No. 24-60462

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TENNESSEE; STATE OF MISSISSIPPI; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; COMMONWEALTH OF KENTUCKY; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; COMMONWEALTH OF VIRGINIA; STATE OF WEST VIRGINIA,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, *Secretary, U.S. Department of Health and Human Services*; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MELANIE FONTES RAINER, *in her official capacity as the Director of the Office for Civil Rights*; CENTERS FOR MEDICARE AND MEDICAID SERVICES; CHIQUITA BROOKS-LASURE, *in her official capacity as Administrator of the Centers for Medicare and Medicaid Services*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi

RECORD EXCERPTS

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

CHARLES W. SCARBOROUGH
MCKAYE L. NEUMEISTER
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Docket Sheet

APPEAL,BWR,NO_CMC

U.S. District Court
Southern District of Mississippi (Southern)
CIVIL DOCKET FOR CASE #: 1:24-cv-00161-LG-BWR
Internal Use Only

State of Tennessee et al v. Becerra et al
Assigned to: District Judge Louis Guirola, Jr
Referred to: Magistrate Judge Bradley W. Rath
Case in other court: Fifth Circuit, 24-60462
Cause: 28:2201 Declaratory Judgment

Date Filed: 05/30/2024
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

State of Tennessee

represented by **Steven James Griffin**
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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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PRO HAC VICE
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V.

Defendant

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Defendant

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ATTORNEY TO BE NOTICED

Sarah Suwanda-Federal Gov
(See above for address)
ATTORNEY TO BE NOTICED

Zachary Sherwood-Federal Gov
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ATTORNEY TO BE NOTICED

Defendant

Melanie Fontes Rainer
in her official capacity as the Director of the Office for Civil Rights

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(See above for address)
ATTORNEY TO BE NOTICED

Sarah Suwanda-Federal Gov
(See above for address)
ATTORNEY TO BE NOTICED

Zachary Sherwood-Federal Gov
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Centers for Medicare and Medicaid Services

represented by **James Earl Graves , III**
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ATTORNEY TO BE NOTICED

Sarah Suwanda-Federal Gov
(See above for address)
ATTORNEY TO BE NOTICED

Zachary Sherwood-Federal Gov
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ATTORNEY TO BE NOTICED

Defendant

Chiquita Brooks-LaSure
in her official capacity as Administrator of the Centers for Medicare and Medicaid Services

represented by **James Earl Graves , III**
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ATTORNEY TO BE NOTICED

Sarah Suwanda-Federal Gov
(See above for address)
ATTORNEY TO BE NOTICED

Zachary Sherwood-Federal Gov
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Email All Attorneys

Date Filed	#	Docket Text
05/30/2024	1 (p.18)	COMPLAINT against Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services (Filing fee $ 405; receipt number 5418349), filed by State of Nebraska, State of Indiana, State of West Virginia, State of Tennessee, State of Oklahoma, Commonwealth of Virginia, State of Georgia, State of Mississippi, Commonwealth of Kentucky, State of Ohio, State of South Carolina, State of South Dakota, State of Kansas, State of Louisiana, State of Alabama. (Attachments: # 1 (p.18) Exhibit A - HHS Final Rule, # 2 (p.300) Exhibit B - Comment Letter of TN and Other States, # 3 (p.305) Civil Cover Sheet)(JCH) (Entered: 05/31/2024)
05/30/2024		(Court only) ***Set NO-CMC and Magistrate-BWR Flags (JCH) (Entered: 05/31/2024)
05/31/2024	2 (p.300)	Summons Issued as to Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services. (JCH) (Entered: 05/31/2024)
05/31/2024		Issued summons emailed to attorney to email address listed on docket. (JCH) (Entered: 05/31/2024)
05/31/2024	3 (p.305)	NOTICE of Appearance by Justin L. Matheny-State Gov on behalf of State of Mississippi (Matheny-State Gov, Justin) (Entered: 05/31/2024)
06/03/2024	4 (p.306)	MOTION for Clifton E. Katz to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5419987) by State of South Dakota (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good

		Standing)(Matheny-State Gov, Justin) (Entered: 06/03/2024)
06/03/2024	5 (p.313)	MOTION for Michael R. Williams to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5420217) by State of West Virginia (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/03/2024)
06/03/2024	6 (p.321)	MOTION for T. Elliot Gaiser to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5420299) by State of Ohio (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/03/2024)
06/04/2024	7 (p.328)	MOTION for Harrison G. Kilgore to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5421329) by State of Tennessee (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Griffin, Steven) (Entered: 06/04/2024)
06/04/2024		TEXT ONLY ORDER granting 4 (p.306) Motion to Appear Pro Hac Vice. That Attorney Clifton E. Katz be admitted pro hac vice in this case on behalf of Plaintiff State of South Dakota in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/4/2024 (AB) (Entered: 06/04/2024)
06/04/2024		TEXT ONLY ORDER granting 5 (p.313) Motion to Appear Pro Hac Vice. That Attorney Michael R. Williams be admitted pro hac vice in this case on behalf of Plaintiff State of West Virginia in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/4/2024 (AB) (Entered: 06/04/2024)
06/04/2024		TEXT ONLY ORDER granting 6 (p.321) Motion to Appear Pro Hac Vice. That Attorney T. Elliot Gaiser be admitted pro hac vice in this case on behalf of Plaintiff State of Ohio in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/4/2024 (AB) (Entered: 06/04/2024)
06/04/2024		TEXT ONLY ORDER granting 7 (p.328) Motion to Appear Pro Hac Vice. That Attorney Harrison G. Kilgore be admitted pro hac vice in this case on behalf of Plaintiff State of Tennessee in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/4/2024 (AB) (Entered: 06/04/2024)

06/04/2024	8 (p.335)	MOTION for Lincoln J. Korell to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5421527) by State of Nebraska (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/04/2024)
06/04/2024		(Court only) Attorney T. Elliot Gaiser - PHV for State of Ohio,Clifton E. Katz - PHV for State of South Dakota,Harrison Gray Kilgore - PHV for State of Tennessee,Michael R. Williams - PHV for State of West Virginia added. (JCH) (Entered: 06/04/2024)
06/05/2024	9 (p.342)	MOTION for Stephen J. Petrany to Appear Pro Hac Vice by State of Georgia (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/05/2024)
06/05/2024		TEXT ONLY ORDER granting 8 (p.335) Motion to Appear Pro Hac Vice. That Attorney Lincoln J. Korell be admitted pro hac vice in this case on behalf of Plaintiff State of Nebraska in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/5/2024 (AB) (Entered: 06/05/2024)
06/05/2024		(Court only) Attorney Lincoln J. Korell - PHV for State of Nebraska added. (JCH) (Entered: 06/05/2024)
06/05/2024		Pro Hac Vice fee paid by Stephen J. Petrany $ 100, receipt number 5421712 (JCH) (Entered: 06/05/2024)
06/05/2024		TEXT ONLY ORDER granting 9 (p.342) Motion to Appear Pro Hac Vice. That Attorney Stephen J. Petrany be admitted pro hac vice in this case on behalf of Plaintiff State of Georgia in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/5/2024 (AB) (Entered: 06/05/2024)
06/06/2024		(Court only) Attorney Stephen John Petrany - PHV for State of Georgia added. (JCH) (Entered: 06/06/2024)
06/06/2024	10 (p.349)	MOTION for Alexander Barrett Bowdre to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5423120) by State of Alabama (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/06/2024)
06/06/2024	11 (p.356)	MOTION for James A. Barta to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5423245) by State of Indiana (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/06/2024)
06/06/2024	12 (p.365)	MOTION for Justin D. Clark to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5423258) by Commonwealth of Kentucky (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/06/2024)

06/06/2024	13 (p.373)	MOTION for Thomas T. Hydrick to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5423271) by State of South Carolina (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/06/2024)
06/07/2024		TEXT ONLY ORDER granting 10 (p.349) Motion to Appear Pro Hac Vice. That Attorney Alexander Barrett Bowdre be admitted pro hac vice in this case on behalf of Plaintiff State of Alabama in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/7/2024 (AB) (Entered: 06/07/2024)
06/07/2024		TEXT ONLY ORDER granting 11 (p.356) Motion to Appear Pro Hac Vice. That Attorney James A. Barta be admitted pro hac vice in this case on behalf of Plaintiff State of Indiana in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/7/2024 (AB) (Entered: 06/07/2024)
06/07/2024		TEXT ONLY ORDER granting 12 (p.365) Motion to Appear Pro Hac Vice. That Attorney Justin D. Clark be admitted pro hac vice in this case on behalf of Plaintiff Commonwealth of Kentucky in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/7/2024 (AB) (Entered: 06/07/2024)
06/07/2024		TEXT ONLY ORDER granting 13 (p.373) Motion to Appear Pro Hac Vice. That Attorney Thomas T. Hydrick be admitted pro hac vice in this case on behalf of Plaintiff State of South Carolina in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/7/2024 (AB) (Entered: 06/07/2024)
06/07/2024		(Court only) Attorney Justin D. Clark - PHV for Commonwealth of Kentucky,Alexander Barrett Bowdre - PHV for State of Alabama,James A. Barta - PHV for State of Indiana,Thomas T. Hydrick - PHV for State of South Carolina added. (JCH) (Entered: 06/07/2024)
06/07/2024	14 (p.380)	MOTION for Kevin M. Gallagher to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5424423) by Commonwealth of Virginia (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/07/2024)

06/07/2024	15 (p.387)	MOTION for Brendan T. Chestnut to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5424456) by Commonwealth of Virginia (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/07/2024)
06/10/2024	16 (p.395)	MOTION for James R. Rodriguez to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5425052) by State of Kansas (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 06/10/2024)
06/10/2024		TEXT ONLY ORDER granting 14 (p.380) Motion to Appear Pro Hac Vice; granting 15 (p.387) Motion to Appear Pro Hac Vice. That Attorneys Kevin M. Gallagher and Brendan T. Chestnut be admitted pro hac vice in this case on behalf of Plaintiff Commonwealth of Virginia in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/10/2024 (AB) (Entered: 06/10/2024)
06/10/2024		TEXT ONLY ORDER granting 16 (p.395) Motion to Appear Pro Hac Vice. That Attorney James R. Rodriguez be admitted pro hac vice in this case on behalf of Plaintiff State of Kansas in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 6/10/2024 (AB) (Entered: 06/10/2024)
06/10/2024		(Court only) Attorney Kevin M. Gallagher - PHV,Brendan T. Chestnut - PHV for Commonwealth of Virginia,James R. Rodriguez - PHV for State of Kansas added. (JCH) (Entered: 06/10/2024)
06/11/2024	17 (p.402)	MOTION for Whitney Hermandorfer to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5426210) by State of Tennessee (Griffin, Steven) (Entered: 06/11/2024)
06/12/2024		DOCKET ANNOTATION as to #17. Motion and attachments are filed as one main document. Attachments or exhibits should be scanned separately and docketed as properly identified attachments to the main document within the same docket entry. Attorney is directed to follow this procedure in future filings. L.U.Civ.R. 7.(b)(2). (wld) (Entered: 06/12/2024)
06/13/2024		TEXT ONLY ORDER granting 17 (p.402) Motion to Appear Pro Hac Vice. That Attorney Whitney Hermandorfer be admitted pro hac vice in this case on behalf of Plaintiff State of Tennessee in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge

