IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC,; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; - and - STATE OF TEXAS; STATE OF WISCONSIN; STATE OF NEBRASKA; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF ARIZONA; and STATE OF MISSISSIPPI, by and through Governor Phil Bryant, Plaintiffs, V. SYLVIA BURWELL, Secretary Of the United States Department Of Health and Human Services; And UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants,	7:16-CV-108 Preliminary Injunction December 20, 2016

BEFORE THE HONORABLE REED C. O'CONNOR
United States District Judge
In Wichita Falls, Texas

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(December 20, 2016.)

THE COURT: All right. Is everyone here or are we still waiting?

MS. NESTLER: Your Honor, Adam Grogg who is arguing for the defendant. He went to the restroom.

THE COURT: Okay. Very good. How about you guys?

MR. NIMOCKS: Good morning, Judge. Austin Nimocks for Texas. All the Plaintiffs are here.

THE COURT: All the Plaintiffs are here. So you are here for the states.

MR. RIENZI: And Mark Rienzi from the Beckham Fund for the private Plaintiffs, Your Honor.

THE COURT: Okay. Very good. And then we will wait -- Tell me your name, ma'am.

MS. NESTLER: Emily Nestler.

MR. HEAPS: And Bailey Heaps.

THE COURT: Okay. Thank you, Mr. Heaps.

MR. GROGG: I apologize, Your Honor.

THE COURT: No apology needed. Mr. Grogg?

MR. GROGG: Yes. Thank you.

THE COURT: Okay. Very good. Are you all ready to begin?

MR. GROGG: Yes, sir.

THE COURT: Okay. And who is going to start, since it's the Plaintiff's motion.

MR. RIENZI: I will, Your Honor.

THE COURT: Very good.

MR. RIENZI: Good morning and may it please the Court. Mark Rienzi for the private plaintiffs.

What I would like to do this morning, Your Honor, is tell you briefly about plaintiffs and how they practice medicine, tell you about the rule in this case, and then talk about the reason that Plaintiffs need a preliminary injunction and the various ways in which the rule is illegal and should be subject to that preliminary injunction.

I would like to start off by telling you a little bit about Franciscan Alliance. So Franciscan Alliance is a Catholic hospital group founded by the Sisters of St. Francis of Perpetual Adoration. They came to the United States in the 1870s, fleeing religious persecution in Germany when the government tried to control their order. They began taking care of patients in 1875 and they've done that continually from 1875 to the present. They do that now through a network of 13 hospitals which perform more than 4 million procedures a year.

In the course of that they give more -- they give almost a billion dollars a year in care to the poor and the elderly through Medicare and Medicaid and that's part of what has them subject to this rule that's in front of the Court that they give that care. They also give about half a billion

dollars of totally uncompensated care to the poor and disabled and elderly.

They do all of this because of their religious values and their religious approach to healthcare. As Sister Jane Marie says in her declaration they understand what they doing to be continuing the ministry of Jesus Christ through healthcare. That's the understanding of their enterprise. And because of that, that comes with certain requirements about how they take care of people and how they practice medicine. That certainly drives their commitment to take care of the poor and the disabled and the elderly. It also controls how they deal with patients on a day-to-day basis, and so the sisters believe that every patient should be treated with love and respect and dignity, that they should be welcomed, and they should consciously be aware of being loved by the sisters in saint -- and Franciscan Alliance system.

That commitment also includes some things that the sisters believe are not appropriate parts of healthcare and are not good and loving and kind and dignified to do to people. One of those is that they cannot provide abortions in their hospitals. They don't believe that that is consistent with continuing the ministry of Jesus Christ. They don't believe that that is the way to treat every human being with love and dignity and respect.

They have the same beliefs about trying to surgically

or chemically alter somebody's sex. So sister Jane Marie explains in I think paragraph 27 of her declaration that their view is that every person, regardless of their sexual orientation, regardless of their sexual identity, ought to be treated with love and kindness and dignity and respect.

The sisters do not believe, however, that it is consistent with treating people with love, kindness, dignity and respect to try to physically alter their body or chemically alter their body to change their biological sex. I understand on abortion and gender transition the sisters' view isn't necessarily the view shared by everybody. Other people have different views; and that is fine, but that is the view of the sisters and the healthcare system that they operate. That's how they practice medicine.

Let me briefly just mention the other two private plaintiffs just so you have it in the record. Specialty Physicians is a physician group that is solely owned and controlled by Franciscan. In other words, it's essentially part of Franciscan Alliance. It's a different corporation, but it is completely owned and controlled by Franciscan Alliance.

Christian Medical and Dental Association, CMDA, is an association of Christian Health Care Providers, it has about 18,000 members, and the group exists for, among other things, to come out with joint ethics statements and joint value

statements about the way these people choose to practice medicine and every member of the CMDA signs a statement of faith to be part of the organization and allows the organization to speak for it.

Let me briefly introduce the rule. The rule comes from or is purportedly based on the Affordable Care Act which was enacted in 2010 and in particular the rule purports to -- the rule purports to be in I think Section 1557 of the Affordable Care Act.

Section 1557 though doesn't say anything about the word "sex." It doesn't say anything about gender identity. It doesn't say anything about abortion or termination of pregnancy. Instead, what 1557 does and what Congress did when it passed the statute is 1557 incorporates several other federal civil right statutes and says that those shall apply to healthcare, too. And in particular what's relevant here is that the statute says Title IX of the education amendments of 1977, (20 U.S.C. 1681 et seq). All right. And that's what the rule is purporting to interpret, is Congress reference to Title IX in Section 1557. The rule is, according to the government, an effort to interpret and apply that rule by Congress to use that statute.

I want to pause for a moment on the fact that Congress did choose to incorporate and refer to another statute as opposed to doing what would have been much simpler,

simply saying there shall be no discrimination on the basis of sex. All right? That language, "on the basis of sex," appears in lots of statutes, Title IX, but others, and it would have been very easy, in fact easier and simpler, for Congress simply to say "no discrimination on the basis of sex." They didn't do that. Instead they refer to and incorporated an existing legal structure and that existing legal structure is Title IX. The agency I think wants to approach it as if Congress just said "on the basis of sex" and give a blank check to figure out whatever that means now. I don't think they'd be right even if that were the case, but Congress made a deliberate choice not simply to say "on the basis of sex" but instead to specifically refer to and incorporate an existing legal structure that had been in existence for four decades or so.

I think there are three aspects of Title IX's legal structure that merits some attention when thinking about whether this rule is authorized by law.

First, of course, is just the meaning of "sex." Title IX actually does say "sex," of course. Title IX says: No discrimination and education on the base is sex -- I'm paraphrasing -- but Title IX does say "sex" and as this Court is aware, and I know you've dealt with it in a prior case, there are arguments to be made, which I can get to in a few minutes, about what Congress meant in Title IX when it said

"on the basis of sex." So one is just -- That terms comes from Title IX. The only hook here for the Government to get to anything about sex discrimination is Title IX. That's the only place it's referenced.

Secondly, when Congress wrote Title IX it was quite clear that the grounds prohibited for discrimination in Title IX did not include anything that would force a religious institution to violate its beliefs.

So here's the exact language from Title IX:

"This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenants of such organization." And that's in 20 U.S.C. 1681.

So the grounds prohibited, the grounds for discrimination prohibited under Title IX, whatever they included, did not and do not include anything that would force a religious organization to violate its religious beliefs.

The third aspect of Title IX that I'd like to flag for the Court is that Title IX was also very clear and Congress was also very clear in Title IX about the relationship between a ban on sex discrimination and abortion. Congress was exceedingly clear on that front and it said -- and this is 20 U.S.C. 1688 -- Congress said, quote: "Nothing in this chapter shall be construed to require or prohibit any

person or public or private entity to provide or pay for any benefit or service including the use of facilities related to an abortion."

So again Congress, when it bans sex discrimination and education in Title IX was quite clear about the fact the ground prohibited there could never include forcing anybody, public, private, individual, entity, anybody, religious, non-religious; right? It's not limited to religious objectors. Congress was clear that the grounds prohibited could not include forcing anybody to provide or pay for an abortion.

Based on Congress's reference to Title IX in Section 1557 of the Affordable Care Act, the agency issued the new rule at issue in this case. The Affordable Care Act was enacted in 2010. The agency didn't issue this rule until 2016.

Let me flag a few things that this rule does. First and foremost and the big question in front of the Court, this rule redefines -- defines or purports to interpret the word "sex." So the agency says that "sex" includes not just biological sex, not just male and female and their physical attributes, but also, quote, "gender identity," which the agency says is, quote, "an individual's internal sense of gender which may be male, female, neither, or a combination of male and female and which may be different from an

individual's sex assigned at birth." Close quote.

In the course of adopting that definition, the Government obviously generated a large filing in the *Federal Register*. When it originally came out it was almost 350 pages of double spaced typed. It's been condensed into the three column format. It's now a mere 99 pages. But in course of that the agency gave a lot of guidance about what it meant by the definition of "sex," what it meant by discrimination, and whether it would include the blanket religious exemption from Title IX and the blanket abortion exemption from Title IX. And the agency was quite clear that it would not accept the blanket exceptions from Title IX. I use the word "blanket." That's the word that the agency uses in the regulation. They don't want a, quote, "blanket" exemption like Title IX has and instead they say we will deal with this on a case-by-case basis, look to other statutes and other provisions, and those things will be where we'll look. And they say the reason they want to reject a blanket exemption is precisely that something they think a blanket exemption, sometimes they think protecting religious liberty wouldn't be a good idea, and so they say for example they think they do have a compelling interest in making sure everybody provides coverage for sex change operations.

So the Government rejected -- If, at the end of the day, the agency was willing to say there's a complete blanket

religious exemption just like in Title IX and just like in Title IX nothing here can force anybody to provide or pay for an abortion, the private Plaintiffs would not have anything to complain about. It is the fact that they considered and in the text of the rule and the regulation reject the idea of carrying over those religious exemptions and abortion exemptions from Title IX that creates all the trouble and that I would suggest to you also makes the rule violate the Administrative Procedures Act.

The rule provides a lot of guidance about what it means to discriminatory based on gender identity. For example, and this is at page 31455 of the regulation, the agency explains, quote:

"A provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." Close quote.

So the agency is telling my clients, who do provide medically necessary hysterectomies, for example, if a woman has uterine cancer, my clients generally don't do elective sterilizations, it's part of their Catholic beliefs is that they shouldn't sterilize people, but if someone has uterine cancer, for example, and needs to have a uterus removed, my

clients will perform that.

And what the agency is saying, if you would perform it for a medical reason, if you would take out a uterus that has cancer, a diseased uterus, you also must be willing to take out a healthy uterus from somebody who wants the uterus removed as a treatment for their transgender dysphoria.

The agency likewise explains at page 31435 the way they are going to understand "discrimination." Quote:

"Thus, if a covered entity covers certain types of elective procedures that are beyond those strictly identified as medically necessary or appropriate, it must apply the same standards to its coverage of comparable procedures for gender transition."

Again, the agency's way of understanding "discrimination" here is that if you provide, say, reconstructive surgery after a mastectomy for a woman who has breast cancer, you also have to be willing to provide surgery for somebody who wants a transition from being a man to a woman. Their view of "discrimination" is that if you don't do it equally for both you are violating this regulation.

The rule also says that having a health plan; right? The rule is not only about the medical services my clients provide, it's also about the health plans that they provide to their employees, and the agency says under the heading of Discriminatory Actions Prohibited -- and this is in section

92.207 of the rule on page 31472 -- under the heading of Discriminatory Actions Prohibited it says that:

"A covered entity shall not have or implement a categorical exclusion or limitation for all health services related to gender transition."

So the agency in the rule is quite clear about what they understand "discrimination" to mean and the problem for my clients, Your Honor, is that my clients do the things that the rule suggests are discriminatory. My clients do provide hysterectomies for women with cancer but they don't provide them to try to surgically change somebody from a woman to a man. My clients do provide those types of health services but they have a religious -- and they also have a medical objection to providing them for gender transition; right? They also believe that these types of procedures are often experimental, that very often it's not good to give these procedures to children because children who have gender dysphoria often by the time they finish going through puberty don't have gender dysphoria. But the rule says that they would need to change those policies.

And the agency was quite clear in the rule that it understood it was going to be making a lot of people change their policies. And so this is on page 31455. Quote:

"We anticipate that a large number of providers may need to develop or revise policies or procedures to

incorporate this prohibition."

So the agency was very much aware that it was forcing changes in behavior.

All of this is wrapped up in a rule which the agency says it expects to have the maximum effect permissible by law. That's on 31377 and several other places in their regulation. They want it to be interpreted to have the maximum possible effect under the law. They say that its rule is supposed to be a set of standards to tell covered entities like Franciscan how they are supposed to behave and how they are supposed to comply. And they acknowledge and they say that providers are going to have to change their policies.

There are a lot of consequences for the Plaintiffs here if they don't do what the Government says which is why we're in court asking for a preliminary injunction. Among others, there's the possibility of losing federal funding that is a core part for Franciscan Alliance, specifically, core part of their ability to serve the poor and the disabled and the elderly. That is a lot of what they do and they do it for religious reasons and they do it very well and they do a lot of it. They would risk losing that. They could risk having to repay that if they are found to have made a false statement in one of the assurances that the rule says the Government will require from people going forward. All right? So the rule says you have to make assurance to us, not simply

generally that you don't discriminate based on sex, which is the kind of assurance that Franciscan Alliance has made, you know, or would make all the time. They don't discriminate based on sex. But specifically that you don't violate this rule that lays out this new way thinking about what the word "sex" means and this new way of thinking about what "discrimination" means.

