UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Rapides Parish School Board (the "School Board") has moved for partial summary judgment. It asks this Court to award prospective declaratory, injunctive, and other equitable relief, including vacatur of several agency statements. It seeks that relief to preclude future enforcement actions by Defendants because the School Board does not provide gender-identity based access to single-sex spaces, athletics, and physical education classes. ECF No. 22 at 10. But on the day he took office, President Trump issued an Executive Order providing that it "is legally untenable" to "require[] gender identity-based access to single-sex spaces under" antidiscrimination statutes including, "for example, Title IX of the Educational Amendments Act." Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8616 (Jan. 30, 2025) ("*Defending Women EO*").

The Court should deny the School Board's motion. Defendants have moved to dismiss this action on jurisdictional and threshold grounds. ECF No. 30. The Court should resolve Defendants' motion to dismiss before addressing the School Board's motion for partial summary judgment and dismiss this case for the reasons stated in support of that motion. ECF No. 30-1.

In all events, especially given the *Defending Women EO*, there is no Article III case or controversy between adverse parties. The School Board has failed to show imminent enforcement as it must to establish this Court's jurisdiction. If that were not enough, its motion should be denied because its claims are not ripe and the motion otherwise fails to apply correct legal standards. Nor has the School Board justified any of the remedies it seeks. Remedies ordinarily operate with respect to specific parties. Both Article III and traditional equitable principles dictate that, if the School Board prevails (and it should not), any relief should be party specific.

Moreover, should the Court grant the School Board's motion for partial summary judgment, it should deny its motion for certification under Federal Rule of Civil Procedure 54(b). The School Board's motion seeks to resolve one portion of several counts of the Complaint. But the claims that remain to be litigated assert different legal theories for seeking the same relief that the School Board is seeking now. And the School Board has not established that there is a compelling reason to undermine the historic presumption against piecemeal appeals.

BACKGROUND

Relevant statutory and factual background is set out in Defendants' memorandum in support of their motion to dismiss. *See* ECF No. 30-1 at 2-6. Given the posture of this case, Defendants summarize only the procedural history relevant to Plaintiff's motion.

On June 3, 2025, the School Board filed the instant motion for partial summary judgment. ECF No. 19. The School Board's motion addresses only some claims raised under Heading (A) of counts I, II, III, and V in the Complaint. *Id*., Compl. ¶¶ 308-14, 340-47, 370-75, 429-34. On July 14, 2025, Defendants filed a motion to dismiss the Complaint in its entirety. ECF No. 30.

LEGAL STANDARDS

A motion for partial summary judgment seeks "a pre-trial adjudication that certain issues are established for trial of the case," not a final judgment. *FDIC v. Massingill*, 24 F.3d 768, 774 (5th Cir. 1994). An order granting a motion for partial summary judgment is "subject to revision by the district court, and has no *res judicata* effect." *Id*. For challenges "to an agency action under the [APA], 'summary judgment [and not partial summary judgment] is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review.'" *Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 723 (W.D. Tex. 2019) (cleaned up and citation omitted).

In a facial challenge to an agency rule, the plaintiff "must establish that no set of circumstances exists under which the [rule] would be valid." *Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215, 220 (5th Cir. 2016) (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006)); *see also Reno v. Flores*, 507 U.S. 292, 301 (1993). "That means that to prevail, the Government need only demonstrate that [the rule] is [valid] in some of its applications." *United States v. Rahimi*, 602 U.S. 680, 693 (2024), *remanded,* 117 F.4th 331 (5th Cir. 2024). The Court must "consider the circumstances in which" the challenged provision is "most likely" to be valid. *Id*. at 701. "Where [courts] conclude that a challenged regulatory provision does not exceed [the statute's] limits . . . [they] will uphold the provision and preserve the right of complainants to bring as-applied challenges against any alleged unlawful

applications." *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1185 (D.C. Cir. 2020) (citation omitted).

ARGUMENT

I. The School Board's Motion for Partial Summary Judgment Should be Denied Without Prejudice.

The Court should not reach the merits of the School Board's motion for partial summary judgment at this stage and should instead deny the motion without prejudice. A motion for partial summary judgment does not seek final judgment but instead seeks "a pre-trial adjudication that certain issues are established for trial of the case." *Massingill*, 24 F.3d at 774. But there is no basis for a trial in an APA case. "In APA cases such as this one, . . . 'the district court sits as an appellate tribunal. The 'entire case' on review is a question of law.'" *FirstHealth Moore Reg'l Hosp. v. Becerra*, 560 F. Supp. 3d 295, 303 (D.D.C. 2021) (citation omitted). It is thus standard practice to resolve APA cases on cross-motions for summary judgment that address all the plaintiff's claims. *See, e.g., id*.

This practice is standard for a reason. After production of the administrative record for a discrete agency action the School Board has standing to challenge, the parties can narrow the universe of contested issues and then submit briefing as they would before an appellate court addressing the entire universe of the School Board's claims, based on a complete record, at one time. Adjudicating the School Board's motion for partial summary judgment risks this case devolving into piecemeal summary judgment motions. Litigating each component of each count in the Complaint separately would result in multiple rounds of summary judgment briefing, which would be inefficient and time consuming for the Court and the parties.

Despite the School Board's unorthodox request for multifurcated briefing in this APA case, it provides no justification for the request in its motion, merely asserting that it "reserves the right to . . . raise its other statutory and constitutional claims later, if necessary[.]" ECF No. 19 at 3. But APA cases provide no basis to brief the issue of whether a discrete agency action is contrary to law ahead of briefing on a claim that the same agency action is arbitrary and capricious or contrary

to constitutional right. And there is no telling how many rounds of briefing the School Board may wish to engage in on the plethora of legal issues pleaded in the Complaint based on how their first bite at the apple goes. The mere fact that the School Board wants to litigate a portion of Heading (A) of each count of the Complaint is not a sufficient reason for multifurcated briefing in an APA case, since any APA plaintiff could make that argument, and the exception would swallow the rule. In short, the School Board has provided no reason, and there is no valid reason, for multifurcated briefing. The Court thus should deny the School Board's motion as premature. That course would be consistent with standard APA practice to litigate all claims in an APA case at once, following production of the administrative record for any discrete reviewable agency actions a plaintiff has standing to challenge.[1]

II. The School Board Has Not Demonstrated an Article III Case or Controversy Between Adverse Litigants under the Heightened Standard Applicable at the Summary Judgment Stage.

