UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J. DIERLAM,

Plaintiff,

v. Case No. 4:16-CV-00307

JOSEPH R. BIDEN JR., in his official capacity as President of the United States, *et al.*,

Defendants.

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

More than six years into this litigation, Mr. Dierlam seeks emergency relief. Pl.'s Mot. Temp. Inj. (PI Mot.), ECF No. 130. Mr. Dierlam's motion was spurred by a notice of proposed rulemaking promulgated by the Department of Health and Human Services (HHS) regarding Section 1557 of the Affordable Care Act (ACA). PI Mot. at 1; *see also* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022). But Section 1557 is not one of the ACA provisions challenged in Mr. Dierlam's Third Amended Complaint, and thus any changes HHS proposes to its regulations implementing it are irrelevant to this lawsuit and provide no ground for emergency relief.

Even if Mr. Dierlam's complaint sought to raise challenges to the proposed Section 1557 rulemaking, this Court would lack jurisdiction because the proposed rulemaking is just that—a set of proposals for public comment which may not ultimately be implemented. The content of any final rule promulgated by HHS regarding Section 1557 is yet unknown and will depend on HHS's consideration of comments received during the rulemaking process, as Mr. Dierlam

acknowledges. *See* PI Mot. at 8 (acknowledging that "interim rules[1] are not final as generally required for review under the APA"). Accordingly, Mr. Dierlam cannot currently identify any non-speculative injuries caused by the notice of proposed rulemaking. *See Crane v. Johnson*, 783 F.3d 244, 251-52 (5th Cir. 2015) ("[W]e have repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013))). And any challenge to the Section 1557 notice of proposed rulemaking would be unripe for similar reasons. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (recognizing that in some cases "standing and ripeness boil down to the same question"). Furthermore, the proposed rule is not final agency action because it does not "mark the consummation of the agency's decisionmaking process" and no legal consequences flow from it. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016).

In addition, Mr. Dierlam does not meet the requirements for a preliminary injunction:[2]

1. Mr. Dierlam's delay in seeking a preliminary injunction—which is premised on Defendants' allegedly "continu[ing]" their conduct—bars emergency relief. Mr. Dierlam asserts that the notice of proposed rulemaking regarding Section 1557 is relevant to his claims in this lawsuit because it demonstrates that Defendants "fully intend to continue their mischief of

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[1] Although Mr. Dierlam uses the term "interim rules," the specific action at issue is a notice of proposed rulemaking, which does not have any current effect. Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022).

[2] Mr. Dierlam also requests that "this court expedite a decision on the defendant's MTD so that I may pursue an Appeal of this case without further delay." PI Mot. at 1. Defendants take no position on Mr. Dierlam's request to expedite, although Defendants note that an immediate appeal may not be available even after the Court has resolved Defendant's partial motion to dismiss, which does not address Mr. Dierlam's retrospective Religious Freedom Restoration Act claim.

imposing their religious beliefs upon the population." PI Mot. at 1. In other words, Mr. Dierlam sees a purported continuing pattern in Defendants' conduct. *See also* PI Mot. at 8 (". . . the current situation should be viewed as merely the continuation of previous bad behavior.").

Given that this case was initially filed in 2016, and the Third Amended Complaint was filed in March 2022, Mr. Dierlam's six-year delay forecloses a preliminary injunction. "[D]elay in seeking a remedy is an important factor bearing on the need for a preliminary injunction. Absent a good explanation, a substantial period of delay militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief. Evidence of an undue delay in bringing suit may be sufficient to rebut the presumption of irreparable harm." *Symetra Life Ins. Co. v. Rapid Settlements Ltd.*, 612 F. Supp. 2d 759, 774 (S.D. Tex. 2007) (citations omitted); *see also Leaf Trading Cards, LLC v. Upper Deck Co.*, No. 3:17-cv-3200-N, 2019 WL 7882552, at *2 (N.D. Tex. Sept. 18, 2019) (holding that "courts generally consider anywhere from a three-month delay to a six-month delay enough to militate against issuing injunctive relief" and collecting cases).