		Bradley W. Rath on 6/13/2024 (AB) (Entered: 06/13/2024)
06/13/2024		(Court only) Attorney Whitney D. Hermandorfer - PHV for State of Tennessee added. (JCH) (Entered: 06/13/2024)
06/13/2024	18 (p.410)	NOTICE of Appearance by James Earl Graves, III on behalf of Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services (Graves, James) (Entered: 06/13/2024)
06/13/2024	19 (p.412)	NOTICE of Appearance by Sarah Suwanda-Federal Gov on behalf of All Defendants (Suwanda-Federal Gov, Sarah) (Entered: 06/13/2024)
06/13/2024	20 (p.413)	MOTION for Preliminary Injunction *and § 705 Stay* by Commonwealth of Kentucky, Commonwealth of Virginia, State of Alabama, State of Georgia, State of Indiana, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of West Virginia (Attachments: # 1 (p.18) Exhibit A - Declaration of Stephen Smith, # 2 (p.300) Exhibit B - Declaration of Cody Smith, # 3 (p.305) Exhibit C - Declaration of Kimberly Sullivan, # 4 (p.306) Exhibit D - Declaration of Jeremy Brunssen, # 5 (p.313) Exhibit E - Declaration of Cheryl Roberts, # 6 (p.321) Exhibit F - Declaration of Steven Voigt, # 7 (p.328) Exhibit G - Declaration of Robert Kerr, # 8 (p.335) Exhibit H - Declaration of Wanda Davis, # 9 (p.342) Exhibit I - Declaration of Matthew Althoff, # 10 (p.349) Exhibit J - Declaration of Stephanie Azar)(Griffin, Steven) (Entered: 06/13/2024)
06/13/2024	21 (p.463)	MEMORANDUM in Support re 20 (p.413) MOTION for Preliminary Injunction *and § 705 Stay* filed by Commonwealth of Kentucky, Commonwealth of Virginia, State of Alabama, State of Georgia, State of Indiana, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of West Virginia (Griffin, Steven) (Entered: 06/13/2024)
06/14/2024	22 (p.499)	RESPONSE in Opposition re 20 (p.413) MOTION for Preliminary Injunction *and § 705 Stay Insofar as It Seeks an Expedited Briefing Schedule* filed by Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services (Suwanda-Federal Gov, Sarah) (Entered: 06/14/2024)
06/14/2024	23 (p.503)	SCHEDULING ORDER re 20 (p.413) MOTION for Preliminary Injunction *and § 705 Stay* filed by State of Oklahoma, State of Indiana, Commonwealth of Kentucky, State of Kansas, State of South Dakota, State of South Carolina, State of Ohio, State of Mississippi, State of Alabama, State of Nebraska, Commonwealth of Virginia, State of West Virginia, State of Georgia, State of Tennessee, and State of Louisiana. Defendants shall file their response to the 20 (p.413) Motion by June 27, 2024, and Plaintiffs shall file any reply by July 1, 2024. Please see the Scheduling Order

		for additional details. Signed by District Judge Louis Guirola, Jr., on 6/14/2024. (BR) (Entered: 06/14/2024)
06/27/2024	24 (p.506)	RESPONSE in Opposition re 20 (p.413) MOTION for Preliminary Injunction *and § 705 Stay* filed by Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services (Attachments: # 1 (p.18) Ex. 1 - Neese Class Certification Order, # 2 (p.300) Ex. 2 - Neese Final Judgment Order)(Suwanda-Federal Gov, Sarah) (Entered: 06/27/2024)
07/01/2024	25 (p.543)	MOTION for Garry M. Gaskins, II to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5441257) by State of Oklahoma (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 07/01/2024)
07/01/2024	26 (p.550)	REPLY to Response to Motion re 20 (p.413) MOTION for Preliminary Injunction *and § 705 Stay* filed by Commonwealth of Kentucky, Commonwealth of Virginia, State of Alabama, State of Georgia, State of Indiana, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of West Virginia (Griffin, Steven) (Entered: 07/01/2024)
07/02/2024	27 (p.569)	MOTION for Kelsey L. Smith to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5441745) by State of Louisiana (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 07/02/2024)
07/02/2024		TEXT ONLY ORDER granting 25 (p.543) Motion to Appear Pro Hac Vice. That Attorney Garry M. Gaskins, II be admitted pro hac vice in this case on behalf of Plaintiff State of Oklahoma in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 7/2/2024 (AB) (Entered: 07/02/2024)
07/02/2024		TEXT ONLY ORDER denying 27 (p.569) Motion to Appear Pro Hac Vice. The certificate of good standing attached to the motion had expired as of the filing of the application. The motion is hereby denied without prejudice to movant's right to refile when an updated certificate is obtained. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 7/2/2024 (AB) (Entered: 07/02/2024)
07/02/2024		(Court only) Attorney Garry M. Gaskins, II - PHV for State of Oklahoma added. (JCH) (Entered: 07/02/2024)
07/02/2024	28 (p.576)	MOTION for Kelsey L. Smith to Appear Pro Hac Vice by State of Louisiana (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 07/02/2024)
07/03/2024		DOCKET ANNOTATION as to # 28. Attorney is advised that when attaching a Certificate of Good Standing, "attachment" should

		be chosen from the category box, not "exhibit". If exhibit is chosen, each exhibit needs to be labeled with a letter/number. Attorney is not required to re-file, but should follow this procedure in future filings. (JCH) (Entered: 07/03/2024)
07/03/2024	29 (p.583)	MEMORANDUM OPINION AND ORDER granting 20 (p.413) Motion for Preliminary Injunction. See Order for details. Signed by District Judge Louis Guirola, Jr on 7/3/24. (JCH) (Entered: 07/03/2024)
07/03/2024	30 (p.614)	PRELIMINARY INJUNCTION. See document for details. Signed by District Judge Louis Guirola, Jr on 7/3/24. (JCH) (Entered: 07/03/2024)
07/03/2024		TEXT ONLY ORDER granting 28 (p.576) Motion to Appear Pro Hac Vice. That Attorney Kelsey L. Smith be admitted pro hac vice in this case on behalf of Plaintiff State of Louisiana in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 7/3/2024 (AB) (Entered: 07/03/2024)
07/03/2024		(Court only) Attorney Kelsey L. Smith - PHV for State of Louisiana added. (JCH) (Entered: 07/03/2024)
07/11/2024	31 (p.616)	MOTION for Lindsey R. Keiser to Appear Pro Hac Vice (Paid $100 PHV fee; receipt number AMSSDC-5447870) by Commonwealth of Kentucky (Attachments: # 1 (p.18) Exhibit 1 - Certificate of Good Standing)(Matheny-State Gov, Justin) (Entered: 07/11/2024)
07/18/2024		TEXT ONLY ORDER granting 31 (p.616) Motion to Appear Pro Hac Vice. That Attorney Lindsey R. Keiser be admitted pro hac vice in this case on behalf of Plaintiff Commonwealth of Kentucky in association with local counsel conditioned upon completion of the registration procedures found on the Court's website and at the following link: https://www.mssd.uscourts.gov/attorney-admissions-page. NO FURTHER ORDER WILL ISSUE. Signed by Magistrate Judge Bradley W. Rath on 7/18/2024 (AB) (Entered: 07/18/2024)
07/19/2024		(Court only) Attorney Lindsey R. Keiser - PHV for Commonwealth of Kentucky added. (RLW) (Entered: 07/19/2024)
07/22/2024	32 (p.624)	MOTION for Entry of a Briefing Schedule for Dispositive Motions by Commonwealth of Kentucky, Commonwealth of Virginia, State of Alabama, State of Georgia, State of Indiana, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of West Virginia (Griffin, Steven) (Entered: 07/22/2024)
07/24/2024	33 (p.631)	First MOTION for Extension of Time to File Answer *or Response to the Complaint* by Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes

		Rainer, United States Department of Health and Human Services (Suwanda-Federal Gov, Sarah) (Entered: 07/24/2024)
07/31/2024	34 (p.634)	SUMMONS Returned Executed by State of Nebraska, State of Indiana, State of West Virginia, State of Tennessee, State of Oklahoma, Commonwealth of Virginia, State of Georgia, State of Mississippi, Commonwealth of Kentucky, State of Ohio, State of South Carolina, State of South Dakota, State of Kansas, State of Louisiana, State of Alabama. Melanie Fontes Rainer served on 5/31/2024, answer due 6/21/2024. (Matheny-State Gov, Justin) (Entered: 07/31/2024)
07/31/2024	35 (p.639)	SUMMONS Returned Executed by State of Nebraska, State of Indiana, State of West Virginia, State of Tennessee, State of Oklahoma, Commonwealth of Virginia, State of Georgia, State of Mississippi, Commonwealth of Kentucky, State of Ohio, State of South Carolina, State of South Dakota, State of Kansas, State of Louisiana, State of Alabama. Centers for Medicare and Medicaid Services served on 5/31/2024, answer due 6/21/2024. (Matheny-State Gov, Justin) (Entered: 07/31/2024)
07/31/2024	36 (p.644)	SUMMONS Returned Executed by State of Nebraska, State of Indiana, State of West Virginia, State of Tennessee, State of Oklahoma, Commonwealth of Virginia, State of Georgia, State of Mississippi, Commonwealth of Kentucky, State of Ohio, State of South Carolina, State of South Dakota, State of Kansas, State of Louisiana, State of Alabama. Chiquita Brooks-LaSure served on 5/31/2024, answer due 6/21/2024. (Matheny-State Gov, Justin) (Entered: 07/31/2024)
07/31/2024	37 (p.649)	SUMMONS Returned Executed by State of Nebraska, State of Indiana, State of West Virginia, State of Tennessee, State of Oklahoma, Commonwealth of Virginia, State of Georgia, State of Mississippi, Commonwealth of Kentucky, State of Ohio, State of South Carolina, State of South Dakota, State of Kansas, State of Louisiana, State of Alabama. United States Department of Health and Human Services served on 5/31/2024, answer due 7/31/2024. (Matheny-State Gov, Justin) Modified answer date on 8/1/2024 (wld). (Entered: 07/31/2024)
07/31/2024	38 (p.654)	SUMMONS Returned Executed by State of Nebraska, State of Indiana, State of West Virginia, State of Tennessee, State of Oklahoma, Commonwealth of Virginia, State of Georgia, State of Mississippi, Commonwealth of Kentucky, State of Ohio, State of South Carolina, State of South Dakota, State of Kansas, State of Louisiana, State of Alabama. Xavier Becerra served on 5/31/2024, answer due 6/21/2024. (Matheny-State Gov, Justin) (Entered: 07/31/2024)
08/01/2024		Reset Deadlines: United States Department of Health and Human Services answer due 7/31/2024. (wld) (Entered: 08/01/2024)
08/01/2024		DOCKET ANNOTATION as to #37. Clerk corrected answer deadline for United States Department of Health and Human Services to 7/31/2024. (wld) (Entered: 08/01/2024)

