UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Alexander R. Deanda, Plaintiff, v. **Xavier Becerra**, et al., Defendants.	Case No. 2:20-cv-00092-Z

NOTICE OF PLAINTIFF'S PROPOSED FINAL JUDGMENT

The plaintiffs respectfully submit their proposed final judgment, which is attached to this filing as Exhibit 1. The plaintiffs wish to explain in this notice why they have crafted the proposed relief as it appears in the attached judgment.

The Court denied Mr. Deanda's motion for class certification, so it must resolve whether (and to what extent) Mr. Deanda is entitled to a universal remedy that would restrain the defendants from violating the parental rights of non-parties to this litigation. The issue of universal remedies is one of the most contentious and unresolved issues in modern litigation. It is also an issue that is under-theorized, even though it often arises in litigation, because scope-of-remedy issues typically become moot after an appellate court resolves the legality or constitutionality of a disputed statute or agency rule. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (declining to rule on the propriety of a "nationwide injunction" after upholding the challenged agency rule); *id.* at 2412 n.28 (2020) (Ginsburg, J., dissenting); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.").

The problem is aggravated by the behavior of many district-court judges, who simply assume or act as though a judicial pronouncement of unconstitutionality or illegality formally revokes the underlying statute or agency rule in an act akin to an executive veto—and who issue "universal" remedies consistent with the idea that the judicially disapproved statute or regulation ceases to exist and can no longer be enforced against anyone. *See, e.g.*, *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302, 1329 (N.D. Cal. 1984) (issuing a preliminary injunction that prohibited the government from "enforcing or attempting to enforce *in any way* the provisions of 38 U.S.C. §§ 3404–3405," without limiting its relief to the named plaintiffs) (emphasis added), *rev'd by Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *ACLU v. Reno*, 31 F. Supp. 2d 473, 499 n.8 (E.D. Pa. 1999) (issuing preliminary injunction barring enforcement of a federal statute against anyone, rather than limiting relief to the named plaintiffs); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020) (rebuking a district court for "purport[ing] to enjoin GA-09 as to *all* abortion providers in Texas," when the plaintiffs in that case were "only a subset of Texas abortion providers and did not sue as class representatives."), *vacated on other grounds by Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021). This is a manifestation of what some have called the "writ-of-erasure" mindset—the idea that judges wield the power to formally suspend a statute, a way of thinking has been reinforced by the sloppy and inaccurate nomenclature that is all too often used to describe the power of judicial review. *See, e.g.*, *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) ("It is often said that courts 'strike down' laws when ruling them unconstitutional. That's not quite right."); *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022) ("'[C]ourts have no authority to strike down statutory text'" (quoting *Borden v. United States*, 141 S. Ct. 1817, 1835–36 (2021) (Thomas, J., concurring in the judgment)).

In determining whether Mr. Deanda is entitled to a universal remedy, the court should carefully distinguish the three types of remedies available to Mr. Deanda: (1) Declaratory relief under 28 U.S.C. § 2201(a); (2) A remedy that "holds unlawful and sets aside" agency action under 5 U.S.C. § 706(2); and (3) Injunctive relief. Each of these remedies is governed by different sources of law that define the permissible scope of these remedies.

A. The Declaratory Judgment Act

A declaratory judgment is a creature of statute, and the permissible scope of a declaratory remedy is set forth in the statute that authorizes declaratory relief:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare *the rights and other legal relations of any interested party seeking such declaration*, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added). Courts rarely quote or analyze the language of the Declaratory Judgment Act, but the statute makes clear that a court may declare only: (1) the "rights and other legal relations"; (2) of an "interested party" seeking this declaration. The statute does not authorize courts to make declarations of law in the abstract, and any declaration must comport with each of these statutory requirements.

Several implications follow. The first is that the Court's declaratory relief should be phrased in terms of the "rights and other legal relations" belonging to Mr. Deanda, rather than an abstract pronouncement on the constitutionality of an agency rule or the legality of a defendant's conduct. A declaratory judgment announcing that "42 C.F.R. § 59.10(b) violates the Fourteenth Amendment" is too abstract to qualify as a statement of the "rights or "legal relations" of Mr. Deanda, even though it could be read to imply that the defendants' administration of the Title X program is violating

Mr. Deanda's "rights." Better instead to phrase the declaratory judgment in terms of a litigant's "rights" and "legal relations," such as the following:

> 1. The Court **DECLARES** that the defendants' administration of the Title X program violates Mr. Deanda's rights under section 151.001(a)(6) of the Texas Family Code, as there is nothing in 42 U.S.C. § 300(a) that purports to preempt state laws requiring parental consent or notification before distributing contraceptive drugs or devices to minors.
>
> 2. The Court **DECLARES** that the defendants' administration of the Title X program violates Mr. Deanda's fundamental right to control and direct the upbringing of his minor children, which is protected by the due process clause of the fourteenth amendment, as protected by the Supreme Court of the United States.