The Court lacks jurisdiction because the School Board cannot demonstrate an Article III case or controversy. "Article III of the Constitution affords federal courts the power to resolve only 'actual controversies arising between adverse litigants.'" *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021) (citation omitted). And as articulated in Defendants' memorandum in support of their motion to dismiss, ECF No. 30-1 at 7-12, the School Board has not demonstrated pre-enforcement standing because it has not shown "circumstances that render the threatened enforcement sufficiently imminent." *See Neese v. Becerra*, 123 F.4th 751, 753 (5th Cir. 2024)

[1] Insofar as the School Board suggests, in reply, that it anticipates dismissing claims or aspects of claims against Defendants if it prevails on this motion, the Federal Rules of Civil Procedure preclude that plan. If the Court grants the instant motion, Plaintiff dismisses other legal claims against the Defendants, and the Court enters final judgment, the judgment may be invalid. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 878 n.15 (5th Cir. 2022) (judgment was invalid because it purported to dismiss a single claim without prejudice under Rule 41(a)); *Bailey v. Shell Western E & P, Inc.*, 609 F.3d 710, 720 (5th Cir. 2010) (when Rule 41(a) refers to an "action," there is no reason to believe that term is intended to include dismissal of separate claims that make up the action); *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 662-63 (5th Cir. 1979).

(citation omitted).

Even if the School Board's allegations were sufficient to defeat a motion to dismiss, which they are not, the School Board certainly fails to satisfy the more demanding burden required to consider entry of partial summary judgment. "At the summary judgment stage, 'the plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts' validating [its] right to standing." *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 332-33 (5th Cir. 2002) (citation omitted). Application of traditional pre-enforcement standing doctrine in this context means that the School Board must show, with concrete evidence, that the School Board itself "view[s its] conduct as gender-identity discrimination;" that each Defendant "will view it as such" under the relevant statute; that the School Board has no "valid, non-discriminatory reasons for [its sex-separation] practices," including that they serve a legitimate interest in privacy; that the School Board's "current [sex-separation] practices have . . . been chilled or otherwise affected" by the challenged agency statements; and "that an enforcement proceeding is imminent." *Neese*, 123 F.4th at 753-54. The School Board comes nowhere close to providing evidence of any of that.

As an initial matter, the School Board—which bears the burden of proof and persuasion—submits a brief failing to point to any evidence or argument showing (1) that it views its own conduct and policies as impermissible discrimination, (2) that it has no valid, nondiscriminatory reason for each policy it references, (3) that its policies have been chilled or otherwise affected by any challenged agency statement, or (4) that any enforcement proceeding is imminent. ECF No. 22 at 9-11. The only consideration relevant to a traditional pre-enforcement standing analysis that the School Board arguably addresses in its brief is whether the Government views its policies and conduct as gender-identity discrimination. *See* ECF No. 22 at 10. The School Board's failure to address all the other relevant criteria is alone sufficient to deny its motion and dismiss this action. Absent those other criteria, the School Board has not shown circumstances that render the threatened enforcement sufficiently imminent. *See Neese*, 123 F.4th at 753-54.

Even on the issue of whether Defendants view the School Board's policies as

impermissible discrimination, the School Board's analysis falters. Most importantly, the School Board entirely ignores the President's Executive Order providing that it "is legally untenable" to require "gender identity-based access to single-sex spaces under, for example, Title IX" and other sex discrimination provisions. *Defending Women EO*. Beyond that, the School Board primarily references preamble statements—language published in the Federal Register about a statute or rule but not the actual regulatory language in the Code of Federal Regulations—issued by public officers who no longer hold office. ECF No. 22 at 10. Insofar as the School Board believes that preamble statements issued by public officers who no longer hold office somehow bind any current office holders committed to implementing current Executive Branch policy, the School Board provides no support for that misunderstanding. *See infra* n.6; *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1988). The *Defending Women EO* reflects current Executive Branch policy on this issue, guides the agencies' enforcement decisions, and undermines any claim that the School Board faced threatened enforcement action sufficiently imminent at the outset of this litigation.

Even if the Court were to disregard current Executive Branch policy—which it should not—the preamble statements and regulatory provisions invoked by the School Board do not establish that the Government views gender identity-based access to single-sex spaces as required under the relevant statutes, or that the School Board's policies are otherwise precluded.

Consider first the statute at issue in Count I, 42 U.S.C. § 9849(b). Misleadingly quoting the word "access," the School Board cites to nonbinding preamble statements published in the Federal Register, inaccurately suggesting that something published on those pages describes a view that gender identity-based access to single-sex spaces is required. ECF No. 22 at 10 (citing 89 Fed. Reg. 36,684, 36,686, 36,962 (May 3, 2024)). One commenter suggested that the rule "would affect women's access to services[.]" 89 Fed. Reg. at 36,692. And the agency's response was that the commenter's concerns "do not accurately characterize requirements" under the statute or the rule. 89 Fed. Reg. at 36,692. The agency did not say gender identity-based access to single-sex spaces was required. *Id.* On page 36,693, the agency responded to commenter concerns about single-sex

spaces but did not say that gender identity based access to single-sex spaces is required. *Id*. at 36,693. Rather, it said that "[t]o the extent warranted, the Department will provide guidance for grantees with questions about compliance with nondiscrimination obligations." *Id*. And the School Board does not show that it ever sought that guidance or was told by HHS that it must provide gender-identity based access to single-sex spaces. *Nat'l Family Planning and Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). Again, the *Defending Women EO* provides for Executive Branch policy on these issues.

The School Board's concerns about pronoun usage are similarly unsupported. ECF No. 22 at 10. In response to commenter concerns that grant recipients would be required "to use participants' preferred pronouns[,]" the agency was clear: "[t]his rule does not require grant recipients to adopt any particular views" about anything, including pronouns, and the "regulation neither addresses specific conduct constituting discrimination under any particular statute nor dictates any of the outcomes of any claim of discrimination." 89 Fed. Reg. at 36,693. The School Board essentially concedes that there is no agency statement requiring particular pronoun usage, instead citing these pages to support its assertion that the agency "refus[ed] to disavow" a pronoun requirement. ECF No. 22 at 10. But an alleged refusal to disavow is hardly concrete evidence that the agency views the School Board's conduct as actionable prohibited discrimination under 42 U.S.C. § 9849(b). Article III precludes issuance of an advisory opinion on these issues in this circumstance. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 378 (2024) ("[F]ederal courts do not issue advisory opinions about the law"); *Glass v. Paxton*, 900 F.3d 233, 242 (5th Cir. 2018).