2. Mr. Dierlam fails to demonstrate that he satisfies the preliminary injunction factors. Preliminary injunctions are extraordinary remedies, *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994), "not to be granted routinely, but only when the movant, by a clear showing, carries [the] burden of persuasion." *Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

The last two factors merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, for the same reasons previously stated in Defendants' partial motion to dismiss, Defs.' P. MTD, ECF No. 126, Mr. Dierlam cannot establish a likelihood of success on the merits of the claims asserted in his Third Amended Complaint. And even if the Section 1557 notice of proposed rulemaking were final agency action subject to challenge, Mr. Dierlam cannot amend his complaint to challenge HHS's notice of proposed rulemaking regarding Section 1557 through a motion for preliminary injunction. *See, e.g.*, *Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 9 (D.D.C. 2014) (The court lacks jurisdiction over a preliminary injunction motion that "raises issues different from those presented in the complaint"); *Clay v. Okla. Dep't of Corr.*, No. CIV-12-1106-C, 2013 WL 3058122, at *2 (W.D. Okla. June 17, 2013) ("When the movant seeks intermediate relief beyond the claims in the complaint, the court is powerless to enter a preliminary injunction."). And, in any event, the Court would lack jurisdiction over any challenge to the proposed rule because, as discussed above, the notice of proposed rulemaking has no current effect.

Likewise, Mr. Dierlam also cannot establish a likelihood of irreparable harm in the absence of preliminary relief. First, as explained in Defendants' partial motion to dismiss, Mr. Dierlam lacks any ongoing injury related to his prospective claims because the defendant-agencies created religious exemptions to the contraceptive coverage requirement and because the shared-responsibility payment was reduced to $0, Defs.' P. MTD at 15-20. Second, Mr. Dierlam can show no likelihood of irreparable harm from the Section 1557 notice of proposed rulemaking, because, even assuming *arguendo* that the proposals described in the notice would have any effect on Mr. Dierlam, the notice does not represent HHS's final conclusions and will

itself have no effect on Mr. Dierlam. To obtain emergency relief Mr. Dierlam must demonstrate that irreparable harm is likely, not merely possible, *Winter*, 555 U.S. at 20; "[s]peculative injury is not sufficient" to "make a clear showing of irreparable harm," *Holland Am. Ins*., 777 F.2d at 997; *see also Pizza Inn, Inc. v. Pizza Inn Advert. Plan Coop.*, No. 4:20-CV-00064-RWS, 2020 WL 6803253, at *5 (E.D. Tex. Apr. 3, 2020) (no emergency injunctive relief where plaintiff "ha[d] not demonstrated that the threat of irreparable harm"—the loss of its business—"is imminent or even likely").

3. Mr. Dierlam's requested relief—an order preventing Defendants from undertaking unspecified rulemakings on a broad range of topics—would be improper even if his request for emergency relief were otherwise well founded. Mr. Dierlam asks for "a preliminary injunction against the defendants to prevent them from enforcing or creating any additional health care regulations such as 'gender affirming care' impacting faith and morals." PI Mot. at 10. But "[a] preliminary injunction grants 'intermediate relief of the same character as that which may be granted finally.'" *Sai*, 54 F. Supp. 3d at 8 (quoting *De Beers Consol. Mines v. United State*s, 325 U.S. 212, 220 (1945)); *accord Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1134 (11th Cir. 2005) ("Preliminary injunctions are a tool appropriately used only to grant intermediate relief of the same character as that which may be granted finally." (internal quotation omitted)); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003) ("[P]reliminary relief may never be granted that addresses matters 'which in no circumstances can be dealt with in any final injunction that may be entered.'" (quoting De Beers, 325 U.S. at 220)), *abrogated on other grounds by eBay, Inc. v. MercExchange. LLC*, 547 U.S. 388 (2006). Accordingly, the maximum scope of relief potentially available to Mr. Dierlam in a motion for a preliminary injunction is the same as what would be available at final judgment—relief specific

to Mr. Dierlam relating to only the provisions of the ACA that Mr. Dierlam challenges in this Third Amended Complaint. But, for the reasons stated above, he is not entitled to even that significantly narrower preliminary relief.

Dated: September 19, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2022, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system. Because Plaintiff is not registered on the CM/ECF system, I also served Plaintiff with a copy of the foregoing document by electronic mail.

Executed on September 19, 2022, in Washington, D.C.

/s/ Rebecca Kopplin
REBECCA KOPPLIN