No. 21-11174

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANCISCAN ALLIANCE, INCORPORATED; CHRISTIAN MEDICAL AND DENTAL SOCIETY; SPECIALTY PHYSICIANS OF ILLINOIS, L.L.C.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

AMERICAN CIVIL LIBERTIES UNION OF TEXAS; RIVER CITY GENDER ALLIANCE,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas

JOINT RECORD EXCERPTS FOR DEFENDANTS-APPELLANTS AND INTERVENOR DEFENDANTS-APPELLANTS

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1. Docket Sheet

APPEAL,JURY,STAYED

U.S. District Court
Northern District of Texas (Wichita Falls)
CIVIL DOCKET FOR CASE #: 7:16-cv-00108-O

Franciscan Alliance, Inc. et al v. Price et al
Assigned to: Judge Reed C. O'Connor
Related Case: 7:16-cv-00054-O
Case in other court: USCA5, 17-10135
USCA5, 20-10093
United States District Court, 21-11174
Cause: 05:702 Administrative Procedure Act

Date Filed: 08/23/2016
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutes: Other Statutory Actions
Jurisdiction: U.S. Government Defendant

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Plaintiff

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Date Filed	#	Docket Text
08/23/2016	1 (p.42)	COMPLAINT WITH JURY DEMAND against All Defendants filed by Nebraska, State of, Speciality Physicians of illinois, LLC, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Christian Medical and Dental Society, Kansas, Franciscan Alliance, Inc., Texas, State of, Wisconsin State of. (Filing fee $400; Receipt number 0539-7816698) Clerk to issue summons(es). In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 (p.42) Cover Sheet, # 2 (p.126) Cover Sheet Supplement, # 3 (p.128) Additional Page(s) Notice of Related Case) (Nimocks, Austin) (Entered: 08/23/2016)
08/23/2016	2 (p.126)	New Case Notes: A filing fee has been paid. No court file needed. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge

		(Judge Ray). Clerk to provide copy to plaintiff if not received electronically. (plp) (Entered: 08/23/2016)
08/23/2016	3 (p.128)	Summons issued as to Sylvia Burwell, U.S. Department of Health and Human Services, U.S. Attorney, and U.S. Attorney General. (plp) (Entered: 08/23/2016)
08/26/2016	4 (p.140)	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC. (Nimocks, Austin) (Entered: 08/26/2016)
09/02/2016	5 (p.142)	SUMMONS Returned Executed as to Sylvia Burwell ; served on 8/30/2016. (Nimocks, Austin) (Entered: 09/02/2016)
09/02/2016	6 (p.143)	SUMMONS Returned Executed as to U.S. Department of Health and Human Services ; served on 8/30/2016. (Nimocks, Austin) (Entered: 09/02/2016)
09/16/2016	7 (p.144)	MOTION to Intervene filed by American Civil Liberties Union of Texas, River City Gender Alliance (Attachments: # 1 (p.42) Proposed Order). Party American Civil Liberties Union of Texas added.Attorney Rebecca L Robertson added to party American Civil Liberties Union of Texas (pty:intvd), Attorney Rebecca L Robertson added to party River City Gender Alliance(pty:intvd) (Robertson, Rebecca) (Entered: 09/16/2016)
09/16/2016	8 (p.154)	Brief/Memorandum in Support filed by American Civil Liberties Union of Texas, River City Gender Alliance re 7 (p.144) MOTION to Intervene (Robertson, Rebecca) (Entered: 09/16/2016)
09/16/2016	9 (p.192)	Appendix in Support filed by American Civil Liberties Union of Texas, River City Gender Alliance re 8 (p.154) Brief/Memorandum in Support of Motion (Robertson, Rebecca) (Entered: 09/16/2016)
09/16/2016	10 (p.248)	ANSWER to 1 (p.42) Complaint,,,,, filed by American Civil Liberties Union of Texas, River City Gender Alliance. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Robertson, Rebecca) (Entered: 09/16/2016)
09/16/2016	11 (p.282)	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by American Civil Liberties Union of Texas, River City Gender Alliance. (Robertson, Rebecca) (Entered: 09/16/2016)
10/03/2016	12 (p.284)	MOTION for Extension of Time to File Response/Reply to 7 (p.144) MOTION to Intervene filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC (Goodrich, Luke) (Entered: 10/03/2016)

10/05/2016	13 (p.288)	SUMMONS Returned Executed. (Nimocks, Austin) (Entered: 10/05/2016)
10/05/2016	14 (p.289)	SUMMONS Returned Executed. (Nimocks, Austin) (Entered: 10/05/2016)
10/05/2016	15 (p.290)	ORDER: It is ORDERED that counsel for the putative intervenors, James Esseks and Rebecca Robertson, file briefing explaining why they are opposed to Plaintiffs' Motion for Extension of Time 12 (p.284) on or before October 7, 2016. Should Plaintiffs find it necessary to reply, they must do so on or before October 10, 2016. (Ordered by Judge Reed C O'Connor on 10/5/2016) (skg) (Entered: 10/05/2016)
10/05/2016	16 (p.292)	Brief/Memorandum in Support filed by American Civil Liberties Union of Texas, River City Gender Alliance re 12 (p.284) MOTION for Extension of Time to File Response/Reply to 7 (p.144) MOTION to Intervene , 15 (p.290) Order Setting Deadline/Hearing, (Robertson, Rebecca) (Entered: 10/05/2016)
10/06/2016	17 (p.297)	REPLY filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Kansas, State of Nebraska, State of Texas, State of Wisconsin re: 12 (p.284) MOTION for Extension of Time to File Response/Reply to 7 (p.144) MOTION to Intervene (Goodrich, Luke) (Entered: 10/06/2016)
10/07/2016	18 (p.301)	NOTICE of Attorney Appearance by Adam Anderson Grogg on behalf of Sylvia Burwell, U.S. Department of Health and Human Services. (Filer confirms contact info in ECF is current.) (Grogg, Adam) (Entered: 10/07/2016)
10/07/2016	19 (p.304)	RESPONSE filed by Sylvia Burwell, U.S. Department of Health and Human Services re: 7 (p.144) MOTION to Intervene (Grogg, Adam) (Entered: 10/07/2016)
10/07/2016	20 (p.307)	ORDER granting 12 (p.284) Motion for Extension of Time to Respond to Motion toIntervene. (Ordered by Judge Reed C O'Connor on 10/7/2016) (trt) (Entered: 10/07/2016)
10/17/2016	21 (p.310)	AMENDED COMPLAINT WITH JURY DEMAND against All Defendants filed by State of Nebraska, Specialty Physicians of Illinois, LLC, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Christian Medical and Dental Society, State of Kansas, Franciscan Alliance, Inc., State of Texas, State of Wisconsin, State of Louisiana, State of Arizona, State of Mississippi. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Nimocks, Austin) (Entered: 10/17/2016)