Plaintiffs are also subject to other types of HHS or DOJ enforcement. It's worded very broadly that: "The agency may take such remedial action as the director may require." I'm not exactly sure what that means, but sounds very broad. Sounds like it could at least include trying to recoup money that has been paid, and frankly, spent taking care of the poor and elderly.

The places were also subject to private lawsuits and that's not a small consideration. The agency was quite clear repeatedly in the regulation that it meant to be creating a private right of action. It meant to be creating rights for private people to go sue health care providers who didn't provide these types of services. And there have already been some suits like that. There have been suits like that against Catholic hospitals for precisely the kind of behavior Franciscan engages in here, not including sex change operations in health insurance or refusing to sterilize somebody who wants to be sterilized. That's Franciscan's

behavior. Those lawsuits have already started coming. So basically every day that the doors are open at Franciscan they are possibly creating claims for new people that could cost tens or hundreds of thousands of dollars both on the claim and the attorney fees which are including in those claims and they are also jeopardizing all of the federal funding that they have received and they are also risking false claims liability for the assurances they will the be forced to give. That's already happening. Again, the private lawsuits are already happening. It already happening in the sense that HHS is already investigating the State of Texas, one of the Plaintiffs in this case, for -- which obviously Mr. Nimocks can talk about more than I can -- but they are already doing investigations of the State of Texas over this rule, so it's not some speculative hypothetical. We engage in behavior that the rule says you can't engage in.

We think we are well within our medical judgment rights and religious judgment rights to do that. We think that the rule is invalid. We don't think that the agency had a right to say that "sex" includes gender identity and specifically sex change operations and abortions, so we think it's an illegal rule. But right now we are engaged in behavior that the rule gives us every reason to think jeopardizes the continued existence and certainly continued good functioning of the hospital and its care for the elderly

and the poor.

Let me say this and then I'm happy to -- I defer the Court as to how you want to do it. I'm happy to jump in and start going claim by claim. I wanted to give you the basic set up. I could go by claim by claim or I could pause here and let other people talk. I certainly don't mean to filibuster and monopolize the time.

THE COURT: I just want you to be able to present whatever you want to present and then I will have some follow-up questions at the end and I will do the same for the state Plaintiffs and then the same for the federal government.

MR. RIENZI: Okay. I certainly won't repeat. I'm going to assume that you've got the briefs and you don't need me to repeat what we've said there, so briefly let me just walk through the claims.

Under the Administrative Procedure Act, the agency violated that act because Congress has not authorized this action. What they have done is actually contrary to law, it's arbitrary, and capricious. The word "sex" in Title IX simply does not have the definition that the agency is giving it. That's something I know this Court has already addressed in the schools context. The analysis there also applies just as well here. Title IX by its terms, by its nature, was designed to -- really took a binary view of "sex," frankly, Title IX. It said that we are concerned that women aren't getting the

same treatment as men and it said that we want to make sure that women have equal educational opportunity to men. There is no basis whatsoever to think that when Congress did that it had the 2016 versions of gender identity and things that are in this rule in mind. Congress simply didn't. That's not what the word meant when Congress enacted it. It's not what it meant in 2010, frankly, when Congress incorporated Title IX into the Affordable Care Act. So, "sex" doesn't include gender identity under Title IX.

It's not that Congress couldn't include gender identity. I want to be clear about that. Congress could include gender identity; in fact, in other statues has done precisely that. The Violence Against Women Act, for example, Congress does that. So there have been efforts in the 40 something years from Title IX to today, there have been efforts to expand federal civil right laws like Title VII and Title IX to include gender identity. Congress has considered and rejected those efforts.

In some context Congress has decided that they should protect gender identity and they have done it and they have done it by including the words "gender identity." The agency is trying to take a big step that Congress has chosen not to take. Congress could have taken that step in the ACA but they didn't. They specifically referred to an existing legal structure.

It also violates the APA not just for getting the definition wrong but for getting the exemptions wrong. The agency knows it was supposed to include those exemptions which is why for every other statute that Congress incorporated in 1557 the agency not only took the prohibition but also took the exemptions. But they said they think about religious exemptions differently and they would rather sort out the religious exemptions under some other statute but they would rather not include a blanket exemption here.

As a threshold matter, I would just point out the mere fact that they refused to include the blanket exemption here is great evidence that they do not really think all religious objectors get protected here. They are very careful and very coy in their brief not to actually say that. What they say is that their rule contemplates addressing religious liberty objections. It contemplates addressing them and I say frank say it contemplates address them later. All right?

We have to act now and we want to know what our rights are and what our obligations are now when we have to act with grave consequences hanging over our head. The agency says, No. No. No. Wait until something happens to you, wait until somebody sues you, wait until we come for your funding and then we will figure out if what you did was legal or not. I don't think that's the way the law works or should work, but that's their treatment of religious exemptions.

They also -- They have this litany that they like to repeat of the Religious Freedom Restoration Act, the Church Amendment, the Weldon Amendment, and the Coats Amendment.

One, again, note what they do not say. They do not say that those four things equal blanket exemption; right? They could say that. If they had said that I would have been happier when I read their brief and my clients would have been happier, but they don't say that at all. In fact, they make clear that those things are limited and the Government, frankly, likes keeping those limits in its back pocket; right? So the Church Amendment, for example, applies to three specific federal funding streams. It does not, it does not apply to everybody. It's not a nationwide conscience right. I wish it were, but it's not, and the Government has argued that it's not. The Government has argued in other cases recently that the Church Amendment doesn't protect institutions; it only protects individuals, people, persons. That's good for members of the CMDA so far as it reaches, which is not every place it needs to reach. It's not good for Franciscan Alliance.

The Weldon Amendment is one that the agency just recently had the opportunity in California where California was forcing all healthcare insurance policies to include abortion. The agency had the opportunity to say we understand that the Weldon Amendment forbids the Government from doing

this. Instead, they didn't. They said, No, this is okay. That's different. The Weldon Amendment is only about providing care, not about providing insurance, so tough luck; the Weldon Amendment doesn't protect you.

The Coats Amendment is another one. It's limited to abortion. By its terms the Coats Amendment talks about protecting an entity from discrimination by the federal government over abortion. The definition of "entity" though says that "entity" includes individuals in training programs. I don't know if it's the Government's view that "entity" includes a hospital like Franciscan Alliance, but it's certainly not clear from the text that the Government's view -- it's not clear from their brief -- that Franciscan has an absolute protection against being forced to provide abortions.

I would point out that the private Plaintiffs' view of this law is frankly, in many ways, similar to what you read in the amicus brief by the ACLU. The ACLU understands full well that this law is designed to force religious objectors, like Franciscan Alliance, to perform sex change operations and in certain circumstances to provide abortions. The Government has resisted carrying over what is in Title IX because they want to sort that out later. They think they've got arguments about it later. Our view is, one, it violates the APA not to carry that stuff over; but, two, if we are going to sort out

sometime whether we have a religious liberty right not to provide abortions and not to provide gender transition operations, we think we have the right to get that established now when we have to act when the law is telling us that what we are doing is illegal and when the law also tells us we have a religious liberty rights. That conflict is real right now, it's live right now, and the idea that the Government gets to sort of shoot first and figure out the legality later doesn't make sense and is inconsistent with our civil rights laws.

Now, let me briefly touch on -- So the RFRA argument. The Government seems to acknowledge I think that their actions are subject to RFRA. That's good. At times they act like they've made some big concession to say that RFRA and these other federal statutes and apply. Of course, that's no concession at all. Whether they said that or not, federal statutes apply and the agency can't undo those federal statutes. But it's good they say RFRA applies.

In their brief they do not provide any substantive defense to the RFRA claim. They say, Judge, kick it down the line. Do it later. But they don't provide a defense of the RFRA claim. That's the end of the RFRA claim at the preliminary injunction stage. There is a substantial burden on plaintiff's religion. They've got a Government telling them that they have to do things that under their religion they simply cannot do. The Government fails the strict

scrutiny test. It doesn't have a compelling interest in doing this. It doesn't need to do this. The idea that the best way to make sex change operations available is to force unwilling people to do them is a pretty bizarre idea. I frankly doubt that people who want to have sex change operations really want to get them for people who think it's a bad thing to do. I suspect that they don't. I suspect that they would rather get them from people who think this is a great thing to do for people and I'm helping. The same with abortions.

The key point though is the Government offers you know defense; right? They wrote a 50 page brief. They wrote nothing to explain how they satisfy RFRA's compelling interest test. That should be the end of it for the RFRA matter.

On the free speech question. The regulation says that referring to somebody by their biological gender can be considered creating a hostile environment for them. It cites documents that say healthcare professionals should not impose a binary view of gender while the fact of the matter is the Plaintiffs here have a binary view of gender. Their view of sexuality is that it is not something that is determined by the feelings or beliefs of an individual but it is something that is a matter of biology and it is something that relates to their God-given nature. Again, that doesn't have to be the belief shared by everybody, but that is the belief shared by the private Plaintiffs. The Government cites documents saying

that that is outdated and that that should not be imposed on patients. Well, if by imposing it on patients they mean Franciscan Alliance won't do sex change operations and will tell people, Hey, we don't think it's actually good to go cutting up your body and doing this, we think you should get some other kind of help, that's the kind of medical advice that the Plaintiffs in this case give and have given and wish to continue to give. The rule suggests that's no longer permissible, that that is hostile environment, that that is discrimination under the rule and that is harmful, frankly, not only for the Plaintiffs but also for their patients. The patients have the right to get the honest medical advice from the people they are talking to. The Government may not like the honest medical advice from, for example, Dr. Hoffman, the CMDA doctor who has got a declaration in the record that his advice is that trying to chemically alter a child to hold off puberty is not good thing for the child. Patients are entitled to that advice. They don't have to heed it. They can go find another doctor if they want. But the Government shouldn't be regulating what doctors say to their patients and shouldn't be forcing doctors to engage in these services that are against their beliefs.

On the void for vagueness claim, I would simply say the Government wrote a -- well, it was originally a 350 page rule, it's been condensed into the 99 page version, and then a

50 page brief. The 50 page brief maybe makes the vagueness claim better than the rule did; right? They essentially are saying to the Plaintiffs here you have to violate the rule if you want to find out what's in it; right? We are not going to tell you clearly whether you are allowed to turn down sex change operations now. We are going to wait and see later. Go ahead and do it, do it at risk of great peril, great financial peril, great peril to your religious ministry. Go ahead and do that and we're going to tell you later. We are going to figure it out later whether that's okay. Well, we would suggest there's no reason to have figure it out later. Either the rule makes our conduct illegal or it doesn't; right?

And I would just -- if I could put three examples on the table that I would love to get clear answers and know the answer to. Hysterectomy; right? Is it discrimination under this rule if you provide a hysterectomy for someone with cancer but you won't for gender transition? On the issue of abortion, you know, my clients perform a dilation and evacuation or a dilation and curettage on a woman who's had a miscarriage. In other words, the baby has died and they are clearing out body of the baby. They do those things for miscarriages. They would not do them for abortions. Is that discrimination based on termination of pregnancy? I think it is based on what I read. If they want to say it's not, then

my clients would be thrilled to hear that.

And, lastly, to go back to Dr. Hoffman, in his declaration he says he gives puberty blocking medication to children as young as three or four who have a condition known precocious puberty. All right? Essentially, their body kicks into puberty when they're much too young for their body to actually handle that and so he will give hormones or puberty blocking hormones to hold off puberty in those children until they get to an age where they are physically developed enough that their body can go through those changes, but he says he wouldn't do or try to hold off puberty at, you know, a normal age of ten or twelve years old or whenever the child would normally start going puberty at that age for sex change reasons is not a good thing to go.

Again, we think by the rule that that's discrimination. I think the Government's brief is designed in part to say we don't quite know in it's discrimination, but if that's the case then we've got a serious vagueness problem; right? We don't know whether our actions, which we've put out clearly in the documents and the affidavits, our actions are what they are, our beliefs are what they are, and we've tried to be very clear about that, we've put it on the table, and we need to know are we legally allowed to keep doing that or are we violating the law when we do that. The Government ought to just be able answer those simple questions.

And, lastly, I will briefly touch on the substantive due process claim at the end. It's a short claim. The gist of it, Your Honor, though is the idea of the Government forcing doctors to provide abortions and sterilizations which, I should have said this earlier, but obviously a lot of sex change operations are sterilizations, whether it's a hysterectomy, whether it's cutting out other organs, those are -- or even chemicals like hormones can often lead to sterilization. So our substantive due process argument is simply that the idea of the Government having the ability to force doctors and force religious healthcare providers to provide these types of services against their will is a -- it's been long been established that they can't do that and the Government doesn't really contest that. The Government says, Well, you've got the Church Amendment, so you are fine. The Church Amendment, as I said before, doesn't actually cover everything under this rule. Church Amendment is limited to funding streams. This rule by its terms is not just limiting funding streams, it's all activities by the healthcare providers. So from a substantive due process point of view, if there a fundamental mystery of the universe and meaning of life, right though choose, for example, to terminate a pregnancy and have an abortion, surely there is the same kind of commitment right for a healthcare provider who says, Well, my mystery of the universe is that I can't kill that baby or

mystery of the universe is that I can't go sterilizing people. They can't claim down. There's certainly no need to reach it, but I just wanted to flag what it is.

So, in sum, again I would just end with from our point of view the rule is illegal in a lot of different ways. We face a lot of very serious consequences if we don't get protection. You know, the easiest and sort of most overarching way to deal with that is the Administer Procedures Act which is simply they don't have the authority to do what they're doing, they certainly don't have the authorize to do what they're doing without giving us the exemptions that are in Title IX, and ultimately the Government shouldn't be able to put us in that position and given that they have put us in that position that's why we need relief from the Court.