Plaintiff presents even less evidence that HHS views its policies as impermissible discrimination under Section 504 of the Rehabilitation Act, which is at issue in Count III. The School Board invokes two sections of Title 45 Part 84 of the Code of Federal Regulations ("CFRs"): §§ 84.31, 84.45(a). ECF No. 22 at 10. But § 84.31 merely addresses the scope of application of Part 84 Subpart D; it includes no agency statement providing a view that gender identity-based access to single-sex spaces or athletics is required under Section 504. And the other provision states that a funding recipient providing "housing to its students without disabilities shall

provide comparable, convenient, and accessible housing to students with disabilities at the same cost as to others[,]"—not that gender identity-based access to single-sex spaces is required. *Id.* § 84.45(a).[2]

The School Board also cites nonbinding and superseded[3] preamble statements about the Rehabilitation Act published in the Federal Register. ECF No. 22 at 10 (citing 89 Fed. Reg. 40,066, 40,068-69, 40,078 (May 9, 2024)). But those statements did not say HHS viewed Section 504 as requiring gender identity-based access to single-sex spaces or precluding the School Board's other policies. Rather, they discussed "access to *care* due to . . . gender dysphoria." 89 Fed. Reg. at 40,069 (emphasis added). The School Board cites no evidence that it has denied anyone access to care for any reason, ECF No. 22 at 10, even assuming the Court had jurisdiction to review the legality of nonbinding statements that have since been superseded, ECF No. 30-1 at 17-20.

As for Count V, the School Board relies on nonbinding statements issued by the Equal Employment Opportunity Commission ("Commission"), ECF No. 22 at 10—including the EEOC's resource document, *Enforcement Guidance on Harassment in the Workplace* (issued in April 2024), which was vacated by another federal district court, *Texas v. EEOC*, No. 2:24-CV-173-Z, 2025 WL 1414332, at *16 (N.D. Tex. May 15, 2025), and website pages that have been removed and superseded. The School Board does not articulate how these materials have reflected the Commission's views on Title VII as relevant to show threatened EEOC enforcement sufficiently imminent at the outset of the litigation. To the contrary, the School Board's evidence suggests that the Chair, who is one of the EEOC's two current Commissioners, has not viewed Title VII as compelling gender identity-based access to single-sex spaces. ECF No. 19-11. In any event, EEOC lacks independent authority to bring a Title VII enforcement action against a public

[2] The School Board nowhere explains how it has standing to challenge § 84.45(a) given that it has not adduced evidence showing that it provides housing to its students.

[3] These statements have been superseded. Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance; Clarification, 90 Fed. Reg. 15,412 (April 11, 2025); ECF No. 30-1 at 18-20.

school district, undermining any claim by the School Board that it faces imminent enforcement action by EEOC. 42 U.S.C. § 2000e-5(f)(1) (describing how the Commission may not bring a civil action against a "political subdivision" of a "government," and instead permits only an EEOC referral to DOJ for DOJ to exercise independent enforcement discretion).

Regarding Section 1557, which is challenged in Count II, the School Board lacks standing to press this claim because it is an educational institution subject to Title IX, not a health program or activity subject to Section 1557. ECF No. 30-1 at 13-14. The School Board submits testimony showing that it receives Medicaid funds to pay for nursing and medical services, therapy services, behavioral health services, and personal care services for some of its students. Declaration of Jeff Powell Decl. ¶ 19 ("Powell Decl."), ECF No. 19-14. True, parts of the School Board's operations paid for by those Medicaid funds are covered by Section 1557. ECF No. 30-1 at 13-14. But the School Board does not show that it is excluding children from these Medicaid-funded services on the basis of gender identity. And the School Board adduces no evidence showing that Medicaid funds any of its sex-separated programs or activities, like athletics or physical education classes.

In any event, the School Board lacks standing to raise this claim for additional reasons. The School Board references 45 C.F.R. §§ 92.101, 92.206. ECF No. 22 at 10. Contrary to the School Board's suggestion, § 92.101 does not include an agency statement that Section 1557 requires gender identity-based access to single-sex spaces. And insofar as the best reading of § 92.206(b)(3)'s ending clause[4] suggests that gender identity-based access to single-sex spaces is required by entities covered by Section 1557, the School Board invokes no authority suggesting that the mere existence of such a provision compels the agency to exercise enforcement discretion inconsistent with the view of the law set forth in the *Defending Women EO*. The School Board does not dispute that, even setting aside preliminary orders issued by other district courts

[4] No other portion of 45 C.F.R. § 92.206 includes an agency statement that Section 1557 requires gender identity-based access to single-sex spaces.

precluding enforcement of this provision,[5] the *Defending Women EO* would have guided the agency's Section 1557 enforcement decisions since the outset of this litigation. *See United States v. Texas*, 599 U.S. 670, 679 (2023) (discussing Executive Branch's absolute discretion to make prosecution decisions); *Alden v. Maine*, 527 U.S. 706, 756 (1999) (describing how actions "brought by the United States itself require the exercise of political responsibility" which is a "control"); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965); *see also California v. Texas*, 593 U.S. 659, 669 (2021) (no standing to challenge a statutory provision that is not being enforced by executive branch defendants).[6] Furthermore, contrary to any suggestion by the School Board, ECF No. 22 at 10, no provision of the agency's Section 1557 rules codified at Part 92 of Title 45 of the Code of Federal Regulations includes an agency statement expressing a view that Section 1557 requires covered entities to use particular pronouns in addressing patients.

Finally, any attempt by the School Board to invoke its pronoun policies in an effort to show

[5] Order Modifying Stay at 4, *Texas v. Becerra*, No. 6:24-cv-211-JDK (E.D. Tex. Aug. 30, 2024), ECF No. 41; *Tennessee v. Becerra*, 739 F. Supp. 3d 467, 486 (S.D. Miss. July 3, 2024). A third preliminary injunction is no longer in effect after the district court dismissed the action for lack of an Article III case or controversy based on the *Defending Women EO*. Endorsed Order, *Florida v. HHS*, No. 8:24-cv-1080 (M.D. Fla. June 9, 2025), ECF No. 79.