10/21/2016	22 (p.397)	MOTION for Summary Judgment *(Partial)* filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin (Attachments: # 1 (p.42) Proposed Order)Attorney Austin R Nimocks added to party State of Arizona(pty:pla), Attorney Austin R Nimocks added to party State of Louisiana(pty:pla), Attorney Austin R Nimocks added to party State of Mississippi(pty:pla) (Nimocks, Austin) (Entered: 10/21/2016)
10/21/2016	23 (p.404)	Brief/Memorandum in Support filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re 22 (p.397) MOTION for Summary Judgment *(Partial)* (Nimocks, Austin) (Entered: 10/21/2016)
10/21/2016	24 (p.440)	MOTION for Summary Judgment *(Partial)* filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC (Goodrich, Luke) (Entered: 10/21/2016)
10/21/2016	25 (p.444)	Brief/Memorandum in Support filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re 24 (p.440) MOTION for Summary Judgment *(Partial)* (Goodrich, Luke) (Entered: 10/21/2016)
10/21/2016	26 (p.508)	Appendix in Support filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re 24 (p.440) MOTION for Summary Judgment *(Partial)* (Goodrich, Luke) (Entered: 10/21/2016)
10/24/2016	27 (p.1427)	MOTION to Stay *BRIEFING ON PLAINTIFFS DISPOSITIVE MOTIONS AND RESET DEADLINES FOR RESPONDING TO MOTION TO INTERVENE* filed by American Civil Liberties Union of Texas, River City Gender Alliance (Attachments: # 1 (p.42) Proposed Order) (Robertson, Rebecca) (Entered: 10/24/2016)
10/26/2016	28 (p.1438)	MOTION to Set Schedule for Preliminary Injunction Proceedings filed by Sylvia Burwell, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Grogg, Adam) (Entered: 10/26/2016)
10/28/2016	29 (p.1445)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 27 (p.1427) MOTION to Stay *BRIEFING ON PLAINTIFFS DISPOSITIVE MOTIONS AND RESET DEADLINES FOR RESPONDING TO MOTION TO INTERVENE* (Goodrich, Luke) (Entered: 10/28/2016)

10/31/2016	30 (p.1453)	REPLY filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 27 (p.1427) MOTION to Stay *BRIEFING ON PLAINTIFFS DISPOSITIVE MOTIONS AND RESET DEADLINES FOR RESPONDING TO MOTION TO INTERVENE* (Robertson, Rebecca) (Entered: 10/31/2016)
11/01/2016	31 (p.1460)	MOTION to Expedite *Telephonic Status Conference* filed by Sylvia Burwell, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Grogg, Adam) (Entered: 11/01/2016)
11/01/2016	32 (p.1463)	ORDER granting in part and denying in part 28 (p.1438) Motion. See order for details. (Ordered by Judge Reed C O'Connor on 11/1/2016) (Judge Reed C O'Connor) (Entered: 11/01/2016)
11/01/2016		Hearing/Deadline Modification: Deadlines/hearings set per 32 (p.1463) Order on Motion for Miscellaneous Relief. Supplemental briefing due by 11/9/2016. Responses due by 11/23/2016. Replies due by 11/30/2016. (skg) (Entered: 11/02/2016)
11/02/2016	33 (p.1470)	ORDER: Defendants' Motion to Expedite Telephonic Status Conference 31 (p.1460) is GRANTED in part and DENIED in part. This motion is GRANTED in that their request for a hearing will take place at 9:00 AM on November 7, 2016. Note: the hearing will take place in the District Judge's Courtroom, 2nd floor, 501 W. 10th Street, Fort Worth, Texas. This motion is DENIED in that the Court does not typically hold hearings by telephone. (Ordered by Judge Reed C O'Connor on 11/2/2016) (skg) (Entered: 11/02/2016)
11/02/2016	34 (p.1471)	NOTICE of *Defendants* re: 33 (p.1470) Order Setting Deadline/Hearing, Terminate Motions,, filed by Sylvia Burwell, U.S. Department of Health and Human Services (Grogg, Adam) (Entered: 11/02/2016)
11/03/2016	35 (p.1474)	CERTIFICATE OF SERVICE by State of Texas *on U.S. Attorney, Northern District of Texas* (Nimocks, Austin) (Entered: 11/03/2016)
11/03/2016	36 (p.1475)	ORDER: Defendants have withdrawn their request for a status conference and indicate the concerns that motivated them to request a status conference have been fully resolved. Accordingly, the hearing set for November 7, 2016 is cancelled. (Ordered by Judge Reed C O'Connor on 11/3/2016) (skg) (Entered: 11/03/2016)
11/09/2016	37 (p.1476)	Brief/Memorandum in Support filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re 22 (p.397) MOTION for Summary Judgment *(Partial)*, 24 (p.440) MOTION for Summary Judgment *(Partial) Supplemental Brief in support of Motions for Preliminary Injunction* (Nimocks, Austin) (Entered: 11/09/2016)

11/10/2016	38 (p.1485)	MOTION for Reconsideration filed by American Civil Liberties Union of Texas, River City Gender Alliance with Brief/Memorandum in Support. (Attachments: # 1 (p.42) Proposed Order) (Robertson, Rebecca) (Entered: 11/10/2016)
11/15/2016	39 (p.1509)	Consent MOTION for Leave to File Excess Pages (), Motion for Extension of Time to File Answer filed by Sylvia Burwell, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Grogg, Adam) (Entered: 11/15/2016)
11/15/2016	40 (p.1512)	ORDER granting 39 (p.1509) Defendants' Consent Motion for Expanded Page Limit for Opposition to Plaintiffs' Preliminary Injunction Motions and for Extension of Time to Respond to the Complaint. Defendants' answer to Plaintiffs' operative complaint shall be due 25 days after the Court issues its ruling on Plaintiffs' preliminary injunction motions. (Ordered by Judge Reed C O'Connor on 11/15/2016) (ewd) (Entered: 11/15/2016)
11/17/2016	41 (p.1513)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 38 (p.1485) MOTION for Reconsideration (Nimocks, Austin) (Entered: 11/17/2016)
11/17/2016	42 (p.1519)	NOTICE of Attorney Appearance by Emily Brooke Nestler-DOJ on behalf of Sylvia Burwell, U.S. Department of Health and Human Services. (Filer confirms contact info in ECF is current.) (Nestler-DOJ, Emily) (Entered: 11/17/2016)
11/21/2016	43 (p.1522)	REPLY filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 38 (p.1485) MOTION for Reconsideration (Robertson, Rebecca) (Entered: 11/21/2016)
11/21/2016	44 (p.1527)	Unopposed MOTION for Leave to File Overlength Brief filed by American Civil Liberties Union of Texas, River City Gender Alliance (Attachments: # 1 (p.42) Proposed Order) (Robertson, Rebecca) (Entered: 11/21/2016)
11/22/2016	45 (p.1533)	ORDER: Putative Intervenors' Unopposed Motion for Expanding Page Limit for Amici Curiae Brief in Opposition to Plaintiffs' Motions for Preliminary Injunction 44 (p.1527) should be and is hereby GRANTED. (Ordered by Judge Reed C O'Connor on 11/22/2016) (skg) (Entered: 11/22/2016)
11/22/2016	46 (p.1534)	NOTICE of Attorney Appearance by Bailey Wilson Heaps-DOJ on behalf of Sylvia Burwell, U.S. Department of Health and Human Services. (Filer confirms contact info in ECF is current.) (Heaps-DOJ, Bailey) (Entered: 11/22/2016)
11/22/2016	47 (p.1537)	NOTICE of Attorney Appearance by Brian Matthew Hauss on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Hauss, Brian) (Entered: 11/22/2016)