Ex. 1 at ¶¶ 1–2. Other phrasings can be used, but courts should always bear in mind that 28 U.S.C. § 2201 authorizes declarations only of a *litigant's* "rights and other legal relations," and declaratory judgments should describe those "rights" and "legal relations" rather than offer abstract pronouncements on the constitutionality of an agency rule or the legality of a defendant's conduct.

The second implication is that courts may declare only the rights and legal relations of a "party" to the lawsuit. They cannot declare the rights of a non-party or a non-litigant under 28 U.S.C. § 2201. *See* David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45 ("[The court is empowered to declare only the 'rights' of the 'party seeking such declaration,' and he must be 'interested'; these terms seem both to forbid litigation of third-party rights absolutely"). Of course, a declaration that the defendants are violating Mr. Deanda's "rights" under section 151.001(a)(6) and the Fourteenth Amendment will imply that the defendants are also violating the rights of other similarly situated individuals. But a district court cannot formally pronounce the rights of non-litigants in a declaratory judgment, even if its ruling indicates that others would qualify for similar declaratory relief if they were ever to request it from the courts. And any declaratory relief that a district court purports to award

to non-parties or non-litigants cannot have "the force and effect of a final judgment or decree" within the meaning of 28 U.S.C. § 2201(a).

B. The Administrative Procedure Act

The Administrative Procedure Act, unlike the Declaratory Judgment Act, authorizes a court to "hold unlawful and set aside" agency action that it deems unlawful or unconstitutional. 5 U.S.C. § 706(2). Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants,[1] the APA goes further by empowering the judiciary to act directly on the challenged agency *action*. This statutory power to "set aside" agency action is a veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions—in the same way that an appellate court formally revokes and wipes away an erroneous trial-court judgment. *See Data Marketing Partnership, LP v. United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) ("The APA gives courts the power to 'hold unlawful and set aside agency action[s].' 5 U.S.C. § 706(2). Under prevailing precedent, § 706 'extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to "set aside"—*i.e.*, formally nullify and revoke—an unlawful agency action.'" (citation omitted)); *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368, 374–75 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation.").[2] The

1. *See Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute.").
2. *See also* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 253, 258 (2017) ("The APA instructs federal courts to 'hold unlawful and set aside' arbitrary or unlawful agency action. When the APA was enacted in 1946, that instruction reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments . . . . Just as a district court judgment infected with error should be invalidated and returned for reconsideration, so too with agency action."); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 940 (2011) (explaining how judicial review of agency action is "built on the appellate review model of

APA gives the judiciary a unique power that it lacks when reviewing the constitutionality of statutes: Reviewing courts may formally vacate an agency rule or order, rather than merely declaring the rights of litigants or enjoining government officials from enforcing the disputed law.

Mr. Deanda is therefore entitled to vacatur of the second sentence of 42 C.F.R. § 59.10(b), which states that:

> Title X projects may not require consent of parents or guardians for the provision of services to minors, nor can any Title X project staff notify a parent or guardian before or after a minor has requested and/or received Title X family planning services.

42 C.F.R. § 59.10(b). This is a universal remedy because the agency actions themselves are vacated—*i.e.*, "set aside"—which allows Mr. Deanda to obtain relief that benefits non-parties to the lawsuit. *See Data Marketing*, 45 F.4th at 859; *Franciscan Alliance*, 47 F.4th at 374–75; authorities cited in note 2, *supra*.

It does not matter that Mr. Deanda did not challenge 42 C.F.R. § 59.10(b) in his complaint or explicitly request a remedy under 5 U.S.C. § 706(2). *See* First Amended Complaint, ECF No. 1, at ¶ 54. Courts must award the relief to which a party is entitled regardless of whether it asked for that relief in its pleadings. *See* Fed. R. Civ. P. 54(c) ("A . . . final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 333 (2010) (in "the exercise of its judicial responsibility" it may be "necessary . . . for the Court to consider the facial validity" of a statute, even though a facial challenge was not brought); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S. Ct. 2292, 2307 (2016) (a request in the

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> the relationship between reviewing courts and agencies," which "was borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation"); Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1126 (2020) ("[T]he APA allows universal vacatur of rules.").

complaint to issue "such other and further relief as the Court may deem just, proper, and equitable" is sufficient to preserve claims that go unmentioned in the pleadings), overruled on other grounds in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); *Driggers v. Business Men's Assurance Co. of America*, 219 F.2d 292, 299 (5th Cir. 1955) ("[T]he final judgment should grant the relief to which plaintiff may prove himself entitled, even if he has not demanded such relief in his pleadings."); *Sapp v. Renfroe*, 511 F.2d 172, 176, n.3 (5th Cir. 1975) (allowing claim for damages raised for first time on appeal in light of Rule 54(c) and the catchall prayer for relief). Mr. Deanda is clearly entitled to this relief, as the second sentence of 42 C.F.R. § 59.10(b) is incompatible with this Court's analysis of the preemption and constitutional issues. And Mr. Deanda had good reason for omitting this specific request from his complaint: The second sentence of 42 C.F.R. § 59.10(b) was not adopted until October 7, 2021—well after the deadline for amending the pleadings. *See* 86 Fed. Reg. 56,144, 56,166 (Oct. 7, 2021). There is also no statute-of-limitations obstacle to vacatur of this agency rule.