[6] The agency's regulations may bind an HHS administrative hearing examiner to an interpretation of the statute in an HHS adjudicatory proceeding. *See* ECF No. 30-1 at 3 (describing trial-type adjudicatory procedures required to suspend or terminate federal funding). But those proceedings would have to be initiated by an HHS civil rights enforcement officer, who is subject to Executive Branch policy in the *Defending Women EO*. 45 C.F.R. § 80.7(c)-(d) (complainants may not initiate funding termination proceedings (incorporated by 45 C.F.R. § 92.303(a))); 45 C.F.R. § 92.303(c). The School Board cites no evidence that it or anyone else is subject to an HHS adjudicatory proceeding on these issues. Moreover, although private litigants have brought civil actions against covered entities under Section 1557, Article III courts are not bound by interpretative rules addressing Section 1557. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 413 (2024). Furthermore, the School Board's invocation of stale agency statements in the preamble to the Section 1557 rule, *see* ECF No. 22 at 10 (citing 89 Fed. Reg. 37,522, 37,593, 37,596, 37,698-701 (May 6, 2024)), do not reflect current Executive Branch policy and are without concrete future effect insofar as they are inconsistent with the *Defending Women EO*. Although the School Board cites authority noting that preamble statements are sometimes reviewable agency actions insofar as they reflect an agency's settled understanding of the law, *see* ECF No. 22 at 15, those cases do not involve government defendants who were subject to a superseding Executive Branch policy reflected in a subsequent Executive Order. *See Brock*, 796 F.2d at 538-39.

that an enforcement action is imminent would be meritless. *See* ECF No. 22 at 10. In addition to all the reasons already discussed, any discrimination claim that sounds in the nature of hostile environment harassment would require "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999). The School Board adduces no evidence that the Government views its pronoun policies as meeting that standard or that its policies have effectively precluded any student from accessing an education at its schools. *See id.*; *Neese*, 123 F.4th at 753. On the contrary, the evidence the School Board submits in this area undermines its standing. The School Board's own policy prohibits all harassment, on any ground. ECF No. 19-15 at 107. The policy is explicit that harassment is prohibited even if it is "not caused by a student's race, color, national origin, ethnicity, sex, sexual orientation or disability." *Id*. There is no exclusion in the School Board's policy permitting harassment based on gender identity. *Id*. And the School Board's broad anti-harassment policy appears to adopt the same or a similar standard that applies under federal law. *See id*. ("so severe, persistent, or pervasive that it creates an intimidating threatening or abusive educational environment for a student").[7]

III. The School Board's Claims Are Not Ripe.

Even if the School Board could show sufficiently imminent enforcement to satisfy Article III's standing requirement, it has not satisfied the more stringent requirements of the ripeness doctrine, which is rooted in both Article III principles as well as traditional equitable principles restraining issuance of discretionary relief. *See Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 n.18 (1993); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162-66 (1967). "To determine whether claims are ripe, [courts] evaluate (1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). Both prongs must be satisfied. "Unsuitability for review is

[7] The School Board's complaints about current or future compliance costs do not establish standing. ECF No. 22 at 11-12. A plaintiff cannot create pre-enforcement standing by incurring costs that are based on a fear of future enforcement that is not imminent. *California*, 593 U.S. at 669-70; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

determinative." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 435 n.30 (5th Cir. 2021). Similarly, a court need not show "fitness of the issues for judicial decision" where a plaintiff "has not satisfied the hardship prong[.]" *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 718 (5th Cir. 2012).

The School Board's claims are unripe for the same reasons articulated by Judge Brown with respect to several "Becerra Actions" in *Texas v. Becerra*, 2024 WL 1221168, at *5-7 (S.D. Tex. Mar. 21, 2024). There, the State of Texas sought pre-enforcement review of three "Becerra Actions" issued by HHS after the former president had instructed agencies to consider revising agency actions "to prevent and combat discrimination on the basis of gender identity and sexual orientation[.]" *Id*. at *3. The case was unfit for review because "Texas's challenge at this stage offers more questions than answers as to how the Becerra Actions may be enforced." *Id*. at *6. Although Texas claimed that the Becerra Actions implied that its conduct would be precluded, the state adduced no evidence that the Becerra Actions had been enforced to prevent that conduct. *Id*.

The School Board's claims are similarly unfit for review. Again, the School Board focuses on a purported "irreconcilable conflict," *see id*., between challenged agency actions and, principally, its sex-separated athletics programs, physical education classes, and private spaces. But the plain language of challenged agency statements do not say that sex-separated spaces are per se unlawful. *See, e.g.,* 2 C.F.R. § 300.300(c);[8] 45 C.F.R. § 92.101(a)(2)(iv). Antidiscrimination laws have long permitted covered entity policies that are premised on a legitimate, nondiscriminatory rationale,[9] and the School Board does not explain what would stop Defendants

[8] This provision is currently on the books at 45 C.F.R. § 75.300(e) but is being relocated without material change to 2 C.F.R. § 300.300(c). *See* Health and Human Services Adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 89 Fed. Reg. 80,055, 80,058 (Oct. 2, 2024). For ease of reference, Defendants may refer only to 2 C.F.R. § 300.300(c) in portions of this brief. But argument addressing 2 C.F.R. § 300.300(c) applies to the analogous provision in 45 C.F.R. § 75.300(e).

[9] *See Klocke v. Univ. of Tex.*, 938 F.3d 204, 211 (5th Cir. 2019) (applying "reasonable and non-discriminatory reasons" test to resolve Title IX sexual orientation-related "gender bias" claim); *Pederson v. La. State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) (applying "legitimate, nondiscriminatory explanation" test to resolve Title IX claim); *Metoyer v. Am. Eagle Airlines, Inc.*,

from concluding that the School Board's sex-separated policies are permissible under these statements because they are supported by a legitimate nondiscriminatory interest in, for example, privacy. *See D.H. by A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821, 834-35 (M.D. Tenn. 2022). Indeed, the President has directed that it would be "legally untenable" for Defendants to take an enforcement action under, for example, 2 C.F.R. § 300.300(c)(11) based on a theory that it "requires gender identity-based access to single-sex spaces." *Defending Women EO*. The School Board also ignores the traditional standards applicable to claims of hostile environment harassment, which require harassment "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 651. The School Board provides no evidence to suggest that Defendants will imminently view its policies as harassment under that standard.

