion should be denied because Defendants purportedly "waived their severability argument," Response at 4—which suggests (incorrectly) that Defendants did not raise severability at all in their Opposition. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 761 F.3d 409, 425 (5th Cir. 2014) (indicating that arguments "*raised for the first time* in a motion for reconsideration" are generally waived (emphasis added)). Yet Plaintiffs also assert that Defendants' Motion should be denied because it "re-urge[s]" and "rehash[es]" severability arguments that were *previously made*, Response at 5—which would be incompatible with waiver. Plaintiffs then argue that Defendants' "cursory reference to severability" in their Opposition "forfeit[ed] that argument." *Id.* at 4. But contrary to this mischaracterization, Defendants' Opposition plainly and repeatedly argued that (1) Plaintiffs' PI Motion only meaningfully challenged the provisions of the Rule concerning gender-affirming care (or, at most, those provisions concerning gender identity discrimination), and that (2) any stay or preliminary injunction should therefore be limited to those provisions alone. *See* Opposition at 1, 6-8, 15, 21, 25. That second proposition is inherently premised on those specific provisions being independent of—and thus ultimately severable from—ones

unrelated to gender-affirming care. *Cf. Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 352 (D.C. Cir. 2019) (concluding that challenged provisions that "ha[d] no connection" with other provisions of a rule were severable). And that same proposition is further bolstered by the Rule's severability clause, which reflects Defendants' clear intention to have the rest of the Rule still take effect even if a portion of it were "held to be invalid or unenforceable." 45 C.F.R. § 92.2(c).

It is unremarkable, moreover, that Defendants' Opposition did not discuss severability at the level of detail demanded by Plaintiffs given its reliance on *Career Colleges*—which, as Plaintiffs acknowledge, "sa[id] nothing of severability." Response at 3 n.2. That case, like this one, involved an Administrative Procedure Act challenge to a multifaceted federal regulation; the plaintiffs in that case, like Plaintiffs here, only sought preliminary relief from certain provisions of the regulation at issue; and the *Career Colleges* court accordingly explained that any relief under § 705 should be limited to those challenged provisions alone without at all suggesting that such tailoring required a robust severability analysis. 98 F.4th at 255-56. The Court's Order here, of course, appeared to suggest that Defendants did not provide sufficient "guidance" as to which specific provisions of the Rule were appropriately subject to the § 705 stay the Court deemed warranted, Order at 27, and Defendants sought to provide such guidance in their Motion, *see* Motion at 1-2. But Defendants do not construe the Court's Order as doubting whether provisions concerning gender-affirming care (or gender identity discrimination more broadly) can easily be severed from ones having nothing to do with that issue at all.[2]

Plaintiffs' severability arguments, in short, are simply a distraction from the central question addressed by Defendants' Motion—namely, whether Plaintiffs were entitled to a stay of the entire Rule in the first place. They were not, *see Career Colleges*, 98 F.4th at 255-56, and Plaintiffs' Response does nothing to change that fact.

CONCLUSION

Defendants' Motion to Reconsider should be granted.

[2] Indeed, two other district courts in Florida and Mississippi had little trouble severing provisions of the Rule that they concluded were unlawful from other portions of the Rule that went unchallenged. *See* Motion at 6-7 (describing the much more limited substantive relief granted by those courts).

DATED: August 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 12, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Eastern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Zachary W. Sherwood
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