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

WESTERN DIVISION

MCCOMB CHILDREN'S CLINIC, LTD., Plaintiff, v. XAVIER BECERRA, in his official Capacity as Secretary of the United States Department of Health and Human Services, *et al*., Defendants.	Case No. 5:24-cv-00048-LG-ASH

MOTION TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, TO ENTER A BRIEFING SCHEDULE FOR DISPOSITIVE MOTIONS

Defendants respectfully request that the Court stay further district court proceedings in this case until Defendants' time to file a notice of appeal from this Court's preliminary injunction in *Tennessee v. Becerra*, No. 1:24-cv-00161-LG-BWR (S.D. Miss. July 3, 2024), ECF No. 30, lapses, and if Defendants do file a notice of appeal, until the appeal is finally resolved. A stay of district court proceedings "to await a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case" is "at least a good, if not an excellent" reason to stay proceedings. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009). Such a stay would not prejudice Plaintiff McComb Children's Clinic ("MCC") because MCC is already protected by the nationwide preliminary injunction issued by this Court in *Tennessee* as well as the declaratory judgment that MCC obtained against HHS as a class member in *Neese v. Becerra*, No. 2:21-cv-00163-Z (N.D. Tex. Nov. 22, 2022), ECF No. 71. On the other hand, a stay would conserve resources of the Court and the parties and minimize the risk of conflicting decisions.

Should this Court deny Defendants' request for a stay, Defendants respectfully ask, in the alternative, for the Court to enter the briefing schedule for dispositive motions proposed below. Cases raising claims under the Administrative Procedure Act ("APA") are resolved on cross-motions for summary judgment without trial if the claims survive a motion to dismiss. And there is no reason to brief multiple piecemeal motions for partial summary judgment, as suggested in MCC's recent motion for partial summary judgment, ECF No. 27. Defendants have conferred with counsel for MCC, who opposes all relief requested in this motion.

BACKGROUND

On May 13, 2024, MCC filed the Complaint in this action challenging the validity of parts of a rule (the "2024 Rule") promulgated by HHS to implement Section 1557 of the Affordable Care Act, the statute's antidiscrimination provision. ECF No. 1. On May 30, 2024, fifteen states filed a complaint in this District challenging many of the same parts of the 2024 Rule. Complaint for Injunctive and Declaratory Relief, *Tennessee v. Becerra*, No. 1:24-cv-00161-LG-BWR (S.D. Miss. May 30, 2024), ECF No. 1. On June 3, 2024, MCC filed a motion for a preliminary injunction, focusing on its claim that Section 1557's prohibition on discrimination on the basis of sex excludes discrimination on the basis of gender identity. ECF Nos. 6, 7. On June 13, 2024, the *Tennessee* plaintiffs filed a motion for a preliminary injunction focusing on the same gender identity discrimination provisions. *Tennessee*, No. 1:24-cv-00161-LG-BWR (S.D. Miss. June 13, 2024), ECF Nos. 20-21.

In responding to the preliminary injunction motions in this case and in *Tennessee*, Defendants argued, *inter alia*, that plaintiffs were unlikely to succeed on the merits of their challenges. On July 3, 2024, this Court issued an order in *Tennessee* that stayed nationwide the effective date of specified provisions of the 2024 Rule "in so far as [the 2024 Rule] is intended to extend discrimination on the basis of sex to include discrimination on the basis of gender identity." Preliminary Injunction, *Tennessee*, No. 1:24-cv-00161-LG-BWR (S.D. Miss. July 3, 2024), ECF No. 30 ("PI Order"). This Court also enjoined Defendants "nationwide from enforcing, relying

on, implementing, or otherwise acting pursuant to the [2024 Rule] to the extent that the final rule provides that 'sex' discrimination encompasses gender identity." *Id*. Defendants' deadline to file a notice of appeal of the *Tennessee* preliminary injunction is September 3, 2024. MCC's motion for a preliminary injunction, ECF No. 6, remains pending.

On August 15, 2024, MCC moved for partial summary judgment. ECF No. 27. MCC's motion addresses only part of one of the three claims in its Complaint, i.e., First Claim Part (A), which alleges that Section 1557's prohibition on discrimination on the basis of sex excludes discrimination on the basis of gender identity. ECF No. 28.

ARGUMENT

The Court should stay further district court proceedings in this case until Defendants' time to notice an appeal of the *Tennessee* PI Order lapses, and if Defendants do notice an appeal, until the appeal is finally resolved. A stay is supported by all of the traditional stay factors. A stay is independently justified by considerations arising from the class-wide declaratory judgment in *Neese*, which, unless overturned on jurisdictional grounds, has preclusive implications here. Alternatively, should this Court deny Defendants' request for a stay, Defendants respectfully ask for the Court to enter the briefing schedule for dispositive motions proposed below.