Nor has the School Board demonstrated hardship from delay. A plaintiff faces no hardship when "no irremediable adverse consequences flow from requiring a later challenge to [a] regulation[.]" *Toilet Goods*, 387 U.S. at 164. *See Texas*, 2024 WL 1221168 at *6. Here, the School Board does not deny that it has continued to enforce its longstanding sex-separation and other policies for many years without any interruption by Defendants, and it does not contend that it is suspending enforcement of its policies pending relief from this Court. Moreover, any assertion by the School Board that the challenged agency actions themselves impose imminent irreparable adverse consequences ignores the statutory enforcement procedures established by Congress, which would begin with a request for compliance by "voluntary means." *See* ECF No. 30-1 at 2-4. The School Board has not identified any "irremediable adverse consequences [that would] flow from requiring a later challenge to [any] regulation" at issue if the applicable agency ever made such a hypothetical future request. *See Toilet Goods*, 387 U.S. at 164. That is especially so given that the School Board has not explained how "good-faith conduct" proceeding on a belief that its policies are premised on legitimate nondiscriminatory justifications or are otherwise permissible

806 F. Supp. 2d 911, 917, 919 (W.D. La. 2011) (Drell, J.) ("a legitimate, nondiscriminatory or nonretaliatory reason" justifies employment actions under Title VII).

"would trigger an immediate funding cut-off, much less the sort of retroactive penalty that was involved in *Abbott Labs*." *Gonzales*, 468 F.3d at 829. It would not. *See* ECF No. 30-1 at 2-4.[10]

IV. The School Board Applies the Wrong Legal Standard for Its Facial Challenge.

The School Board's motion should be denied for the additional reason that it does not satisfy the applicable legal standard governing a facial challenge to agency statements. The School Board's motion fails to even mention that standard. The School Board must "establish that no set of circumstances exists under which the" particular challenged provision "would be valid." *Associated Builders & Contractors of Tex.*, 826 F.3d at 220 (citation omitted); *see also Reno*, 507 U.S. at 301. To apply that standard, the Court must "consider the circumstances in which" the challenged provision is "most likely" to be valid. *Rahimi*, 602 U.S. at 701.

To be sure, consistent with Executive Branch policy, Defendants agree with the School Board that it would be "legally untenable" for Defendants to enforce 42 U.S.C. § 9849 or 2 C.F.R. § 300.300(c)(11) to "require[] gender identity-based access to single-sex spaces," including athletics programs or physical education classes. *Defending Women EO*. But agency statements challenged by the School Board do not, on their face, require gender identity-based access to single-sex spaces. Consider 2 C.F.R. § 300.300(c)(11), which addresses prohibited discrimination in Head Start programs. That provision does not say that covered entities must provide gender identity-based access to single-sex spaces. Nor does 42 U.S.C. § 9849 authorize enforcement actions that promote controversial gender ideology extremism when the covered entity's conduct is supported by valid nondiscriminatory interests. *Id*.; *see supra* at n.9.

The School Board cannot satisfy its burden for this facial challenge because there are

[10] Compliance at any point during any putative enforcement process would preclude a funding agency from terminating funding. *See* 45 C.F.R. § 80.7(d) (no funding loss proceedings if compliance can be achieved voluntarily after OCR investigation); *id*. § 80.10(f) (permitting recipient to "correct[] its noncompliance" to preclude future funding loss after decision by hearing examiner but before decision takes effect); *see also id*. § 80.10(g) (recipient "shall be restored to full eligibility" as soon as "it brings itself into compliance"). And at any "point in any putative enforcement process, [the School Board] would be able to raise the same claims [it] now raise[s]." *Am. College of Pediatricians v. Becerra*, No. 1:21-cv-195, 2022 WL 17084365, at *15 (E.D. Tenn. Nov. 18, 2022).

applications of the challenged agency statements that would be valid. For example, assuming that the thirteen students attending the School Board's schools identified in paragraph 280 of the Complaint are all biological females, if the School Board were to deny those biological girls participation in federally funded Head Start programs altogether because they look, speak, and act like biological males, it is hard to understand why that would not be a violation of 42 U.S.C. § 9849 consistent with the agency statement codified at 2 C.F.R. § 300.300(c)(11) or 45 C.F.R. § 75.300(e)(11). Indeed, the School Board does not claim otherwise. After all, the law in this circuit provides that a covered entity may violate a statute prohibiting sex discrimination if biological "sex was a motivating factor" in the challenged decision. *Doe v. William Marsh Rice Univ.*, 67 F.4th 702, 709 (5th Cir. 2023) (quoting *Doe v. Purdue Univ.*, 928 F.3d 652, 667 (7th Cir. 2019) (Barrett, J.)). *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

Assuming the challenged agency statements encompass both valid and unlawful applications, the School Board cannot satisfy the governing standard. *See Reno*, 507 U.S. at 301; *Associated Builders & Contractors of Tex.*, 826 F.3d at 220. The Court should thus deny its facial challenge and instead "preserve the right of [the School Board] to bring as-applied challenges against any alleged unlawful applications" involving controversial and unlawful gender ideology. *Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1185 (citation omitted). Otherwise, granting the School Board the relief it seeks would suggest that many uncontroversial applications of, for example, 2 C.F.R. § 300.300(c)(11), involving conduct where biological sex is an unmistakable and impermissible motivating factor, are unlawful merely because the conduct could also be characterized as gender identity discrimination. That is not the law.

Rather than even try to establish that the challenged agency statements are invalid in all their applications, the School Board raises several points on which the parties are not adverse but that have little to do with any challenged provision. First, the School Board contends that Title IX allows, and sometimes requires, sex distinctions. ECF No. 22 at 17-20. But Executive Branch policy is clear. Agencies are required to interpret and implement statutes and regulations to "protect[] sex-based distinctions, which are explicitly permitted under Constitutional and statutory

precedent." *Defending Women EO* § 3(f). And the School Board fails to cite any agency action it challenges that declares it unlawful to make a sex distinction.

Second, the School Board argues that Title IX and the Affordable Care Act reflect the biological reality of male and female, ECF No. 22 at 20-22, and, specifically, that "[r]edefining 'sex' to mean gender identity would" violate the statutes, *id*. at 21. But again, there is no adversity between the parties on this issue. The Executive Branch definition of the term "sex" is set forth in the *Defending Women EO*, not in any of the challenged agency statements.[11] Specifically, "'Sex' shall refer to an individual's immutable biological classification as either male or female. 'Sex' is not a synonym for and does not include the concept of 'gender identity.'" *Defending Women EO* § 2(a). And insofar as the term "sex" is used in any of the agency statements at issue in this case, the *Defending Women EO* is clear: the EO's definition "shall govern all Executive interpretation of and application of Federal law and administration policy[.]" *Id*. The School Board's facial challenge fails because an individual's immutable biological classification as either male or female, as defined in the *Defending Women EO*, is a motivating factor in at least some circumstances encompassed by, for example, 2 C.F.R. § 300.300(c)(11). *See supra* at p. 15.

