IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

RAPIDES PARISH SCHOOL BOARD, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*., Defendants.	Case No. 1:25-CV-00070-DDD-JPM

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

This Court should dismiss this action. The Rapides Parish School Board ("School Board") concedes that it cannot satisfy the traditional standard for pre-enforcement standing—"threatened enforcement" that was "sufficiently imminent[,]" *Neese v. Becerra*, 123 F.4th 751, 753 (5th Cir. 2024) (citation omitted), "at the time [it] filed suit"—three days before then-President-elect Trump took office, *see Carney v. Adams*, 592 U.S. 53, 59 (2020). And the Court has no authority to disregard myriad pronouncements of the Supreme Court and the Fifth Circuit about the jurisdictional and threshold issues necessarily raised by this case, as the School Board seemingly demands throughout its opposition.[1]

ARGUMENT

I. The School Board Has Not Shown Threatened Enforcement That Was Sufficiently Imminent When It Filed the Complaint.

The School Board has not shown "threatened enforcement" that was "sufficiently imminent" at the outset of this litigation—two months after the presidential election and three days before President Trump took office. *See Neese*, 123 F.4th at 753 (citations omitted). The *Defending Women EO* is not a change that mooted the School Board's claims; it merely underscores what was true when the Complaint was filed: that three days before President Trump's inauguration the School Board did not face imminent threatened or actual enforcement based on either its refusal to permit gender identity-based access to single single-sex spaces or its pronoun policies.

The Court may consider events after the Complaint was filed to determine whether the School Board can satisfy its obligation to show threatened enforcement that was sufficiently

[1] The School Board's opposition is littered with misstatements about challenged agency statements. *E.g.*, ECF No. 35 at 7 (contending that HHS "regulations for Head Start programs" require "the School Board [to] treat an individual's 'gender identity' as his or her sex" when the regulation says that sex discrimination includes circumstances characterized as discrimination on the basis of gender identity); *id*. at 8 ("Under this rule, the School Board must change its sex-specific policies and practices for Head Start students"); *id*. at 13 ("[T]he School Board's sex-specific policies and practices are open-and-shut violations on the face of each mandate."). The Court should disregard all the School Board's characterizations about challenged agency statements that are inconsistent with their terms.

imminent at the outset of the litigation,[2] *e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013) (considering failure "to offer any evidence that [plaintiffs'] communications have been monitored under" challenged statute in civil action filed on the day the statute was enacted), as "common sense dictates[,]" *Nat'l Sec. Couns. v. CIA*, 898 F. Supp. 2d 233, 262 (D.D.C. 2012). "[I]f an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm. . . . If the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm [that was sufficiently imminent] for standing" at the outset of the litigation. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 436 (2021).

Essentially conceding that it cannot satisfy the applicable standard, the School Board instead asserts that challenged regulatory provisions themselves somehow impose an injury even without any showing of any enforcement. Pl. Rapids Parish School Bd.'s Resp. in Opp'n to Defs.' Mot. to Dismiss 6, ECF No. 35. But the Supreme Court has "consistently spoken of the need to assert an injury" caused by "actual or threatened *enforcement*[.]" *California v. Texas*, 593 U.S. 659, 670 (2021). In *California*, individual plaintiffs made essentially the same claims. *Id*. at 669. The Court rejected the notion that the mere existence of a legal code's provisions can impose burdens or costs without actual or imminent enforcement. *Id*. at 669-71.[3]

Plaintiff's theory was also recently rejected by the Fifth Circuit. In *Neese v. Becerra*, 123 F.4th 751 (5th Cir. 2024), the plaintiff-physicians were undeniably objects of the challenged rule

[2] And insofar as the Court prefers to examine this issue through the lens of the ripeness doctrine, *see* Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial Summ. J., ECF No. 34 at 11-14, the analysis is not based on the time that the Complaint was filed at all. *Anderson v. Green*, 513 U.S. 557, 559 (1995); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 n.2 (5th Cir. 1987).