I. The Traditional Stay Factors Justify a Stay.

The Court should stay further district court proceedings in this case pending any appeal of the *Tennessee* PI Order because a ruling by the appellate court is likely to provide substantial, if not dispositive, guidance to this Court and the parties in resolving the merits issues presented in this case. Moreover, a stay could not possibly prejudice MCC because MCC is protected by this Court's preliminary injunction in *Tennessee* and the *Neese* judgment.

A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). A stay may address economy concerns arising from "a multiplicity of suits" challenging regulations. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 154-55 (1967). When determining whether to grant a stay, courts generally consider

(1) whether the stay would prejudice the non-moving party, (2) whether the proponent of the stay would suffer hardship or inequity if forced to proceed, and (3) whether granting the stay would further judicial economy. *Arch Ins. Co. v. Clark Constr., Inc.*, No. 5:22-cv-100-KS-BWR, 2023 WL 2762025, at *1 (S.D. Miss Apr. 3, 2023).

Weighing these factors confirms that a stay is warranted here. First, a stay of proceedings will not prejudice MCC because MCC is protected by this Court's nationwide preliminary injunction in *Tennessee*, which, among other things, enjoined Defendants "nationwide from enforcing, relying on, implementing, or otherwise acting pursuant to the [2024 Rule] to the extent that the final rule provides that 'sex' discrimination encompasses gender identity." PI Order. Moreover, as a *Neese* class member, MCC has already obtained a declaratory judgment against HHS, declaring that "Section 1557 of the ACA does not prohibit discrimination on account of . . . gender identity." Final Judgment at 1, *Neese v. Becerra*, No. 2:21-cv-00163-Z (N.D. Tex. Nov. 22, 2022), ECF No. 71. The proposed stay would not affect the *Tennessee* PI Order or MCC's declaratory judgment in *Neese* and would merely stay further litigation in the district court in this case pending a decision from the Fifth Circuit in any appeal in *Tennessee* on potentially dispositive issues. *See*, *e.g.*, *Latta v. U.S. Dep't of Educ.*, 653 F. Supp. 3d 435, 440-41 (S.D. Ohio 2023) (no prejudice to Plaintiff from stay because challenged program "is currently enjoined"); Electronic Order, *Walker v. Azar*, No. 1:20-cv-02834-FB-VMS (E.D.N.Y. Nov. 2, 2020) (granting stay pending appeal of preliminary injunction and finding that the "possibility of further irreparable harm to the plaintiffs pending appeal is mitigated by the extant preliminary injunction"); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 1050354, at *4 (W.D. Wash. Mar. 17, 2017) (finding that any prejudice to plaintiffs from stay would be "minimal—if there is any at all" in light of the preliminary injunctive relief already in effect); *Hawaii v. Trump*, 233 F. Supp. 3d 850, 853-54 (D. Haw. 2017) (same); *Boardman v. Pac. Seafood Grp.*, No. 1:15-108-CL, 2015 WL 13744253, at *2 (D. Or. Aug. 6, 2015) (same); *see also Whitman-Walker Clinic v. HHS*, No. 20-1650 (JEB), 2021 WL 4033072, at *2 (D.D.C. Sept. 3, 2021) (finding that prejudice to plaintiffs

from a stay of proceedings was minimal where the provisions of the Rule "that form the heart of Plaintiffs' objections are currently—and will remain—enjoined").

By contrast, requiring Defendants to defend this action without waiting for the Fifth Circuit's views on the issues raised in this case would be a wasteful exercise. *See*, *e.g.*, *Whitman-Walker*, 2021 WL 4033072, at *3 ("In the interim, a substantial amount of the parties' and the Court's resources would have been expended and potentially for little gain."). If district court proceedings continue while an appeal is ongoing, Defendants will have to litigate the same issues in this Court that will be under review in the Fifth Circuit. "[I]t makes no sense" to litigate such issues simultaneously. *See United States v. Abbott*, 92 F.4th 570, 571 (5th Cir. 2024) (Mem.) (Jones, J., concurring). *See also McGregory v. 21st Century Ins. & Fin. Servs., Inc.*, No. 1:15-CV-00098-DMB-DAS, 2016 WL 11643678, at *3 (N.D. Miss. Feb. 2, 2016) (possibility of defendant expending substantial resources in litigation only for appellate decision to resolve issue "weighs in favor of a stay"). A Fifth Circuit ruling on appeal could prove fully or partially dispositive of the issues in this case or, at the very least, "will have a significant impact on the litigation going forward." *See* Electronic Order, *Walker*, No. 1:20-cv-02834-FB-VMS (E.D.N.Y. Nov. 2, 2020); *Lincoln Gen. Ins. Comp. v. Autobuses Tierra Caliente, Inc.*, No. 3:04-CV-1535-L, 2006 WL 2474096, at *2 (N.D. Tex. Aug. 28, 2006) ("judicially prudent to stay this action until the Fifth Circuit rules" when "the pertinent issues in this case are also the issues before the Fifth Circuit").