Third, the School Board argues that gender dysphoria is not a disability under Section 504 of the Rehabilitation Act. ECF No. 22 at 25-28. But the School Board does not point to any provision of the CFR that says anything to the contrary. Indeed, the School Board's argument does not refer to a single provision of the CFR. *Id.* As HHS recently explained, the "regulatory text in the final rule does not say that gender dysphoria is a disability." 90 Fed. Reg. at 15,412. And any

[11] The School Board's arguments that relevant statutes at issue allow for sex distinctions and that Defendants may not "[r]edefine 'sex' to mean gender identity" do not state a claim under the APA because they do not attack an agency action reflecting those views. "Under the terms of the APA, [the School Board] must direct its attack against some particular 'agency action' that causes it harm." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). If the challenged agency statements do not say that the statutes preclude sex distinctions or do not include a definition of the term "sex" in a relevant statute, the School Board's arguments do not state claims under the APA. The School Board errs insofar as it "under[stands the Court] to be reviewing an abstract decision apart from the specific agency action[]" that it challenges. *Biden v. Texas*, 597 U.S. 785, 809 (2022). The School Board raises other arguments that are seemingly premised on similar misunderstandings. ECF No. 22 at 31-32.

preamble language, assuming it could be challenged, has since been superseded. ECF No. 30-1 at 18-20.

Finally, the School Board argues that Title VII does not require gender-identity exemptions from sex-specific workplace facilities and speech policies. ECF No. 22 at 28-31. But the School Board fails to satisfy an essential element of an APA claim because it fails to tie its argument to an EEOC action that is in effect and that the School Board seeks to "hold unlawful and set aside[.]" 5 U.S.C. § 706.

V. The School Board is Not Entitled to the Relief it Seeks.

A. The School Board is Not Entitled to Declaratory or Injunctive Relief.

The School Board has not shown that it is entitled to declaratory or injunctive relief. *See* ECF No. 19 ¶ B. A "plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*. The School Board has not satisfied any of these requirements.[12]

1. The School Board Has Failed to Show Imminent Irreparable Injury.

The School Board's allegations of possible future harm do not establish imminent irreparable injury. "An injunction is appropriate only if the anticipated injury is imminent and

[12] "[T]he discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court. Such equivalence of effect dictates an equivalence of criteria for issuance." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) (citing *Samuels v. Mackell*, 401 U.S. 66, 73 (1971)); *see also Committee on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (similar); *Bradley Lumber Co. of Ark. v. NLRB*, 84 F.2d 97, 100 (5th Cir. 1936) (The "power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin.").

irreparable." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). The mere existence of a statute or rule cannot itself be irreparable injury; the injury must derive from "actual or threatened *enforcement*." *California*, 593 U.S. at 670. And, as explained, *supra* at pp. 5-11, the School Board has adduced no evidence showing imminent enforcement here, much less "a formal notice of intent" by Defendants to bring an enforcement action for the "specific conduct" at issue as required by *Google, Inc. v. Hood*, 822 F.3d 212, 226 (5th Cir. 2016). *See also Am. College of Pediatricians*, 2022 WL 17084365, at *15. The School Board also cannot claim imminent irreparable injury by inflicting harm on itself by "chang[ing] its policies[,]" ECF No. 22 at 33, when it has not shown that threatened enforcement is sufficiently imminent. *Clapper*, 568 U.S. at 416.

The School Board has likewise failed to show that "sovereign immunity" renders any hypothetical future loss of federal funding irreparable, ECF No. 22 at 34, given the relevant statutes' explicit procedures for judicial review of funding suspension or termination decisions, as described in the following paragraph. *See also* ECF No. 30-1 at 2-5.

2. The School Board Has Not Shown Inadequate Remedies at Law.

The School Board has not shown that it lacks an adequate remedy at law. To the contrary, any decision to suspend or terminate federal funding based on an alleged violation of 42 U.S.C. § 9849, Section 1557, or the Rehabilitation Act, would be subject to judicial review—where the School Board could raise the claims it brings here—in a district court proceeding challenging the termination or suspension decision. *See* ECF No. 30-1 at 2-5 (describing judicial review procedures provided by law); 5 U.S.C. § 705. In other words, "[b]efore any agency decision to terminate funds can become effective, [the School Board] will be able to seek judicial review as provided for in Title VI." *Sch. Dist. of City of Sagina. v. HEW*, 431 F. Supp. 147, 154 (E.D. Mich. 1977). The School Board "can have a recognition of all [its] just rights under the scheme of procedure set up by the act." *Bradley Lumber Co.*, 84 F.2d at 100; *see also FTC v. Claire Furnace Co.*, 274 U.S. 160, 173-74 (1927) (plaintiff may "adequately . . . present[] every ground of objection" to agency action in the event it is enforced and thus district court "should have refused

to entertain" an injunction).

B. At Most, Narrow Declaratory Relief, Rather than Nationwide Vacatur, Would be Equitable.

If the Court concludes that any of the challenged agency statements at issue here are unlawful, and even if the APA authorizes universal vacatur,[13] the Court should decline as a matter of equitable discretion to enter a universal vacatur of any provision of any challenged agency statement. *See* ECF No. 19 ¶ A. Text and precedent both make clear that whether to enter vacatur—and the scope of any such relief—is constrained by equitable principles. *See* 5 U.S.C. § 702(1); *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality opinion). And those principles preclude the Court from issuing a remedy that is more burdensome to the defendant than necessary to redress a plaintiff's injuries. *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2556-58 (2025). Universal vacatur of any agency statement challenged here is unnecessary to redress the School Board's fear of future enforcement action against its sex-separation policies and other similar policies that would be contrary to the *Defending Women EO*. The Court should thus at most issue a judgment declaring that any challenged agency statement is invalid and unenforceable insofar as it precludes the School Board from operating sex-separate athletics programs, physical education classes, and private spaces.