[3] *Compare California*, 593 U.S. at 671 ("Here, the plaintiffs say, they have already suffered a pocketbook injury, for they have already bought health insurance"); *with*, ECF No. 35 at 6 (On January 17, 2025, "the School Board suffered two . . . injuries: the regulatory burden of the challenged rules and the costs of compliance").

interpreting Section 1557 to encompass gender identity discrimination by health care providers.[4] But those plaintiffs could not manufacture standing by gesturing toward the burden or cost of changing their policies to, for example, "provide everything a transgender patient might demand" without showing imminent enforcement based on that purported hypothetical application. *Neese*, 123 F.4th at 753 (citation omitted).[5]

Even if mootness were the correct analytical lens (and it is not), the distinction is immaterial given that adversity between the parties' interests must be maintained "at all stages of litigation." *TransUnion*, 594 U.S. at 431. The School Board's briefing seemingly assumes that the only way to moot a claim for relief against a regulation is by rescission. *E.g.,* ECF No. 35 at 13-14 ("an

[4] True, it is ordinarily more difficult for a plaintiff to show imminent injury in settings where the government threatens actions against a third party, whose expected response in turn plaintiff believes will cause it injury. *See* ECF No. 35 at 7. But those principles do not authorize a plaintiff to bypass traditional pre-enforcement standing doctrine. *See Wilderness Soc'y v. Griles*, 824 F.2d 4, 11-12 (D.C. Cir. 1987) (comparing "preenforcement review of agency action" setting with "cases in which the government acts directly against a third party" and explaining that in the "first setting" the court must still assess the imminent "likelihood that the clash between the government and the plaintiff will in fact occur" under the challenged rule); *see also Contender Farms, LLP v. USDA*, 779 F.3d 258, 264 (5th Cir. 2015) (referring to distinction as merely "often a helpful guidepost"). *West Virginia v. EPA*, 597 U.S. 697 (2022) is inapposite. In that case, the D.C. Circuit had issued a remand order to the Environmental Protection Agency ("EPA") after the first Trump Administration repealed an Obama-era rule. *Id*. at 717. The remand order required further EPA rulemaking consistent with the D.C. Circuit's view that the Clean Air Act authorized enforcement of rules requiring generation shifting. *Id*. Although the Biden Administration contended that it would not enforce the Obama rule while it conducted new rulemaking consistent with the D.C. Circuit remand order, there was little dispute that the intervenor States—who petitioned the Supreme Court for review—faced imminent Biden Administration enforcement of EPA's (and the D.C. Circuit's) then-view of the Clean Air Act as authorizing generation shifting after EPA complied with the D.C. Circuit's remand order. *Id*. at 720 (explaining that the Government vigorously defends the legality of generation shifting). Supreme Court review redressed that imminent injury. *Id*. The School Board, in contrast, has failed to show any threatened or actual enforcement based on its policies.

[5] If the School Board's theory were right, the plaintiff in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), could have avoided the need to show a real and immediate threat of being subjected to the challenged police chokehold procedure by moving outside of Los Angeles and claiming that the actual injury of his moving costs were fairly traceable to a non-irrational fear of the challenged police chokehold policy—a procedure to which he, after all, had already been subjected.

executive order does not change a regulation"). But that is merely "[o]ne way" that a controversy can become insufficiently live; it is not a prerequisite to mootness. *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 672 (5th Cir. 2023). On the contrary, mootness may occur when a successor in office "does not intend to pursue the policy of his predecessor which gave rise to the lawsuit[.]" Fed. R. Civ. P. 25(d) advisory committee's note to 1961 amendment. *See, e.g., Four Star Publ'ns, Inc. v. Erbe*, 304 F.2d 872, 874-75 (8th Cir. 1962). In that case, enforcement is no longer imminent, any adversity that arguably existed is thus no longer live, and any judgment would essentially be advisory in nature—and thus ineffective—because it would not impact Defendants' imminent conduct toward the School Board. *See Rhodes v. Stewart*, 488 U.S. 1, 4 (1988); *Moharam v. TSA*, 134 F.4th 598, 605 (D.C. Cir. 2025); *Winsness v. Yocom*, 433 F.3d 727, 736 (10th Cir. 2006); *Jews for Jesus, Inc. v. Hillsborough Cnty. Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998).[6]

