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

REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

In opposing Defendants' Motion to Stay Proceedings ("Stay Motion"), ECF No. 29, Plaintiff repeatedly contends that resolving a single "purely legal question"—namely, as Plaintiff puts it, whether the "gender identity mandates" purportedly imposed by the Final Rule at issue in this case "are within the statutory authority granted . . . by Congress" to the U.S. Department of Health and Human Services ("HHS")—will decide this case in its entirety. Pl.'s Opp. to Defs.' Mot. to Stay ("Opposition") at 2-4, ECF No. 31; *see, e.g.*, *id.* at 2 (describing Plaintiff's "excess of statutory authority claim" as "purely legal" and asserting that "relief" related to that claim "would make a ruling on [Plaintiff's] other claims unnecessary"). And Plaintiff has moved for partial summary judgment on that question. *See* Pl.'s Mot. for Partial Summ. J., ECF No. 27; *see also* Opposition at 3 ("Granting [Plaintiff's] motion . . . would preclude any need to rule on [Plaintiff's] other claims."); *id.* at 5 ("[Plaintiff] agrees: once its motion is granted[,] this case will not be piecemeal, it will be all but resolved.").

Defendants have since appealed a preliminary injunction order addressing that very same legal question, which was issued by this same Court in another case involving similar challenges

to the same Final Rule. *See Tennessee v. Becerra*, -- F. Supp. 3d --, 2024 WL 3283887, at *10 (S.D. Miss. July 3, 2024); Preliminary Injunction, *Tennessee*, No. 1:24-cv-161 (S.D. Miss. July 3, 2024), ECF No. 30; *see also* Notice of Appeal, *Tennessee*, No. 1:24-cv-161 (S.D. Miss. Aug. 30, 2024), ECF No. 42. The "dispositive issue" in this case, as Plaintiff describes it, Opposition at 2, is thus before the Fifth Circuit.[1] How that court will rule on that issue remains to be seen. But the Fifth Circuit's ruling will surely have a "substantial effect," if not a "controlling" one, on Plaintiff's claims here, *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009), irrespective of any further district court proceedings that take place in the interim. Pressing on with such proceedings would therefore be an inefficient, if not wholly wasteful, use of the parties'—and, more importantly, the Court's—time and resources. The Court should accordingly stay further district court proceedings in this case until the *Tennessee* appeal is finally resolved. *See* Stay Motion at 1, 3-6.

In its Opposition, Plaintiff raises a handful of objections to this sensible outcome, which range from the unpersuasive to the illogical. Plaintiff first contends that granting Defendants' Stay Motion would somehow "exacerbate" the Court's workload "further." Opposition at 2. Yet between (1) staying district court proceedings entirely—such that the Court would do nothing until the Fifth Circuit resolves the *Tennessee* appeal—and (2) issuing a decision on a partial summary judgment motion that, depending on how the Fifth Circuit rules, could later be rendered a nullity, the latter option is clearly more likely to increase the Court's work (and needlessly so). *See, e.g.*, *Coker v. Select Energy Servs.*, 161 F. Supp. 3d 492, 495 (S.D. Tex. 2015) (concluding that a stay was warranted in part because it would help "avoid expending unnecessary judicial resources");

[1] Defendants have separately appealed a stay order issued pursuant to 5 U.S.C. § 705 by a Texas district court in another case involving a challenge to the Final Rule that is also similar to Plaintiff's here. *See Texas v. Becerra*, -- F. Supp. 3d --, 2024 WL 3297147, at *5 n.5, *11 (E.D. Tex. July 3, 2024) (stating that the Final Rule "likely violates the law and exceeds the scope of HHS's authority"); Order Modifying Stay, *Texas*, No. 6:24-cv-211 (E.D. Tex. Aug. 30, 2024), ECF No. 41; *see also* Notice of Appeal, *Texas*, No. 6:24-cv-211 (E.D. Tex. Aug. 30, 2024), ECF No. 43. That appeal is now before the Fifth Circuit as well.

Accident Ins. Co. v. Classic Bldg. Design, LLC, No. 2:11-cv-33, 2012 WL 4898542, at *2 (S.D. Miss. Oct. 15, 2012) ("[C]onsiderations of judicial economy counsel, as a general matter, against investment of court resources in proceedings that may prove to have been unnecessary." (citation omitted)).[2]

Plaintiff next argues that "[t]here is no reason to delay ruling on" its motion for partial summary judgment. Opposition at 3. Respectfully, Defendants provided several good ones in its Stay Motion, foremost of which is that it "makes no sense" to litigate the legal question upon which Plaintiff's partial summary judgment motion hinges, now that the same question has been presented to the Fifth Circuit in the *Tennessee* appeal. *United States v. Abbott*, 92 F.4th 570, 571 (5th Cir. 2024) (Mem.) (Jones, J., concurring); *see Coker*, 161 F. Supp. 3d at 495 (noting that "[s]taying a case pending in a district court . . . is appropriate when the district court anticipates that the Fifth Circuit will issue a ruling" in another case "that addresses unresolved issues in the stayed case"). Relatedly, whatever work this Court has "already performed" in this case, Opposition at 3, and whatever additional work it performs while the *Tennessee* appeal remains pending, will not be decisive in any practical sense until that higher court rules on that question one way or another.