On the School Board's view, it would be perfectly lawful under 42 U.S.C. § 9849, for example, to exclude kids, including students who "identify" contrary to their sex, from participating in Head Start or attending Rapides Parish School Board schools. But the School Board has never suggested that it wishes to engage in that type of discriminatory conduct or that it would be harmed by being required to refrain from it. To the contrary, the "school board welcomes all kids, including students who identify contrary to their sex[.]" ECF No. 19-14 ¶ 35. The School Board only claims harm if it were precluded from enforcing its policies requiring sex-

[13] Defendants preserve for further review the argument that the APA's provision for the courts to "set aside" unlawful agency actions, 5 U.S.C. § 706(2), does not authorize the type of universal vacatur that the School Board seeks. *But see Tex. Med. Ass'n v. HHS*, 110 F.4th 762, 779 (5th Cir. 2024) (rejecting the argument that the APA does not authorize vacatur).

specific athletics programs, physical education classes, and private facilities, and other sex-specific policies. *Id.* ¶¶ 36-49. Thus, if the Court determines that some relief is appropriate here (and it should not for all the reasons asserted in this brief and Defendants' motion to dismiss), the Court could afford complete relief to the School Board by issuing a judgment declaring that any challenged agency statement is invalid and unenforceable insofar as it precludes the School Board from operating sex-separate athletics programs, physical education classes, and private spaces. That declaratory judgment would remedy any harm to the School Board.

That course of action is more consistent with the APA than issuing universal vacatur here. Congress enacted the APA against a background rule that statutory remedies must be construed in accordance with "traditions of equity practice[.]" *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The Supreme Court has recently reinforced this principle of interpretation, instructing that "[w]hen Congress empowers courts to grant equitable relief, there is a strong presumption that courts will exercise that authority in a manner consistent with traditional principles of equity." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024). And the Court explained that even seemingly mandatory statutory language—such as a directive "that an injunction 'shall be granted' if" certain conditions are met—will not "supplant the traditional equitable principles" governing relief. *Id.* at 1577. "[S]uch an abrupt departure from traditional equity practice" as requiring universal relief no matter the equities requires "plain[er]" language than that. *Id.*; *see also Hecht Co.*, 321 U.S. at 329 (Congress's authorization for courts to issue a remedy "hardly suggests an absolute duty" to grant such relief "under any and all circumstances.").

So too with the APA. As an initial matter, the APA itself provides for traditional forms of equitable actions and relief, such as "declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. § 703, and explicitly preserves "the power or duty of the court to . . . deny relief on any . . . equitable ground[,]" *id.* § 702. In light of the traditional equitable principles against which the statute was enacted—and which are explicitly incorporated into the statute—there is no sound reason to conclude that Congress did not merely authorize but compelled courts to abandon the "bedrock practice of case-by-case judgments with respect to the parties in each

case" by adopting the unremarkable "set aside" language in § 706. *Texas*, 599 U U.S. at 695 (Gorsuch, J., concurring in the judgment) (citation omitted).

Finally, this construction of the APA—as permitting, but not requiring, universal vacatur—is consistent with Fifth Circuit precedent. The Fifth Circuit has treated universal vacatur as a discretionary equitable remedy, not one that is automatic or compelled in every case. *See Cargill*, 57 F.4th at 472 (concluding without contradiction from any other member of the court that the district court could consider on remand "a more limited remedy" than universal vacatur, and instructing the district court to "determine what remedy . . . is appropriate to effectuate th[e] judgment"), *aff'd*, 602 U.S. 406 (2024); *see Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 952 n.102 (5th Cir. 2024) (noting that the en banc *Cargill* court remanded the case to district court for briefing on the appropriate scope of any relief under the APA). And the Fifth Circuit has sometimes declined to enter vacatur in favor of a remedy termed "remand without vacatur" when equitable principles have so directed. *E.g., Cent. & S.W. Servs, Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).[14]

C. The School Board is Not Entitled to Vacatur in Addition to Declaratory or Injunctive Relief, and the Court Must Limit Any Relief Only to the Ending Clause of 45 C.F.R. § 92.206(b)(3).

In no circumstance should the Court award both vacatur as well as declaratory or injunctive relief, as the School Board's motion seemingly contemplates. *See* ECF No. 19 ¶¶ A-B. A court that vacates an agency action under the APA should not also issue declaratory or injunctive relief. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010).

Moreover, the scope of any relief ordered by the Court should be limited to the agency statement, "including by adopting a policy or engaging in a practice that prevents an individual

[14] In addressing the scope of relief under 5 U.S.C. § 705, the Fifth Circuit recently observed that "[w]hen a reviewing court determines that agency regulations are unlawful, the *ordinary* result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2025) (emphasis added) (citation omitted). But "ordinary," of course, does not mean "mandatory." And the School Board has provided no sound basis to follow that course here.

from participating in a health program or activity consistent with the individual's gender identity" codified at 45 C.F.R. § 92.206(b)(3), if the School Board has standing to challenge that statement (which it does not). The Fifth Circuit has made clear that any relief should only involve "portions of the Rule" that a plaintiff "*actually challenges*." *Career Colleges*, 98 F.4th at 255. And that is the only portion of the CFR at issue in this case that arguably presents an agency statement on the issue of gender identity-based access to single-sex spaces—the focus of the School Board's challenge.[15]

VI. The School Board Provides No Basis for Its Motion for Rule 54(b) Certification.

The School Board has provided no basis to grant its motion to certify, under Rule 54(b), an interlocutory decision that this Court has not even entered. *See* ECF No. 19 ¶ C. Rule 54(b), which must be applied in a manner that effectively preserves "the historic federal policy against piecemeal appeals," *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980) (citation omitted), permits, in limited circumstances, a court to direct entry of final judgment of interlocutory decisions. Fed. R. Civ P. 54(b). This rule requires a two-step analysis. *Curtiss-Wright Corp.*, 446 U.S. at 7-10; *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435-38 (1956). First, a court must determine that it has rendered a final "'judgment' in the sense that it is a decision upon a cognizable claim for relief[.]" *Curtiss-Wright*, 446 U.S. at 7 (citation omitted). Next, the court must determine whether there is any just reason for delay. *Id*. at 8. Plaintiff satisfies neither step.

At the first step, the School Board has not shown that the Court has entered a judgment on a single claim for relief, within the meaning of Rule 54(b). The Fifth Circuit "has not announced a single test for" addressing this step, *Johnson v. Ocwen Loan Servicing LLC*, 916 F.3d 505, 508 (5th Cir. 2019), and instead looks to the "competing methods" from other circuits to provide "guideposts." *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000). "One

[15] The School Board has provided no basis to grant relief against enforcement of the agency statement set forth in the first thirty-two words of 45 C.F.R. § 92.206(b)(3). HHS anticipates enforcing this first clause consistent with the definition of "sex" set forth in the *Defending Women EO*. The School Board does not argue that the first clause of 45 C.F.R. § 92.206(b)(3) is an incorrect statement of antidiscrimination law.

approach 'focuse[s] upon the possibility of separate recoveries under arguably separate claims.'" *Id*. (citation omitted). "If the alleged claims for relief do not permit more than one possible recovery, then they are not separately enforceable nor appropriate for Rule 54(b) certification." *Id*. "Another approach 'concentrate[s] on the facts underlying the putatively separate claims.'" *Id*. (citation omitted). "[I]f there is a great deal of factual overlap between the decided and the retained claims they are not separate[.]" *Id*. (citation omitted). Finally, "claims are not distinct when they are 'so closely related that they would fall afoul of the rule against splitting claims if brought separately.'" *Id*. (citation omitted).