08/05/2024	39 (p.659)	RESPONSE to Motion re 33 (p.631) First MOTION for Extension of Time to File Answer *or Response to the Complaint* filed by Commonwealth of Kentucky, Commonwealth of Virginia, State of Alabama, State of Georgia, State of Indiana, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of West Virginia (Griffin, Steven) (Entered: 08/05/2024)
08/05/2024	40 (p.666)	RESPONSE in Opposition re 32 (p.624) MOTION for Entry of a Briefing Schedule for Dispositive Motions filed by Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services (Suwanda-Federal Gov, Sarah) (Entered: 08/05/2024)
08/29/2024	41 (p.670)	NOTICE of Appearance by Zachary Sherwood-Federal Gov on behalf of Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services (Sherwood-Federal Gov, Zachary) (Entered: 08/29/2024)
08/30/2024	42 (p.672)	NOTICE OF APPEAL as to 29 (p.583) Order on Motion for Preliminary Injunction, 30 (p.614) Preliminary Injunction by Xavier Becerra, Chiquita Brooks-LaSure, Centers for Medicare and Medicaid Services, Melanie Fontes Rainer, United States Department of Health and Human Services. (Sherwood-Federal Gov, Zachary) (Entered: 08/30/2024)
09/06/2024	43 (p.673)	Appeal Remark re 42 (p.672) Notice of Appeal : Letter sent to attorney from USCA RE: USCA # 24-60462 and instructions. (JCH) (Entered: 09/06/2024)
09/06/2024		USCA Case Number 24-60462 for 42 (p.672) Notice of Appeal, filed by Chiquita Brooks-LaSure, United States Department of Health and Human Services, Centers for Medicare and Medicaid Services, Xavier Becerra, Melanie Fontes Rainer. (JCH) (Entered: 09/06/2024)

Tab 2

Defendants' Notice of Appeal

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

STATE OF TENNESSEE, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, Defendants.	No. 1:24-cv-00161-LG-BWR

NOTICE OF APPEAL

Please take notice that Defendants hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Court's July 3, 2024 Memorandum Opinion and Order, ECF No. 29, and the Court's July 3, 2024 Preliminary Injunction, ECF No. 30.

Dated: August 30, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Zachary W. Sherwood
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Tab 3

Memorandum Opinion & Order Granting Plaintiffs' Motion for Expedited Relief, § 705 Relief, and a Preliminary Injunction

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

STATE OF TENNESSEE, et al. — **PLAINTIFFS**

v. — **CAUSE NO. 1:24cv161-LG-BWR**

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

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR EXPEDITED RELIEF, § 705 RELIEF, AND A PRELIMINARY INJUNCTION

BEFORE THE COURT is the [20] Urgent and Necessitous Motion for § 705 Relief, a Preliminary Injunction, and Expedited Relief filed by Plaintiffs State of Tennessee, State of Mississippi, State of Alabama, State of Georgia, State of Indiana, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, Commonwealth of Virginia, and State of West Virginia. Plaintiffs seek to enjoin the following defendants from enforcing a final rule issued by the United States Department of Health and Human Services ("HHS") on May 6, 2024: The HHS, Xavier Becerra in his official capacity as Secretary of HHS, Melanie Fontes Rainer in her official capacity as the Director of the Office for Civil Rights, the Centers for Medicare and Medicaid Services, and Chiquita Brooks-LaSure in her official capacity as Administrator of the Centers for Medicare and Medicaid

Services. *See* Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) (hereafter referred to as the "May 2024 Rule"). Plaintiffs also seek a stay of the July 5, 2024, effective date of the May 2024 Rule. The parties have fully briefed the Motion.

After reviewing the submissions of the parties, the record in this matter, and the applicable law, the Court finds that Plaintiffs have demonstrated they are entitled to a stay of the effective date of the May 2024 Rule, and a preliminary injunction prohibiting Defendants from enforcing, relying on, implementing, or otherwise acting pursuant to the May 2024 Rule's challenged provisions.

I. INTRODUCTION

In the absence of Congressional action addressing discrimination on the basis of gender identity, the Executive Branch began publishing regulations and policy statements in 2016 that interpreted Title IX's prohibition of discrimination on the basis of sex to include discrimination on the basis of gender identity. As discussed in detail below, this lawsuit and the pending Motion challenges HHS's latest regulation, which purportedly implements the prohibition of discrimination set forth in Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116(a). The ACA incorporates the provisions of Title IX in order to address sex discrimination in the healthcare field. *Id.*

II. PLAINTIFFS' COMPLAINT

Plaintiffs include fifteen individual states that allege HHS is "seek[ing] to supplant [their] health regulations with a regime that sides with HHS's

commitment to gender ideology over medical reality." (Compl. at 1-2, ECF No. 1). The Complaint alleges that HHS's May 2024 Rule would require Plaintiffs to "use taxpayer funds to pay for unproven and costly gender-transition interventions through Medicaid and state health plans — even for children who may suffer irreversible harms." (*Id.* at 2). Plaintiffs further allege that the May 2024 Rule attempts to outlaw policy decisions "excluding insurance coverage for risky and costly gender-transition surgeries . . . ." (*Id.* at 6). Plaintiffs contend that the Rule "unlawfully coerces [their] compliance by threatening to strip billions of dollars in federal funding that assists their most vulnerable populations." (*Id.*). Since Plaintiffs "could not have foreseen" that Section 1557 would be implemented in this manner, they "accepted these federal dollars from HHS and built extensive health programs — with annual budgets in the billions — in reliance on that funding." (*Id.*). Plaintiffs also fear that the May 2024 Rule will subject them to lawsuits by employees and patients, "even though neither Congress nor the States intended to waive the States' sovereign immunity in these areas." (*Id.*).

Plaintiffs maintain that the May 2024 Rule violates: (1) 5 U.S.C. § 706(2)(A), (C) by unlawfully defining "on the basis of sex"; (2) 5 U.S.C. § 706(2)(A), (C) by unlawfully regulating the practice of medicine; (3) 5 U.S.C. § 706(2)(B) because it is contrary to the Spending Clause, Nondelegation Doctrine, and the Eleventh Amendment of the United States Constitution; and (4) 5 U.S.C. § 706(2)(A) because it is arbitrary and capricious. (*Id.* at 64-75).

In the present Motion for § 705 Relief and a Preliminary Injunction, Plaintiffs seek an order:

> a. Declaring the 2024 Rule's redefinition of sex discrimination likely unlawful under Section 1557 of the Affordable Care Act, the Administrative Procedure Act, and the U.S. Constitution;
>
> b. Staying the effective date of the 2024 Rule, pursuant to 5 U.S.C. § 705, as it pertains to the provisions set forth at 42 C.F.R. §§ 438.3, 438.206, 440.262, 460.98, 460.112; 45 C.F.R. §§ 92.5, 92.6, 92.7, 92.8, 92.9, 92.10, 92.101, 92.206-211, 92.301, 92.303, 92.304; and any other provision of the 2024 Rule applied with respect to "sex" discrimination that encompasses gender identity;
>
> c. Preliminarily enjoining HHS, and any other agency or employee of the United States, from enforcing, relying on, implementing, or otherwise acting pursuant to the 2024 Rule's challenged provisions; and
>
> d. Granting any and all other preliminary relief the Court deems proper.

(Mot. at 2, ECF No. 20).

HHS counters that its May 2024 Rule merely clarifies that "sex discrimination necessarily includes discrimination" in accord with the rationale of *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644 (2020). (HHS's Resp. at 1, ECF No. 24). It claims that "most of Plaintiffs' arguments . . . suffer from the same fatal flaw: they ask this Court to enjoin a Rule that has not yet been applied by the agency." (*Id.*). It further notes that "a covered entity does not violate § 1557 if it has a legitimate nondiscriminatory reason for denying care or coverage to a transgender person." (*Id.*).

III. STATUTORY AND REGULATORY BACKGROUND

In 1972, Congress enacted Title IX, which provides, "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (emphasis added).[1] The statute excepts certain educational institutions, social fraternities and sororities, "voluntary youth service organizations," "Boy or Girl conferences," "father-son or mother-daughter activities at educational institutions," and institute of higher learning scholarship awards in "beauty" pageants from this prohibition of discrimination on the basis of sex. *Id.*

Section 1557 of the ACA, which was enacted in 2010, prohibits discrimination "on the ground prohibited by title IX . . . under any health program or activity, any part of which is receiving Federal financial assistance . . . or under any program or activity that is administered by an Executive Agency . . . ." 42 U.S.C. § 18116(a). The ACA also adopts the "enforcement mechanisms provided for and available under" Title IX "for purposes of violations of this subsection." *Id.* The Secretary of HHS is responsible for enforcing Section 1557 and promulgating regulations to implement it. 42 U.S.C. § 18116(c).

[1] A detailed history and analysis of the enactment of Title IX can be found in *Tennessee v. Cardona*, No. CV 2: 24-072-DCR, 2024 WL 3019146, at **1-5 (E.D. Ky. June 17, 2024) (enjoining HHS from enforcing a recent regulation interpreting Title IX to prohibit discrimination on the basis of gender identity and sexual orientation in education).

In 2016, HHS issued its first rule providing that the prohibition of sex discrimination set forth in Section 1557 includes discrimination on the basis of gender identity and termination of pregnancy. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016). Soon afterwards, the United States District Court for the Northern District of Texas issued a nationwide preliminary injunction prohibiting enforcement of the 2016 rule. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016).[2] HHS repealed the 2016 Rule in 2020. *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020). The United States District Court for the Eastern District of New York stayed the repeal and preliminarily enjoined HHS from enforcing the 2020 repeal. *Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020).

On June 15, 2020, the Supreme Court held that an employer who fires a person for being homosexual or transgender violates Title VII because, in that circumstance, the termination is "for traits or actions [the employer] would not have questioned in members of a different sex." *Bostock*, 590 U.S. at 651. Although the *Bostock* Court assumed that the word "sex," in Title VII referred to the biological

[2] The case styled *Franciscan Alliance, Inc. v. Becerra*, 7:16cv108-O (N.D. Tex.), had a lengthy and complicated procedural history due to the agency and executive actions that took place during that time. *See Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 372-74 (5th Cir. 2022). The Fifth Circuit ultimately found that the plaintiff's APA claim was moot and that the district court's vacatur of the 2016 Rule should remain in effect. *Franciscan All., Inc. v. Becerra*, 47 F.4th 372-74, 377 (5th Cir. 2022). It reasoned that "[p]ermitting important agency rules to flicker in and out of existence is detrimental to the rule of law." *Id.* at 375.

distinctions between male and female when Title VII was enacted in 1964, it held, "For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex." *Id.* at 655, 662.