The voluntary cessation doctrine does not salvage this case. ECF No. 35 at 14-16. That doctrine "'has no play' when the [Government] did not act 'in order to avoid litigation.'" *Alaska v. USDA*, 17 F.4th 1224, 1239 (D.C. Cir. 2021) (citation omitted). *See Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018) ("the goal is to determine whether the defendant's actions are 'litigation posturing'"); *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009). Any change in Executive Branch policy reflected in the *Defending Women EO* was brought about by the people casting their votes, not to moot this lawsuit or any other. And contrary to the School Board's suggestion, ECF No. 35 at 15-16, "[i]t is black-letter law that the government's mere 'ability to reimplement the . . . regulation at issue is insufficient to prove the voluntary-cessation exception.'" *U.S. Navy SEALs 1-26*, 72 F.4th at 674 (citation omitted). There is no basis to even surmise that Defendants intend to take imminent enforcement action after Defendants secure a dismissal and "the judge is out of

[6] Indeed, the School Board contends that it "seeks vacatur" of unspecified EEOC action because of the advisory impact of a judicial opinion in subsequent private lawsuits brought under Title VII. ECF No. 35 at 11. But "a judgment's 'possible, indirect benefit in a future lawsuit' does not preserve standing"—it is impermissibly advisory. *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023) (citation omitted). *See also Moharam*, 134 F.4th at 605; *infra* at pp. 9-10.

the picture[.]" *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 10 (1st Cir. 2021). Defendants are committed to implementing the President's Executive Orders, which would foreclose, for example, enforcement to compel gender identity-based access to single-sex spaces. The *Defending Women EO* makes this case very different from cases cited by the School Board, such as *West Virginia v. EPA*, where the Court found that the Biden Administration's mere litigation promise not to enforce an Obama-era rule purportedly reanimated by the D.C. Circuit did not permit mootness, especially when the Government was actively complying with a remand order to reanimate and enforce essentially the same rule. 597 U.S. at 718-20. Nor has the Government dropped an already-initiated enforcement action against the School Board after it filed this lawsuit—the School Board points to no such enforcement action, threatened or actual. *See DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) ("mootness in the present case depends not at all upon a 'voluntary cessation'").[7]

II. The School Board is a Title IX Entity, not a Section 1557 Entity.

Even setting aside the lack of imminent enforcement, the School Board lacks standing to press claims in Count II challenging any provision of Department of Health and Human Services ("HHS") Section 1557 regulations. First, the School Board invokes conclusory allegations that it "must change its policies or practices" to ensure that it does not engage in impermissible gender identity discrimination in the provision of its ancillary Medicaid-funded services. ECF No. 35 at 8 (citing Compl. ¶¶ 248-49, ECF No. 1). But those conclusory allegations introduce the subsequent allegations regarding the School Board's sex-specific athletics, physical education classes, and private facilities, Compl. ¶¶ 251-65—none of which the Complaint plausibly alleges to be funded

[7] The School Board elides the issue when it refers only to provisions of the *Defending Women EO* that direct removal of statements, policies, regulations, etc. ECF No. 35 at 15. The School Board concedes that through the *Defending Women EO*, the Executive "instructed his subordinates" regarding enforcement. *Id*. at 15. Absent threatened enforcement based on its policies, the School Board has only an abstract interest here. *California*, 593 U.S. at 669-71. Moreover, the School Board's cases do not support pressing forward with this action even if voluntary cessation applied (which it does not). *See, e.g., United States v. W.T. Grant, Co.*, 345 U.S. 629, 635-36 (1953) (despite finding voluntary cessation applied, prospective relief was inappropriate because "no significant threat of future violation"); 5 U.S.C. § 702(1).

by Medicaid. Otherwise, the Complaint invokes policies that are in no way implicated by any cited provision of Section 1557 regulations. *Compare*, Compl. ¶¶ 266-68, *with* 45 C.F.R. § 92.1 *et seq*.