Thank you, Your Honor.

MR. Nimocks: Good morning, Judge. And may it please the Court. Austin Nimocks on behalf of Texas and the other sovereign Plaintiffs.

I will do my best to avoid repeating arguments that Professor Rienzi articulated, but I want to go -- start with the statute I think that is really at the center of this case, and that's Title IX, and go into what is it and what does it mean.

As the Court is well aware, the Supreme Court of the United States has made clear that we interpret the language

employed by Congress at the time of the enactment. Here we are talking about the educational amendments of 1972. The question of what does the word "sex" mean is significant here and particularly because Congress did not delegate in 1972 to the agency HHS, at the time HEW, authority over the term. It didn't give it an expressed grant to define terms and so we look to the plain meaning of the term at the time that Congress employs it, so the absence of delegation by Congress puts us in this circumstance.

Now, we go through extensively in our brief, and I'm referring to ECF document 23 at pages 12 through 16, the history of the term "sex" in particular what it was and what it meant at the time it was enacted by Congress in 1972. And I would note to this point that our esteemed opponents have not sought to fight us on that particular history in terms of what does the term mean.

The Defendant's approach is the term means what they want it to mean in the current light as opposed to looking at what the term meant at the time Congress enacted it. This is important as it impacts the rule because the word "sex" at the time Congress enacted it in 1972 had two critical components:

Number one, it was abundantly clear that the word "sex" was biological in nature, that it had biological moorings to the sense of being male and female.

And, secondly, it was binary in nature, meaning that

the word "sex" meant you were male or female, the options or categories, so to speak, of "sex" were male and female. That is extolled in looking at dictionary definitions that we provide ad nauseam, looking at scholarly writing, and even amongst scholars who were familiar with and/or embedded in what I will call the transgender movement at the time understood the words gender -- read in the concept of gender identity which emerged only shortly thereafter had a completely different idea and meaning than the term "sex" that Congress used.

Now, in Title IX, which is what we're talking about, Congress gave us some indications additionally -- in addition to using the term "sex" and bringing its plain meaning along with it as to what it meant when it used the term "sex." In Section 1686 of 20 U.S.C., that's a provision that the Court may be familiar with where Congress authorized the separate living facilities that were permitted to fund recipients on the basis of sex and then the agency at the time responsible for implementing Title IX, the Department of Health, Education, and Welfare, I believe in 1974 or '75, promulgated 34 CFR Sections 106.32 and .33 both which provide that providing separate intimate facilities on the base of sex was permitted, so we have an indication as to again the implementation of the federal government of the plain meaning of "sex" putting into action Congress's clear intent when it

used the word "sex."

But now we turn to the rule at issue, Your Honor. And Professor Rienzi has touched on this and I want to expound a little bit on it. And I'm going to from this point forward make reference to page numbers and I'm referring to the rule, Your Honor, as published in the *Federal Register*. Volume 81 of the *Federal Register*. I'm looking at page 31392 where Health & Human Services now say that gender identity, which is encompassed they say within the term "sex" includes an array of possible gender identities beyond male and female. So not only does the agency, Your Honor, go beyond the biological moorings of sex and permit within their new construction of gender identity the right to select that which you are, but no longer is it more to the categories of male and female. And when the agency uses the word of array of possible gender identities but doesn't tell us what the ends of the spectrum are at all, I think on its face that's an indication of a rule that's arbitrary and capricious. We have no idea what the array is. They don't point us to the boundaries of the array, how big or small is it or where we can even find answers to that particular question. They dig their heels in on this concept.

Now, I'm looking at page 31428 to tell us that:

"Individuals," and I'm quoting here, "with non-binary gender identities may face difficulty in accessing certain

gender specific programs. However, covered entities must treat all individuals consistent with their gender identity including with regard to access to facilities."

Your Honor, this language is undoubtedly a reference to sex-designated facilities including intimate facilities which are designated in a binary fashion. Yet the agency demands that there is no binary nature to this definition, that there is no array of possibilities, and that anybody who falls within the rubric of this rule must accommodate that array especially with regard to facilities.

How can a hospital that designates restrooms or intimate facilities like Franciscan Alliance accommodate from a facility basis an array that is completely undefined? It makes it impossible to comply, it is a vague, and I would say void on that basis and thus arbitrary and capricious.

But shortly before this reference on page 31428 that I just mentioned, curiously the agency adopts *United States against Virginia* on pages 31408 and 09. This is a case, Your Honor, that where the Virginia Military Institute went all the way to the United States Supreme Court and Justice Ginsburg required that male and female have equal access to the educational opportunities at that institution.

And there are two things about that opinion that I will note:

Number one, if you take a close look at it, it is

very binary in nature. The language employed by Justice Ginsburg extolls the differences between men and women and talks about it in that context.

Number two, she drops a footnote acknowledging that when it comes to intimate facilities separate facilities must be provided by men and women.

So the agency here in this case adopts a judicial case and framework over the course of two pages of its rule that is a binary case that acknowledges the differences between men and women and requires that separate intimate facilities be provided. The agency is just very inconsistent and imprecise within its own rule.

With that, Your Honor, I would like to turn to addressing the legal basis that HHS articulates for the rule as to why they believe they are allowed to do this or why what they are doing is perfectly permissible or consistent with federal law. On page 31384 they say the following, quote:

"In the proposed rule we noted that the approach taken in the proposed definition," this is referring to sex, "is consistent with the approach taken by the federal government in similar matters," unquote.

And there they drop a footnote, footnote 42, where the agency cites the U.S. Office of Personnel Management, which is a convenient citation because OPM can do anything and it hardly ever gets challenged because it's just the federal

government self-regulating and a couple of other internal federal agencies and then on page 31387 they talk again about the basis for the rule and they say this:

"We noted that like other federal agencies," and they drop footnote 56 and I'll come pack to that, "HHS has previously interpreted sex discrimination to include discrimination on the basis of gender identity," where they then drop footnote 57.

Well, if you look closely at footnotes 56 and 57, this is again on page 31387 of the rule, Your Honor, this is a clear example of a federal self-fulfilling prophecy. The basis for their interpretation is so weak I almost feel like I'm giving it too much attention to mention it, but I'll go through the footnotes since they brought them up. They cite again OPM; a directive by the Department of Labor with regard to contracting; statements of interest filed by the Department of Justice -- as the Court is aware, those are things that the Department of Justice can file in virtually any case, if not any case; a memorandum produced by Attorney General Holder; and then a guideline produced by the Department of Education.

Now, what's curious about this guideline they cite about the Department of Education, this happens to be one of the guidelines that is at the center of another dispute that Texas and other sovereigns have with the federal government over gender identity and what it means with regard to

educational facilities in schools and this particular guidance from the Department of Education that they cite as authority for this rule is actually one that has been enjoined by this Court in the litigation to which I alluded a moment ago. Footnote 57 is a letter, a letter from the director of HHS.

And so, Your Honor, to sum it up, the legal basis for this rule that is cited by the agency, to say it's weak is an overstatement. It's virtually non-existent. If the federal government can produce voluntary materials, statements of interest, letters, guidelines like this and then cite it as authoritative for reinterpreting a word from 1972 that Congress never gave it the authority to interpret, then it really turns our system of law completely on its head. So whatever the inclinations of HHS may be, the legal footing for what its doing is virtually non-existent.

What is the impact on Texas and the other sovereigns in this case? As we articulate in our complaint -- Well, before I say that, let me just make clear for the Court that HHS acknowledges in the rule that this rule impacts virtually every medical provider across the country. The one caveat that they note would be that medical providers who accept only Medicare Part B would not fall within the ambit of this rule but medical providers who accept only Medicare Part B are virtually non-existent in today's medical community. So these let's just acknowledge form the outset that this touches the

entire of the medical profession.

The problem is that HHS doesn't have the right to touch the standards of care in the medical profession. That doesn't belong to them at all.

As we articulate in our Amended Complaint, this is ECF 21 at ECF page 23, the U.S. Supreme Court has itself has acknowledged that the state has a significant role to play in regulating the medical profession. That's from *Gonzales against Carhar* in 2007 and that includes maintaining high standards of professional conduct in the practice of medicine. That's from the *Barsky* case in 1954.

The federal government has no right or ability to determine what the standard of care is in any particular state any more than it has the right to determine what the rules of professional ethics and conduct are for lawyers. That's why these -- these things are regulated by the states. That's why the states themselves issue individual licenses. This is our Republican form of government and our notion of federalism operating at its finest. I can't walk into Louisiana and practice law unless the Louisiana Bar gives me permission. That's their sovereign right. And the same thing goes with medical professionals. If you want to practice medicine in Texas or any other state, it is the state that licenses you, it's the state that holds you accountable, it is the state that sets the standard of care; not HHS. But HHS has come in

with this rule and declared outright that certain medical viewpoints and standards of care are now outmoded. The words they use on page 31429 is that you if you have a professional medical opinion or a standard of care with regard to gender transition, related treatments or procedures, that would not be -- that would allow a medical professional to say no on any number of bases, that is, quote, "outdated and not based on current standards of care," says the federal government in this particular rule. Again, I'm looking at page 31429.

Now, what's staggering about this particular statement is there is no acknowledgment whatsoever by the agency that this would conflict with the regulation of the practice of medicine or of nursing or the medical -- the healing arts in general, because, you know, for example, Texas, Your Honor, has myriad licenses for different forms of healing arts where this could impact people other than those with an M.D. But there's no acknowledgment by the agency of that whatsoever. And on page 31429 they drop footnote 229 which they takes us to footnote 263. And I want to point out what they cite on -- in footnote 263 which is on page 31435. Their basis for stating that all other medical opinions are outdated and not based on current standards of care is citing the World Professional Association For Transgender Health, who I looked up, because I regularly engage in the practice of law on a full-time basis. For an annual fee of $210 I can be a

member of that organization. And I'm not a doctor. I don't have any medical training. I have no business treating individuals in a medical capacity.

And they also cite the Institute of Medicine of the National Academies. Where's -- I mean, let's at least give it an honest try if you're going to rewrite standards of care. How about the American Medical Association? Or how about the fact that when we are dealing with individuals who are suffering with these conditions, who are diagnosed as having gender identity disorder or what is now called gender dysphoria the DSM 5, that we are dealing with a mental disorder, the American Psychological Association would be on reasonable basis to cite. But that would be unreasonable, back to my original argument, Your Honor, because this belongs to the states. The federal government does not have the right on to tell doctors how to practice law and even if in some wild scenario it did, what's abundantly clear, Your Honor, is that Congress never delegated to HHS the authority to set standards of care for the medical profession and healing arts. That is significantly missing from any congressional text, whether we are talking about Title IX or whether we are talking about the Affordable Care Act in 2010. It is completely missing.

So, in terms of commandeering this rule, Texas and the other sovereigns, or actually ever sovereign in this

country, standards of medical care, its right to regulate the profession, we believe that the federal government is significantly overreaching.

We articulate in our Amended Complaint on page 23 the Texas standard that doctors are to execute -- excuse me -- independent medical judgment. We articulate the provisions in Texas law under the Occupational Code, the Health & Safety Code. We mention for the convenience of the Court the Texas Medical Board which is the government agency charged with licensing and governing the medical profession in Texas that this rule and the declarations with regard to the standard of care and what doctors and other medical professionals can and can't do usurps that authority of Texas and we would say unlawfully.

In addition, Your Honor, the rule invades Texas and the other states' relationship with it's employees and I will touch on this briefly in two particular fashions.

Number one, Texas, like I would guess every other state, strives to accommodate the various religious and conscientious beliefs of its employees. Even if we did not, which we very much do, Title VII requires of that of employers. If you fall under Title VII you must reasonably accommodate the religious beliefs of your employees whether it's, you know, wearing a yamaka or working on Sunday, the case law is full of the imposition on the government to bend

over backwards to reasonably accommodate. How on earth can an employer like Texas accommodate the religious and conscious beliefs of its medical employees when the federal government at the same time is telling us there is no accommodation for religious beliefs with regard to gender transition procedures?

There is no quarter whatsoever under our regime for the rules that we're imposing. It places Texas as an employer in an impossible position because you have one federal law telling us to accommodate, promote, and diverse society and on the other hand saying there is no room for you if you have this set of beliefs. You cannot play. So that's -- that's bone additional invasion.

And then also it goes to the question of benefits. Texas, like most employers, provides benefits to its employees and that that includes healthcare coverage and that is a matter that is between the employer and its employees.

As we showed the Court in our filing last night, ECF No. 60, the declaration we just received from our ERS agency, Texas has 556,500 participants in our health insurance plan. That is a very large number of individuals that we provide for, insure, and have a contractual relationship with. This rule seeks to change those contractual terms and invades Texas's sovereign choice to provide certain types of coverage or not provide certain types of coverage, whether that be with regard to abortion or in this instance gender transition

procedures.

Finally, Your Honor, I will touch very briefly on the end spending clause arguments that Texas and the other sovereigns raise although I will say I don't think the Court has to reach that constitutional question if it finds that the rule violates or does not survive the APA challenges here.

Texas, like every other state in the union, is engaged in cooperative federalism with the federal government as it pertains to Medicare and Medicaid programs. And the Supreme Court has made very clear that when that cooperative federalism dynamic is upon us the terms of that cooperative federalism are viewed in a contractual sense and there has to be a knowing and voluntary understanding as to what the terms are when in this instance the states engage in this cooperative federalism with the federal government.

Medicare came into existence around I believe 1965. The statutory term at issue here came into existence around 1972 as it pertains to Title IX. There is no way, Your Honor, that Texas or any other sovereign would have any idea that when we engaged in the Medicaid program that the interpretation now thrust upon us by Health & Human Services would be, as they say it is, and I won't belabor the terms.