In January 2021, President Biden issued an Executive Order entitled Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Biden Executive Order No. 13,988, 86 Fed. Reg. 07023-25 (Jan. 25, 2021). Two months later, the Department of Justice issued guidance instructing federal agencies to apply *Bostock* to Title IX. Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, C.R. Div., Memorandum re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021). And in May of that year, HHS published guidance "inform[ing] the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning May 10, 2021, [HHS] will interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity." Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021) (hereafter referred to as "May 2021 Notification"). HHS explained that "[t]his interpretation will guide the Office of Civil Rights (OCR) in processing complaints and conducting investigations, but [it] does not itself determine the outcome in any particular case or set of facts." *Id.*

The May 2021 Notification was challenged by Texas doctors who claimed that HHS had "misread *Bostock* and argued that healthcare providers may continue [to make] sex-specific medical decisions relevant to 'gender identity' so long as one does not engage in 'sex' discrimination when doing so." *Neese v. Becerra*, 640 F. Supp. 3d 668, 673 (N.D. Tex. 2022). On November 11, 2022, the *Neese* court held that the May 2021 HHS notification was unlawful and should be set aside. *Id.* at 685-87.[3]

In March 2022, HHS issued a "Notice and Guidance on Gender Affirming Care" (the "2022 Notice"). "The 2022 Notice state[d] that attempts to restrict gender-reassignment surgeries are dangerous and covered entities restricting an individual's ability to receive gender-affirming care likely violate Section 1557." *Franciscan All., Inc.*, 47 F.4th at 373-74 (citations omitted). The 2022 Notice also provided that HHS "is investigating and, where appropriate, enforcing Section 1557" in "cases involving discrimination on the basis of . . . gender identity." *Id.* On October 1, 2022, the United States District Court for the Northern District of Texas held that the 2022 Notice was arbitrary and capricious, and it issued a declaratory judgment that the 2022 Notice was unlawful. *State of Texas v. EEOC*, 633 F. Supp. 3d 824 (N.D. Tex. 2022).[4] HHS did not appeal the Texas federal court's decision.

Prior to entry of the decisions in *Neese* and *State of Texas v. EEOC*, HHS "propose[d] to address nondiscrimination on the basis of sex, including gender

[3] The *Neese* decision is currently on appeal. *See Neese v. Becerra,* 640 F. Supp. 3d 668 (N.D. Tex. 2022), *appeal docketed,* No. 23-10078 (5th Cir. Jan. 25, 2023).
[4] The *State of Texas v. EEOC* case also concerned an EEOC Notice and Guidance that is not relevant to the present Motion. *See* 633 F. Supp. 3d at 828.

identity and sexual orientation, consistent with *Bostock* and related case law, as well as subsequent Federal agency interpretations." Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824-01 (Aug. 4, 2022). After notice and comment, HHS amended and published the rule, which is now the subject of this lawsuit.

IV. DISCUSSION

A. Standing

In order to preserve the separation of powers, Article III of the United States Constitution limits judicial power to cases and controversies. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006); *see also* U.S. CONST. art. III, § 2, cl. 1. "For there to be a case or controversy under Article III, the plaintiff must have a "personal stake in the case — in other words, standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (internal quotation marks omitted). In order to establish standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* at 423. In other words, "[i]f the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." *Id.*

As explained in more detail below, the Court finds that Plaintiffs have demonstrated that the May 2024 Rule will cause concrete, imminent injury in the form of compliance costs. *See Food & Drug Admin. v. All. for Hippocratic Med.*, 602

U.S. 367, 382 (2024) ("Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements."). This injury will likely be redressed by the injunctive relief sought by Plaintiffs since enjoining enforcement of the May 2024 Rule would prevent the Plaintiffs from incurring compliance costs.[5]

B. Requirements for Imposing a Preliminary Injunction and a § 705 Stay

In order to obtain a preliminary injunction, plaintiffs must demonstrate the following four elements:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011). The first two elements "are the most critical." *Career Colleges & Schs. of Tex. v. United States Dep't of Educ.*, 98 F. 4th 220, 233 (5th Cir. 2024). "And there is authority that likelihood of success on the merits is the most important [element] . . . ." *Id.* (citations omitted). "A preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Bluefield Water Ass'n, Inc. v. City of Starkville, Miss.*, 577 F.3d 250, 253 (5th Cir. 2009) (citations omitted).

[5] HHS argues that all of the Plaintiffs except the State of Tennessee lack Article III standing to challenge the May 2024 Rule's amendments to 45 C.F.R. § 92.206. However, if at least one plaintiff has standing, the lawsuit may proceed. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52, n.2 (2006).

In addition, the APA provides that a district court "may issue all necessary and appropriate process to postpone the effective date of any agency action" to the extent necessary to prevent irreparable injury. 5 U.S.C. § 705. The parties agree that the same four requirements for imposing a preliminary injunction also apply to a § 705 stay.

1. Substantial Likelihood of Success on the Merits

When considering plaintiffs' likelihood of success on the merits, courts look to "standards provided by the substantive law." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016), *as revised* (June 27, 2016). Plaintiffs base their claims on Section 706 of the APA, which requires courts reviewing agency action to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

> The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be --
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity; [or]
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

5 U.S.C. § 706 (2)(A-C).

Plaintiffs raise four general challenges to the May 2024 Rule. Here, it is only necessary to determine whether Plaintiffs have established a substantially likelihood that HHS exceeded its statutory authority when it applied the *Bostock* holding to interpret the phrase "on the basis of sex" in Title IX. Given that agencies

are "mere creatures of statute," this inquiry requires interpretation of the statute's plain meaning, which involves consideration of the statute's language as well "as the language and design of the statute as a whole." *Inhance Techs., L.L.C. v. U.S. Env't Prot. Agency*, 96 F.4th 888, 893 (5th Cir. 2024).

The Supreme Court recently held that agencies are no longer entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* , 467 U.S. 837, 839 (1984), because Chevron "allow[ed] agencies to change course even when Congress [had] given them no authority to do so." *Loper Bright Enters. v. Raimondo*, No. 22-1219, 2024 WL 3208360, at *21 (U.S. June 28, 2024). Thus, *Chevron* "foster[ed] unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty." *Id.* at *21 (internal citations and quotation marks omitted). Now, courts

> must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Id. at *22.

The Supreme Court further held that "statutes, no matter how impenetrable, do — in fact, must — have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'" *Id.* at *16 (quoting *Wisc. Cent. Ltd v. United States*, 585 U.S. 274, 284 (2018)). For this

reason, courts must interpret words included in a statute "consistent with their ordinary meaning . . . at the time Congress enacted the statute." *Wisc. Cent. Ltd*, 585 U.S. at 284. Meanwhile, a statute's scope is determined by examining its "text in light of context, structure, and related statutory provisions." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005). If an agency's interpretation of its statutory authority "is not the one the court, after applying all relevant interpretive tools, concludes is best . . . it is not permissible." *Id.* at *16.

42 U.S.C. § 18116 (c) grants the Secretary of HHS authority to promulgate regulations implementing Section 1557 of the ACA. The relevant, substantive portion of the statute provides:

> An individual shall not, *on the ground prohibited under . . . title IX of the Education Amendments of 1972, (20 U.S.C. 1681 et seq.),* . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).

42 U.S.C. § 18116 (a) (emphasis added). Plaintiffs argue that the May 2024 Rule exceeds HHS's statutory authority because "[n]either Section 1557 nor Title IX mention 'gender identity' as a protected category." (Pl.'s Mem. at 11, ECF No. 21). "Instead," they point out, "Congress expressly limited the statutes' coverage to discrimination on the basis of *sex*." (*Id.*) (emphasis in original).

HHS counters that the meaning of the term "sex" is irrelevant because the *Bostock* Court held, "[N]othing in our approach to these cases turns on the outcome of the parties' debate" over the definition of "sex." (HHS's Resp. at 9, ECF No. 24)

(quoting *Bostock*, 590 U.S. at 655).[6] Furthermore the preamble to the May 2024 Rule states that HHS "determined it is not necessary to define 'sex' in this rule[.]" 89 Fed. Reg. at 37,575. The Court finds that HHS's position is not persuasive. As explained in more detail infra, *Bostock*'s holding hinged on the broad "but for" causation standard applicable to Title VII, while the present case pertains to a very different statutory scheme, Title IX.[7] Furthermore, the *Bostock* Court expressly limited its holding to Title VII claims when it stated, "[N]one of these other [sex discrimination] laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. . . ." *Bostock*, 590 U.S. at 681.

Since the word "sex" is not defined in Title IX, courts must interpret the term according to its meaning in or around 1972, when the statute was enacted. *See Wisc. Cent. Ltd*, 585 U.S. at 284. The day before Title IX was enacted, the Supreme Court stated, "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both." *Peters v. Kiff*, 407 U.S. 493, 504 n.12 (1972). Soon after Title IX's enactment, the Court

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[6] The *Bostock* Court explained, "[B]ecause the employees concede the point for argument's sake, we proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female." *Bostock*, 590 U.S. at 655.

[7] The lack of a definition of the term "sex" in the May 2024 Rule results in ambiguity that undermines many of HHS's arguments in the case. For example, it argues, "[N]othing in the Rule 'prohibits a covered entity from operating sex separated programs and facilities.'" (HHS Resp. at 15, ECF No. 24) (quoting 89 Fed. Reg. 37,593). The impact of this statement necessarily depends on what HHS means by "sex," i.e., whether it includes "gender identity" in the meaning of that term.

expressed its view that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

After reviewing definitions of "sex" published in dictionaries contemporary with the enactment of Title IX, the Eleventh Circuit determined that "when Congress prohibited discrimination on the basis of 'sex' in education [in Title IX], it meant biological sex, i.e., discrimination between males and females." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc); *see also Neese*, 640 F. Supp. at 678 n.6 (determining that, when Title IX was enacted, "'sex' was commonly understood to refer to physiological differences between men and women — particularly with respect to reproductive functions.").

In *Adams*, the Eleventh Circuit dismissed assertions that the term "sex" in Title IX is ambiguous because, "[i]f 'sex' were ambiguous, it is difficult to fathom why the drafters of Title IX went through the trouble of providing an express carve-out for sex-separated living facilities, as part of the overall statutory scheme." *Id.* at 813. For example, those who identify as transgender "would be able to live in both living facilities associated with their biological sex and living facilities associated with their gender identity." *Id.* Therefore, the Eleventh Circuit explained:

> [R]eading "sex" to include "gender identity" . . . would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity. Such a reading would thereby establish dual protection under Title IX based on both sex and gender identity when gender identity does not match sex. That conclusion cannot comport with the plain meaning of "sex" at the time of Title IX's enactment and the

> purpose of Title IX and its implementing regulations, as derived from their text.

Id. at 814.[8]

While considering Title VII in *Bostock*, the Supreme Court noted that the pertinent question "isn't just what 'sex' meant [when the statute was enacted], but what [the statute] says about it." 590 U.S. at 656. It continued:

> Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" In the language of law, this means that Title VII's "because of " test incorporates the simple and traditional standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

Id. Since events often have multiple but-for causes, the *Bostock* Court explained, "[s]o long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* This "sweeping standard" led the Court to hold that an employer who fires a person for being homosexual or transgender violates Title VII because, in that circumstance, the termination is "for traits or actions [the employer] would not have questioned in members of a different sex." *Id.* at 651-52.

However, *Bostock*'s ruling concerning Title VII does not apply to Title IX because Congress used different causation language in Title IX ("on the basis of

[8] HHS attempts to distinguish *Adams* by citing the Eleventh Circuit's analysis of the equal protection claims asserted by the plaintiff in that case, not the plaintiff's Title IX claims. *Adams*, 57 F.4th at 808-09. The Eleventh Circuit's discussion of the meaning of "sex" at the time of Title IX's enactment is persuasive in the present case. *Id.* at 812-15.

sex") and Title VII ("because of . . . sex"). *Neese*, 640 F. Supp. 3d at 676-78. In fact, the *Bostock* Court appeared to be speaking of Title IX when it stated, "The employers [who oppose interpreting discrimination "because of sex" to include gender identity and sexual orientation] might be onto something if Title VII *only ensured equal treatment between groups of men and women* or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action." *Bostock*, 590 U.S. at 671 (emphasis added).