The School Board's inclusion of non-federally funded health education classes as a small part of its overall curriculum—as well as ancillary provision of Medicaid-funded services—do not transform the School Board from a Title IX education institution into an entity whose entire operations are governed by Section 1557 under the challenged regulation. Even assuming that health education classes are best considered a Section 1557 health project—as opposed to a Title IX education program—the School Board would have to plausibly allege that it is "*principally engaged*" only in the combination of teaching health classes and providing Medicaid-funded services for Section 1557 to govern all its operations. 45 C.F.R. § 92.4 (emphasis added). And the Complaint fails to include any allegations placing these services in the context of the School Board's overall activities. It is implausible that they constitute the School Board's *raison d'etre*. Undeniably, the School Board's curriculum is principally unrelated to health classes and Medicaid-funded services, and includes programs teaching math, languages, literature, history, the sciences, and fine arts.[8]

III. The School Board Misstates *Mechling Barge*.

Recognizing that proceeding with the School Board's claims would be incompatible with the Supreme Court's holding in *A.L. Mechling Barge Line, Inc. v. United States*, 368 U.S. 324 (1961), the School Board resorts to misstatements about that case. ECF No. 35 at 18-19. The School Board seeks to distinguish it based on the Court's resolution of an irrelevant component of the case involving a challenge to an agency order. *Id*. at 18. But the *Mechling Barge* plaintiff raised two claims for relief, and the Court's resolution of the second claim for relief, not the first, provides the relevant holding. 368 U.S. at 326-27.

[8] The School Board is wrong to suggest that its provision of health insurance to employees subjects it to Section 1557. The rule is clear that "[t]he provisions of this part shall not apply to any employer . . . with regard to its employment practices, including the provision of employee health benefits." 45 C.F.R. § 92.2(b). That conduct is instead governed by Title VII.

In addition to challenging the agency's order,[9] the *Mechling Barge* plaintiff raised a second claim for relief: an Administrative Procedure Act ("APA") claim for relief against enforcement of an agency policy of "granting 'temporary' [rate] authority . . . to the Railroads over the protests of the [barge lines] and without any hearing or findings[.]" *Id*. at 327, 330. Although the agency represented that it had "amended its practice" since the suit was filed, the Court did not resolve this claim on mootness grounds. *Id*. at 331-32. Rather, the Court held that "sound discretion withholds" equitable remedies against Executive Branch policies "where it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted." *Id*. at 331. The School Board's understanding of the relevant holding in *Mechling Barge* is thus wrong—the relevant holding governed the plaintiff's claim for relief from the agency's alleged policy, not from the order. *Mechling Barge*, 368 U.S. at 331.

Nor is the School Board helped by invoking the truism that courts have a virtually unflagging obligation to decide cases within their jurisdiction. ECF No. 35 at 19. The School Board seeks to invoke this Court's jurisdiction to consider claims for relief under the APA. Compl. ¶¶ 5, 8, 294-97. And one element of an APA cause of action is that there must be no "appropriate . . . equitable ground" under which to "dismiss any action or deny relief." 5 U.S.C. § 702(1). The Court has a virtually unflagging obligation to enforce this provision of the APA and the Supreme Court's holding in *Mechling Barge*, the latter of which recognizes that the Judiciary owes the Executive Branch respect and comity when a challenged policy is subject to internal review or revision.

[9] The *Mechling Barge* plaintiff "prayed the court to set aside [an agency] Order" authorizing certain railroad rates pending further agency action "on the ground that the [agency] lacked power" to issue it. 368 U.S. at 327. Because the railroads subsequently eliminated the authorized rates, the Court agreed that the challenge to the order was moot and applied *Munsingwear* vacatur principles to that mooted agency order. *Id*. at 327-30. Defendants agree that this component of the opinion has no relevance here. There is no final order suspending or terminating the School Board's federal funding—there is no indication in the record that the Defendants have ever considered initiating a proceeding for any such final order.