But the Supreme Court has made it clear that it is not even just lawyers, it's the state officials that are governing the program. Those lay people must be able to

clearly understand that's the language that the Supreme Court used in the *Arlington Central* case in 2006, clearly understand from the language of the law itself the conditions to which they are agreeing.

Your Honor, even if we go back to just 2010 and the Affordable Care Act, there's nothing in the Affordable Care Act that would allow us to clearly understand that the definition now being thrust upon us by the defendants is clearly upon us so, we do not believe that the federal government can survive the spending clause challenge and the language retirement on that, Your Honor, is stringent. I mean, Congress has to really spell it out. If you look at the *Sossamon* case, S-O-S-S-A-M-O-N that we cite in our brief, that was a case where Texas agreed to -- I can't even remember the program -- but something along the lines if "all appropriate relief" was the language to which Texas agreed and the Supreme Court said that that agreement did not waive our sovereign immunity, that a government official could not clearly understand from all appropriate relief that monetary rewards or penalties, the waiver of sovereign immunity, would result from that. That's how stringent and exacting this standard is under the spending clause, so we don't believe there is any way that the defendants are survive that challenge in the alternative.

The last thing I will say and then I will sit down,

Your Honor, has to do with the scope of any injunction or injunctive relief that may come from the Court. Because this is a promulgated rule by an agency, that rule is either valid or it's not and that rule that is a federal rule that applies to everybody is valid or it's not and it doesn't -- the HHS did not seek to draw jurisdictional lines and we cite to this in our reply brief, some of the legal standard, that's ECF No. 56 at ECF pages 20 through 21. Any relief that the Court is to agree with the Plaintiffs must have a nationwide flavor to it because it's a nationwide rule, regardless of who the particular parties are that are before the Court.

Thank you, Your Honor.

THE COURT: Thank you.

MR. GROGG: Good morning, Your Honor. May it please the Court. Adam Grogg for the federal defendants. We are here this morning, Your Honor, on plaintiff's motions for preliminary injunction and as Your Honor knows and as the Supreme Court has made quite clear, a preliminary injunction as an extraordinary form of relief and we respectfully submit that it is not warranted under these circumstances.

First and most importantly, Plaintiffs have failed to demonstrate irreparable injury or that the balance of equities the tips in their favor.

Second, they are unlikely to succeed in establishing that this Court has jurisdiction over this premature action.

And third if the Court were to reach the merits, which it should not, Plaintiffs are unlikely to establish that the regulation that they challenge, which was promulgated by the Department of Health & Human Services after a robust notice and comment process, is contrary to the statute or to the Constitution.

I'll start with irreparable injury. The Supreme Court has made clear in cases like *Winter v. Natural Resources Defense Counsel* that irreparable injury is a prerequisite to the issuance of a preliminary injunction. Crucially, *Winter* also confirms that in order to succeed on their present motions Plaintiffs have to put forward more than mere speculation about possible injuries. Rather, they have to show that irreparable injury is likely in the absence of an injunction. And from cases like *Lyons* from 1983 from the Supreme Court, which we've also cited in our briefs, we know that the threat of irreparable injury must be real, substantial, and immediate. Likely. Not merely possible. Real immediate. The injuries the Plaintiffs allege are none of these things.

Plaintiffs are concerned primarily about the finding of unlawful discrimination under Section 1557 of the Affordable Care Act by the Department of Health and Human Services and concomitant termination of federal financial assistance under the statute or also about damages liability

at the conclusion of private lawsuits.

But these are speculative possibilities. That's over three key reasons:

First, the Plaintiffs miscast the rules scope and effects.

Second, Plaintiffs ignore the rule's built in protections from medical judgment and religious and conscious based views.

And, third, Plaintiffs ignore the rule's built in procedures for enabling HHS on the basis of concrete facts gathered through a comprehensive investigation and considering all the circumstances including any defenses that might be applicable to determine whether a violation of Section 1557 has occurred.

Let me just pause at the moment at the outset to underscore what I believe is the parties' agreement on the rather narrow aspects of the dispute given the various provisions of the rule. Specifically, most provisions of the rule are not at issue here. At issue here is only sex discrimination under the rule, not discrimination based on race or national origin, and similarly, the Plaintiffs' claims center on certain aspects of how HHS has interpreted the statute's prohibition on sex discrimination.

Even so, Plaintiffs miscast the rule's scope and effects. First, the department has repeatedly confirmed that

under the rule scientific or medical reasons can justify distinctions based on sex. In other words, borrowed from the familiar *McDonald Douglas* framework that the rule embodies, a healthcare provider's sound medical judgment can be a legitimate non-discriminatory reason for any alleged occurrence of discrimination. Plaintiffs are therefore wrong to assert that the rule seeks to override medical judgment.

My colleague this morning, Mr. Nimocks, on behalf of the State Plaintiffs, spoke or said he found it surprising that HHS did not acknowledge that it was attempting to establish a national standard of care or regulate the licensing procedures for physicians in the various states of the union.

It's not surprising that HHS didn't do that because HHS -- or it didn't acknowledge that because HHS did not do that. In this rule HHS did not seek to set out a national standard of care with regard to any issue. And, again, as we've emphasized in our briefs and as the Department emphasized in the rule making scientific or medal reasons can justify discriminations on the base of sex. We are not attempting -- the Department is not attempting to invade the physician/patient relationship like the State plaintiff laws the state Plaintiffs have put forward here and emphasized this morning. The rule safeguards that relationship.

Second, as with medical judgment, the rule respects

religious views. The rule expressly incorporates applicable federal statutory protections for religious freedom and conscious such that no part of the rule can be applied so as to -- and here I will paraphrase some of the relevant provisions at issue. No part of a rule can be applied so as to require any individual to perform or assist in the performance of any part of a health service program if doing so would violating his religious beliefs or moral convictions, that's the Church Amendment and specifically Subsection D.

No part of the rule can be applied so as to substantially burden a person's exercise of religion unless doing so is the least restricted means of furthering governmental interest. That's the Religious Freedom Restoration Act, or RFRA. No part of the rule can be applied so as to discriminate against any institutional or individual healthcare entity on the basis that that health care entity does not provide, pay for, provide coverage of, or refer for abortions consistent with the Weldon Amendment. Because the rule incorporate these laws, the Church Amendment, the Coats Amendment as well, the Weldon Amendment, and RFRA. It simply does not attempt to force doctors to violate their religious beliefs nor, as we have explained in our brief, does the rule prevent employers from providing their employees with reasonable religious accommodations.

Third, the rule does not require any covered entity

to perform or to provide insurance coverage for any particular medical service but instead ensures that services are provided and covered in non-discriminatory ways. Given this, Plaintiffs' claims stemming from the rules definition of "sex discrimination" as encompassing discrimination on the basis of termination of pregnancy are particularly unfounded.

The rule does note state nor has the department ever stated that the rule requires covered entities to perform or cover abortions. Indeed, that's consistent with the fact that rule incorporates the federal statutory protections for provider's religious beliefs that we've just discussed and with the fact that the rule does not preempt the state Plaintiffs' laws prohibiting coverage or funding of abortions. We cited these laws and yet Plaintiffs have failed entirely to address them. Their claims concerning abortion can go no further.

Indeed, given these aspects of the rule, all of Plaintiffs' allegations of irreparable injury fail. The crux of Plaintiffs' theory of irreparable injury is that Plaintiffs face the possibility of losing their departmental funding and that to avoid a fund cut off under the rule non-state Plaintiffs will be forced to provide medical services and health insurance coverage for services that violate their medical and religious judgment and that the state Plaintiffs will be prevented from following their own healthcare laws and

policies. In fact, as I've already explained, the rule does no such things. Moreover, and this goes to both the lack of irreparable injury and the fact that Plaintiffs' claims are not ripe.

Setting aside a Plaintiffs' incorrect theories about what the rule actually requires, Plaintiffs' claimed injuries are still speculative. Rather than challenging the application of the rule in a particular instance, Plaintiffs seek to challenge aspect of the rule in the abstract. But without a concrete allegation of discrimination, none of the facts that an investigation into such an allegation would uncover are known, including with regard to the particular medical service or insurance coverage for such service that was refused. For example, the medical necessity of that service for that specific patient. The provider's or insurer's reasons for denying the service or coverage and any relevant defenses and any facts on which those defense might turn that might under the rule's expressed terms shield the covered entity from liability.

Further factual development therefore is necessary to understand whether any of the Plaintiffs are violating the rule and without that development the hypothetical possibilities of a finding of unlawful discrimination and the termination of federal financial assistance are speculative, unlike in *Abbott Labs*, for example, therefore, the issues here

are not purely legal.

Those aspects of this case also distinguish it from Your Honor's recent ripeness holding in the Texas' and challenge to the Department of Education interpretation concerning transgender students access to healthcare that my colleagues -- opposing counsel has already discussed this morning.

I also -- I will take as one example the -- one of the examples put forward by counsel for the private Plaintiffs this morning. With regard to physicians, a particular physician's medical judgment about the ethicacy and appropriateness of puberty blocking medication in children. It seems rather remarkable that the Plaintiffs here would seek to set forth that medical judgment devoid of any factual circumstances, devoid of any specific patient, devoid of any understanding about the need for those services or any concerns that might properly be raised, discussed, and considered in the course of an actual encounter with a patient and a provider. Rather than await that kind of situation and understand the facts that would undergird any allegation of discrimination that might hypothetically and speculatively issue forth from that encounter, Plaintiffs are seemingly to ask the Department and/or this Court for a blanket pre-enforcement judgment that their views are appropriate.

That doesn't seem consistent with how the courts

addressed similar circumstances. For example, in the medical malpractice realm, for example, you would not see a doctor, I don't believe, coming in and seeking from a court a blanket pre-enforcement declaration that certain of her policies and practices were valid under a state law concerning medical profession.

For all of these reasons we firmly believe that this Court cannot proceed to adjudicate the merits of Plaintiffs' claims without further factual development.

There's a second reason as well that Plaintiffs' claims are not justiciable and that is with regard to the specific statutory scheme under Section 1557 that would channel challenges like Plaintiffs' through an administrative process before the agency with judicial review available therefore. That kind of scheme was addressed in the doctrine established by the Supreme Court in cases like *Thunder Basin* and *Elgin*. We acknowledge and respect, Your Honor, that in the decision regarding the Department of Education interpretation that Texas has brought that you also rejected the Government's *Thunder Basin* argument. For the reasons stated in our briefs here and, for example, by the *Highland's* district court, also cited in our briefs, we respectfully disagree and we believe that Plaintiffs must press their claims not in a pre-enforcement action like this one but rather pursuant to the comprehensive scheme of administrative

and judicial review that Congress has authorized by incorporating in Section 1557 the enforcement mechanisms under Title VI, Title IX, Section 504, and the Age Act.

The administrative process under Section 1557 is designed to allow this the Department to make case-by-case determinations as to whether unlawful discrimination has occurred and in so doing to adequately assess the myriad factual and legal intricacies upon which discrimination allegations turn and that are relevant to any applicable defenses as well. Such determinations and assessments simply are not possible on the limited record here.

For all of these reasons then the Court should not reach the merits of Plaintiffs' claims. Plaintiffs have not established irreparable injury, Plaintiffs' claims are not ripe, Plaintiffs lack standing for many of the similar reasons, as we have explained in our briefs, and this Court lacks jurisdiction given Section 1557's comprehensive remedial scheme.

Nonetheless, I will turn briefly to Plaintiffs' claims on the merits. We again acknowledge Your Honor's conclusion in the Department of Education case that the term "sex" unambiguously refers to biological or chromosomal differences between men and women only. Again, we respectfully disagree and would point Your Honor to contrary conclusions reached by other courts.

But this case presents a different question. Here the issue is whether Congress in Section 1557 of the Affordable Care Act has specifically spoken to the issue of whether that provision's prohibition on sex discrimination reaches discrimination reaches discrimination against those whose birth assigned sex differs from their gender identity. We know from, for example, the Supreme Court's decision in *Jackson* that Title IX's prohibition on sex discrimination which Section 1557 incorporates is to be broadly construed because discrimination is a term that covers a wide range of unequal treatment.

We know from the Supreme Court's decision in *Oncale* which held that Title VII's prohibition against sex discrimination encompasses same sex sexual harassment that, quote:

"Statutory prohibitions often go beyond principle evil to cover reasonably comparable evils and it is ultimately provisions of our laws, rather than the principle concerns of our legislators, by which we are governed."

And we know from the Supreme Court's decision in *Price Waterhouse* that discrimination on the basis of sex is not limited to preferring males over females or vice versa but includes differential treatment based on sex-based considerations, including sex stereotyping. Here Section 1557 prohibits sex discrimination in federally financed health

programs and activities but the statute does not define discrimination on the basis of sex or instruct how one's sex is to be determined in the event of a conflict between genetic or anatomical makeup and one's gender identity or in the event the different indicators point in different corrections. In Section 1557 therefore Congress has not directly spoken to the precise question of whether discrimination against transgender individuals is prohibited and of *Chevron's* second step the Department's interpretation in the rule is reasonable and certainly not manifestly contrary to the statute.