The School Board has not shown that the claims it pursues in its motion for partial summary judgment are appropriate for Rule 54(b) certification under any of these methods. Vacatur, declaratory relief, or an injunction against enforcement, of, for example, 2 C.F.R. § 300.300(c)(11) is the same relief that the School Board is seeking for claims that would remain to be litigated in this case if this Court entered final judgment for the School Board on the claims at issue in the present motion, Compl. Prayer for Relief; thus, the School Board has not satisfied the separate recoveries test. *See Lloyd Noland Found, Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 780 (11th Cir. 2007) ("Resolution of one theory [does] not constitute a 'final judgment' conferring appellate jurisdiction while the alternate theory for the same relief remain[s] outstanding."). The School Board cannot explain, for example, what separate and different relief it would still be seeking if later in the litigation it succeeds in showing that the same challenged provisions are arbitrary and capricious, contrary to 42 U.S.C. § 2000d-1 and 20 U.S.C. § 1682, invalid for failure to undergo notice and comment, or violate of the Spending Clause. Compl. ¶¶ 315-37.

There is also a great deal of factual overlap between the legal theory at issue in the present motion and the claims that remain. For example, it is not clear why the School Board's claims under 42 U.S.C. § 2000d-1, *id*. ¶¶ 315-17, or under the Spending Clause, *id*. ¶¶ 331-37, would be based on different facts. The School Board alleges that it brings those claims as to the same provisions that are challenged in the present motion.

And if the School Board were to bring the remaining claims in the Complaint in separate

litigation, that would violate the rule against claim splitting. The rule against claim splitting applies "where the claims in the more recent suit arise from the 'same nucleus of operative facts' as those advanced in the prior suit and might have been properly asserted in the prior suit." *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 6:22-CV-01934, 2023 WL 6063813, at *5 (W.D. La. Sept. 13, 2023) (citation omitted). Take, for example, the School Board's claim that 2 C.F.R. § 300.300(c)(11) violates the Spending Clause. Compl. ¶ 331-33. Whether the alleged single wrong is HHS's promulgation of 2 C.F.R. § 300.300(c)(11), or the School Board's fear of future enforcement of that regulation, the Spending Clause claim involves the same nucleus of operative facts as the theories the School Board has briefed in the present motion.

The School Board has also failed to satisfy the second step required for Rule 54(b) certification—showing that there is no just reason for delay. The function of the district court at step two is to act as a "dispatcher" exercising sound judicial discretion to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. *Curtiss-Wright*, 446 U.S. at 7-8 (quoting *Mackey*, 351 U.S. at 435, 437). Because this second step must be exercised "in the interest of sound judicial administration" in order "to assure that application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals[,]'" *id*. at 8 (citation omitted), the School Board must establish that this is the infrequent case that presents it with "some danger of hardship or injustice through delay which would be alleviated by immediate appeal; it should not be entered routinely as a courtesy to counsel." *PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996).

But the School Board presents no argument to satisfy this prong. It has not shown, for example, a financial judgment causing the School Board to "suffer severe daily financial loss" due to "current interest rates." *Curtiss-Wright*, 446 U.S. at 6. The School Board seeks only prospective relief against future agency administrative enforcement (that would be contrary to the *Defending Women EO*). But, again, the School Board has failed to show threatened imminent enforcement at all. *Supra* at pp. 5-11; ECF No. 30-1 at 8-12. "It will be a rare case where Rule 54(b) can appropriately be applied when the contestants on appeal remain, simultaneously, contestants

below." *Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 44 (1st Cir. 1988). This is not that rare case.

The only argument the School Board makes is that it satisfies the second step[16] because courts should address statutory grounds before constitutional ones. ECF No. 22 at 13-14. But the School Board cites no authority suggesting that a plaintiff may manipulate a court's discretion to decide the grounds on which to hold unlawful agency action in an APA case by withholding argument that it may want to raise later without waiving or abandoning those arguments.[17]

If the Court grants the School Board's motion for partial summary judgment but does not certify the order under Rule 54(b), the Court should provide Defendants with clear notice of whether it intends any relief to take immediate effect. Unless the Court makes clear that it is entering an immediately effective and appealable interlocutory injunction, relief entered upon entry of an order granting a motion for partial summary judgment would be interlocutory and thus ineffective until the Court enters final judgment.[18]

CONCLUSION

The School Board's motion for partial summary judgment should be denied.

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[16] The School Board does not argue that it satisfies the first step.

[17] For example, in *Braidwood Management, Incorporated v. EEOC*, 70 F.4th 914, 940 n.60 (5th Cir. 2023), on which Plaintiff relies, ECF No. 22 at 13-14, the parties, who had both appealed the district court's decision, presumably presented all of their arguments to the Fifth Circuit in their briefs at one time. There is no indication that the plaintiff had only argued statutory claims in its briefing, reserving the ability to argue constitutional claims if it lost on the statutory ones. In fact, the School Board's approach is fundamentally inconsistent with multiple provisions of the Federal Rules of Civil Procedure, including Rule 54(b) and Rule 41(a). *See supra* at n.1. If a plaintiff wants to abandon claims before a district court, the proper course is to seek leave to file an amended complaint withdrawing those claims. And, in any event, this argument only addresses Plaintiff's believed right to multifurcated briefing, it does not explain why Rule 54(b) is satisfied if the Court were to rule on Plaintiff's motion and outstanding claims in the Complaint remain to be litigated.

[18] *Gerardi v. Pelullo*, 16 F.3d 1363, 1371 n.13 (3d Cir. 1994); *Int'l Controls Corp. v. Vesco*, 535 F.2d 742, 744-46 (2d Cir. 1976); *Redding & Co. v. Russwine Const. Corp.*, 417 F.2d 721, 727 (D.C. Cir. 1969); *Gauthier v. Crosby Marine Serv., Inc.*, 590 F. Supp. 171, 175 (E.D. La. 1984).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on August 15, 2025, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's CM/ECF system. Parties may access this filing through the CM/ECF system.

/s Liam C. Holland
LIAM C. HOLLAND