The Court is aware that some Circuit courts have applied *Bostock* in Title IX cases. For example, the Fourth Circuit has cited *Bostock* for the proposition that "discrimination against a person for being transgender is discrimination 'on the basis of sex'" in violation of Title IX. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020). Therefore, the Fourth Circuit applied Title VII's but for causation standard and held:

> [T]he [School] Board could not exclude Grimm from the boys [sic] bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions.

Id. at 616. Meanwhile, the Seventh Circuit has determined that *Bostock* provides "useful guidance" in a Title IX case, calling Title VII and Title IX "closely related area[s]" of law, and noting that both Title VII and Title IX "involve sex stereotypes and less favorable treatment because of the disfavored person's sex." *Metro. Sch. Dist. of Martinsville*, 75 F.4th at 769. The Seventh Circuit expressed doubt that "sex" should be "narrowly" interpreted "as something assigned at birth or a function

of chromosomal make-up." *Metro. Sch. Dist. of Martinsville*, 75 F.4th at 770. Finally, the Ninth Circuit "'construe[s] Title IX's protections consistently with those of Title VII' when considering a Title IX discrimination claim." *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023) (quoting *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022)).

However, in the Court's view, "Title VII . . . is a vastly different statute from Title IX." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). "Title IX condition[s] federal funding on a recipient's promise not to discriminate, in what amounts essentially to a contract between the Government and the recipient. In contrast, Title VII is framed as an outright prohibition [of discrimination]." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

Since Title IX and Section 1557 of the ACA were enacted pursuant to Congress's authority under the Spending Clause of the Constitution, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022), the Supreme Court "insists that Congress speak with a clear voice" when imposing conditions on the receipt of federal funds, "recognizing that there can, of course, be no knowing acceptance of the terms of the putative contract if a State is unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it." *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) (cleaned up). This "clarity requirement is a binding constitutional command, imposing a constitutional bar on ambiguous spending conditions and providing grounds for an injunction against the enforcement of such conditions." *Texas v. Yellen*, No. 22-

10560, 2024 WL 3159081, at *9 (5th Cir. June 25, 2024) (holding that). Title VII, on the other hand, was enacted pursuant to the Commerce Clause, which grants Congress "expansive" regulatory power. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549-50 (2012) (quoting U.S. Const. art. I, § 8, cl. 3)).

Neither Title IX nor Section 1557 contain clear statements prohibiting discrimination on the basis of gender identity; they only refer to "sex." Since even the *Bostock* majority agreed that "homosexuality and transgender status are distinct concepts from sex," *Bostock*, 590 U.S. at 669, Plaintiffs would have had no way of knowing that sex discrimination would be interpreted as including transgender discrimination when they accepted federal funding and developed their healthcare programs.

The *Bostock* Title VII analysis is also inapplicable because the Fifth Circuit "does not unquestionably apply [Title VII case law] to Title IX." *Neese*, 640 F. Supp. 3d at 677 (citing *inter alia Beasley v. St. Tammany Par. Sch. Bd.*, No. 94-2333, 1997 WL 382056, at *3 (E.D. La. July 9, 1997) ("Unlike other circuits, [the Fifth Circuit] does not blindly apply Title VII standards to the Title IX context.")). While HHS cites *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), in support of its argument that federal courts "have routinely looked to interpretations of Title VII to inform Title IX," (HHS Mem. at 9, ECF No. 24), the Fifth Circuit has held that "*Franklin* did not establish any sweeping parallel between Title IX and Title VII." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 655 (5th Cir. 1997). In *Rosa*, the Fifth Circuit explained:

> [W]e cannot take liberties with statutory language or with the reasoning of the Supreme Court. *Franklin*'s single citation to [*Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986),] to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context.

Id. at 656.

HHS also relies on *Carder v. Cont'l Airlines, Inc.*, a Uniformed Services Employment and Reemployment Rights Act case where the Fifth Circuit mentioned, "Based on its legislative history, this court has interpreted Title IX as being intended to prohibit a wide spectrum of discrimination against women in the same manner as Title VII." 636 F.3d 172, 180 (5th Cir. 2011). However, that reference to Title VII and Title IX is limited to the employment discrimination context. *Id.* (citing *Lakoski v. James*, 66 F.3d 751, 757 (5th Cir. 1995) ("Title IX's proscription of sex discrimination, *when applied in the employment context*, does not differ from Title VII's.") (emphasis added); *see also Rosa H.*, 106 F.3d at 656. As a result, this Court, like the *Neese* court, fears that it "would risk amending [Title IX and Section 1557] outside the legislative process reserved for the people's representatives" if it failed to acknowledge the different language in Title VII and Title IX. *See Neese*, 640 F. Supp. 3d at 679.

Analysis of the language and provisions of Title IX, as well as its regulations, provides even more support for finding that the *Bostock* holding does not apply to Title IX and Section 1557. For example, "Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'" *Neese*, 640 F. Supp. 3d at 680 (citing 20 U.S.C. § 1681(a)(2) (allowing schools in some cases to change

"from being an institution which admits only students of one sex to being an institution which admits students of *both sexes*"); 20 U.S.C. § 1681(a)(8) (stating if father-son or mother-daughter activities are provided for "one sex," reasonably comparable activities must be provided for "the *other* sex")).

HHS argues that these provisions of Title IX are irrelevant here because Section 1557 only incorporates the ground of discrimination prohibited by Title IX and its enforcement provisions. (HHS's Resp. at 10, ECF No. 24). However, "[t]he court's job is to interpret the words [in statutes] consistent with their ordinary meaning at the time Congress enacted the statutes unless the context in which the words appear suggests some other meaning." *Nat'l Ass'n of Priv. Fund Managers v. Sec. & Exch. Comm'n*, 103 F.4th 1097, 1110 (5th Cir. 2024). Therefore, the context in which Congress used the term "sex" in Title IX is relevant to this Court's determination of what Congress meant by that term at that time.[9] Furthermore, it would be unworkable for courts to hold that "on the basis of sex" under Title IX has a different meaning in the context of Section 1557 regulations than it does in pure Title IX regulations.

For example, Title IX's regulations explicitly permit, and sometimes even require, consideration of sex. These regulations protect (1) sex-education classes designated by sex, 34 C.F.R. § 106.34(a)(3); (2) comparable, "separate toilet, locker

[9] It is not necessary for the Court to determine whether all of Title IX was incorporated into Section 1557. The May 2024 Rule recognizes that Section 1557 cites the entire statute, "20 U.S.C. 1681 et seq.," but the Office of Civil Rights views inclusion of "et seq." [as] simply part of an ordinary citation to the title IX statute." 89 Fed. Reg. 37,532.

room, and shower facilities on the basis of sex," *id.* § 106.33; (3) separate "physical education classes or activities during participation in . . . sports," *id.* § 106.34(a)(1); and (4) "separate [sports] teams for members of each sex," *id.* § 106.41(b). The regulations further require schools to provide "equal athletic opportunity for members of both sexes," in "the selection of sports and levels of competition" for "both sexes." *Id.* § 106.41(c). "Thus, while an employer risks Title VII liability when it makes distinctions among employees based on sex, an education program risks Title IX liability *when it fails to distinguish* between student athletes based on sex." *Soule v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 63 (2d Cir. 2023) (Menashi, J. concurring) (emphasis added).

In summary, the Court has found no basis for applying *Bostock*'s Title VII analysis to Section 1557's incorporation of Title IX. HHS acted unreasonably when it relied on *Bostock*'s analysis in order to conflate the phrase "on the basis of sex" with the phrase "on the basis of gender identity." Specifically, the *Bostock* holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Bostock*, 590 U.S. at 681. Interpreting the word "sex" to include gender identity would create contradictions and ambiguity within Title IX and its regulations. And it is impossible to determine what Section 1557 meant by "the ground prohibited under . . . Title IX" without considering what type of discrimination was prohibited by Title IX. Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim that HHS exceeded its statutory authority by applying the *Bostock* holding to Section 1557's incorporation

of Title IX in its May 2024 Rule. "And to the extent that Congress and the Executive Branch may disagree with how the courts have performed [their] job in a particular case, they are of course always free to act by revising the statute." *See Loper Bright*, 2024 WL 3208360 at *17.

2. Substantial Threat of Irreparable Harm

"An irreparable harm is one for which there is no adequate remedy at law." *Book People, Inc. v. Wong*, 91 F.4th 318, 340 (5th Cir. 2024). "If a plaintiff is an object of a regulation 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'" *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). The Fifth Circuit has recognized that "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs. . . . Such harm, however, must be more than "speculative." *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022). These compliance costs do not have to be quantified but must only be more than de minimis. *Id.* at 1035.

Plaintiffs argue they will suffer irreparable harm in the form of either nonrecoverable compliance costs or the loss of federal funds without the Court's immediate intervention. (Pls.' Mem. at 23, ECF No. 21). For example, Stephen Smith, Director of the Division of TennCare, has testified that Tennessee's Medicaid and CHIP programs do not provide coverage for gender-transition surgeries. (Pls.' Mot., Ex. A at 3, ECF No. 20-1). Therefore, he explains that the May 2024 Rule

would cause Tennessee to endure an "administratively burdensome process" that would take approximately nine months to complete in order to avoid losing "significant federal funding." (*Id.*). He concludes that "if Tennessee's Medicaid and CoverKids programs were required to cover sex-transition surgeries, there would be an immediate increase in state and federal expenditures." (*Id.* at 4).

Cody Smith testifies on behalf of the State of Mississippi that the Mississippi Department of Medicaid is barred from providing coverage for gender transition procedures for children under age eighteen. (Pls.' Mot., Ex. B at 3, ECF No. 20-2). He further explains that Mississippi Medicaid and CHIP programs do not cover "operative procedures to treat a mental condition" or "cover services that are cosmetic in nature." (*Id.* at 3). He states that Mississippi would be required to immediately expend resources in order to comply with the May 2024 Rule if it requires coverage for treatment of mental conditions, cosmetic procedures, and gender transition procedures for minors. (*Id.*). Louisiana, Nebraska, Virginia, Ohio, South Carolina, Alabama, and South Dakota have submitted similar declarations describing the harm that the May 2024 Rule will cause them. (Pls.' Mot., Ex. B-J, ECF Nos. 20-2 through 20-10).

HHS argues that Plaintiffs have not alleged imminent harm because they (1) face no credible threat of imminent enforcement under the Rule, let alone injury in fact, [and] (2) have failed to establish that their purported financial losses are

imminent and nonspeculative . . . ." (HHS Resp. at 22, ECF No. 24).[10] However, as the Fifth Circuit has explained, Plaintiffs "are entitled to receive clarification from this court before stifling their constitutional practices or otherwise exposing themselves to punishment or enforcement action." *See Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914, 927-28 (5th Cir. 2023).

Also, Plaintiffs have submitted testimony that they will incur compliance costs when the May 2024 Rule goes into effect regardless of whether they are subjected to enforcement actions or lose federal funding. These compliance costs provide sufficient basis for finding a substantial threat of irreparable harm.