Counsel for the private Plaintiffs addressed at some length this morning the Department's rationale and the rule for looking at the various statutes Section 1557 incorporates and understanding how any contours or exemptions in those statutes ought to be applied into the healthcare context. I think the key thing for the Court to understand is that when Section 1557 was enacted three of the four statutes that Section 1557 referenced already applied to any healthcare activities or programs that received federal funds. The new work, as the Department explained in the request for information and again I believe in the notice of proposed rule making, the new work that are Section 1557 was doing was in the field of sex discrimination. Prior to Section 1557 Title IX only applied to Title IX's prohibition on sex discrimination only applied to educational programs and

activities. When Congress enacted Section 1557 it prohibited sex now on the basis -- prohibited discrimination on the basis of sex in health programs and activities and so the Department was required in understanding what Congress was doing there to take account of the fact that Congress was extending a prohibition on sex discrimination from one field into other and to understand therefore whether and how to incorporate exemptions specific to the educational realm that the Congress had provided in Title IX. Those same kinds of concerns were not present, for example, under Title VI because Title VI prohibition against race discrimination had already applied. So, as we've explained in our briefs and as the Department explained in the rulemaking, given significant differences between the educational context and the healthcare context, the Department reasonably determined that it would look to the specific exemptions in the Affordable Care Act itself rather than import wholesale the exemptions specific to the education context from Title IX.

Your Honor, for all the reasons I've already discussed, we submit that the Department's interpretation of "sex discrimination" in the rule is reasonable under *Chevron*.

If Your Honor reaches a contrary conclusion here, as Your Honor did in the Department of Education case, the parties agree that the Court need go no further and should go no further and we've explained that rationale in our briefs,

such cases like *Northwest Austin* from the Supreme Court.

In any event, Plaintiffs' spending clause argument that Mr. Nimocks touched on briefly this morning is fundamentally the same as the *Chevron* argument. We understand that the documents differ, but it's just the ways in which they've put forth that argument make clear that if this Court were to accept the Plaintiffs' *Chevron* argument it, of course, would not need to reach the spending clause argument.

If the Court, on the other hand, were to reject the Plaintiffs' *Chevron* argument then we would submit that it would necessarily have to reject the same kinds of assertions about what "sex" means or meant the Plaintiffs put forward under the guise of the spending clause.

Plaintiffs' remaining constitutional challenges likewise hinge on the rule's prohibition of discrimination on the basis of gender identity or on their unfounded assertions about the rule's requirements with regard to abortion. In any event, as we've explained in our brief, the rule does not violate the First Amendment. It specifically does not seek to override or regulate what medical advice doctors or other healthcare providers can provide to patients or express to anyone else and Plaintiffs have not met their heavy burden under the Fifth Amendment, whether impressing a facial void for vagueness challenge or in asserting a novel substance and due process claim.

Your Honor, for all of these reasons we respectful request that the Court deny Plaintiffs' motions for preliminary injunction. Yet, if the Court were to grant an injunction, the Supreme Court has made quite clear that it must extend no further than necessary to provide complete relief to these Plaintiffs.

Mr. Nimocks respectfully I think got it precisely backward when he said that scope of any injunction must be considered regardless of the Plaintiffs before the Court. That's wrong. The scope of any preliminary injunction must extend no further than is necessary to prevent irreparable injury to these Plaintiffs, the named Plaintiffs, that are before us today.

We do not contest, as Your Honor is well aware from the Department of Education case, that in appropriate circumstances district courts do enter nationwide injunctions, but the question of -- the question here is not one of whether an injunction would apply nationwide. The question is whether the -- the proper question is whether it should extend to non-Plaintiffs. And the Fifth Circuit, for example, in the Texas immigration challenge found that it was appropriate for that district court to extend relief to non-Plaintiffs because doing so, that court found, was the only way of preventing irreparable harm to the named Plaintiffs. Here Plaintiffs have put forward no such arguments and nor, we would

respectfully submit, can they. Plaintiffs simply cannot show that in order to protect their own interests, which is the relevant question before the Court if the Court were to issue an injunction, Plaintiffs cannot show that it is necessary to protect their interests to extend relief to non-Plaintiffs.

With that, Your Honor, I'm happy to answer any questions either now or next.

THE COURT: Okay. If I could just ask you a few questions. The -- so the private Plaintiffs or at least the Franciscans and the others say that they have a categorical exclusion in their insurance policy to covering both abortion services and transition services and that they do that for religious reasons. If they continue that policy in place after January 1 of 2017 will they be in compliance with the rule or not in compliance with the rule?

MR. GROGG: For all the reasons we've explained, Your Honor, those kinds of determinations, even with regard to the very specific provision of the rule that you're referencing which says that any categorical exclusion or limitation that is specific to all services pertaining to gender transition is facially invalid under the rule.

For all the reasons we explained, however we still believe that those kinds of determinations need to be made on a case-by-case basis informed by the facts in front of the Court.

This is particularly relevant, given as Your Honor referenced, the Franciscan Alliance Plaintiffs have asserted a RFRA protection to changing their health insurance policy. Understanding whether they would succeed on RFRA claim would similarly require certain facts, specifically with regard to the least restricted means analysis and those kinds of fact, we would submit, are not before the Court. We have though acknowledged in our briefs that other the Plaintiffs here, Franciscan Alliance, seemingly on the basis of their allegations, has alleged having the kind of categorical exclusion or limitation that the rule prohibits and yet we would say that understanding whether that prohibition violates the rule would require additional factual development.

THE COURT: And the additional factual development you say goes to other means that might be available to provide this kind of treatment. What do you need to know to make that decision?

MR. GROGG: To be clear, to provide coverage for these kinds of treatments after services.

THE COURT: Yes.

MR. GROGG: I think it's particular to the RFRA defense that's been asserted here and so understanding whether the rule, if it were applied, so as to require Franciscan Alliance to revise its health insurance policy.

THE COURT: Well, you say if it were applied. You

are telling me it does apply to require -- In other words, you are saying -- As I understand your position, you are saying that if -- and I'm going to ask them about their policy in a minute -- but if, as I understand their policy, they have a categorical exclusion for coverage for these services, you're telling me that that violates the rule on its face while in certain circumstances it might be permitted and it might not be permitted. So why do you say -- why do you phrase it that way?

MR. GROGG: Sorry. I -- I didn't mean to introduce confusion. What I just meant to say was that under the least restrictive means analysis in RFRA the question is whether requiring Franciscan Alliance to change its healthcare policy is the least restrictive means of furthering a compelling governmental interest and the facts that might inform that analysis and that aren't present here would be with regard to, for example, and there are other examples as well perhaps, but whether a particular patient that had alleged that Franciscan Alliance policy was discriminatory under the rule and under that specific provision of the rule had alternative means of accessing coverage for that particular service. And it's these kinds of facts in that circumstance that would be required and it's those similar kinds of facts that in all the circumstances that the Plaintiffs have put forward here that would we think require additional development before these

claims can be adjudicated.

THE COURT: The Franciscans have a policy forbidding providing abortions it sounds like. Can they continue their categorical policy of banning abortions after January 1, 2017?

MR. GROGG: So the January 1st 2017 date is relevant to the provisions of the rule concerning health insurance coverage, so I take it to be that that's -- that's your question.

THE COURT: Okay. Well, let me ask you this. The rule was promulgated, what, May 16th, 2016?

MR. GROGG: That's correct.

THE COURT: Is that right? Okay.

MR. GROGG: Yes, sir.

THE COURT: So from May 16, 2016, forward can the Franciscans categorically ban abortion-related procedures?

MR. GROGG: Right. I just wanted to clarify because I do think generally it's useful to be rather specific about the rules requirements with regard to providing services and providing coverage.

THE COURT: Yes. I'm sorry.

MR. GROGG: But as I said, actually in this particular instance, Your Honor, it's academic. The rule does not state and the Department has never stated that the rule requires any covered entities to provide or perform abortions. In this regard --

THE COURT: Even if they provide D&C and D&E in other contexts, non-abortion, non-termination of pregnancy context?

MR. GROGG: That's right. I think again it's also distinctly relevant to this inquiry that the rule incorporates existing federal statutory provisions like the Weldon Amendment that say that no -- We've quoted the language in our brief, Your Honor, but that would ensure that the rule by its own terms cannot be applied in the ways that you've just described and the Plaintiffs alleged.

THE COURT: All right. And so -- But as it relates to their provision of treatment services related to gender transition, a categorical ban for that kind of treatment would be barred by the rule?

MR. GROGG: So that -- that is not --

THE COURT: For the Franciscans.

MR. GROGG: For Franciscan Alliance. So again, here I think it's important to distinguish between the rule's effects with regard to the provision of services and the provision for health insurance coverage.

THE COURT: I understand. I'm asking about services.

MR. GROGG: Services. So while the rule does have a categorical -- say that any categorical health insurance exclusion for gender transition services is a facial violation of the rule, absent applicable religious defense, the rule does not have a parallel -- parallel provision in the regard

of -- with regard to provision of services. And so this is where --

THE COURT: Can you say that one more time?

MR. GROGG: Sure. I'm sorry. It was my fault -- my fault for swallowing my words. The rule does in the provision of health -- with regard to the provision of health insurance coverage say that a categorical ban is a facial violation of the rule. And I'll pause there for a second just to note that the Department has explained its rationale there and the Plaintiffs we would say mischaracterize what the Department's rationale is. That provision of the rule concerning health insurance coverage understands that if the healthcare -- if the healthcare policy on its face singles out a particular kind of treatment for an exclusion or limitation that that is evidence of discrimination on its face.

Switching though to Your Honor's question which is about the provision of services related to gender transition --

THE COURT: But hold on. I'm sorry you switched -- I'm sorry for you to switch my questions. Stay that again. A categorical exclusion of treatment is evidence on its face of discrimination?

MR. GROGG: A categorical exclusion of -- in a health insurance policy --

THE COURT: In a policy.

MR. GROGG: Yes.

THE COURT: All right.

MR. GROGG: For providing transition-related -- it's all transition-related services. So, for example, Mr. Nimocks referenced a declaration that the State Plaintiffs filed at I think ten thirty or eleven p.m. last night with regard to the Texas State Employees Health Benefits Program. We, of course, have not quite had ample time to review that declaration and yet you will note that the declaration speaks specifically to Texas's health benefits plans exclusion with regard to services pertaining to gender transition surgery and is not, according to the declaration or the declaration rather is silent with regard to other treatments for gender dysphoria including counseling and hormone therapy and things like that. So it seems to us that this then confirms that Texas has not alleged having the kind of categorical band in health insurance coverage that the rule prohibits.

In services the rule does not have a similar prohibition on categorical bans. The rule rather requires the standard kind of analysis that would go into any claim of discriminatory treatment and would look to -- If a patient came to a Franciscan Alliance hospital seeking some aspect of gender transition services and if the Franciscan Alliance hospital declined to provide those services -- And again, these are all hypotheticals at this point, no allegations like

these are actually before the Court in this case -- then the Department would look to understand whether Franciscan indeed provides similar kinds of services in other circumstances and it would required an nuanced fact-specific analysis in coming to understand whether that particular complainant, that particular patient, has adequately alleged discrimination under the rule and under Section 1557.

THE COURT: And so if the Franciscans have a religious belief that providing transition related services designed to change the sex or the gender of the patient, they have a religious belief against that and they ban all services related to that -- Now, they provide similar therapies and similar medicines in other circumstances but not for the purposes of transitioning, that a categorical ban by any member of their hospital system in doing that for religious beliefs, can they leave the courtroom today with a commitment from you that that categorical ban would not subject them to either liability or put them in violation of the rule?

MR. GROGG: I don't believe that on the present record either we or the Court have enough facts to understand how -- whether a violation of Section 1557 has been adequately stated. We are in sort of a bizarre posture here where the Plaintiffs are attempting to show that their policies are discriminatory under the rule and this Court and the Department is put in the position of trying to understand

whether those allegations are sufficient. But outside the context of a particular factual scenario which would take into account the specific service that was declined, any reasons given for that service --

THE COURT: But don't we know the reasons that they are declining them if they are saying that it violates our religious tenants, our sincerely held religious beliefs, don't we know the reasons that they are declining them?

MR. GROGG: So we certainly understand certain aspects of Franciscan's religious beliefs from what they've put forward before this Court. That's correct. With regard to other reasons, I was referring to the Plaintiffs' and counsel's indication of medical judgment.

THE COURT: But just -- that's a different question than I asked --

MR. GROGG: On the original question only Your Honor is asking. Yes, I still think that the Department and the Court would need to look to what the particular service was, what the patient's provider had said about the medical necessity of that for that patient and all of the circumstances surrounding an allegation of actual discrimination, an allegation of actual -- an actual violation of the rule and those kind of facts are just simply not before the Court right now.

THE COURT: So if the patient or the patient's other

advisors conclude that this patient in needs transition services and that patient goes to the Franciscans and the Franciscans say we do not do this, period, categorically, it is against our religion, what other facts do you need to know to determine whether they would be in violation of the rule or not?

MR. GROGG: So I think it would hinge on the particular service or circumstance. So if --

THE COURT: Well, but they are you saying it's any service. Any -- We will provide no service --

MR. GROGG: Sure. And so we need to understand what kind of services they do provide in other sets of circumstances. The Plaintiffs have --

THE COURT: But why is that important?

MR. GROGG: Because the question under Section 1557 and the rule is whether services have been provided in a discriminatory manner, whether services have been denied or limited on account of sex and in understanding that you would need to have a comparator. You would need to understand how Franciscan would provide services under different circumstances.

Plaintiffs have focused repeatedly on an example given in the rule makings regulatory impact analysis section with regard to his direct needs that is meant to provide an example of certain policy changes that might need to happen.

But again, I think -- and sorry to repeat myself, Your Honor, but there are -- I think this Court is well aware from facing any number of cases involving discrimination how fact intensive those cases can be and all of the facts that would attend an actual complainant coming before the Department or in a private lawsuit and alleging that one of the of Plaintiffs here had acted in a discriminatory manner would certainly inform application of the rule in those circumstances.