For similar reasons, there are obvious benefits to judicial economy in awaiting further guidance from the Fifth Circuit. *See* Order, *Jordan v. Hall*, No. 3:15-cv-00295-HTW-LGI (S.D. Miss. July 27, 2018), ECF No. 175 ("The Court believes that it would not be an effective use of judicial resources to try this case" before further appellate guidance); *Boyd v. Am. Heritage Ins. Co.*, 282 F. Supp. 2d 502, 503 (S.D. Miss. 2003) ("If this Court follows the reasoning in [a case on appeal] and that case is later vacated . . . , then both this Court and the parties will have wasted valuable time and resources"). As noted above, a Fifth Circuit ruling may prove dispositive or, at the very least, provide guidance on relevant legal issues and facilitate further proceedings in this

case. *See*, *e.g.*, *Coker v. Select Energy Servs.*, 161 F. Supp. 3d 492, 495 (S.D. Tex. 2015) ("interest in judicial economy favors a stay because [litigation resources] may be needlessly incurred if the Fifth Circuit and/or Supreme Court rules" on pending issues). A stay will also minimize the risk of conflicting decisions that could result from simultaneously litigating the same issues in this Court and in the Fifth Circuit. *See Whole Woman's Health v. Hellerstedt*, Case No. A-16-CA-1300-SS, 2017 WL 5649477, at *2 (W.D. Tex. Mar. 16, 2017) ("How the Court of Appeals for the Fifth Circuit answers the significant legal questions of this case will likely alter upcoming proceedings. Thus, staying this case avoids duplicative and potentially unnecessary litigation, conserving judicial resources."); Order at 2, *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, No. CIV-22-232-RAW (E.D. Okla. Dec. 8, 2022), ECF No. 58 (appeal of preliminary injunction decision "may implicate the same issues that will be addressed here in future proceedings, and a stay would avoid potentially duplicative briefing and conserve the resources of both the parties and the court"); *Bahl v. N.Y. Coll. of Osteopathic Med. of N.Y. Inst. of Tech.*, No. CV 14-4020, 2018 WL 4861390, at *4 (E.D.N.Y. Sept. 28, 2018) (finding that a stay will serve court's interests because it will "minimize the possibility of conflicts between different courts") (citing cases).

For precisely these reasons, courts have held that "[s]taying a case pending in a district court in the Fifth Circuit is appropriate when the district court anticipates that the Fifth Circuit will issue a ruling in an unrelated case that addresses unresolved issues in the stayed case." *Coker*, 161 F. Supp. 3d at 495. When the Fifth Circuit "will soon consider matters that involve the same legal issues[,] . . . the issuance of a stay advances each of the three relevant factors." *Id*. Indeed, awaiting "a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case" provides "a good . . . if not an excellent" "reason for [a] district court's stay." *See Miccosukee Tribe of Indians of Fla.*, 559 F.3d at 1198.

Accordingly, the Court should stay further district court proceedings in this case until Defendants' time to notice an appeal of the *Tennessee* PI Order lapses, and if Defendants do notice an appeal, until the appeal is finally resolved.

II. The *Neese* Final Judgment Independently Warrants a Stay.

The class-wide final judgment in *Neese* has preclusive implications for this case and thus independently warrants a stay of proceedings here. In 2021, HHS notified the public that it "will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include . . . 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, 27,985 (May 25, 2021). After HHS issued that notice, two health care providers filed a putative class action complaint against HHS demanding declaratory and injunctive relief. Compl., *Neese v. Becerra*, No. 2:21-cv-00163-Z (N.D. Tex. Aug. 25, 2021), ECF No. 1. In late 2022, the *Neese* court certified the following class under Federal Rule of Civil Procedure 23(b)(2): "All health-care providers subject to Section 1557 of the Affordable Care Act." Order at 1, *Neese v. Becerra*, No. 2:21-cv-00163-Z (N.D. Tex. Nov. 22, 2022), ECF No. 70. The *Neese* court then entered a judgment for the class against HHS, declaring that "Section 1557 of the ACA does not prohibit discrimination on account of . . . gender identity." Final Judgment at 1, *Neese v. Becerra*, No. 2:21-cv-00163-Z (N.D. Tex. Nov. 22, 2022), ECF No. 71.