IV. Claims in Count III Challenging a Superseded Preamble Statement that HHS Never Treated as Binding are Unreviewable and Moot.

The preamble statements challenged in Count III are not a reviewable agency action. Defs.' Mem. in Supp. Their Mot. to Dismiss 17-20, ECF No. 30-1. Contrary to the School Board's suggestions, ECF No. 35 at 20, preamble statements are presumably nonbinding, *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986).[10] True, in unique cases they may sometimes be subject to judicial review, *Nat. Res. Def. Council v. EPA*, 559 F.3d 561, 564 (D.C. Cir. 2009), but "only if the agency treats the [statement] as binding, and only if [it] has appreciable legal consequences for the plaintiff[.]" *Nat'l Treasury Emps. Union v. Vought*, --- F.4th ----, 2025 WL 2371608, at *11 (D.C. Cir. Aug. 15, 2025).

The School Board has not shown "events" since the preamble statement was issued indicating that "the agency has applied [it] as if it were binding on regulated parties." *Id*. at *8 (citation omitted). It does not cite any HHS hearing examiner opinion claiming to be bound by the language in any preamble statement. It does not cite anything from any enforcement action referencing any preamble statement. *See id.* at *11 (contrasting cases in which enforcement officials relied on guidance "in making permitting decisions throughout the country"). Instead, it relies only on unsupported assertions. ECF No. 35 at 20.

Contrary to those assertions, an agency does "not apply [an action] 'as if it were binding'" where, as here, it follows up with a "clarifying" action. *Vought*, 2025 WL 2371608, at *11. And HHS's clarification, *see* Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance; Clarification, 90 Fed. Reg. 15412, 15412 (Apr. 11, 2025), shows that it has not treated the 2024 preamble statement as binding.[11]

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[10] *See also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002); *All. for Hippocratic Medicine v. FDA*, 78 F.4th 210, 264 (5th Cir. 2023) (Ho., J., concurring) ("we do not use preambles to expand the meaning of clear regulatory text").

[11] HHS's clarification distinguishes this case from those relied on by the School Board in which all record indicia showed that the challenged statement reflected a "final and binding interpretation of the statute[.]" *See Cent. & S.W. Servs., Inc.*, 220 F.3d 683, 689 n.2 (5th Cir. 2000). *See also Texas v. EEOC*, 933 F.3d 433, 443-47 (5th Cir. 2019).

In any event, HHS's superseding statement on Section 504 has mooted the School Board's challenge to the original preamble statement. The School Board cites no authority to suggest that the 2024 preamble statement "has not been repealed or replaced" because "[t]hat would require notice-and-comment rulemaking[.]" ECF No. 35 at 16. The 2024 preamble statements were never proposed as regulations to begin with.[12]

The School Board is wrong for the additional reason that the preamble statements merely "advise the public of the agency's [now-superseded] construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (citation omitted). "Because an agency is not required to use notice-and-comment procedures to issue [such] an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Id.* at 101.

Again, the School Board is incorrect to rely on the voluntary cessation doctrine, ECF No. 35 at 16-17, given that (1) HHS did not issue the clarification to avoid this litigation and (2) mere authority to reimplement an interpretation is insufficient to show that the voluntary cessation exception applies. *See supra* at pp. 4-5. In any event, a new interpretative rule re-adopting the 2024 agency statements would at most give rise to a new APA challenge to that new rule based on a new administrative record; it would not resurrect a challenge to the 2024 preamble statements challenged here. *See Biden v. Texas*, 597 U.S. 785, 808-10 (2022) (explaining how one agency statement supersedes another under APA principles regardless of notice and comment); *Allied Home Mortg. Corp. v. U.S. Dep't of Housing and Urban Development*, 618 F. App'x 781, 787 (5th Cir. 2015).