HHS further argues:

> [T]he *Neese* declaratory judgment undermines Plaintiffs' claims of standing and irreparable harm, because the Rule states that HHS "is not applying the challenged interpretation"— that is, that discrimination on the basis of sex in § 1557 includes discrimination on the basis of gender identity —"to members of the *Neese* class pending the appeal." 89 Fed. Reg. at 37,574 n.118. Thus, because the *Neese* class includes all healthcare providers subject to § 1557, any potential future application of the Rule's interpretation that sex discrimination includes gender identity discrimination to a healthcare provider could occur only if the *Neese* judgment is overturned on appeal. Any such potential future injury is not sufficiently "imminent," . . . to establish standing or imminent irreparable harm.

(HHS Mem. at 25, ECF No. 24). HHS's argument is based on a footnote, which provides:

> In *Neese v. Becerra* . . . the U.S. District Court . . . held that [HHS] misapplied *Bostock* when it issued a public notice, 86 FR 27984 (May

[10] HHS also argues that Plaintiffs "lack standing to invoke the purported interests of their citizens." (*Id.* at 22). It is not necessary for the Court to address this argument because the Court has found that Plaintiffs themselves have established standing and a substantial threat of irreparable harm.

> 25, 2021), stating that it would interpret section 1557 and title IX's prohibition on sex discrimination to include discrimination on the basis of sexual orientation and gender identity. . . . The Department is not applying the challenged interpretation to members of the *Neese* class pending the appeal.

89 Fed. Reg. at 37,574 n.118. In *Neese*, the court certified "a class of all healthcare providers subject to Section 1557 of the Affordable Care Act." *Neese*, 342 F.R.D. 399, 405 (N.D. Tex. 2022); (*see also* HHS Resp., Ex. 1, ECF No. 24-1). The court later entered a judgment declaring:

> (1) Plaintiffs and members of the certified class need not comply with the interpretation of "sex" discrimination adopted by Defendant Becerra in his Notification of Interpretation and Enforcement of May 10, 2021; and
> (2) Section 1557 of the ACA does not prohibit discrimination on account of sexual orientation and gender identity, and the interpretation of "sex" discrimination that the Supreme Court of the United States adopted in *Bostock v. Clayton County* . . . is inapplicable to the prohibitions on "sex" discrimination in Title IX of the Education Amendments and in Section 1557 of the ACA.

(HHS Resp., Ex. 2, ECF No. 24-2). The *Neese* court denied the plaintiffs' request for injunctive relief. (*Id.*).

Even if Plaintiffs are part of the *Neese* class, neither the *Neese* Judgment nor the footnote in the May 2024 Rule prevent Plaintiffs from establishing Article III standing or a substantial threat of irreparable harm. The *Neese* Judgment was specifically tied to a general notice of policy issued by HHS, while the present lawsuit concerns a different final rule, which is much more detailed and extensive in scope. Moreover, neither the *Neese* Judgment nor the footnote[11] explicitly relieve

[11] A vague footnote to a response to a comment to a proposed rule surely provides cold comfort to those regulated by the May 2024 Rule. As the Fifth Circuit has

these Plaintiffs from compliance with the May 2024 Rule. As a result, Plaintiffs have no assurance that they will be excused from incurring compliance costs when the May 2024 Rule goes into effect. Plaintiffs therefore have established a substantial threat of imminent irreparable harm.

3. Balance of Equities and Consideration of the Public Interest

The last two requirements that Plaintiffs must establish are "(3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey*, 647 F.3d at 595. "The balance-of-harms and public-interest factors merge when the government opposes an injunction." *Career Colleges & Schs. of Tex.*, 98 F.4th at 254.

A stay of the effective date of the May 2024 Rule will not harm either HHS or the public interest because it will merely preserve the status quo. *See Louisiana v. Biden*, 55 F.4th at 1035. Meanwhile, Plaintiffs have shown that they would either incur substantial costs in order to implement the May 2024 Rule's requirements or lose federal funding. As a result, the Court finds that Plaintiffs have established all four elements for imposing a preliminary injunction and stay.

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presumed, administrative agencies, "no less than Congress, do not 'hide elephants in mouseholes.'" *Ryder v. Union Pac. R.R. Co.* , 945 F.3d 194, 203 (5th Cir. 2019) (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.").

C. The Proper Scope of the Injunction

1. Stayed Regulations

The regulations for which Plaintiffs seek a stay are: 42 C.F.R. §§ 438.3, 438.206, 440.262, 460.98, 460.112; 45 C.F.R. §§ 92.5, 92.6, 92.7, 92.8, 92.9, 92.10, 92.101, 92.206-211, 92.301, 92.303, 92.304. After careful review, the Court finds that the July 5, 2024, effective date should be stayed as to each of these regulations in so far as these regulations are intended to extend discrimination on the basis of sex to include discrimination on the basis of gender identity. Defendants are also enjoined from enforcing, relying on, implementing, or otherwise acting pursuant to the May 2024 Rule's provisions concerning gender identity.

2. Whether Relief Should be Restricted to Plaintiffs

"Nothing in the text of Section 705, nor of Section 706, suggests that either preliminary or ultimate relief under the APA needs to be limited to" the plaintiff. *Career Colleges & Schs. of Tex.*, 98 F.4th 220, 255 (5th Cir. 2024). "Instead, . . . the scope of preliminary relief under Section 705 aligns with the scope of ultimate relief under Section 706, which is not party-restricted and allows a court to 'set aside' an unlawful agency action." *Id.* The court explained:

> The Department [of Education's] protests against nationwide relief are incoherent in light of its use of the Rule to prescribe uniform federal standards. When 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.

Id. at 255. The Court therefore finds that a nationwide stay of the effective date of the May 2024 Rule should be imposed.[12]

D. Necessity of a Bond

"The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). However, the court "may elect to require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). Due to the strength of Plaintiffs' case as well as the lack of evidence that an injunction will cause HHS to suffer financial harm, the Court finds that Plaintiffs should not be required to post security.

V. CONCLUSION

A "statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States v. Champlin Ref. Co.*, 341 U.S. 290, 297 (1951). "In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning. [Courts] therefore avoid interpretations that would attribute different meanings to the same phrase." *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 587 U.S. 262, 268

[12] HHS cites the Fifth Circuit's refusal to affirm a universal injunction in *Braidwood Mgmt., Inc. v. Becerra*, No. 23-10326, 2024 WL 3079340 (5th Cir. June 21, 2024). However, the *Braidwood* court determined that "there was no basis for a universal injunction because "there was no basis for the district court to grant relief under the APA." *Id.* at *13. The Fifth Circuit cited, and did not overrule, its published decision granting a nationwide stay two months earlier in *Career Colleges & Schs. of Tex.* *See id.* (citing 98 F.4th at 255).

(2019). Therefore, "it is never our job to rewrite . . . statutory text under the banner of speculation about what Congress might have done." *Garland v. Cargill*, No. 22-976, 144 S. Ct. 1613, 1626 (2024) (holding that the ATF exceeded its statutory authority when it issued a final rule providing that the word "machinegun" as it is used in 26 U.S.C. § 5845(b), includes a "bump-stock-type device").

Consequently, this Court cannot accept the suggestion that Congress, with a "clear voice," adopted an ambiguous or evolving definition of "sex" when it acted to promote educational opportunities for women in 1972. Title IX and its regulations not only permit, but at times require, consideration of sex as well as separation on the basis of sex. *See* 20 U.S.C. § 1686 ("[N]othing contained herein shall be construed to prohibit . . . separate living facilities for the different sexes."); 34 C.F.R. § 106.41(b),(c) (allowing funding recipients to maintain separate sports teams based on sex, provided that the recipient offers equal athletic opportunity for members of both sexes). For all of the reasons noted above, the Court finds that Plaintiffs have demonstrated that there is a substantial likelihood of success on the merits of their claims and that they will suffer irreparable harm in the form of either compliance costs or lost federal funding. The substantial cost of compliance with the 181-page rule weighs in favor of maintaining the status quo. Therefore, Plaintiffs have demonstrated that they are entitled to a nationwide preliminary injunction prohibiting Defendants from enforcing HHS's May 2024 Rule. Plaintiffs are also entitled to a stay of the rule's July 5, 2024, effective date pursuant to 5 U.S.C. § 705.

IT IS THEREFORE ORDERED AND ADJUDGED that the [20] Urgent and Necessitous Motion for § 705 Relief, a Preliminary Injunction, and Expedited Relief filed by Plaintiffs is **GRANTED**.

IT IS FURTHER ORDERED AND ADJUDGED that the July 5, 2024, effective date of the final rule entitled Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) is **STAYED** nationwide pursuant to 5 U.S.C. § 705, in so far as this final rule is intended to extend discrimination on the basis of sex to include discrimination on the basis of gender identity in the following regulations: 42 C.F.R. §§ 438.3, 438.206, 440.262, 460.98, 460.112; 45 C.F.R. §§ 92.5, 92.6, 92.7, 92.8, 92.9, 92.10, 92.101, 92.206-211, 92.301, 92.303, 92.304.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants are **ENJOINED** nationwide from enforcing, relying on, implementing, or otherwise acting pursuant to the May 2024 Rule's provisions concerning gender identity.

SO ORDERED AND ADJUDGED this the 3rd day of July, 2024.

s/ *Louis Guirola, Jr.*

LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE

Tab 4

Preliminary Injunction

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

STATE OF TENNESSEE, et al. — **PLAINTIFFS**

v. — **CAUSE NO. 1:24cv161-LG-BWR**

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

PRELIMINARY INJUNCTION

For the reasons set forth in the Memorandum Opinion and Order entered herewith,

IT IS ORDERED AND ADJUDGED that the July 5, 2024, effective date of the final rule entitled Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) is **STAYED** nationwide pursuant to 5 U.S.C. § 705, in so far as this final rule is intended to extend discrimination on the basis of sex to include discrimination on the basis of gender identity in the following regulations: 42 C.F.R. §§ 438.3, 438.206, 440.262, 460.98, 460.112; 45 C.F.R. §§ 92.5, 92.6, 92.7, 92.8, 92.9, 92.10, 92.101, 92.206-211, 92.301, 92.303, 92.304.

IT IS FURTHER ORDERED AND ADJUDGED that the United States Department of Health and Human Services, Xavier Becerra in his official capacity as Secretary of HHS, Melanie Fontes Rainer in her official capacity as the Director of the Office for Civil Rights, the Centers for Medicare and Medicaid Services, and

Chiquita Brooks-LaSure in her official capacity as Administrator of the Centers for Medicare and Medicaid Services are **ENJOINED** nationwide from enforcing, relying on, implementing, or otherwise acting pursuant to the final rule entitled Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024), to the extent that the final rule provides that "sex" discrimination encompasses gender identity.

SO ORDERED AND ADJUDGED this the 3rd day of July, 2024.

s/ *Louis Guirola, Jr.*

LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE

Tab 5

Complaint (Excerpts)

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

STATE OF TENNESSEE, STATE OF MISSISSIPPI, STATE OF ALABAMA, STATE OF GEORGIA, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF NEBRASKA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, COMMONWEALTH OF VIRGINIA, AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MELANIE FONTES RAINER, in her official capacity as the Director of the Office for Civil Rights; CENTERS FOR MEDICARE AND MEDICAID SERVICES; and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare and Medicaid Services,

Defendants.