As long as it remains valid, the *Neese* judgment "conclusively resolves" the issue of whether Section 1557 prohibits discrimination on the basis of gender identity as between HHS and health care provider class members, such as MCC. *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023). "[T]he point of a declaratory judgment 'is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by res judicata.'" *Id*. (citation omitted). "[C]laim preclusion is the core idea of the class action: the procedural form exists precisely to liquidate the claims of many common stakeholders through litigation by a representative few of them." William B. Rubenstein, Newberg and Rubenstein on Class Actions § 18:14 (6th ed. 2024). "If the representatives prevail, the class members may take advantage of that victory" but "are then barred from litigating again themselves." *Id*. "The effect of a judgment in an action under Rule 23(b)(2) is . . . that all class members generally will be bound." Charles

Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1775 (3d ed. 2024); *see also Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982).

The fact that *Neese* is on appeal before the Fifth Circuit does not undermine its current preclusive effect. The Fifth Circuit and other circuits have held "that the fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for the purposes of subsequent litigation." *Blinder, Robinson & Co., Inc. v. SEC*, 837 F.2d 1099, 1104 n.6 (D.C. Cir. 1988) (citing *Martin v. Malhoyt*, 830 F.2d 237, 265 (D.C. Cir. 1987)); *see also Prager v. El Paso Nat'l Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969) ("The fact that the judgment is now on appeal to the New Mexico Supreme Court (where it remains undecided) has no effect on its absolute effect as a bar."). Nor can there be any doubt that MCC is a *Neese* class member. The *Neese* class includes "[a]ll health-care providers subject to Section 1557 of the Affordable Care Act ('ACA')." ECF No. 18-2. And MCC alleges that its "primary purpose is to provide healthcare." Compl. ¶ 20.[1]

At least until the Government's appeal in *Neese* is finally resolved, proceedings in this case should be stayed. Courts have grappled with the problem of "[a]ccording preclusive effect to a judgment from which an appeal has been taken"—that doing so "risks denying relief on the basis of a judgment that is subsequently over-turned." *See Martin*, 830 F.2d at 264. And the "solution to this dilemma is to defer consideration of the preclusion question until the appellate proceedings addressed to the prior judgment are concluded[.]" *Id*. at 265. A stay (as opposed to dismissal) is particularly appropriate given the Government's arguments on appeal in *Neese* that the district court lacked subject matter jurisdiction, which if successful would render the district court without

[1] Even if any ambiguity existed as to MCC's membership in the *Neese* class or other aspects about the reach of the *Neese* final judgment, the *Neese* court, not this Court, is responsible for construing its order. This Court must "avoid[] trenching on the authority of its sister court" to construe its orders. *See Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999); *see also Chancey v. Biden*, No. 1:22-cv-110, 2022 WL 20087119, at *1 (N.D. Fla. July 22, 2022) (denying request for district court to clarify whether plaintiffs are members of another court's certified class).

authority to enter judgment either for or against the class. *See BC Waycross Spring Hill, LLC v. FL Spring Hill Cortez, LLC*, No. 8:22-cv-1397-TGW, 2022 WL 18492708, at *2 (M.D. Fla. Sept. 6, 2022) (holding that a stay is most appropriate "where the jurisdiction of the first-filed court is in question"); *Callicut v. Safeco Ins. Co. of Illinois*, No. 3:-24-cv-00003-MPM-JMV, 2024 WL 1099306, at *2 (N.D. Miss. Mar 13, 2024) (a stay pending resolution of first-filed case "allows this court to 'keep its powder dry' and react to all possible rulings by the [first] court").

A stay is also consistent with the principle that members of a certified class "should not be allowed to litigate the same issue at the same time in more than one federal court" even before entry of final judgment. *Roth v. Austin*, 62 F.4th 1114, 1117 (8th Cir. 2023) (citation omitted); *see also Green v. McKaskle*, 770 F.2d 445, 447 (5th Cir. 1985) ("[T]he individual class member should be barred from pursuing his own individual lawsuit that seeks equitable relief within the subject matter of the class action."); *Wynn v. Vilsack*, No. 3:21-cv-514, 2021 WL 7501821, at *3 (M.D. Fla. Dec. 7, 2021); *Hu v. U.S. Dep't of Homeland Sec.*, No. 4:17-cv-02363-AGF, 2018 WL 1251911, at *4-5 (E.D. Mo. Mar. 12, 2018).