11/22/2016	48 (p.1539)	NOTICE of Attorney Appearance by Brigitte Adrienne Amiri on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Amiri, Brigitte) (Entered: 11/22/2016)
11/22/2016	49 (p.1541)	NOTICE of Attorney Appearance by Louise Melling on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Melling, Louise) (Entered: 11/22/2016)
11/23/2016	50 (p.1543)	RESPONSE filed by Sylvia Burwell, U.S. Department of Health and Human Services re: 22 (p.397) MOTION for Summary Judgment *(Partial)*, 24 (p.440) MOTION for Summary Judgment *(Partial)* (Grogg, Adam) (Entered: 11/23/2016)
11/23/2016	51 (p.1609)	NOTICE of Attorney Appearance by James Esseks on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Esseks, James) (Entered: 11/23/2016)
11/23/2016	52 (p.1611)	NOTICE of Attorney Appearance by Joshua Block on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Block, Joshua) (Entered: 11/23/2016)
11/23/2016	53 (p.1613)	RESPONSE filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 22 (p.397) MOTION for Summary Judgment *(Partial)*, 24 (p.440) MOTION for Summary Judgment *(Partial)* (Hauss, Brian) (Entered: 11/23/2016)
11/28/2016	54 (p.1675)	Consent MOTION for Leave to File Excess Pages, MOTION for Extension of Time to File Response/Reply to 50 (p.1543) Response/Objection () filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin (Goodrich, Luke) (Entered: 11/28/2016)
11/29/2016	55 (p.1678)	ORDER: GRANTING Plaintiffs' Consent Motion for Expanded Page Limit and Extension of Time to File Replies in Support of Preliminary Injunction 54 (p.1675) , filed November 28, 2016. Plaintiffs request (1) extension of the deadline to file replies in support of preliminary injunction; (2) leave to file reply briefs that exceed the Courts 10-page limit. Accordingly, Plaintiffs reply briefs may exceed the 10-page limit and shall be due December 2, 2016. (Ordered by Judge Reed C O'Connor on 11/29/2016) (skg) (Entered: 11/29/2016)
12/02/2016	56 (p.1679)	REPLY filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 22 (p.397) MOTION for Summary Judgment *(Partial)* (Attachments: # 1 (p.42)

		Declaration(s) in support of State Plaintiffs' Reply Brief) (Nimocks, Austin) (Entered: 12/02/2016)
12/02/2016	57 (p.1710)	REPLY filed by Christian Medical and Dental Society, Franciscan Alliance, Inc. re: 24 (p.440) MOTION for Summary Judgment *(Partial)* (Attachments: # 1 (p.42) Declaration(s)) (Goodrich, Luke) (Entered: 12/02/2016)
12/06/2016	58 (p.1748)	ORDER: The Court sets Plaintiffs' Motions for Preliminary Injunction 22 (p.397) AND 24 (p.440) for hearing at 9:00 a.m. on December 20, 2016. The hearing will convene in the District Judges Courtroom, 2nd floor, 1000 Lamar Street, Wichita Falls, Texas. (Ordered by Judge Reed C O'Connor on 12/6/2016) (skg) (Entered: 12/06/2016)
12/15/2016	59 (p.1749)	NOTICE of Attorney Appearance by Mark Rienzi on behalf of Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC. (Filer confirms contact info in ECF is current.) (Rienzi, Mark) (Entered: 12/15/2016)
12/19/2016	60 (p.1751)	NOTICE of *Filing Evidence in Support* re: 56 (p.1679) Reply, 22 (p.397) MOTION for Summary Judgment *(Partial)* filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin (Nimocks, Austin) (Entered: 12/19/2016)
12/22/2016	61	ELECTRONIC Minute Entry for proceedings held before Judge Reed C O'Connor: Evidentiary Hearing held on 12/20/2016. Attorney Appearances: Plaintiff - Mark Rienzi, Austin R Nimocks; Defense - Adam Anderson Grogg. (Court Reporter: Denver Roden) (No exhibits) Time in Court - 3:10. (chmb) (Entered: 12/22/2016)
12/31/2016	62 (p.1756)	ORDER granting injunction and not reaching Motions for Summary Judgment. (Ordered by Judge Reed C O'Connor on 12/31/2016) (Judge Reed C O'Connor) (Entered: 12/31/2016)
01/09/2017	63 (p.1802)	MOTION to Stay *Preliminary Injunction* filed by American Civil Liberties Union of Texas, River City Gender Alliance (Hauss, Brian) (Entered: 01/09/2017)
01/09/2017	64 (p.1815)	ORDER Expediting Briefing on 63 (p.1802) Motion to Stay (Ordered by Judge Reed C. O'Connor on 1/9/2017) (chmb) (Entered: 01/09/2017)
01/09/2017		Hearing/Deadline Modification: Deadlines/hearings set per 64 (p.1815) Order on Motion to Stay. Responses due by 1/17/2017. Replies due by 1/20/2017. (skg) (Entered: 01/10/2017)
01/17/2017	65 (p.1816)	RESPONSE filed by Sylvia Burwell, U.S. Department of Health and Human Services re: 63 (p.1802) MOTION to Stay *Preliminary Injunction* (Grogg, Adam) (Entered: 01/17/2017)
01/17/2017	66 (p.1819)	Motion for Extension of Time to File Answer filed by Sylvia Burwell, U.S. Department of Health and Human Services with

		Brief/Memorandum in Support. (Grogg, Adam) (Entered: 01/17/2017)
01/17/2017	67 (p.1822)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 63 (p.1802) MOTION to Stay *Preliminary Injunction* (Nimocks, Austin) (Entered: 01/17/2017)
01/19/2017	68 (p.1831)	REPLY filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 63 (p.1802) MOTION to Stay *Preliminary Injunction* (Hauss, Brian) (Entered: 01/19/2017)
01/24/2017	69 (p.1837)	ORDER granting in part and denying in part 63 (p.1802) Motion for Ruling and Stay; and granting 66 (p.1819) Motion for Extension. Defendants' answer to Plaintiffs' operative complaint shall be due on or before March 1, 2017. Plaintiffs and Defendants must file a response to Putative Intervenors' request for permissive intervention on or before February 8, 2017. See order for details. (Ordered by Judge Reed C. O'Connor on 1/24/2017) (chmb) (aba) (Entered: 01/24/2017)
01/30/2017	70 (p.1849)	NOTICE of Attorney Appearance by Daniel Irwin Mach on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Mach, Daniel) (Entered: 01/30/2017)
01/30/2017	71 (p.1851)	NOTICE OF INTERLOCUTORY APPEAL as to 62 (p.1756) Order on Motion for Summary Judgment to the Fifth Circuit by American Civil Liberties Union of Texas, River City Gender Alliance. Filing fee $505, receipt number 0539-8170756. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Hauss, Brian) (Entered: 01/30/2017)
02/02/2017	72 (p.1854)	NOTICE OF INTERLOCUTORY APPEAL as to 69 (p.1837) Order on Motion to Stay, to the Fifth Circuit by American Civil Liberties Union of Texas, River City Gender Alliance. Filing fee $505, receipt number 0539-8180447. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the