Civil Action No. 1:24cv161 LG-BWR

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. "[F]rom time immemorial," the States have maintained primary responsibility for regulating the medical field through their constitutionally reserved powers to protect their citizens' health and welfare. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). But a new rule from the

U.S. Department of Health and Human Services ("HHS") seeks to supplant States' health regulations with a regime that sides with HHS's commitment to gender ideology over medical reality. *See* Dep't of Health & Human Servs., *Nondiscrimination in Health Programs and Activities*, 89 Fed. Reg. 37,522 (May 6, 2024) ("2024 Rule") (Exhibit A). Purporting to implement the Affordable Care Act's prohibition on "sex" discrimination, HHS's 2024 Rule threatens States and healthcare providers with massive penalties for failing to align their policies, coverage decisions, and even medical care with patients' subjective gender identities rather than sex. The results of HHS's 2024 Rule will be radical: Hospitals and clinics that limit rooms to members of the same sex will be guilty of unlawful discrimination. So too will a surgeon who performs mastectomies to treat breast cancer yet declines to remove healthy breast tissue from a girl who identifies as a boy. Even a nurse who discusses health problems more prevalent in males risks liability if her patient is a male who identifies as a woman. States, for their part, must use taxpayer funds to pay for unproven and costly gender-transition interventions through Medicaid and state health plans—even for children, who may suffer irreversible harms. Courts have twice struck down similar HHS efforts to govern the Nation's health providers by administrative fiat. Plaintiffs now ask this Court to enjoin and invalidate the 2024 Rule's unlawful attempt to do the same.

INTRODUCTION

2. HHS's 2024 Rule is the latest effort by the Biden Administration to enshrine sweeping gender-identity mandates without congressional consent.

3. When Congress adopted the Affordable Care Act in 2010, it included a nondiscrimination provision known as Section 1557. *See* 42 U.S.C. § 18116. That provision in turn incorporates other longstanding civil rights laws to protect patients from unlawful

PLAINTIFFS' IMPENDING IRREPARABLE HARM

198. The 2024 Rule will inflict significant, irreparable harm on the Plaintiff States that only prompt judicial intervention can redress.

I. Nonrecoverable Compliance Costs.

199. *First*, Plaintiff States would suffer the "irreparable harm of nonrecoverable compliance costs." *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 194 (5th Cir. 2023) (citation omitted).

200. The 2024 Rule acknowledges as much. HHS estimates that the cost of revising relevant policies and procedures to comply with the 2024 Rule will result in a one-time cost of $65 million across all covered entities. 89 Fed. Reg. at 37,680. It predicts the initial cost of training employees on the 2024 Rule across all covered entities will be more than $927 million, with ongoing annual training estimated to cost another $309 million per year. *Id*. at 37,679, 37,680. And it estimates that required annual recordkeeping will cost millions more. *Id*. at 37,682.

201. Because TennCare's administrative rules for the State's Medicaid and CHIP programs exclude coverage for gender-transition surgeries, compliance with the 2024 Rule would require amending those rules through formal rulemaking. The rulemaking process is governed by the Tennessee Uniform Administrative Procedures Act and takes approximately nine months to complete. That process includes rule drafting, obtaining the review and approval of the offices of the Governor and Attorney General, posting for public comment, a rulemaking hearing, and a hearing before the Joint Government Operations Committee of the Tennessee legislature.

II. Derogation of Plaintiff States' Sovereignty.

202. *Second*, enforcement of the 2024 Rule would undermine Plaintiff States' sovereignty. "[T]he State has a significant role to play in regulating the medical profession,"

Gonzales v. Carhart, 550 U.S. 124, 157 (2007), as well as "an interest in protecting the integrity and ethics of the medical profession," *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). This includes "maintaining high standards of professional conduct" in the practice of medicine. *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954).

203. The State also "has an interest in protecting vulnerable groups … from mistakes," *Glucksberg*, 521 U.S. U.S. at 731, and in "the elimination of particularly gruesome or barbaric medical procedures," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022). It is also "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

204. As discussed, Plaintiff States have adopted laws prohibiting healthcare providers from offering gender-transition treatments to minors. *See supra*, ¶¶ 107-09, 117-18, 126, 128, 130-36. Tennessee, Mississippi, and other Plaintiff States have likewise chosen not to cover certain gender-transition interventions—including sex-reassignment surgeries—through their Medicaid or state employee health programs. *See supra*, ¶¶ 112-13, 116, 121-126, 129, 132-35. Plaintiff States will be unable to enforce these duly enacted laws and longstanding policies without coming into conflict with the 2024 Rule.

205. States have "sovereign interests in enforcing their duly enacted state laws." *Tennessee*, 615 F. Supp. 3d at 841. Thus, "irreparable harm exists when a federal regulation prevents a state from enforcing its duly enacted laws." *Texas v. Becerra*, 577 F. Supp. 3d 527, 557 (N.D. Tex. 2021) (collecting cases).

III. Threatened Loss of Federal Funding and Civil Liability.

206. *Third*, enforcement of the 2024 Rule threatens to collectively strip Plaintiff States of tens of billions of dollars in federal HHS funds and to impose substantial penalties through private suits. This severe financial exposure endangers important health programs that serve some of the Plaintiff States' most vulnerable residents.

207. For example, TennCare administers Tennessee's Medicaid program, as well as CoverKids and its PACE program for the elderly. TennCare annually serves nearly 1.5 million Tennesseans, including low-income individuals, pregnant women, children, caretaker relatives of young children, older adults, and those with disabilities.

208. TennCare received approximately $10.3 billion in HHS funding for State Fiscal Year 2022-2023. That includes more than $10.2 billion for Tennessee's Medicaid program, $109.8 million for CoverKids (CHIP), and $10.8 million for the State's PACE program.

209. All are regulated by the 2024 Rule. Yet Tennessee's Medicaid and CHIP programs each categorically exclude coverage for gender-transition surgeries, which the 2024 Rule prohibits. *See* Tenn. Comp. R. & Regs. 1200-13-13-.10(a)(72), 1200-13-21-.06(1).

210. Tennessee thus faces a credible threat that HHS will enforce the 2024 Rule against it and terminate substantial federal financial assistance to noncomplying state entities. The 2024 Rule also subjects Tennessee to civil liability through Section 1557's private right of action.

211. The same goes for Mississippi and many of the other Plaintiff States. *See supra*, ¶¶ 23-31.

IV. Fiscal Costs of Covering Gender-Transition Interventions.

212. *Fourth*, the 2024 Rule's mandate that health insurers cover gender-transition drugs and surgeries will inevitably result in increased costs for each health plan.

213. According to WPATH 8, the purportedly medically necessary drug interventions for gender transition include:

a. Prescribing and administering puberty blockers off-label; and

b. Prescribing supraphysiological levels of cross-sex hormones off-label and related visits and tests.

WPATH 8, *supra*, at S110.

214. According to WPATH 8, the purportedly "medically necessary" so-called "gender-affirming surgical procedures," *id*. at S18, S128, include the following:

a. "Hysterectomy" (removal of healthy uterus);

b. "Mastectomy" (removal of healthy breasts);

c. "Salpingo-oophorectomy" (removal of healthy ovaries and fallopian tubes);

d. "Orchiectomy" (removal of healthy testicles);

e. "Phalloplasty" (constructing penis-like structure using tissue from skin), including "urethral lengthening," "prosthesis," "colpectomy" (closure of healthy vagina), "colpoclesis" (shortening of healthy vagina), and "scrotoplasty" (creating new scrotums);

f. "Metoidioplasty" (constructing penis-like structure using tissue from a hormone-enlarged clitoris), including "urethral lengthening," "prosthesis," "colpectomy" (closure of healthy vagina), "colpoclesis" (shortening of healthy vagina), and "scrotoplasty" (creating new scrotums);

g. "Vaginoplasty" (constructing vagina-like structure), including methods of "[penile] inversion" (using combination of skin surrounding penis and scrotal skin), "peritoneal [flaps pull-through]" (pulling down peritoneum (inner lining of

abdominal wall) into space between rectum and urethra/prostate), and "intestinal" technique (using section of terminal large intestine);

h. "Vulvoplasty" (constructing vulva-like structures);

i. "Hair line advancement and/or hair transplant;"

j. "Facelift/mid-face lift (following alteration of the underlying skeletal structures);"

k. "Platysmaplasty" (neck lift);

l. "Blepharoplasty" (eye and lid modification);

m. "Rhinoplasty" (nose reshaping);

n. "Cheek" surgery, including "implant[s]" and "lipofilling;"

o. "Lip" surgery, including "augmentation" and "upper lip shortening;"

p. "Lower jaw" surgery, including "augmentation" and "reduction of the mandibular angle" (cutting or shaving the corner of the lower jaw);

q. "Chin reshaping" surgery;

r. "Chondrolaryngoplasty" (shaving down Adam's apple);

s. "Vocal cord surgery;"

t. "Breast reconstruction" and "augmentation" (mammoplasty);

u. "Body contouring" surgeries, including "liposuction," "lipofilling," and "implants" (such as "pectoral, hip, gluteal, [and] calf");

v. "Monsplasty" (reduction of mons pubis tissue around the pubic bone, which is more pronounced in females);

w. "Nipple-areola tattoo;"

x. "Uterine transplantation" (uterus from donor);

y. "Penile transplantation" (penis from donor); and

z. "Hair removal," including "laser epilation" (laser removal) or "electrolysis" (permanent removal by destroying hair follicles), "from the face, body and genital areas."

Id. at S258, App'x E (cleaned up). WPATH makes clear that the above list "is not intended to be exhaustive." *Id*.

215. According to one study used by HHS in its economic-impact analysis of the 2024 Rule, "the average cost of transition-related care (surgery, hormones, or both) per person needing treatment was $29,929 over 6.5 years," or approximately $4,600 per year. Aaron Belkin, *Caring for Our Transgender Troops—The Negligible Cost of Transition-Related Care*, 373 New Eng. J. Med. 1089 (2015).

216. According to the Williams Institute, 0.52% of adults and 0.74% of adolescents in Tennessee identify as transgender. *See* Williams Institute, *Transgender People*, https://perma.cc/2FNL-G3ZP (last visited May 30, 2024).

217. As of May 2024, approximately 670,000 adults were enrolled in Tennessee's Medicaid program, and approximately 824,000 minors were enrolled in Tennessee's Medicaid and CHIP programs. On top of that, roughly 115,000 adults and nearly 30,000 minors are enrolled in Tennessee's State Plan for state and higher education employees.

218. Mississippi's Medicaid and CHIP programs are expected to provide health insurance coverage for nearly 752,000 in Fiscal Year 2024. Thousands more are enrolled in Mississippi's State Plan.

219. As of May 2024, approximately 345,000 adults were enrolled in Alabama's Medicaid program, and approximately 719,000 minors were enrolled in Alabama's Medicaid and CHIP programs. Thousands more were enrolled in Alabama's State Plan.

220. As of April 2024, approximately 842,652 adults were enrolled in Georgia's Medicaid program, and approximately 1,452,001 minors were enrolled in Georgia's Medicaid and CHIP programs.

221. As of April 2024, more than 1 million adults were enrolled in Indiana's Medicaid program, and more than 800,000 minors were enrolled in Indiana's Medicaid and CHIP programs.