THE COURT: What sort of guidance goes the rule, the preamble to the rule, or anything else that you have produced provide the private Plaintiffs with sufficient information for them to make a decision on whether post January 1 their insurance policy, which categorically excludes this, would be in violation of the rule?

MR. GROGG: I would point Your Honor to the rule's specific incorporation of RFRA and that goes both with regard to the obvious points that RFRA would apply under these circumstances and with regard to any assurances that the Plaintiffs might have to make with regard to their compliance under Section 1557 and the rule. The rule contemplates addressing those kinds of issues and questions on a case-by-case basis as the Department made clear throughout the rule making.

THE COURT: But what they are saying in their briefs

and what the private Plaintiffs have said today is they need to know now whether they will be in violation of this rule or not and they want a ruling by next week or the week after and so what can they look to now to determine whether if they keep this policy in place that their religious freedom claim will protect us?

MR. GROGG: Again, without repeating myself, I feel that these kinds of questions often come up before courts where covered entities would seek an advanced ruling on whether their conduct is or is not in violation of any given law and the doctrines of ripeness and standing, and in this particular posture irreparable injury, prevent courts from litigating those questions until a concrete dispute arises.

THE COURT: Okay. And so that's -- I mean, that's -- essentially, your view is that, at least as it relates to the Franciscans and perhaps special imposition of the APA, that they need to either stand on their currents policy, the current coverage, which they believe violates their religion and wait to see if they're sued or they need, if they're worried about it, if they are worried about losing the billion dollars in federal funding, they need to change the policy.

MR. GROGG: Yes, with just two caveats, if I can add them quickly. One is we'd note that the statutes themselves that are incorporated in Section 1557 include what's called a pinpoint provision with regard to the termination of federal

financial assistance, so the Plaintiffs have come forward saying that the states stand to lose all of their Medicaid and Medicare funding, for example, and ditto with -- the same with the private Plaintiffs. The statute instead sets forth a much more tailored analysis that would look to terminate any federal financial assistance prospectively only and again it's the conclusion of a lengthy administrative process designed to understand the kinds of facts that we've been describing this morning.

But anyway, any termination of any federal financial assistance would be limited to the particular entity that was found to be discriminating, so I just want to make clear that the assertions by Plaintiffs of a potential loss of all federal financial assistance are not only speculative for the reasons that we've described but also just are not consistent with the pinpoint provision and the statute provision.

THE COURT: Will you address Mr. Nimocks's argument about the displacing of the state statute or the state's control of medical standards of conduct?

MR. GROGG: Certainly.

THE COURT: Do you believe that the rule supercedes, for instance, the Occupational Code and then the other codes that he referenced both in his writing and then some today here?

MR. GROGG: It's -- The Department never set out to

establish a national standard of care with regard to any issue in this rulemaking. The Plaintiffs' theory, to the contrary, rests entirely on a discussion in the rulemaking that we've already described somewhat this morning explaining that provision of the rule that prohibits any categorical exclusions or limitations for gender -- transgender services in the health insurance context. And the Department did acknowledge in the context of that discussion and again in explaining why in the health insurance realm it viewed any facial categorical bans on all coverage for gender transition services as discriminatory. But the rule does not do what Mr. Nimocks asserted that it does. It does not purport to override medical judgment. It specifically respects Medical judgment and scientific reason. It does not purport to tell doctors that they are prevented from advising their patients, rather it ensures that they are able to advise their patients without any interference from discrimination. So, no, Your Honor, the simple answer is that this rule does not establish a national standard of care.

THE COURT: Mr. Nimocks says that in Texas the -- either the medical board or the Occupational Code provide that a doctor's medical judgment prevails, that that's the driving factor in determining whether treatment should be provided or not provided and then you said in your argument, I wrote down that you said medical judgment or science can justify

distinction. So is -- Am I misunderstanding what you have said? In other words, is there a conflict between what he is saying in terms of medical judgment by the physician's controls and you saying medical judgment by the physician can justify distinction?

MR. GROGG: I understand the question. I think it's a little difficult for me to make a sort of a clearcut conclusive answer on the basis of what we've seen of these state laws. That's again because the rule never purported to set out a national standard of care and the rule instead respects medical and scientific judgment. I note again just by analogy, for example, the medical malpractice realm. It seems that what Mr. Nimocks is saying and what the rule is saying are compatible in terms of protecting medical judgment and yet understanding how it applies in any given particular circumstance. I don't hear Mr. Nimocks to be saying that in any, for example, medical malpractice case in the State of Texas that if a doctor says my medical judgment told me that, you know, X was the appropriate standard of -- or course of treatment here, that that's the end of inquiry and the entire case goes away.

So, again, it's hard for me to judge but on the basis what of what I've understood from the state party's briefs and what Mr. Nimocks said this morning, I don't see a conflict between those laws and a rule that did not purport to set out

a national standard of care in this field or others.

THE COURT: So if a Texas physician believes medically, scientifically, that these conditions are never -- should never be treated in a medical fashion, that there should never be transition treatment services, transition related services, they should only be dealt with by psychologists and psychiatrists, would he be in violation of the rule?

MR. GROGG: I think it's very difficult to image a doctor coming forward and saying under all circumstances with any patient given -- presenting in front of me of any characteristics, any age --

THE COURT: Can I stop you there?

MR. GROGG: Sure.

THE COURT: Did you not get any comments from physicians saying that that was their belief?

MR. GROGG: I -- I'm sorry, Your Honor. I don't know. I -- I can get further information for the Court, if that would be useful, but --

THE COURT: Well, you said you can't image and I'm just wondering if you've got physicians saying that you ought to be able to imagine --

MR. GROGG: It would seem that the ways in which the rule protects medical and scientific judgment accord with how physicians would approach applying their medical and

scientific judgment, i.e. on a case-by-case basis, given the particular patients before them, given the particular symptoms, the particular descriptions that the patient is providing.

THE COURT: Would a physician be able to say under no circumstances will I engage in this type of treatment services on anyone under the age of 18, that's my medical judgment, my medical belief, under the sage of 18, while they are juvenile?

MR. GROGG: Certainly. And standing here before you as a non-doctor, I can certainly understand the ways in which that medical judgment would be, might be appropriate. The rule in its application on a case-by-case basis would address that particular circumstance and seek to understand how the physician applied his or her medical judgment in that scenario. So I -- the -- In the same way that I think blanket pre-enforcement declarations about what conduct is or is not discriminatory are difficult for the agency and the for the Court to make in the context of this record at this stage and in this case, which again does not involve an allegation by a patient, for example, that any of these Plaintiffs have engaged in discriminatory behavior under the statute or the rule.

For all of those reasons --

THE COURT: And that would -- Your view in that regard would apply even if I took it from 18 to 8, a physician

says categorically my medical belief is that I will not under any circumstances provide treatment related services for anybody under 8 years old?

MR. GROGG: Where I was going with this was to say that I think that assessing a claim of discrimination under those circumstances would quite clearly pay careful attention to the medical judgment asserted. I as a non-doctor --

THE COURT: But it wouldn't put the medical judgment as the primary driver --

MR. GROGG: I think -- I mean, I think in the way a discrimination case or discrimination claim would unfold the medical judgment would absolutely be the primary driver there. You know, again, this is all hypothetical, so it's rather --

THE COURT: I understand.

MR. GROGG: -- difficult to speculate and again it undergirds the kinds of inquiries that Plaintiffs are asking this Court to make and the difficulties associated with them. But the way that the hypothetical Your Honor has posited would occur I guess would be if a patient came into -- an 8 year old patient came in to a physician --

THE COURT: Well, it would be parents bringing the 8 year old --

THE INTERPRETER: Parent and child came in to a physician and the patient said or the parent said that the patient was presenting symptoms of gender dysphoria, that

would begin a lengthy and vitally important dialog between the physician, the patient, the parent where the physician under the rule would have every freedom that the patient -- excuse me -- that the provider had before Section 1557 was enacted and before the rule became applicable to explain all of the valid scientific and medical reasons why certain courses of treatment might be appropriate and why others absolutely would not be an appropriate. We do not -- The Department does not intend the rule to intrude on that process but rather to ensure that throughout in that example that Your Honor has posited or in any number of others that the application of that judgment is not interfered with by unlawful discrimination.

THE COURT: All right. Were categorical exclusions of this nature, either for insurance coverage or for treatment services, permitted when Medicare and Medicaid was first enacted?

MR. GROGG: I can't speak to all law. I may not even -- and I apologize, Your Honor, be able to the speak to all federal law, but the -- I think where Your Honor is going with this would run into the fact that until Section 1557 was enacted as part of the Affordable Care Act in 2010, there was no prohibition against -- federally prohibition against sex discrimination in federally financed healthcare. Title IX --

THE COURT: Let me ask you this then. Before May of

2016 were the Franciscans or even the state, were they in compliance with 1557 in terms of the insurance coverage that they provided?

MR. GROGG: Because Section 1557's prohibition against sex discrimination in federally financed healthcare went into law when the Affordable Care Act was passed in 2010 --

THE COURT: Right.

MR. GROGG: -- certainly Plaintiffs had every opportunity, pursuant to the private causes of action that the Department has recognized Section 1557 incorporates to assert that any such insurance policy with a categorical exclusion was unlawful under the statute. Plaintiffs have not indicated to us or to the Court, I don't believe, that any such actions came forward.

THE COURT: So you believe that before May of 2016, that this year, that the categorical exclusion that all of the Plaintiffs appear to have, I am going to ask them about that in a minute --

MR. GROGG: And we would certainly contest that, but --

THE COURT: Okay. That's why I need to ask them that. But let's just assume -- well, the Franciscans for sure; right?

MR. GROGG: Right.

THE COURT: So let's just stay with the Franciscans.

MR. GROGG: Sure.

THE COURT: Before May of 2016 they were not in compliance with 1557?

MR. GROGG: With --

THE COURT: With the categorical exclusion.

MR. GROGG: It is certainly the case that the rule -- and that provision of the rule becomes effective, as Your Honor has noted, on January 1st, 2017, that the rule has made such categorical exclusions unlawful. Whether such categorical exclusions were unlawful prior to the passage of the rule I think would depend upon how private Plaintiffs or on potentially I guess HHS in its enforcement authority would have interpreted sex discrimination under the statute. But Plaintiffs I think quite conspicuously here have not challenged the statute and to the extent that Your Honor's questioning is related to the spending clause claims, noting again that the parties seem to agree that depending on Your Honor's approach under the APA it's not necessary and perhaps not prudent even to reach the spending clause claim, but there's a particular oddity here in that the Plaintiffs have not challenge the statute and instead have only challenged the regulation and yet they're -- they're raising the contention that the regulation violates or is in excess of Congress's spending power. It's sort of doctrinally a little difficult

and Plaintiffs have certainly I don't believe come forward with any case where a regulation has been struck down under this -- a regulation that is of course executive action has been struck down under the spending clause.

THE COURT: All right. Okay. Does the rule incorporate the religious exemptions in Section 504 or Title -- some of the other -- where is my --

MR. GROGG: You mean the other statutes --

THE COURT: Yes.

MR. GROGG: -- that Section 1557 incorporates the Age Act, Section 504, Title XI?

THE COURT: Right. I've misplaced the statute. I've got it up here somewhere.

MR. GROGG: Yeah. So -- And I can reference the specific provision of the rule, but for the reasons that we've discussed and explained, the Department did, given that those statutes, those three other statutes already applied to federal financed activity -- healthcare activities and programs, the Department did bring those other exemptions in, given that they already had been applied to federally financed healthcare programs and activities. Title IX presents a different question because until the Affordable Care Act passed the prohibition on sex discrimination did not apply broadly to all federally financed healthcare programs and activities but there's a specific provision of the regulations

that addresses any exceptions under Title VI, the Age Act, and Section 504.

THE COURT: But is there an interpretive distinction to make from the fact that you have done that in the other provisions and you specifically did not in the Title IX provision? Is it limited to just because Title IX applied to the education context or is there something more to take, there's something -- there's some less protection to at least the private Plaintiffs than there is under the other provision?

MR. GROGG: So I -- The agency has explained in the rulemaking why differences between the education context and the healthcare context necessitated different approach, including with regard to people's access to educational institutions, their choices to attend religious educational institutions, but again I think the sort of fundamental point is that those -- that any statutory exemptions that had applied in the Title VI, Section 504, and the Age Act contexts already also applied to the federally financed healthcare activities and programs Section 1557 reaches and so Title -- bringing the prohibition on sex discrimination from Title IX into the healthcare context required a more nuanced analysis.

THE COURT: And remind me of why the choice in education is different than the choice in healthcare provision.

MR. GROGG: The agency explained that particularly this question applied -- I'm sorry -- this analysis applies generally but it may be particularly acute in emergency circumstances.

THE COURT: Are there emergency circumstances of transition related treatment?

MR. GROGG: Not -- Standing here as a lawyer and not a doctor, not that I know of, although I can imagine perhaps a situation where someone who was undergoing gender transition and, for example, had been prescribed hormones that were required to be taken, you know, on a daily basis if that patient was an emergency situation and brought into a hospital for extended treatment there might be a question about whether those hormones would need to be provided during the course of that treatment. But again, it's hard for me as a non-doctor to speculate on that.

The basic point though about the difference between the healthcare and education context is as explained by the agency there is, you know, often a -- a choice. In fact, I would imagine typically a choice on the part of a parent, of a child, to attend a religious educational institution, in other words, a sort of knowing decision made that -- where all the relevant factors can be considered. In the healthcare context it's rather different. There's often not, and the agency looked at this, too, particularly in the context of the number

of healthcare mergers, hospital mergers that have resulted from the Affordable Care Act. It may well be that there is not a choice on the part of a patient to go to a religious hospital or a non-religious hospital and so there is not the -- there's not the same dynamic the agency explains that would motivate Congress to provide those kinds of exceptions in specifics to the educational realm as would -- you know, and that Congress did not provide those exceptions in the Section 1557 statute specifically.