		district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Hauss, Brian) (Entered: 02/02/2017)
02/08/2017	73 (p.1857)	RESPONSE filed by Sylvia Burwell, U.S. Department of Health and Human Services re: 69 (p.1837) Order on Motion to Stay, (Grogg, Adam) (Entered: 02/08/2017)
02/08/2017	74 (p.1860)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 69 (p.1837) Order on Motion to Stay, (Goodrich, Luke) (Entered: 02/08/2017)
02/09/2017		USCA Case Number 17-10135 in USCA5 for 71 (p.1851) Notice of Appeal filed by River City Gender Alliance, American Civil Liberties Union of Texas. (skg) (Entered: 02/09/2017)
02/13/2017	75 (p.1868)	NOTICE of Attorney Appearance by Stephanie Hall Barclay on behalf of Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC. (Filer confirms contact info in ECF is current.) (Barclay, Stephanie) (Entered: 02/13/2017)
02/14/2017		Record on Appeal for USCA5 17-10135 (related to 71 (p.1851) appeal): Record consisting of: 1 ECF electronic record on appeal (eROA) is certified,. **PLEASE NOTE THE FOLLOWING:** Licensed attorneys must have filed an appearance in the USCA5 case and be registered for electronic filing in the USCA5 to access the paginated eROA in the USCA5 ECF system. (Take these steps immediately if you have not already done so, since the USCA5 briefing deadline has now been set. Once you have filed the notice of appearance and/or USCA5 ECF registration, it may take up to 3 business days for the circuit to notify the district clerk that we may grant you access to the eROA in the USCA5 ECF system.) To access the paginated record, log in to the USCA5 ECF system, and under the Utilities menu, select Electronic Record on Appeal. Pro se litigants may request a copy of the record by contacting the appeals deputy in advance to arrange delivery. EROA Access granted to Attorney Brigitte Adrienne Amiri for Appellant River City Gender Alliance. (skg) (Entered: 02/14/2017)
02/15/2017	76 (p.1870)	REPLY filed by American Civil Liberties Union of Texas re: 7 (p.144) MOTION to Intervene (Hauss, Brian) (Entered: 02/15/2017)
02/16/2017		Re: USCA5 17-10135 APPEARANCE FORM FILED by Attorney(s): Scott A. Keller for party(s) Appellee State of Arizona

		Appellee State of Kansas Appellee Commonwealth of Kentucky Appellee State of Wisconsin Appellee State of Texas Appellee State of Louisiana Appellee State of Nebraska Appellee State of Mississippi, in case 17-10135 EROA access granted; APPEARANCE FORM FILED by Attorney: Luke William Goodrich for Appellee Specialty Physicians of Illinois, L.L.C. in 17-10135, Attorney Luke William Goodrich for Appellee Christian Medical and Dental Society in 17-10135, Attorney Luke William Goodrich for Appellee Franciscan Alliance, Incorporated in 17-10135 EROA access granted; APPEARANCE FORM FILED by Attorney: Stephanie Hall Barclay for party(s) Appellee Christian Medical and Dental Society Appellee Specialty Physicians of Illinois, L.L.C. Appellee Franciscan Alliance, Incorporated, in case 17-10135 EROA access granted. (skg) (Entered: 02/16/2017)
02/22/2017	77 (p.1878)	NOTICE of Attorney Appearance by Amy Anne Miller on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Miller, Amy) (Entered: 02/22/2017)
02/24/2017	78 (p.1880)	Unopposed Motion for Extension of Time to File Answer *or Otherwise Respond to the Complaint* filed by Sylvia Burwell, U.S. Department of Health and Human Services (Attachments: # 1 (p.42) Proposed Order) (Nestler-DOJ, Emily) (Entered: 02/24/2017)
02/27/2017	79 (p.1884)	ORDER granting 78 (p.1880) Motion for Extension of Time to File Answer Sylvia Burwell answer due 5/2/2017; U.S. Department of Health and Human Services answer due 5/2/2017. (Ordered by Judge Reed C. O'Connor on 2/27/2017) (chmb) (aba) (Entered: 02/27/2017)
02/28/2017		***Clerk's Notice of delivery: (see NEF for details) Docket No:79. Tue Feb 28 12:36:34 CST 2017 (crt) (Entered: 02/28/2017)
03/07/2017	80	APPEARANCE FORM FILED by Attorney(s) Heather Gebelin Hacker for party(s) Appellee State of Arizona Appellee State of Kansas Appellee Commonwealth of Kentucky Appellee State of Wisconsin Appellee State of Texas Appellee State of Louisiana Appellee State of Nebraska Appellee State of Mississippi, in USCA5 case 17-10135. EROA access granted. (skg) (Entered: 03/07/2017)
03/14/2017	81 (p.1885)	NOTICE of Dismissal *Without Prejudice of Counts III-X and XIII-XX* filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin (Nimocks, Austin) (Entered: 03/14/2017)
03/14/2017	82 (p.1888)	MOTION for Summary Judgment filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through

		Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin (Attachments: # 1 (p.42) Proposed Order [Proposed] Order Granting Plaintiffs' Motion for Summary Judgment, # 2 (p.126) Proposed Order [Proposed] Final Judgment and Permanent Injunction) (Nimocks, Austin) (Entered: 03/14/2017)
03/14/2017	83 (p.1898)	Brief/Memorandum in Support filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re 82 (p.1888) MOTION for Summary Judgment (Nimocks, Austin) (Entered: 03/14/2017)
03/14/2017	84 (p.1902)	Appendix in Support filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re 82 (p.1888) MOTION for Summary Judgment (Nimocks, Austin) (Entered: 03/14/2017)
03/27/2017	85 (p.2833)	MOTION to Stay *Pending Appeal* filed by American Civil Liberties Union of Texas, River City Gender Alliance (Block, Joshua) (Entered: 03/27/2017)
04/04/2017	86 (p.2841)	MOTION for Extension of Time to File Response/Reply to 82 (p.1888) MOTION for Summary Judgment filed by Sylvia Burwell, U.S. Department of Health and Human Services (Grogg, Adam) (Entered: 04/04/2017)
04/04/2017	87 (p.2844)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 86 (p.2841) MOTION for Extension of Time to File Response/Reply to 82 (p.1888) MOTION for Summary Judgment (Goodrich, Luke) (Entered: 04/04/2017)
04/05/2017	88 (p.2847)	ORDER: Defendants' Motion for Extension of Time 86 (p.2841) to Respond to Plaintiffs' Motion for Summary Judgment is GRANTED. Accordingly, Defendants must file a Response to 82 (p.1888) Plaintiffs' Motion for Summary Judgment on or before May 2, 2017. (Ordered by Judge Reed C. O'Connor on 4/5/2017) (skg) (Entered: 04/05/2017)
04/05/2017		***Clerk's Notice of delivery: (see NEF for details) Docket No:88. Wed Apr 5 12:10:12 CDT 2017 (crt) (Entered: 04/05/2017)
04/05/2017	89 (p.2849)	

		RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 85 (p.2833) MOTION to Stay *Pending Appeal* (Goodrich, Luke) (Entered: 04/05/2017)
04/10/2017	90 (p.2857)	REPLY filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 85 (p.2833) MOTION to Stay *Pending Appeal* (Block, Joshua) (Entered: 04/10/2017)
04/26/2017	91	NOTICE OF APPEARANCE FORM FILED by Attorney Joshua A. Block for Appellant River City Gender Alliance in 17-10135, Attorney Joshua A. Block for Appellant American Civil Liberties Union of Texas in USCA5 (17-10135) EROA access granted. (skg) (Entered: 04/26/2017)
05/02/2017	92 (p.2864)	MOTION to Remand to United States Department of Health and Human Services , MOTION to Stay () filed by Sylvia Burwell, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Grogg, Adam) (Entered: 05/02/2017)
05/02/2017	93 (p.2870)	Motion for Extension of Time to File Answer (), MOTION for Extension of Time to File Response/Reply to 82 (p.1888) MOTION for Summary Judgment , 21 (p.310) Amended Complaint,,, filed by Sylvia Burwell, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Grogg, Adam) (Entered: 05/02/2017)
05/04/2017	94 (p.2873)	RESPONSE AND OBJECTION filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 93 (p.2870) Motion for Extension of Time to File Answer MOTION for Extension of Time to File Response/Reply to 82 (p.1888) MOTION for Summary Judgment , 21 (p.310) Amended Complaint,,,, 92 (p.2864) MOTION to Remand to United States Department of Health and Human Services MOTION to Stay (Nimocks, Austin) (Entered: 05/04/2017)
05/18/2017	95 (p.2881)	REPLY filed by Sylvia Burwell, U.S. Department of Health and Human Services re: 92 (p.2864) MOTION to Remand to United States Department of Health and Human Services MOTION to Stay (Grogg, Adam) (Entered: 05/18/2017)
06/01/2017	96 (p.2887)	MOTION to Withdraw as Attorney filed by American Civil Liberties Union of Texas, River City Gender Alliance (Robertson, Rebecca) (Entered: 06/01/2017)
06/01/2017	97 (p.2890)	Amended MOTION to Withdraw as Attorney filed by American Civil Liberties Union of Texas, River City Gender Alliance

		(Robertson, Rebecca) (Entered: 06/01/2017)
06/02/2017	98 (p.2894)	ORDER granting 97 (p.2890) Amended Motion to Withdraw as Counsel for Intervenors. Attorney Rebecca L Robertson terminated. (Ordered by Judge Reed C. O'Connor on 6/2/2017) (baa) (Entered: 06/02/2017)
06/02/2017		***Clerk's Notice of delivery: (see NEF for details) Docket No:98. Fri Jun 2 16:09:55 CDT 2017 (crt) (Entered: 06/02/2017)
06/08/2017	99 (p.2895)	NOTICE of Attorney Appearance by Kali Alanna Cohn on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Cohn, Kali) (Entered: 06/08/2017)
06/08/2017	100 (p.2896)	Received letter from USCA5 (17-10135): LETTER OF ADVISEMENT. Reason: sent to Distrct Court inquiring about the estimated timeframe for their ruling on the putative-intervenors' motion for permissive intervention. (skg) (Entered: 06/08/2017)
06/13/2017	101 (p.2898)	ORDER: The Court sets Putative Intervenors' Motion for Stay of Proceedings Pending Appeal (ECF No. 85 (p.2833)) and Defendants' Motion for Voluntary Remand and Stay (ECF No. 92 (p.2864)) for hearing on June 26, 2017 at 2:00 pm. Note, the hearing will convene in the United States District Judge's Second Floor Courtroom, 501 West 10th Street, Fort Worth, Texas. Counsel for Putative Intervenors, Defendants, Private Plaintiffs, and State Plaintiffs should appear and be prepared to discuss all issues related to any pending motions, including Putative Intervenors' Motion to Intervene (ECF No. 7 (p.144)). (Ordered by Judge Reed C. O'Connor on 6/13/2017) (skg) (Entered: 06/13/2017)
06/13/2017		***Clerk's Notice of delivery: (see NEF for details) Docket No:101. Tue Jun 13 15:03:43 CDT 2017 (crt) (Entered: 06/13/2017)
06/26/2017	102 (p.2899)	NOTICE of Attorney Appearance by Alexander Haas on behalf of Thomas E. Price, M.D., U.S. Department of Health and Human Services. (Filer confirms contact info in ECF is current.) (Haas, Alexander) (Entered: 06/26/2017)
06/26/2017	103	ELECTRONIC Minute Entry for proceedings held before Judge Reed C. O'Connor: Motion Hearing held on 6/26/2017 re 85 (p.2833) Motion to Stay filed by River City Gender Alliance, American Civil Liberties Union of Texas. Attorney Appearances: Plaintiff - Mark Rienzi, Luke Goodrich, Austin Nimocks; Defense - Alexander Haas, Adam Grogg, Briam Hauss, Joshua Block, Kali Cohn. (Court Reporter: Denver Roden) (No exhibits) Time in Court - 1:25. (chmb) (Entered: 06/26/2017)
06/30/2017	104 (p.2901)	JUDGMENT/MANDATE of USCA (17-10135) as to 72 (p.1854) Notice of Appeal filed by River City Gender Alliance, American Civil Liberties Union of Texas. IT IS ORDERED that appellees' motion to dismiss appellants' appeal from the denial of intervention as of right is GRANTED. IT IS FURTHER

		ORDERED that because appellants have not been granted intervention and are not parties to this case, we lack jurisdiction to adjudicate the merits of the protective appeal from the preliminary injunction order. Accordingly, appellants' motion for a stay of the preliminary injunction order pending appeal is DENIED without prejudice to appellants reasserting the motion if they become parties to the case. Issued as Mandate: 6/30/2017. See Order for further specifics. (Attachments: # 1 (p.42) USCA5 cover letter) (skg) (Entered: 06/30/2017)
07/10/2017	105 (p.2907)	ORDER: For the foregoing reasons, the Court finds that Defendants' Motion for Voluntary Remand and Stay (ECF No. 92 (p.2864)) should be and is hereby GRANTED in part. Accordingly, the case is hereby STAYED until further order of the Court and all pending motions are held in abeyance. Defendants are hereby ORDERED to file a status report on or before August 4, 2017, identifying any rulemaking proceedings initiated with respect to the challenged Rule. The Court expressly RETAINS jurisdiction over Plaintiffs' asserted claims and will maintain a supervisory role until the stay is lifted by requiring periodic status reports from the existing parties. Further, the Court CLARIFIES that the December 31, 2016 Preliminary Injunction Order (ECF No. 62 (p.1756)) is unaffected by this Order and remains in full force and effect throughout the duration of the stay until further order of the Court. (Ordered by Judge Reed C. O'Connor on 7/10/2017) (skg) (Entered: 07/10/2017)
07/10/2017		***Clerk's Notice of delivery: (see NEF for details) Docket No:105. Mon Jul 10 13:25:43 CDT 2017 (crt) (Entered: 07/10/2017)
08/04/2017	106 (p.2917)	STATUS REPORT filed by Thomas E. Price, M.D., U.S. Department of Health and Human Services. (Haas, Alexander) (Entered: 08/04/2017)
08/16/2017	107 (p.2920)	Notice of Substitution of Counsel by AUSA. (Grogg, Adam) (Entered: 08/16/2017)
08/16/2017	108 (p.2923)	ORDER: Pursuant to the Court's July 10, 2017 Order, Defendants filed a Status Report (ECF No. 106 (p.2917)) on August 4, 2017, indicating "a draft of a proposed rule is going through the clearance process within the Executive Branch." Status Report 1, ECF No. 106 (p.2917) . In order for the Court to continue monitoring any and all "rulemaking proceedings initiated with respect to the challenged Rule" the Court hereby ORDERS Defendants to file a Status Report with updates on the rulemaking proceedings on or before October 16, 2017, and every 60 days thereafter. (Ordered by Judge Reed C. O'Connor on 8/16/2017) (skg) (Entered: 08/16/2017)
08/16/2017		***Clerk's Notice of delivery: (see NEF for details) Docket No:108. Wed Aug 16 11:44:05 CDT 2017 (crt) (Entered: 08/16/2017)
10/16/2017	109 (p.2924)	

		STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Nestler, Emily) (Entered: 10/16/2017)
12/15/2017	110 (p.2927)	STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Nestler, Emily) (Entered: 12/15/2017)
02/13/2018	111 (p.2930)	STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Nestler, Emily) (Entered: 02/13/2018)
04/10/2018	112 (p.2933)	Notice of Substitution of Counsel by Rhett Martin, U.S. Department of Justice Civil Division (Martin, Rhett) Modified text on 4/10/2018 (skg). (Entered: 04/10/2018)
04/16/2018	113 (p.2936)	STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Martin, Rhett) (Entered: 04/16/2018)
06/25/2018	114 (p.2939)	STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Martin, Rhett) (Entered: 06/25/2018)
08/14/2018	115 (p.2943)	STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Martin, Rhett) (Entered: 08/14/2018)
09/19/2018	116 (p.2947)	NOTICE of Attorney Appearance by David Jonathan Hacker on behalf of Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin. (Filer confirms contact info in ECF is current.) (Hacker, David) (Entered: 09/19/2018)
09/19/2018	117 (p.2950)	Unopposed MOTION to Withdraw as Attorney *for State Plaintiffs (Austin R. Nimocks)* filed by State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin (Attachments: # 1 (p.42) Proposed Order) (Nimocks, Austin) (Entered: 09/19/2018)
09/20/2018	118 (p.2954)	ORDER of USCA (17-10135) as to 72 (p.1854) Notice of Appeal filed by River City Gender Alliance, American Civil Liberties Union of Texas. The court has granted the motion to withdraw David Nimocks as counsel in this case. Heather Hacker will now proceed as lead counsel for Texas and the other State Appellees in this case. (skg) (Entered: 09/20/2018)
10/15/2018	119 (p.2955)	STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Martin, Rhett) (Entered: 10/15/2018)
12/06/2018	120 (p.2959)	ORDER granting 117 (p.2950) Plaintiffs' Unopposed Motion to Withdraw Austin R. Nimocks as Counsel. Attorney Austin Nimocks terminated. Austin R. Nimocks is no longer counsel for Plaintiffs in this case. David J. Hacker remains as counsel of

		record for State Plaintiffs. (Ordered by Judge Reed C. O'Connor on 12/6/2018) (skg) (Entered: 12/06/2018)
12/06/2018		***Clerk's Notice of delivery: (see NEF for details) Docket No:120. Thu Dec 6 13:45:02 CST 2018 (crt) (Entered: 12/06/2018)
12/11/2018	121 (p.2960)	MOTION for Status Conference filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin with Brief/Memorandum in Support. (Goodrich, Luke) (Entered: 12/11/2018)
12/13/2018	122 (p.2967)	RESPONSE filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 121 (p.2960) MOTION for Status Conference (Block, Joshua) (Entered: 12/13/2018)
12/13/2018	123	***VACATED per Order 126 (p.2986) *** ORDER: The Court sets this matter for a status conference hearing on Wednesday, December 19, 2018, at 8:30 a.m. in the Second Floor Courtroom of the Eldon B. Mahon United States Courthouse, located at 501 W. 10th Street, Fort Worth, Texas. (Ordered by Judge Reed C. O'Connor on 12/13/2018) (skg) Modified on 12/19/2018 (plp). (Entered: 12/13/2018)
12/13/2018		***Clerk's Notice of delivery: (see NEF for details) Docket No:123. Thu Dec 13 13:38:48 CST 2018 (crt) (Entered: 12/13/2018)
12/14/2018	124 (p.2973)	STATUS REPORT filed by Thomas E. Price, U.S. Department of Health and Human Services. (Martin, Rhett) (Entered: 12/14/2018)
12/17/2018	125 (p.2977)	MOTION to lift stay, vacate status conference, and set briefing schedule filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin with Brief/Memorandum in Support. (Goodrich, Luke) (Entered: 12/17/2018)
12/17/2018	126 (p.2986)	ORDER granting 125 (p.2977) Motion to Lift Stay, Vacate Status Conference, and Set Briefing Schedule.(Ordered by Judge Reed C. O'Connor on 12/17/2018)(chmb)(bca) (Entered: 12/17/2018)
12/19/2018		***Clerk's Notice of delivery: (see NEF for details) Docket No:126. Wed Dec 19 09:17:26 CST 2018 (crt) (Entered: 12/19/2018)
01/31/2019	127 (p.2988)	NOTICE of Attorney Appearance by Michael Christopher Toth on behalf of Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State

		of Texas, State of Wisconsin. (Filer confirms contact info in ECF is current.) (Toth, Michael) (Entered: 01/31/2019)
02/01/2019	128 (p.2992)	MOTION to Withdraw as Attorney filed by American Civil Liberties Union of Texas, River City Gender Alliance (Hauss, Brian) (Entered: 02/01/2019)
02/01/2019	129 (p.2997)	MOTION to Intervene filed by American Civil Liberties Union of Texas, River City Gender Alliance (Attachments: # 1 (p.42) Proposed Order) (Cohn, Kali) (Entered: 02/01/2019)
02/01/2019	130 (p.3002)	Brief/Memorandum in Support filed by American Civil Liberties Union of Texas, River City Gender Alliance re 129 (p.2997) MOTION to Intervene (Cohn, Kali) (Entered: 02/01/2019)
02/01/2019	131 (p.3024)	Appendix in Support filed by American Civil Liberties Union of Texas, River City Gender Alliance re 129 (p.2997) MOTION to Intervene , 130 (p.3002) Brief/Memorandum in Support of Motion (Cohn, Kali) (Entered: 02/01/2019)
02/04/2019	132 (p.3032)	MOTION for Summary Judgment filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin (Attachments: # 1 (p.42) Proposed Order, # 2 (p.126) Proposed Final Judgment and Permanent Injunction) (Hacker, David) (Entered: 02/04/2019)
02/04/2019	133 (p.3042)	Brief/Memorandum in Support filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re 132 (p.3032) MOTION for Summary Judgment (Hacker, David) (Entered: 02/04/2019)
02/04/2019	134 (p.3097)	Appendix in Support filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re 132 (p.3032) MOTION for Summary Judgment (Hacker, David) (Entered: 02/04/2019)
02/04/2019	135 (p.3285)	MOTION for Summary Judgment filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC (Attachments: # 1 (p.42) Proposed Order) (Goodrich, Luke) (Entered: 02/04/2019)
02/04/2019	136 (p.3294)	Brief/Memorandum in Support filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re 135 (p.3285) MOTION for Summary Judgment (Goodrich, Luke) (Entered: 02/04/2019)
02/04/2019	137 (p.3358)	Appendix in Support filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re 136 (p.3294) Brief/Memorandum in Support of Motion, 135 (p.3285) MOTION for Summary Judgment