The School Board misses the mark entirely when it argues that "HHS's clarification does not prevent private suits[.]" ECF No. 35 at 17. This case has nothing to do with and cannot redress injury arising from lawsuits brought by nonparties under any private right of action. *Whole*

[12] *See* Proposed Rule, Discrimination on the Basis of Disability in HHS Programs or Activities, 88 Fed. Reg. at 63392, 63495 (Sept. 14, 2023) ("For the *reasons* set forth in the preamble, [HHS] proposes to amend 45 CFR part 84 as follows:") (emphasis added)

Woman's Health v. Jackson, 595 U.S. 30, 44 (2021). In a private suit against the School Board, any plaintiff could invoke whatever agency statements it thinks may persuade a court—even those subject to a vacatur order—based on their "power to persuade, if lacking power to control." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024) (citation omitted).[13] "[A] judgment's 'possible, indirect benefit in a future lawsuit' does not preserve standing[.]" *Haaland*, 599 U.S. at 294 (citation omitted).

V. The School Board Concedes That its Challenge to the 2024 EEOC Guidance is Moot and Cannot Amend its Complaint in its Opposition Brief.

The Court should dismiss Count V. The School Board concedes that it is not seeking judicial review of the EEOC past enforcement actions referenced in the Complaint, ECF No. 35 at 22, and concedes that any claim for judicial review of the 2024 Guidance is moot, *id*. at 17. The School Board now asks for judicial review of "two public-facing webpages" captured in May 2025 and cited in footnote four of its brief. ECF No. 35 at 5 n.4, 17-18. But the websites referenced in the *Complaint*[14] have been superseded, ECF No. 30-1 at 21-22, and the Complaint did not petition this Court for APA review of the superseding websites—which do not even mention the term "gender identity." ECF No. 35 at 5 n.4. "[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss[.]" *Roebuck v. Dothan Sec., Inc.*, 515 F. App'x

[13] Whether or not an agency's interpretive rule is subject to a vacatur order, the same standard applies to its consideration in a lawsuit brought by a private plaintiff. *Compare Loper Bright*, 603 U.S. at 402 (explaining that interpretative rules do not bind courts, they sometimes have a "power to persuade" but not "power to control") (citation omitted), *with*, *e.g., NASD Disp. Resol., Inc. v. Judicial Council of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007) (even if district court opinion is vacated, it "will not be ripped from Federal Supplement 2d" and it "will still be available and will still be citable for its persuasive weight"); *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998) (opinions associated with vacated judgments remain "viable as persuasive authority"); *and Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (explaining that a vacatur order "does not deprive the decision of whatever precedential effect an unappealable district court decision may have").

[14] *Compare* EEOC, Sex-Based Discrimination, https://perma.cc/EE2T-XRLA (cited at Compl. ¶ 185 n.18), *and* EEOC, Prohibited Employment Policies/Practices, https://perma.cc/74GK-E4DS (cited at Compl. ¶ 186 n.19); *with*, EEOC, *Sex-Based Discrimination*, EEOC, https://perma.cc/ZZF8-UVXJ (archived May 27, 2025); *and* EEOC, *Prohibited Employment Policies/Practices*, EEOC, https://perma.cc/TYK5-JU3X (archived May 27, 2025) (both cited at ECF No. 35 at 5 n.4).

275, 280 (5th Cir. 2013). The School Board's challenge to any discrete new website "should be brought in [a] new case[,]" if at all. *Allied Home Mortg.*, 618 F. App'x at 787 (citing *Gulf Oil Corp. v. Simon*, 502 F.2d 1154 (Temp. Emer. Ct. App. 1974)). It does not matter if the superseding website is "even worse" than the one the School Board petitioned this Court to review in the Complaint. *Gulf Oil*, 502 F.2d at 1155. If this case were to reach the merits, judicial review would proceed on the certified record for the agency action challenged in the Complaint, not for any agency action only referenced in Plaintiff's brief. *See The Fund for Animals v. Norton*, 390 F. Supp. 2d 12, 15 (D.D.C. 2005) ("[A] new 'final agency action' resulting from an entirely new rule making process" is "based upon a different administrative record[.]").