222. As of May 2024, approximately 1.5 million adults were enrolled in Kentucky's Medicaid program and almost 530,000 children were enrolled in Medicaid.

223. As of December 2023, approximately 3.6 million Ohioans were enrolled in the State's Medicaid program, with approximately 1.5 million children enrolled in Medicaid or CHIP.

224. As of May 2024, approximately 1,212,000 adults were enrolled in Virginia's Medicaid program, and approximately 782,000 minors were enrolled in Virginia's Medicaid and CHIP programs.

225. Covered plans of the remaining Plaintiff States collectively provide health benefits to millions more individuals.

226. Based on the demographic estimates from the Williams Institute, that means there are likely thousands of people enrolled across the Plaintiff States' covered plans who identify as transgender.

227. Thus, the 2024 Rule's gender-transition mandate will undoubtedly have a "substantial" fiscal effect on Plaintiff States. 89 Fed. Reg. at 37,683. And again, any monies the States expend as a result of the 2024 Rule could not later be recovered—even if the States ultimately prevail in their legal challenge.

V. Threat to the Health and Safety of Vulnerable Citizens.

228. *Finally*, the 2024 Rule will ultimately subject some of Tennessee's most vulnerable citizens to a gender-transition protocol that will leave them with irreversible side effects—including sterilization—and increased health risks for the rest of their lives.

229. The most recent systematic review of the available evidence, published in April 2024, only confirms prior concerns of leading national health authorities abroad and in many States at home regarding the lack of quality evidence supporting the safety and efficacy of medical gender transition, particularly for minors. *See* The Cass Review, *Independent review of gender identity services for children and young people: Final Report* (April 2024), *available at* https://cass.independent-review.uk/home/publications/final-report/.

230. This evidence review highlighted the "weak evidence" regarding the impact of puberty blockers on gender dysphoria and their still unknown effect on "cognitive and psychological development." *Id.* It further noted that the use of cross-sex hormones to treat gender dysphoria in minors "presents many unknowns" due to the "lack of long-term follow-up data," which leaves "inadequate information about the range of outcomes for this group." *Id.*

231. Clinicians are still unable to determine with any certainty which gender dysphoric youth will go on to have an enduring transgender identity. *Id.* That is alarming, given that gender dysphoria for most children naturally resolves by the time they reach adulthood if not subjected to transitioning interventions. Levine, *supra*, at 40-45.

232. Although a growing number of detransitioners have come forward to shed light on the permanent consequences they have endured because of the gender-transition protocol, public advocacy and delayed justice through private lawsuits against their medical providers cannot reverse their chemical or surgical sterilization or restore their lost adolescence.

CLAIM I
Violation of APA, 5 U.S.C. § 706(2)(A), (C)
The 2024 Rule Unlawfully Defines "on the Basis of Sex"

233. Plaintiffs incorporate by reference all preceding paragraphs.

234. HHS is a federal agency within the meaning of the APA. *See* 5 U.S.C. § 551(1).

235. The 2024 Rule is "final agency action" within the meaning of 5 U.S.C. § 704.

236. Plaintiff States lack another adequate remedy in court, and no rule requires that they appeal to a superior agency authority before seeking judicial review.

237. The APA requires courts to set aside and vacate agency action that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C); *see Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022).

238. The 2024 Rule exceeds HHS's statutory authority because it defines discrimination "on the basis of sex" in a manner contrary to Section 1557 and Title IX.

239. The text of neither Section 1557 nor Title IX mentions "sexual orientation" or "gender identity" as protected categories. Instead, Congress expressly limited Title IX's coverage to discrimination "on the basis of sex," and the ordinary public meaning of "sex" at the time of Title IX's enactment unambiguously excludes consideration of a person's gender identity. *See Adams*, 57 F.4th at 812. If the plain meaning of Title IX was not enough, the statute's structure, history, and purpose confirm that "sex" is limited to the traditional biological binary of male and female. Indeed, it makes perfect sense to import Title IX's understanding of "sex"—and sex discrimination—into Section 1557 because, much like in the educational context where differential treatment on the basis of sex may be warranted (e.g., facilities, sports teams), healthcare also

requires different treatment based on biological realities. Men and women have different health needs based on biological sex.

240. Other structural features of the statute confirm the invalidity of HHS's reading. The ACA elsewhere references "sexual orientation," *see* 42 U.S.C. § 294e-1(b)(2), signaling that if Congress wished to prohibit LGBTQ+ discrimination in Section 1557, it knew how to do so.

241. Section 1557, moreover, specifically excludes from its scope "transsexualism" and a "gender identity disorder" "not resulting from physical impairments." 42 U.S.C. § 18116(a) (prohibiting discrimination "on the ground prohibited under … section 794 of title 29"); 29 U.S.C. § 705(20)(F)(i) (providing that "transsexualism" and "gender identity disorders not resulting from physical impairments" are not a "disability" under section 794). Those terms at the time were synonymous with having a transgender identity, so transgender persons that do not have a disorder of sex development—a physical impairment—do not have a "disability" and are excluded from "section 792 of title 29."

242. The 2024 Rule nonetheless states that "sex" discrimination prohibited by Title IX—and incorporated by Section 1557—includes discrimination based on "sexual orientation" and "gender identity." 89 Fed. Reg. 37,698-99.

243. The 2024 Rule rests on *Bostock* for this result. But *Bostock* explicitly declined to "prejudge" whether other nondiscrimination laws—like Title IX—prohibit discrimination based on sexual orientation and transgender status, or whether its ruling affected common practices like maintaining sex-separated "bathrooms." 590 U.S. at 681. Thus, as many federal courts have held, "the rule in *Bostock* extends no further than Title VII." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in Bostock was clear on the narrow reach of its decision and how it was limited only to Title VII itself."). And "it does not follow that principles announced

in the Title VII context automatically apply in the Title IX context." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

244. Nor can *Chevron* deference save the 2024 Rule's misinterpretation of Title IX and Section 1557. For starters, HHS's reading falls outside the range of reasonable interpretations of the statutory text because it purports to resolve a policy issue of major political significance without clear congressional authority, *see West Virginia v. EPA*, 597 U.S. 697, 721-24 (2022), and fails to construe "on the basis of sex" "to avoid serious constitutional doubts," *Brawner v. Scott Cnty.*, 14 F.4th 585, 592 n.2 (6th Cir. 2021) (quoting *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 516 (2009)); *see also infra* Claim III. And to the extent *Chevron* would permit HHS's interpretation, that decision should be reconsidered. *Cf. Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S.) (argued Jan. 17, 2024) (presenting question "[w]hether the Court should overrule *Chevron*").

245. These problems all infect and render unlawful HHS's amendments to its OCR Regulations. They also preclude HHS's amendments to its regulations related to Medicaid, CHIP, and PACE to prohibit discrimination on the basis of gender identity under Section 1557 as well as provisions of the Social Security Act. For the reasons already discussed, Section 1557 does not warrant those changes to the CMS Regulations.

246. Neither does the Social Security Act. Section 1902(a) of the SSA, 42 U.S.C. § 1396a(a)(4)(A), requires State plans to provide "such methods of administration … as are found by the Secretary to be necessary for the proper and efficient operation of the plan." Non-discrimination rules are not "methods of administration." HHS's interpretation of Section 1902 as providing carte blanche authority to impose requirements on State Medicaid plans is inconsistent

with the statutory text and violates the "clear notice" requirements for Spending Clause legislation and the major questions doctrine.

247. Section 2101(a) of the SSA, *id.* § 1397aa, also does not authorize HHS's gender-identity mandate for CHIP. This provision does not grant HHS rulemaking authority or otherwise support HHS's interpretation of "sex" discrimination to include sexual orientation and gender identity. HHS's interpretation of this section is inconsistent with the text and statutory context, as well as the "clear notice" required by the Spending Clause and the major questions doctrine.

248. Section 1894(f)(A) and 1934(f)(A) of the SSA, 42 U.S.C. § 1395eee(f); *id.* § 1396u-4(f), similarly do not give HHS authority to impose its gender identity mandate. HHS's reading of these provisions to afford near limitless rulemaking authority is contrary to statutory text and context, as well as the "clear notice" required by the Spending Clause and the major question doctrine.

249. Because the 2024 Rule's interpretation of Section 1557 and related provisions contravenes the statutory text and bedrock canons of statutory interpretation, it is not entitled to deference and exceeds HHS's legal authority. The 2024 Rule should thus be declared unlawful and "set aside"—meaning vacated. *See* 5 U.S.C. § 706(2); *see also Career Colls. & Sch. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024) (collecting authorities).

CLAIM II
Violation of APA, 5 U.S.C. § 706(2)(A), (C)
The 2024 Rule Unlawfully Regulates the Practice of Medicine

250. Plaintiffs incorporate by reference all preceding paragraphs.

251. HHS further exceeds its statutory authority because the 2024 Rule pervasively regulates the practice of medicine—a matter within the traditional authority of the States and which Congress has not authorized the agency to regulate. This arbitrary expansion of HHS's authority

2024 Rule threatens to force recipients of federal HHS funding in the Plaintiff States to choose between violating state law and abandoning consistent policies or losing their federal funding.

289. The controversy arises in this Court's jurisdiction, as it relates to questions of federal law. Venue is proper, as the State of Mississippi resides in this District. 28 U.S.C. § 1391(e).

290. As set forth throughout this Complaint, the Plaintiff States have filed an appropriate pleading to have their rights declared. The Court can resolve this controversy by declaring that Plaintiff States have a right to receive HHS funding notwithstanding their respective state laws and administrative rules prohibiting gender-transition interventions for minors and excluding gender-transition interventions from their state-sponsored health insurance plans.

PRAYER FOR RELIEF

An actual controversy exists between the parties that entitles the Plaintiff States to declaratory and injunctive relief. Plaintiffs respectfully request that this Court:

a) Enter a stay of the Final Rule's effective date under 5 U.S.C. § 705 and a preliminary injunction enjoining Defendants, and any other agency or employee of the United States, from enforcing or implementing the portions of the 2024 Rule that exceed HHS's statutory authority, violate the APA, and violate the U.S. Constitution;

b) Enter a judgment declaring, pursuant to 28 U.S.C. § 2201 and 5 U.S.C. § 706, that: (i) the Final Rule's gender-identity mandates are unlawful; (ii) the Final Rule is arbitrary and capricious; and (iii) the Plaintiff States, their political subdivisions, and their resident healthcare providers may continue receiving federal financial assistance notwithstanding any failure to adhere to the 2024 Rule's unlawful requirements;

c) Set aside and vacate the Final Rule, pursuant to 5 U.S.C. § 706, on the basis that it exceeds HHS's statutory authority and violates the APA and the U.S. Constitution;

d) Permanently enjoin Defendants and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with Defendants from withholding federal financial assistance from the Plaintiff States, their political subdivisions, and their resident healthcare providers and health insurance issuers for refusing to comply with the Final Rule's unlawful requirements;

e) Grant any and all other relief the Court deems just and proper.

Date: May 30, 2024.

Respectfully submitted,

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*Motion for Pro Hac Vice admission under L.R. 83.1(d) forthcoming.

Counsel for Plaintiff State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2024, I electronically filed the foregoing Record Excerpts with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

/s/ McKaye L. Neumeister

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