Plaintiff further notes that some district courts have recently "entertain[ed] summary judgment motions even while" appeals of their earlier preliminary injunction rulings remain

[2] Plaintiff contends throughout its Opposition that were the Court to grant partial summary judgment on Plaintiff's "excess of statutory authority" claim, this case would "be all but resolved." Opposition at 5. And Plaintiff repeatedly objects to the prospect of having to wait for Defendants to compile an administrative record and then to litigate its other claims. *See, e.g.*, *id.* at 3 ("There is no need to wait for the behemoth administrative record to resolve this claim . . . ."); *id.* at 2 ("Defendants would involve the Court and parties in six months of iterative briefing, exchange of a[] [massive] administrative record . . . and submission of extensive appendices of excerpts from that record, after which the Court would need to undertake its analysis, hear argument, and issue a ruling."). Yet if Plaintiff is so intent on "expeditiously" resolving this case, *id.* at 2, rather than moving for partial summary judgment on only one of its claims—while also "reserv[ing] the right . . . to raise [its] other statutory and constitutional claims later," ECF No. 27 at 2—Plaintiff could instead voluntarily dismiss the other claims that it finds so bothersome and reduce this case solely to the "central narrowing issue" that it considers potentially dispositive, Opposition at 5.

pending. *See* Opposition at 5 (listing cases).[3] But plenty of other courts have stayed district court proceedings in circumstances similar to the ones here so as to avoid "duplicative and potentially unnecessary litigation." *Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300-SS, 2017 WL 5649477, at *2 (W.D. Tex. Mar. 16, 2017); *see* Stay Motion at 4-6 (collecting cases). And such concerns about "conserving judicial resources," *Whole Woman's Health*, 2017 WL 5649477, at *2, should take precedence over Plaintiff's eagerness to rush to summary judgment on only one of its many claims. *Cf. True the Vote v. Hosemann*, 53 F. Supp. 3d 693, 745 (S.D. Miss. 2014) (noting that motions for partial summary judgment under Rule 54(b) "are disfavored").

Finally, Plaintiff argues that proceeding with its motion for partial summary judgment would not prejudice Defendants and could instead "preclude a tremendous amount of litigation effort on Defendants' part." Opposition at 5. Notwithstanding the obvious fact that a stay of district court proceedings would likewise "preclude" further "litigation effort" on both parties' part for the time being, what Plaintiff leaves largely unaddressed is how, exactly, it would be prejudiced by such a stay. *See Arch Ins. Co. v. Clark Constr., Inc.*, No. 5:22-cv-100, 2023 WL 2762025, at *1 (S.D. Miss. Apr. 3, 2023) (listing the factors a court considers when deciding whether to grant a stay). Indeed, Plaintiff asserts that it is "only the secondary beneficiary" of the nationwide preliminary injunction entered in the *Tennessee* case, Opposition at 3, but it does not dispute that it still benefits from that relief nonetheless.[4] Plaintiff also contends that staying proceedings in

[3] It should be noted that the courts in the cases Plaintiff cites apparently proceeded to summary judgment briefing instead of addressing the claims before them in piecemeal fashion, as Plaintiff wishes to do here. *See, e.g.*, *Tennessee v. Cardona*, No. 2:24-cv-72, 2024 WL 3584361, at *2 (E.D. Ky. July 16, 2024) (setting a briefing schedule for "dispositive" summary judgment motions). Those courts thus have "taken a different approach" than the one Plaintiff "request[s]," Opposition at 5, and that approach is consistent with the alternative request Defendants make in their Stay Motion. *See* Stay Motion at 2 (asking that the Court, should it deny Defendants' stay request, enter a briefing schedule for dispositive motions).

[4] Similarly, a district court in Texas has stayed nationwide certain portions of the Final Rule "interpret[ing] . . . discrimination 'on the basis of sex.'" Order Modifying Stay, *Texas*, No. 6:24-cv-211 (E.D. Tex. Aug. 30, 2024), ECF No. 41. Plaintiff likewise benefits from this separate relief.

this case would "delay [Plaintiff's] final relief indefinitely." *Id.* at 5. But until the Fifth Circuit resolves the "purely legal question" at the crux of Plaintiff's partial summary judgment motion, *id.* at 4, any relief this Court might afford at this stage would be non-final, practically speaking, given that *any* such lower court relief could be reversed or vacated by a contrary and potentially binding Fifth Circuit ruling.

Plaintiff, in short, in no way demonstrates that the nationwide preliminary relief from which it is currently benefitting is somehow inadequate to protect it from the allegedly harmful effects of the Rule. And it also fails to provide a persuasive basis for pressing ahead with potentially duplicative proceedings while the purportedly "dispositive issue" in this case, Opposition at 2, remains pending before the Fifth Circuit.

CONCLUSION

For the reasons provided above and in their Stay Motion, Defendants respectfully request that the Court stay further district court proceedings in this case until Defendants' appeal from this Court's preliminary injunction in *Tennessee v. Becerra*, No. 1:24-cv-161 (S.D. Miss. July 3, 2024), is finally resolved. Alternatively, should the Court deny Defendants' request for a stay, Defendants respectfully request that the Court enter their proposed briefing schedule for dispositive motions, *see* Stay Motion at 9-11.

Dated: September 3, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Zachary W. Sherwood
ZACHARY W. SHERWOOD
(IN Bar No. 37147-49)
LIAM C. HOLLAND
Trial Attorneys

United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Tel.: (202) 616-8467
Fax: (202) 616-8470
Email: zachary.w.sherwood@usdoj.gov

Counsel for Defendants