VI. The Complaint Pleads No Claim for Injunctive Relief Against DOJ.

The School Board does not dispute that the proper defendant in an APA case is the agency that issued the challenged agency action, and the School Board challenges no Department of Justice agency action here. ECF No. 35 at 22-23; ECF No. 30-1 at 22. The School Board cites no authority for its mistaken belief that it may sue and seek an injunction against a defendant without asserting a claim for relief against that defendant. *E.g., Reyes v. N. Tex. Tollway Auth.*, 186 F. Supp. 3d 621, 643 (N.D. Tex. 2016) (An "injunction is a remedy that must be supported by an underlying cause of action[.]") (citation omitted).

VII. *Abbott Laboratories v. Gardner* Has Not Been Overturned.

The Court should dismiss Counts II and III without prejudice under 5 U.S.C. § 702(1) given the multiplicity of suits seeking judicial review of the same challenged actions. The School Board seemingly asks this Court to disregard the Supreme Court's pronouncements on this issue in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). ECF No. 35 at 24. But this binding authority has not been overturned by the Court or by subsequent amendment to the APA. Whether or not the Government may have forfeited this non-jurisdictional claim processing rule by not invoking it in

other cases provides no basis for this Court to ignore it when properly invoked in this case. *Fort Bend Cnty. v. Davis*, 587 U.S. 541, 549 (2019).[15]

Nor is a dismissal without prejudice—as its name suggests—prejudicial to the School Board. *See Nat'l Health Fed'n v. Weinberger*, 518 F.2d 711, 713-14 (7th Cir. 1975). The School Board's speculation that sister courts might properly enter only party-specific relief, ECF No. 35 at 25, does not show prejudice because the point of such a dismissal under *Gardner* is to "suggest[] that the plaintiff intervene in a pending action elsewhere." *Abbott Labs v. Gardner*, 387 U.S.136, 155 (1967). *See Chamber of Com. of U.S. v. FTC*, 732 F. Supp. 3d 674, 684 (E.D. Tex. 2024).

Nor does the School Board face prejudice because other challenges are "at varying stages of litigation[.]" ECF No. 35 at 25. The School Board has not been denied intervention in any earlier-filed action, most of which, as the School Board concedes, remain in the early stages of litigation. No motion practice has occurred in the first-filed case addressing the preamble statement at issue in Count III. ECF No. 35 at 24 (noting that case has not yet "proceeded past the pleadings").[16] And Section 1557 rule challenges involving the School Board's own counsel are at similar early postures. *E.g. Missouri v. Kennedy*, No. 4:24-cv-937 (E.D. Mo.).

CONCLUSION

The Court should dismiss this action.

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[15] The other *Gardner* tools for dealing with duplicative challenges to agency rules—transfer or stay—are not properly before the Court. *See* ECF No. 35 at 24-25. If the School Board were to move the Court for one of these alternative solutions, Defendants would consider whether to consent. But no such motion is pending.

[16] The fact that *Texas v. Kennedy*, No. 5:24-cv-00225-H (N.D. Tex.), is stayed, *see* ECF No. 35 at 24, reflects the problems with actively litigating these issues while they are under Executive Branch review. It hardly shows that the School Board is prejudiced by having to explain to the *Texas* court, rather than this Court, why there is some pressing need to move forward with its claims now. And the Government is obviously prejudiced by playing whack-a-mole, having to defend these principles in a multitude of lawsuits. *See Gardner*, 387 U.S. at 155; *Nat'l Health Fed'n*, 518 F.2d at 714 (circumstances "smack[] of gamesmanship" where the same counsel for plaintiff is aware of the different actions and refuse to seek intervention in earlier-filed action).

Dated: September 10, 2025

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