THE COURT: But don't you -- Doesn't that argument lag a little bit, given that you in your regulation have recognized that Title IX is different, that it applies, of course, to education facilities, and you provide in your definitions that where Title IX uses the phrases "student," "employer," and one other that's escaping me, we now replaced that with "individual," and so don't you by regulation take care of that problem?

MR. GROGG: Well, I think that that speaks to the sort of nuanced careful way in which the Department approached Section 1557's new work of bringing prohibition on sex discrimination into the healthcare context. Section 1557 incorporates the grounds prohibited under Title IX, Title VI, the Age Act, Section 504, and so it's up to the agency to understand how to implement that statutory requirement in, you know, the particular context of healthcare programs and

activities and so in understanding the grounds that Title IX prohibits discrimination on the basis of the agency certainly looked to the ways in which any words in that statute might have to be interpreted somewhat differently in the specific healthcare context and again looked to the specific exemptions in the statutory scheme at issue here, the Affordable Care Act. Section 1557 did not add any new -- add an exception in any regard and so the agency had to take a nuanced approach.

THE COURT: Okay. Let me ask you this. I just have a question on the definition section 92.4.

MR. GROGG: Uh-huh.

THE COURT: We defines "sex stereotypes" to include gender -- gendered expectations related to the appropriate roles of a certain sex. Is "sex," there a certain sex? Is that a binary view of the term "sex" in this definition?

MR. GROGG: I don't think so necessarily, Your Honor. I think the definition of "sex stereotyping" and the inclusion of "sex stereotyping" and "gender identity" is ground in --

THE COURT: Well, I understand the "sex stereotyping" generally. I'm saying in your definition the very last word is the word "sex" and are you saying there that that is not a binary definition of sex?

MR. GROGG: I think not.

THE COURT: Okay.

MR. GROGG: I think that it speaks to any number of

ways on which sex can be determined. Is sex determined at birth? Is it determined on the basis of --

THE COURT: And how does sex get assigned at birth?

MR. GROGG: It's an interesting and sometimes with certain newborn children difficult question. There is therefore -- I think this underscores the ways in which Congress has not spoken to the exact question at issue here. So, for example, in the *G.G.* case before the Fourth Circuit with which Your Honor is aware, that Court noted that there was a difference between the gender reflected on G.G.'s driver's license and the gender reflected on G.G.'s birth certificate, I think. And it's these kinds of scenarios --

THE COURT: But I'm just asking as it relates to the birth certificate how does that get assigned? Is there a uniformed which in which that is assigned?

MR. GROGG: I'm not aware, Your Honor. I don't know. My guess is that there are particular state codes that would determine that that would look to the medical judgment of the medical providers in understanding that, but I'm not -- I'm not aware.

THE COURT: Okay. I'm sorry. I'm going long and I've kept you long. Anything else you would like to say that I've not given you a chance to say?

MR. GROGG: I'd like to conclude, Your Honor, by just reaffirming that we are here on Plaintiffs' motions for

preliminary injunction --

THE COURT: Yes.

MR. GROGG: -- an extraordinary remedy. If the Court were inclined to reach the merits, notwithstanding our arguments to the contrary, we would assert the Court's injunction should be narrowly tailored specific to prevent any alleged irreparable injuries pending adjudication on the merits.

THE COURT: Thank you very much.

MR. GROGG: Thank you very much, Your Honor.

THE COURT: So who wants --

MR. RIENZI: May I?

THE COURT: Yes. Very good. Can I just ask you some questions before you --

MR. RIENZI: You're the Judge, Your Honor. You can do it.

THE COURT: I know you get the final word, and so just let me get a few questions out of the way and then I will give you uninterrupted rebuttal argument. But I am kind of running out of time.

Is it true that the Franciscans categorically ban through their insurance coverage all transition-related services? Coverage.

MR. RIENZI: Yes, it's true. It's in Sister Jane Ray Cline's declaration and it is true not only for insurance.

But Mr. Grogg said he wasn't aware of doctors who would have a categorical view on this. Sister Jane Ray's declaration attaches Franciscan's policy. It's categorical they won't provide. The CMDA declaration from Dr. Stevens attaches CMDA's policy. It's categorical. They think it's always wrong.

THE COURT: Okay. That was my next question --

MR. RIENZI: So yes.

THE COURT: -- was CMDA.

MR. RIENZI: Yes. And also the declaration for Dr. Hoffman who primarily -- primarily or exclusively, I forget, I'd have to go look -- treats children says if children needed it for some medical problem like precocious puberty, yes, I do, but I would not do it for a child to stop normal onset of puberty for gender transition period -- gender transition period full stop, so the fact of the matter is: Yes, yes, yes, the private Plaintiffs here say we have categorical views that we can't do this.

THE COURT: And the same for abortion?

MR. RIENZI: And the same for abortion coverage.

THE COURT: Yes.

MR. RIENZI: Coverage and treatment.

THE COURT: And CMDA as well.

MR. RIENZI: CMDA as well. I don't know if their abortion statement is attached but I am 99.99% sure CMDA has a

blanket we think abortion is wrong policy.

THE COURT: If you would just follow up and make sure that's there because I'm not sure.

MR. RIENZI: Yes.

THE COURT: CMDA is at risk of what in terms of -- Are they at risk of financing? Because you have clearly identified financing that Franciscans are at risk of?

MR. RIENZI: Yes.

THE COURT: What about CMDA?

MR. RIENZI: SO CMDA is different. CMDA is an association of doctors. They are not on their own what's called a covered entity under this rule which I think we all sort of blew past. It's in the briefs. But to be a covered entity you have to receive federal financial assistance in some way. The Government in the rule said that they expect virtually every doctor in the country to be a covered entity. So CMDA is a just an association of doctors. It is not itself a covered entity. It doesn't on it's own receive federal funding. It is making claims on behalf of its members, so it's raising an associational claim on behalf of its members.

THE COURT: Okay. All right. Thank you.

I'll ask that of the state. In terms of the provision of actual services, abortion services, abortion related services or transition related services, how does the rule impact you or -- I guess you're impacted -- how are you

impacted now since that part of the rule would have been in effect on May 16 and May 26 of 2016?

MR. RIENZI: Sure. So we're impacted by the rule because the Government's rule says we can't discriminate based on gender identity and it makes clear over-and-over again that the Government understands refusal to provide gender transition, including categorical refusal, to be discrimination.

Now, one of the distinctions Mr. Grogg offered you was he said, Well, we said that clearly about the refusal to give insurance coverage, but that is -- that is discrimination, but we haven't said that about providing the services. Your Honor, that doesn't even pass the rational basis test; right? In other words, if it is discriminatory to say I will never pay money for someone's gender transition, how on earth can they come back and say that they don't think it's discrimination to say I will provide services? Either it's discriminatory to exclude them or it's not, but it's, at the very least, arbitrary to say, Well it is discriminatory if you exclude them in insurance but it's not discriminatory over here. And the rest of the rule provides several examples which I quoted earlier to tell us what do they mean by "discrimination"; right? And they mean if they provide hysterectomies for one reason but not gender transition they think that's discrimination. They've said that and they have

said that they expect the rule to be interpreted to have the maximum effect possible, that they wrote what they wrote in order to guide covered entities and tell us what to do. So our understanding is that under the rule we violate the rule when we refuse to do this and when we do that we are creating liability for ourselves.

I appreciate Mr. Grogg's pointing to the pinpoint provision, but that's not the only provision; right? The directors are allowed to get whatever remedies he or she thinks are just; right, necessary to remedy the violation. We have to make statements and false claims liability could come with treble damages including recoupment of the money they have given us in the past. So I'd love it if it's pinpointed and set to a small thing and it's just going forward but that's just not -- their authority is broad. That's not the authority in the rule. There authority is broader than that and therefor the chill and the danger to us are broader than that. Every day our doors are open. We are at risk of generating claims and creating problems and risking our funding.

The Government presented a long argument, a long argument, that I would suggest was 99 percent all about RFRA; right? The Government's argument they said, Well, let's wait. Wait until it happens to you and then we'll sort it out. Wait until we can think about what the restrictive means would be

on your insurance. Wait until we can figure out, well, how important was it that that procedure was given; right? They want us to wait on all those things.

Those are all arguments about RFRA, which if I can leave to one side I'd like to return to. But I just point out none of them are arguments that, A, this rule doesn't control our conduct right now; it does. And they don't deny that. This rule governs our conduct right now. That's enough for standing. That's enough for ripeness. Most importantly, that's not for the APA claim; right? Their argument is about, Well, let's see how it sorts out in a particular factual circumstance. Those things have nothing at all to do with the APA analysis whether it was lawful to issue this reg this way in the first place. So, on all of those arguments about, Well, wait until the hammer falls, they have knowing to do with the APA claim. They are just arguments for why you should do it under RFRA later.

I don't want to keep going. I have arguments for why they are wrong about RFRA but --

THE COURT: Let me ask this one more question and then I will let you make your final summation and that is where all -- or what are the states that you all, the Franciscans -- Let me ask about the Franciscans. What all states do you all operate in?

MR. RIENZI: Illinois, Indiana, and I believe they

may operate a small facility in Michigan, although I would need to double check that. CMDA though, frankly, has members all across the country.

THE COURT: So in all the states.

MR. RIENZI: In all states; right. And some of them are in private practices. Many of them work for other entities, which to go to Mr. Nimock's point, is also part of why we've think if the law is an invalid illegal law the answer ought to be it's enjoined nationwide. It shouldn't be the case that CMDA members are going to employers who are facing this pressure from the Government. If the law is illegal, the law is illegal.

THE COURT: All right. Any final summation?

MR. RIENZI: Yes, Your Honor. So again, I understood most of Mr. Grogg's argument about wait and see wait and see to be a RFRA argument. Again, it's not a standing argument and it's not a ripeness argument. Why? Because there is no doubt we must comply right now.

The rule talks about needing to change policies. The rule talks about concrete costs for changing policies. All those things are more than enough for standing and ripeness. It controls our conduct now. They say, Well, we should figure out the religious stuff some other day; right? We should figure out the religious stuff some other day.

Let's me just focus on the insurance piece for a

second. The argument was, well, even though our rule says Franciscan's in facial violation of federal law, in facial violation of federal law, you can't give them relief. Why? Well, because maybe later when we sort this out we may figure out that we think it wasn't the least restrictive means or it wasn't that compelling for somebody to get the services. So we can't sort out insurance stuff until we've got an actual person in front of us bringing the claim. That's the argument.

Contrast that with the contraceptive mandate litigation, which I frankly forget if it ever showed up in front of Your Honor. It's been in front of probably more than a hundred federal judges nationwide. It's going on for more than five years. It's essentially been my -- what I've done for the past five years of my life. All of those cases -- all of those cases are certainly before an actual person comes in and complains that my insurance policy didn't cover contraception; right? Many of them were at the preliminary injunction stage. The Government, at least in the many cases that I have handled on the on the contraceptive mandate never said we can't figure out RFRA now, we have to wait for an actual person. What they said every time was let me tell you, Judge, why this passes compelling interest and this is the least restrictive means. They did it in court and court and court all across the country. They've made that argument,

went up to the Supreme Court in *Hobby Lobby,* went up to the Supreme Court again in *Zubic.* None of them involving a specific individual who said, Gosh, I wish this was in my plan. It's just simply not the case that you need that to do the RFRA analysis. To do the RFRA analysis you need us to file a preliminary injunction motion, which we did, establishing the substantial burden on our religion, which we did. The Government had a statutory obligation to answer that and argue about why it passed the strict scrutiny test, which they failed to do. The Supreme Court in *Gonzalez v. Car Part* was crystal clear that at the preliminary injunction stage, as sat in every other stage in RFRA, strict scrutiny is the Government's burden. They could have come forward and said here is why it passes strict scrutiny for us to force Franciscan to do that, But they took a pass. Having taken a pass, they're lose at the preliminary injunction stage.

A few other -- a few other points, Your Honor. I appreciate the repeated references to medical judgment from the Government, but I would just point out that like in the brief they're all heavily caveated. Can justify if it's legitimate medical judgment, non-discriminatory medical judgment, can, reasonable, non-discriminatory. They repeatedly say that the rule does not state that it forces anybody to provide abortions. Does not -- We have never stated in and the rule doesn't state. Well, fine. But the

rule makes it illegal to discriminate based on, quote: "Termination of pregnancy." And the rule tells us that the way the Government figures out discrimination is that if we provide a service for one thing but not for another. That's what the rule says. And so we look at the world and we say, Well, sure, some medical judgments are okay, but we've put ours on the table and we have the right know are we breaking the law or not and the Government doesn't want to tell us.

Where the Government points in its rule and says, Well we respect -- we respect medical judgment, and they specifically say this in the context of health programs that are different for men and women, for example. They say they respect medical judgment but they don't say they respect all medical judgment. They certainly don't say they respect our medical judgment. And even in the context of programs that distinguished between men and women, something that health programs have done nor a lot of really good reasons for a very long time because men and women do have physical differences and, you know, heart treatments for men and women are different and so forth. Even there the Government said, Well, it will be tested based on whether it's based on the best available science. This is at 31405. And elsewhere they say that they are going to use the constitutional test from *United States v. Virginia* saying that it's got to be exceedingly persuasive evidence to overcome intermediate scrutiny. So

they are not simply saying doctors you get to practice medicine and use your best medical judgment, which is what Texas's law says and which is on what all practices are. Instead, they've are saying maybe. Maybe we will respect your medical judgment, maybe not, and we're not going to tell you now.