		(Goodrich, Luke) (Entered: 02/04/2019)
02/08/2019	138 (p.4292)	ORDER granting 128 (p.2992) Proposed Intervenor American Civil Liberties Union of Texas's ("ACLU") Motion to Withdraw Brian Hauss as Counsel. (Ordered by Judge Reed C. O'Connor on 2/8/2019) (skg) (Entered: 02/08/2019)
02/08/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:138. Fri Feb 8 16:32:56 CST 2019 (crt) (Entered: 02/08/2019)
02/25/2019	139 (p.4293)	OBJECTION filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 131 (p.3024) Appendix in Support (Hacker, David) (Entered: 02/25/2019)
02/25/2019	140 (p.4304)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas, State of Wisconsin re: 129 (p.2997) MOTION to Intervene (Hacker, David) (Entered: 02/25/2019)
02/25/2019	141 (p.4322)	RESPONSE filed by Thomas E. Price, U.S. Department of Health and Human Services re: 129 (p.2997) MOTION to Intervene (Martin, Rhett) (Entered: 02/25/2019)
03/08/2019	142 (p.4324)	NOTICE of Attorney Appearance by Lindsey Breton Kaley on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Kaley, Lindsey) (Entered: 03/08/2019)
03/11/2019	143 (p.4326)	RESPONSE filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 139 (p.4293) Response/Objection, (Cohn, Kali) (Entered: 03/11/2019)
03/11/2019	144 (p.4329)	REPLY filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 141 (p.4322) Response/Objection, 140 (p.4304) Response/Objection, (Cohn, Kali) (Entered: 03/11/2019)
03/15/2019	145 (p.4338)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $25; Receipt number 0539-9850529) filed by State of Wisconsin Attorney Steven Carl Kilpatrick added to party State of Wisconsin(pty:pla) (Kilpatrick, Steven) (Entered: 03/15/2019)
03/18/2019	146	ELECTRONIC ORDER granting 145 (p.4338) Application for Admission Pro Hac Vice of Steven C. Kilpatrick. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)).(Ordered by Judge Reed C. O'Connor on 3/18/2019) (chmb) (bca) (Entered: 03/18/2019)
03/21/2019	147 (p.4342)	

		MOTION to Dismiss *Plaintiff State of Wisconsin* filed by State of Wisconsin (Kilpatrick, Steven) (Entered: 03/21/2019)
03/28/2019	148 (p.4345)	Unopposed MOTION to Dismiss *Plaintiff State of Wisconsin* filed by State of Wisconsin (Attachments: # 1 (p.42) Proposed Order) (Kilpatrick, Steven) (Entered: 03/28/2019)
03/29/2019	149 (p.4349)	ORDER of USCA (17-10135) as to 72 (p.1854) Notice of Appeal filed by River City Gender Alliance, American Civil Liberties Union of Texas. IT IS ORDERED that the unopposed motion to dismiss the appeal as to Appellee State of Wisconsin is GRANTED. (Attachments: # 1 (p.42) USCA5 cover letter) (skg) (Entered: 03/29/2019)
04/02/2019	150 (p.4353)	ORDER: It is therefore ORDERED, ADJUDGED, and DECREED that all claims brought by Plaintiff State of Wisconsin against Defendants in this case are hereby DISMISSED with prejudice. (Ordered by Judge Reed C. O'Connor on 4/2/2019) (skg) (Entered: 04/02/2019)
04/02/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:150. Tue Apr 2 13:39:29 CDT 2019 (crt) (Entered: 04/02/2019)
04/04/2019	151 (p.4354)	MOTION to Extend Time (), MOTION for Extension of Time to File Response/Reply to 135 (p.3285) MOTION for Summary Judgment , 132 (p.3032) MOTION for Summary Judgment filed by Thomas E. Price, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Martin, Rhett) (Entered: 04/04/2019)
04/04/2019	152 (p.4358)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas re: 151 (p.4354) MOTION to Extend TimeMOTION for Extension of Time to File Response/Reply to 135 (p.3285) MOTION for Summary Judgment , 132 (p.3032) MOTION for Summary Judgment (Goodrich, Luke) (Entered: 04/04/2019)
04/04/2019	153 (p.4362)	ORDER: Before the Court is Defendants' Motion for Extension of Time to Respond (ECF No. 151), filed April 4, 2019. Plaintiffs oppose the extension. Accordingly, the Court ORDERS Plaintiffs to respond to the motion, explaining their opposition, no later than Monday, April 8, 2019. The Court further ORDERS Defendants to reply no later than Wednesday, April 10, 2019. All other deadlines remain in place. (Ordered by Judge Reed C. O'Connor on 4/4/2019) (trt) (Entered: 04/04/2019)
04/04/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:153. Thu Apr 4 16:42:59 CDT 2019 (crt) (Entered: 04/04/2019)
04/05/2019	154 (p.4363)	RESPONSE filed by Thomas E. Price, U.S. Department of Health and Human Services re: 135 (p.3285) MOTION for Summary

		Judgment , 132 (p.3032) MOTION for Summary Judgment (Martin, Rhett) (Entered: 04/05/2019)
04/05/2019	155 (p.4381)	RESPONSE filed by American Civil Liberties Union of Texas, River City Gender Alliance re: 135 (p.3285) MOTION for Summary Judgment , 132 (p.3032) MOTION for Summary Judgment (Block, Joshua) (Entered: 04/05/2019)
04/05/2019	156 (p.4439)	Appendix in Support filed by American Civil Liberties Union of Texas, River City Gender Alliance re 155 (p.4381) Response/Objection (Block, Joshua) (Entered: 04/05/2019)
05/03/2019	157 (p.4449)	REPLY filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas re: 132 (p.3032) MOTION for Summary Judgment (Hacker, David) (Entered: 05/03/2019)
05/03/2019	158 (p.4484)	REPLY filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re: 135 (p.3285) MOTION for Summary Judgment (Goodrich, Luke) (Entered: 05/03/2019)
05/31/2019	159 (p.4519)	NOTICE of *Proposed Rulemaking* filed by Thomas E. Price, U.S. Department of Health and Human Services (Attachments: # 1 (p.42) Exhibit(s)) (Martin, Rhett) (Entered: 05/31/2019)
06/06/2019	160 (p.4726)	RESPONSE filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas re: 159 (p.4519) Notice (Other) (Goodrich, Luke) (Entered: 06/06/2019)
06/07/2019	161 (p.4735)	ORDER: The Court hereby ORDERS Defendants to submit a reply to the response 160 (p.4726) on or before June 12, 2019. (Ordered by Judge Reed C. O'Connor on 6/7/2019) (skg) (Entered: 06/07/2019)
06/07/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:161. Fri Jun 7 13:23:28 CDT 2019 (crt) (Entered: 06/07/2019)
06/10/2019	162 (p.4736)	NOTICE of Attorney Appearance by Bradley Philip Humphreys on behalf of Thomas E. Price, U.S. Department of Health and Human Services. (Filer confirms contact info in ECF is current.) (Humphreys, Bradley) (Entered: 06/10/2019)
06/12/2019	163 (p.4738)	REPLY filed by Thomas E. Price, U.S. Department of Health and Human Services re: 161 (p.4735) Order Setting Deadline/Hearing (Humphreys, Bradley) (Entered: 06/12/2019)
08/07/2019	164 (p.4744)	ORDER: The Court hereby ORDERS Plaintiffs and Defendants to submit briefing on this issue on or before August 12, 2019. Putative Intervenors are ORDERED to respond on or before August 14, 2019. (Ordered by Judge Reed C. O'Connor on