The inappropriateness of proceeding in this action while *Neese* is pending on appeal provides further support for Defendants' request that the Court stay district court proceedings in this case until Defendants' time to notice an appeal of the *Tennessee* PI Order lapses, and if Defendants do notice an appeal, until the appeal is finally resolved.

III. In the Alternative, the Court Should Enter a Reasonable Briefing Schedule for Resolving All of MCC's Claims.

Alternatively, if the Court denies Defendants' motion for a stay, Defendants respectfully request that the Court enter the following briefing schedule to resolve all of MCC's claims, including the part of one claim addressed in MCC's pending motion for partial summary judgment. MCC's claims arise under the APA, Compl. ¶ 12, and under that statute, "review is to be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *See* 5 U.S.C. § 706 ("the

court shall review the whole record or those parts of it cited by a party"). In light of the requisite time needed to compile, review, certify, and produce the administrative record, Defendants propose the briefing schedule on dispositive motions set out below. This schedule is the same one Defendants proposed in *Tennessee* in the event the Court decides district court proceedings should continue in that case notwithstanding the possibility of an interlocutory appeal.

September 30, 2024:	Defendants to produce the administrative record to Plaintiff[2]
November 4, 2024:	Plaintiff to file its motion for summary judgment
December 9, 2024:	Defendants to file their response to Plaintiff's motion for summary judgment and Plaintiff's pending motion for partial summary judgment; any incorporated cross-motion; and response to complaint
January 8, 2025:	Plaintiff to file its reply in support of its motion for summary judgment (including its motion for partial summary judgment) and incorporated response to any cross-motion filed by Defendants
February 7, 2025:	Defendants to file their reply in support of any cross-motion
February 21, 2025:	Deadline for the parties to file a joint appendix that includes the administrative record materials that either party cited in its summary judgment briefing

Although partial summary judgment is a useful procedural tool to narrow issues that do not involve disputed facts in certain cases proceeding toward trial, it is not designed, as MCC seemingly contemplates, to allow for inefficient piecemeal briefing of the purely legal issues presented in an APA case. *See Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (The "entire case on review is a question of law, and only a question of law.").[3]

[2] Defendants respectfully request that the administrative record—which includes any non-privileged documents that the agency considered in promulgating the Final Rule—be produced to Plaintiff, as it will be too voluminous to file on CM/ECF.

[3] "In reviewing administrative agency decisions, the function of the district court is to determine whether as a matter of law, evidence in the administrative record permitted the agency to make the decision it did, and summary judgment is an appropriate mechanism for deciding [that]

In this context, multiple motions for partial summary judgment on a series of different issues and claims (or parts of claims) represents disfavored "piecemeal" litigation presenting a burden that outweighs any benefit. Responding to and resolving motions for summary judgment are time-consuming undertakings. After production of the administrative record, MCC and Defendants can submit briefs addressing the challenged agency action across the entire universe of contested issues and claims, and the Court can determine the propriety of the challenged agency action based on a complete record at one time. "[T]he interests of judicial economy are best served by a consolidated motion for summary judgment [after production of the administrative record] rather than through the piecemeal approach of numerous partial motions for summary judgment." *See Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, No. 1:05CV1031, 2007 WL 1074606, at *3 (M.D.N.C. Apr. 3, 2007). "When a court rules on a motion for partial summary judgment that does not resolve even all liability issues, an interlocutory appeal may lead to piecemeal litigation and delay, not advance, the litigation." *Solis v. Universal Project Mgmt., Inc.*, No. H-08-1517, 2009 WL 2018260, at *6 (S.D. Tex. July 6, 2009).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay further district court proceedings in this case until Defendants' time to file a notice of appeal from this Court's preliminary injunction in *Tennessee v. Becerra*, No. 1:24-cv-00161-LG-BWR (S.D. Miss. July 3, 2024), ECF No. 30, lapses, and if Defendants do file a notice of appeal, until the appeal is finally resolved. In the alternative, Defendants respectfully request that the Court enter their proposed briefing schedule for dispositive motions.

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legal question[.]" *Tex. Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 595 (N.D. Tex. 2002) (quoting *Sierra Club v. Dombeck*, 161 F.Supp. 2d 1052, 1064 (D. Ariz. 2001)).

Dated: August 23, 2024

Respectfully submitted,

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