They refer to the grounds prohibited for discrimination under Title IX. Again, Congress could have just said on the base of sex there. Instead, it incorporated Title IX. It said 20 U.S.C. 1681 et seq, right, as in "and the stuff that comes after." The religious exemption is right in 1681, so you don't have to go to et seq. The abortion exemption is a few provisions later. But Congress knew what it was doing and it was simply not among the grounds prohibited for discrimination under Title IX. That was not -- The available grounds prohibited for discrimination simply did not include things that forced a religious organization to violate its beliefs. The grounds prohibited simply did not include anything that would force anybody to provide an abortion. And those two crystal clear exemptions in Title IX show precisely what the Government could do and could have done if it were serious about saying, no, we're never going to make anybody give abortion, because they could have just taken the very simple one line from Title IX and said, Yep, we understand that's part of our thing and we're not doing that;

right? We're not forcing anybody to violate that. And they could have said the same thing about religion.

But instead they wrote their several hundred page rule, their 50 page brief and, frankly, Your Honor, they danced around the issue. They don't want to actually commit because they say, as Mr. Grogg was explaining, Well, it would depend on whether it's in a rural area near hospital mergers; right? They're holding out the probably. They want to reserve the right to later decide that maybe they can force us to provide abortions or maybe they can force us to provide gender transition surgeries.

If they are willing to just be clear, gosh, it was really easy to do that. Congress gave them the language. They chose not to do it on purpose. They say in their brief that they did it because they didn't want blanket exemptions, they want to sort it oust of it later. The contraceptive mandate cases make very clear course you can sort this out now at least on a preliminary injunction and give us relief and, at the very least, at least on the Administrative Procedures Act, which again has nothing to do with those sorts of details.

I'm will be very brief. I just want to make sure I'm not missing anything. The last point I think, Your Honor. The Government made some arguments about ripeness and talked about the *Abbott Labs v. Gardner* case. Another case that they

cite on that ground in their brief is the *Susan B. Anthony List v. Driehaus* case from a couple of terms ago. In both of those cases the Government set down a rule that people had to follow and it changed their behavior now. In *Abbott Labs* the Court said, Well, it's going to change how Abbott Labs labels its products now. It affects them now. The same thing is true here unless Franciscan is willing to violate its religious beliefs. The regulate us now. They don't deny that they regulate us now. They say, Well, you don't know how bad the consequences will be because maybe no one will ever come and hit you with a hammer.

For ripeness and standing purposes we have enough where our actions are subject to the rule, our actions are certainly infused with constitutional grounds like in *Susan B. Anthony List*, and it's simply not the case that the Government can impose that on us, force us to follow it, give us a 100 pages of guidance and then say, Oh, well but we still don't know for sure, so you can't come to court. It's a final rule, it's final agency action, and we ought to be able to challenge it. At the very least, we ought to be able to get preliminary injunctive relief.

Thank you, Your Honor.

THE COURT: Mr. Nimocks.

MR. NIMOCKS: Your Honor, I hate to do this, but could I beg Court's indulgence for a brief bathroom break?

THE COURT: I have to leave in ten minutes, so if you can run and come back and finish what you want to say --

MR. NIMOCKS: No. I was going to take a longer period. Ten minutes is fine.

THE COURT: Yes. But let me just ask you. How do you all have to change your policies and procedures either now, post May 2016 or post January 2017?

MR. NIMOCKS: I think -- I think most notably as a sovereign, Your Honor, I would point the Court to the declaration that was filed that we received yesterday and we filed yesterday evening and I -- The language employed in the declarations says that Health Select -- this is in paragraph 6 -- Health Select excludes coverage for gender reassignment surgery related services.

And I've also -- I think that that's a scrivener's error, Your Honor, because I've looked at the actual policy which uses this language:

"Gender reassignment surgery and related services" is the actual language from the policy and this is in Health Select of Texas, the Master Benefit Plan Document Effective January 1 of 2016. The language I recite -- And that's available online, but we could also provide that to the Court and I don't think we provided a citation to that in our briefing, and so I apologize to both the Court and my opposing counsel for that.

But my point is this: Texas has a categorical exclusion on the gender reassignment --

THE COURT: Services.

MR. NIMOCKS: -- services

THE COURT: Surgery or services?

MR. NIMOCKS: Both. Both. Gender reassignment surgery and related services which I interpret to be related to gender reassignment. So -- the Court -- The Court may not understand the process but surgery is in this dynamic is the last resort, so there's a lot of types of treatment and protocol that is gone through before you get to the point of actually having a physical reassignment surgery, so it's not -- it's not -- when we say "and related services," we are talking about all the services that start and go up to the end result of the surgery. And so --

THE COURT: Pretext bans that.

MR. NIMOCKS: Yes, sir. That is correct.

THE COURT: Anything related to --

MR. NIMOCKS: Gender reassignment.

THE COURT: Gender reassignment.

MR. NIMOCKS: Yes, sir. And even if that wasn't the case, Your Honor, the exclusion that we have based on what -- the colloquies that have happened this morning, mean that Texas has a problem in that we have to change our insurance policies, how we do business, in order to comply with the

expectations of HHS because notwithstanding, and I agree with Professor Rienzi, some of the references to medical judgment. The problem here, Your Honor, is that HHS dove head first into medical judgment. I mean, when it says -- when it makes an absolutely declaration that certain medical viewpoints are now outdated and not compliant with standards of care as they see them, they are making an medical judgment assessment. They could have said in the rule we are worried about invidious discrimination and if there is any evidence that somebody -- of a medical provider provided invidious discrimination and refused service based on anything other than medical judgment, that's where we kick in. They could have done that. But they did not. They made a valve judgment and assessment on standards of care.

And when it comes to the categorical ban, I know the Franciscans have doctors and medical providers who absolutely won't do anything under any circumstances, I think the more important question is not whether there exists physicians that have a categorical ban, but it's the right to make that decision. What about a doctor who is willing to go down this path and goes down the path and doesn't like what he or she sees and changes their mind? Do they have the right to say I'm not going to do that anymore? Or to get in? That's -- that's the critical right that Texas and the other state law protects. The right to make that judgment. The right to say

I'm going to practice this type of medicine or I'm not going to practice this type of medicine. You don't have to have planted your flag right now, but HHS has made that value assessment. They have declared certain decisions outmoded and outdated and incompliant and where that's why they cross the sovereign line I think particularly with regard to Texas and others and invade medical judgment standard and I think it confronts with the Court has heard this morning from Mr. Grogg on evaluating things, you know, circumstantially on a base-by-case basis. They won't come out and say when the medical judgment prevails. They wouldn't say in it the rule. As a matter of fact, they say in the rule on page 31393 that they will revaluate each situation on a case-by-case basis. DOJ cited this in their brief on ECF page 35 of ECM number 50. No. They've should defer to the state authority. And this gets into the clear statement doctrine with -- I think there's been a little bit of confusion this morning, Your Honor, and I want to be very clear about it. The clear statement doctrine applies in both a spending clause context but also generally to promulgations of Congress in terms of when it's giving an agency something and we -- we argue this in our replay brief. Congress did not delegate or make a clearly statement to HHS that it ever intended HHS to get involved in making medical decisions or establishing a national medical standard of care. If HHS was going to do that and go beyond questions of

invidious discrimination but say certain medical viewpoints are valid and others are not, that required a clear statement from Congress in either the Affordable Care Act or in Title IX or something else. And so beyond questions of the spending clause per se, one of the powers that HHS is exercising is devoid of an underlying clear statement from Congress and that's something that we articulate in our brief. So before the Court even gets to questions of *Chevron* deference, and this is what we call *Chevron* step zero in our brief, there has to be a clear statement and, secondly, the Court is allowed to ask the question: Would Congress delegate this type of power to this particular agency. Well, when the regulation of the medical practice is a state central function, that's a huge assumption to say that Congress intended HHS to regulate medical standards of care and would delegate that to HHS. The evidence of that is totally lacking, Your Honor, in any of the statutory regime and so that's -- I realize I have taken your question and I have given you a very lengthy answer but --

THE COURT: I need to ask you something else though. There is a footnote in your brief that excepts Louisiana and it is note No. 3 in your reply brief and you state that the state Plaintiffs' coverage excludes transition treatments except Louisiana. What -- I'm not sure I follow what you are trying to convey in that note or what Louisiana does or does not do.

MR. NIMOCKS: You're looking at footnote 3 in the replay brief, Your Honor?

THE COURT: Yes. ECF 56.

MR. NIMOCKS: I am -- Are you -- I don't see what you are referencing in the footnote itself. Are you looking at the body of the brief?

THE COURT: Let's see here.

MR. NIMOCKS: I don't see a citation to anything with regard to Louisiana.

THE COURT: Maybe it's --

MR. NIMOCKS: Maybe it's the fact I don't have them cited in there.

THE COURT: Maybe that's what I was -- I don't know what I was thinking. In addition state Plaintiffs categorically exclude coverage for gender transition procedures and/or sex change operations and then footnote 3 and there's Texas, Arizona, Kansas, etcetera. Is there anything I should take from the fact that Louisiana is not there?

MR. NIMOCKS: No, sir. The best explanation I could provide you speculating and hindsight is that it was an oversight on my part that I thought I had all my states in there --

THE COURT: Oh, I see. Oh, okay. That's fine. But let me do this. Let me -- Since I'm literally running out of

time, I'm going to give you some uninterrupted time to present your final -- any final summation you would like to present.

MR. NIMOCKS: Your Honor, I have -- I have largely said most of what I wanted to say in reply.

There's a couple of additional things that I will add though from my notes. On the question of irreparable harm, and I think the Court is aware of this, you may have been alluding to this with your question, Your Honor, but when a state is precluded from engaging its own potential, the Fifth Circuit has been very clear that is irreparable harm as a matter of law and so that is the quintessential basis for Texas and the other sovereigns.

I wanted to -- Mr. Grogg mentioned the spending clause and I wanted to address that briefly.

The spending clause claim does go to the question of what the -- what language Congress did or did not use and I think assumes that if the Court were to assume or to accept the Department of Justice's argument that cases like *Oncale*, O-N-C-A-L-E, and *Price Waterhouse* expanded the window of the language of Title IX so broad as to permit them to do what they're doing, the Government still has an underlying spending clause problem, and so that's where I think looking at the text of Congress and the spending mechanism still becomes a problem for the Government as it pertains to the sovereign Plaintiffs. So I still think that even if the Court were to

take the most expansive view of the text of Congress and embrace everything that the Department of Justice is arguing, it doesn't answer the spending clause question which does go to the text that Congress used. So we're not -- we're not saying that HHS violated the spending clause. We are saying that if Court believes that Congress gave HHS the power its welding, it didn't do enough though to survive a spending clause challenge so just to be very clear.

And then I would like to -- to be very clear, this is my primary statement but kind of adopt for purposes here some arguments that Professor Rienzi made as it pertains to questions of religious accommodation because I think that even though the analysis is a little different, the principle remains --

THE COURT: The Title VII argument you mean?

MR. NIMOCKS: The Title VII argument. That's exactly right. So IF the Court could take judicial notice of the -- of the state employees, we have individuals that have within Texas and the other Plaintiff states that have the same religious briefs or like those of Franciscan Alliance and so the protections that they have under Title VII are akin to shows under RFRA, and so that religious freedom question still exists here as to Texas and the other sovereign Plaintiffs as employers and our duty to accommodate them. So I think that the religious freedom questions that Professor Rienzi

eloquently articulated do have application as to the sovereigns as well.

THE COURT: And the argument there is that as the state you employee people who have similar beliefs to the Franciscans and so if they refuse to participate in transition related services, take it from there. And you as the state say federal law requires you to do it or we don't know whether it does or not --

MR. NIMOCKS: That's exactly --

THE COURT: We're going to make you do it because we don't want to be -- we don't lose all our funding.

MR. NIMOCKS: That state run or controlled healthcare facilities require the administration and providing this service or this treatment and you as a state employee inside these facilities must administer said treatment. You don't have a choice. We are -- we are required to do it. Then we are -- we are violating our duty to that employee who -- and so the state is caught between a rock and a hard place because you have conflicting federal laws that, you know, come -- come to bear in that particular circumstance. So, yes. Absolutely, Your Honor.

THE COURT: Okay. Anything else?

MR. NIMOCKS: No, Your Honor. That will be it for the State.

THE COURT: Okay. Yes?

MR. RIENZI: Your Honor, you are asking for a cite. And I know we're out of time, shall I give it so I avoid filing something late. Dr. Steven's declaration paragraph 17 and paragraph 20. They've are both in the appendix. They talk about CMDA's commitment opposing abortion and --

THE COURT: Okay. Very good.

MR. NIMOCKS: Your Honor, I'm sorry. One brief additional thing. I just want to remind the Court that we did submit declarations with our reply brief outlining investigations that the Government has into Texas so I think that mitigates in favor of our argument about Texas -- the nature of Texas's coverage and it's coming in conflict with the rule.

THE COURT: Yes.

MR. NIMOCKS: Thank you, Judge.

THE COURT: Thank you all very much. It is pleasure to hear the arguments from you all and I appreciate you coming down on this busy -- what must be a busy time in your lives, so I will get a ruling out as quickly as I can.

I, **DENVER B. RODEN**, United States Court Reporter for the United States District Court in and for the Northern District of Texas, Fort Worth Division, hereby certify that the above and foregoing contains a true and correct transcription of the proceedings in the above entitled and numbered cause.

WITNESS MY HAND on this 23rd day of December, 2016.

/s/ Denver B. Roden

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