C. Injunctive Relief

Mr. Deanda is also entitled to an injunction that restrains the defendants from implementing whatever agency actions this Court vacates or sets aside under 5 U.S.C. § 706(2). *See* Ex. 1 at ¶ 5. Because this injunction is concomitant to the APA remedy, which has formally revoked the contested agency actions, there is no need for angst over the issuance of a "nationwide" or universal injunction that halts the continued implementation of these now-vacated agency actions. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016) ("A nationwide injunction is appropriate when a party brings a facial challenge to agency action under the APA." (citing authorities)). Mr. Deanda would not be eligible for a nationwide injunction (or any type of universal remedy) if he were merely challenging the constitutionality of a statute or ordinance. *See, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)

("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."). But litigants who challenge unlawful agency action are statutorily entitled to a remedy that formally revokes and undoes the agency rule or order, and a universal remedy that restrains the further implementation of the vacated agency actions is necessary to implement this statutory command.

At least one commentator has criticized the widely held view that the APA's "set aside" language authorizes universal remedies such as vacatur and nationwide injunctions. *Compare* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. On Reg. Bull. 37, 41 (2020), *with* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121 (2020) (defending universal remedies under the APA and responding to Harrison's criticisms). But the law of the Fifth Circuit is otherwise,[3] and until the Fifth Circuit repudiates its views this Court cannot deny Mr. Deanda a universal remedy on account of these academic criticisms.

Respectfully submitted.

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Dated: December 15, 2022

3. *See Data Marketing*, 45 F.4th at 859; *Franciscan Alliance*, 47 F.4th at 374–75; authorities cited in note 2, *supra*.

CERTIFICATE OF SERVICE

I certify that on December 15, 2022, I served this document through CM/ECF upon:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Alexander R. Deanda, Plaintiff, v. **Xavier Becerra**, et al., Defendants.	Case No. 2:20-cv-00092-Z

[PLAINTIFFS' PROPOSED] FINAL JUDGMENT

Judgment is entered in favor of plaintiff Alexander R. Deanda, and against defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services, Jessica Swafford Marcella, in her official capacity as Deputy Assistant Secretary for Population Affairs, and the United States of America, on Mr. Deanda's claims that the defendants are violating Mr. Deanda's rights under section 151.001(a)(6) of the Texas Family Code and the due process clause of the fourteenth amendment in their administration of the Title X program.

Judgment is entered in favor of defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services, Jessica Swafford Marcella, in her official capacity as Deputy Assistant Secretary for Population Affairs, and the United States of America, and against plaintiff Alexander R. Deanda, on Mr. Deanda's claim that the defendants are violating Mr. Deanda's rights under the Religious Freedom Restoration Act in their administration of the Title X program.

The Court awards the following relief:

1. The Court **DECLARES** that the defendants' administration of the Title X program violates Mr. Deanda's rights under section 151.001(a)(6) of the Texas Family

Code, as there is nothing in 42 U.S.C. § 300(a) that purports to preempt state laws requiring parental consent or notification before distributing contraceptive drugs or devices to minors.

2. The Court **DECLARES** that the defendants' administration of the Title X program violates Mr. Deanda's fundamental right to control and direct the upbringing of his minor children, which is protected by the due process clause of the fourteenth amendment, as protected by the Supreme Court of the United States.

3. The Court **HOLDS UNLAWFUL** and **SETS ASIDE** the second sentence of 42 C.F.R. § 59.10(b) as "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A)–(C).

4. The Court **ENJOINS** Xavier Becerra, in his official capacity as Secretary of Health and Human Services, Jessica Swafford Marcella, in her official capacity as Deputy Assistant Secretary for Population Affairs, and the United States of America from administering the Title X program in a manner that would allow Mr. Deanda's minor children to obtain contraceptive drugs or devices without first securing the parental consent required by section 151.001(a)(6) of the Texas Family Code.

5. The Court **ENJOINS** defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services, Jessica Swafford Marcella, in her official capacity as Deputy Assistant Secretary for Population Affairs, and the United States of America from enforcing the second sentence of 42 C.F.R. § 59.10(b).

Dated: _____

_____
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE