

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

STATE OF TENNESSEE, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Secretary of the United States
Department of Health and Human
Services, *et al.*,

Defendants.

No. 1:24-cv-00161-LG-BWR

**REPLY IN SUPPORT OF DEFENDANTS’
AMENDED MOTION TO STAY PROCEEDINGS**

In opposing Defendants’ motion to stay district court proceedings, Plaintiffs repeatedly contend that “this Court has already considered and thoroughly addressed the legal questions at issue.” Pls.’ Consolidated Supp. Br. & Opp. to Defs.’ Am. Mot. to Stay (“Opp.”) at 4, ECF No. 48. *See also id.* (noting that the Court’s task in “deciding the merits should not be particularly cumbersome”). In other words, Plaintiffs have now twice confirmed what their goal has been all along: to rush this Court to final judgment on the merits, before the Fifth Circuit has a chance to weigh in. In support of that position, Plaintiffs raise a handful of speculative complaints—none of which counters the fact that all three stay factors weigh in favor of a stay of district court proceedings here. *See* Mem. in Supp. of Defs.’ Am. Mot. to Stay Proceedings (“Defs.’ Br.”), ECF No. 47.

As an initial matter, Plaintiffs’ purported complaints of prejudice ring hollow, as they depend on conflicting presumptions about the outcome on appeal. For example, Plaintiffs argue that if Defendants were to prevail on appeal, Plaintiffs would be forced to choose between undertaking compliance efforts or risking the loss of federal funds while continuing to litigate the

merits of the 2024 Rule. Opp. at 4. Thus, in their view, “[o]nly full vacatur” of the 2024 Rule by this Court would provide Plaintiffs with “full relief and compliance certainty.” *Id.* at 5. But even under this hypothetical, Plaintiffs’ proposed resolution—that the Court enter final judgment in favor of Plaintiffs—presumes, conversely, that Plaintiffs will prevail on appeal. Put simply, Plaintiffs should not be permitted to manufacture prejudice from Defendants’ proposed stay based on conflicting speculations about how the Fifth Circuit may answer potentially controlling issues of law in this case. Rather, as Defendants explained, the best course is to await resolution of Defendants’ appeal of this Court’s preliminary injunction order (“PI Order”), after which the parties and the Court will have more clarity about the appellate court’s views of the relevant legal issues.

Likewise, Plaintiffs’ refrain—that preserving the status quo will leave them in a “confusing compliance limbo,” Opp. at 5—ignores that they would remain similarly situated even if the Court were to proceed to the merits. That is, if the Court were to convert its PI Order into a final judgment, as Plaintiffs request, and the Fifth Circuit were to reverse the Court’s PI Order, Plaintiffs would be in the exact same position as they are now. Indeed, implicit in Plaintiffs’ claim of prejudice is the presumption that they have no recourse should the Fifth Circuit reverse the Court’s PI Order. But that is wrong. If Defendants were to prevail on appeal, Plaintiffs would be free to seek further appellate review or to move for expedited final judgment before the district court once again—with the benefit (for both the parties and the Court) of knowing what circuit law applies.¹

Nor do Plaintiffs offer any meaningful response to the hardship and inefficiencies Defendants and the Court would face if forced to litigate this action further in district court while Defendants’ appeal remains pending. *See* Defs.’ Br. at 4–5. Instead, Plaintiffs argue, on the one hand, that Defendants face “minimal burden” because they will already be litigating similar issues

¹ Plaintiffs separately assert that they should not be forced to “stand aside” while the *McComb* plaintiff litigates its case. Opp. at 6 (citation omitted). But Plaintiffs are not standing aside. Through Defendants’ appeal of this Court’s PI Order, Plaintiffs are currently litigating before the Fifth Circuit the primary question of law at issue in these cases, *i.e.*, whether *Bostock v. Clayton County*, 590 U.S. 644 (2020), applies to Title IX, and by extension, Section 1557 of the Affordable Care Act.

in *McComb v. Becerra et al.*, No. 5:24CV48-LG-ASH (S.D. Miss.), while recognizing, on the other hand, that the issues on appeal may be overlapping with those before this Court. Opp. at 5. Ultimately, Plaintiffs do not deny that rushing to resolve this case on the merits will force Defendants and the Court to expend even more resources to litigate overlapping legal issues—with an increased risk of conflicting judgments in at least three different forums (counting *McComb*). Indeed, Plaintiffs’ suggestion that expedited review on the merits would allow for “potential consolidation of this Court’s merits decision with the appeal now pending before the Fifth Circuit,” Opp. at 6, only underscores that potential burden on the parties. That is, a final decision on the merits would effectively dissolve the Court’s PI Order, thereby raising concerns that the pending Fifth Circuit appeal (with briefing currently scheduled to conclude in January 2025) would be moot.

Finally, Plaintiffs identify a handful of cases in which district courts proceeded to the merits while a preliminary injunction appeal was pending. Opp. at 6. But those outlier cases do not change the overall calculus. Rather, the ordinary course is for courts to stay district court proceedings in circumstances similar to those here, so as to avoid “duplicative and potentially unnecessary litigation.” *Whole Woman’s Health v. Hellerstedt*, No. A-16-CA-1300-SS, 2017 WL 5649477, at *2 (W.D. Tex. Mar. 16, 2017). *See also* Defs.’ Br. at 4–5 (collecting cases). In fact, in another challenge to the 2024 Rule at issue here, the State plaintiffs (and the court) agreed that a stay of district court proceedings pending appeal was the most efficient course. *See Order Staying Case, Texas v. Becerra*, No. 6:24-cv-211 (E.D. Tex. Oct. 2, 2024), ECF No. 46 (ordering “that further proceedings in this case are stayed until Defendants’ appeal is finally resolved”).

At bottom, Plaintiffs cannot dispute the fact that “[h]ow the Court of Appeals for the Fifth Circuit answers the significant legal questions of this case will likely alter upcoming proceedings.” *Whole Woman’s Health*, 2017 WL 5649477, at *2. Nor can they dispute that “staying this case avoids duplicative and potentially unnecessary litigation, [and] conserv[es] judicial resources.” *Id.* Accordingly, Defendants respectfully request that the Court stay further district court proceedings in this case until Defendants’ appeal from this Court’s PI Order is finally resolved.

Dated: October 4, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Sarah M. Suwanda
SARAH M. SUWANDA
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20005
Tel.: (202) 305-3196
E-mail: sarah.m.suwanda@usdoj.gov

Counsel for Defendants