		8/7/2019) (skg) (Entered: 08/07/2019)
08/07/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:164. Wed Aug 7 13:44:14 CDT 2019 (crt) (Entered: 08/07/2019)
08/12/2019	165 (p.4746)	Brief/Memorandum in Support filed by Christian Medical and Dental Society, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas re 164 (p.4744) Order Setting Deadline/Hearing, (Goodrich, Luke) (Entered: 08/12/2019)
08/12/2019	166 (p.4752)	RESPONSE filed by Thomas E. Price, U.S. Department of Health and Human Services re: 164 (p.4744) Order Setting Deadline/Hearing, (Humphreys, Bradley) (Entered: 08/12/2019)
08/14/2019	167 (p.4755)	Brief/Memorandum in Support filed by American Civil Liberties Union of Texas, River City Gender Alliance re 164 (p.4744) Order Setting Deadline/Hearing, (Kaley, Lindsey) (Entered: 08/14/2019)
09/10/2019	168 (p.4761)	ORDER: The Court sets this matter for a hearing on Monday, September 16, 2019, at 10:00 a.m. in the Second Floor Courtroom of the Eldon B. Mahon United States Courthouse, located at 501 W. 10th Street, Fort Worth, Texas. (Ordered by Judge Reed C. O'Connor on 9/10/2019) (skg) (Entered: 09/10/2019)
09/10/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:168. Tue Sep 10 13:42:05 CDT 2019 (crt) (Entered: 09/10/2019)
09/11/2019	169 (p.4762)	NOTICE of Attorney Appearance by Brian Klosterboer on behalf of American Civil Liberties Union of Texas. (Filer confirms contact info in ECF is current.) (Klosterboer, Brian) (Entered: 09/11/2019)
09/12/2019	170 (p.4764)	NOTICE of Attorney Appearance by Andre Segura on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Segura, Andre) (Entered: 09/12/2019)
09/13/2019	171 (p.4766)	NOTICE of Attorney Appearance by Joseph C Davis on behalf of Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC. (Filer confirms contact info in ECF is current.) (Davis, Joseph) (Entered: 09/13/2019)
09/13/2019	172 (p.4768)	Unopposed MOTION to Substitute Attorney, added attorney Michael Christopher Toth,William Thomas Thompson for State of Nebraska,William Thomas Thompson for Commonwealth of Kentucky, by and through Governor Matthew G. Bevin,William Thomas Thompson for State of Mississippi,William Thomas Thompson for State of Kansas,William Thomas Thompson for State of Texas,William Thomas Thompson for State of Arizona,William Thomas Thompson for State of Louisiana.

		Motion filed by State of Nebraska, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Mississippi, State of Kansas, State of Texas, State of Arizona, State of Louisiana (Attachments: # 1 (p.42) Proposed Order) (Toth, Michael) (Entered: 09/13/2019)
09/13/2019	173	ELECTRONIC Minute Entry for proceedings held before Judge Reed C. O'Connor: Motion Hearing held on 9/16/2019. (Court Reporter: Denver Roden) (No exhibits) Attorneys: Bradley Humphries; David Hacker; Joshua Brook; Joseph Davis. Time in Court - :40. (chmb) (Entered: 09/17/2019)
09/17/2019	174 (p.4774)	ORDER granting 172 (p.4768) Motion to Substitute Attorney. Accordingly, the Court SUBSTITUTES William T. Thompson of the Office of the Attorney General of Texas as co-counsel for State Plaintiffs. It is FURTHER ORDERED that Michael Toth is permitted to withdraw and is hereby removed as counsel for State Plaintiffs. (Ordered by Judge Reed C. O'Connor on 9/17/2019) (skg) (Entered: 09/17/2019)
09/17/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:174. Tue Sep 17 16:35:08 CDT 2019 (crt) (Entered: 09/17/2019)
10/15/2019	175 (p.4775)	MEMORANDUM OPINION AND ORDER: For the foregoing reasons, the Court finds that Putative Intervenors' Motion to Intervene (ECF No. 129 (p.2997)) should be and is hereby GRANTED. The Court also finds that Plaintiffs' Motions for Summary Judgment and Permanent Injunction (ECF Nos. 132 (p.3032) , 135 (p.3285)) should be and are hereby GRANTED in part. The Court SEVERS Plaintiffs' APA and RFRA claims from their Title VII, Spending Clause, First Amendment, Tenth Amendment, and Eleventh Amendment claims. The Court ADOPTS its prior reasoning from the preliminary injunction (ECF No. 62 (p.1756)) and now HOLDS that the Rule violates the APA and RFRA. Accordingly, the Court VACATES and REMANDS the Rule for further consideration. (Ordered by Judge Reed C. O'Connor on 10/15/2019) (skg) (Entered: 10/15/2019)
10/15/2019	176 (p.4800)	FINAL JUDGMENT: The Court SEVERS Plaintiffs' APA and RFRA claims from their Title VII, Spending Clause, First Amendment, Tenth Amendment, and Eleventh Amendment claims. The Court ADOPTS the reasoning from its December 31, 2016 Order granting Plaintiffs' request for a preliminary injunction (ECF No. 62 (p.1756)) and now HOLDS that Nondiscrimination in Health Programs & Activities ("the Rule"), 81 Fed. Reg. 31376 (May 18, 2016), codified at 45 C.F.R. § 92, violates the APA and RFRA and enters this Final Judgment on those claims. Accordingly, the Court VACATES and REMANDS the Rule for further consideration. (Ordered by Judge Reed C. O'Connor on 10/15/2019) (skg) (Entered: 10/15/2019)
10/15/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:175, 176. Tue Oct 15 09:37:54 CDT 2019 (crt) (Entered: 10/15/2019)

10/15/2019	177 (p.4801)	ORDER: The Court now STAYS the case involving Plaintiffs' Title VII, Spending Clause, First Amendment, Tenth Amendment, and Eleventh Amendment pending notice by the parties that these claims should go forward. The case shall be administratively closed until further order from the Court. (Ordered by Judge Reed C. O'Connor on 10/15/2019) (skg) (Entered: 10/15/2019)
10/15/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:177. Tue Oct 15 12:10:43 CDT 2019 (crt) (Entered: 10/15/2019)
11/12/2019	178 (p.4802)	MOTION to Amend/Correct 176 (p.4800) Judgment,, filed by Thomas E. Price, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Attachments: # 1 (p.42) Proposed Order) (Humphreys, Bradley) (Entered: 11/12/2019)
11/13/2019	179 (p.4808)	ORDER: Accordingly, before the Court rules on the motion, any party opposed to the 178 (p.4802) Motion to Modify Final Judgment shall respond on or before November 20, 2019, explaining its opposition. (Ordered by Judge Reed C. O'Connor on 11/13/2019) (skg) (Entered: 11/13/2019)
11/13/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:179. Wed Nov 13 11:25:31 CST 2019 (crt) (Entered: 11/13/2019)
11/20/2019	180 (p.4809)	RESPONSE filed by Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Arizona, State of Kansas, State of Louisiana, State of Mississippi, State of Nebraska, State of Texas re: 178 (p.4802) MOTION to Amend/Correct 176 (p.4800) Judgment,, (Thompson, William) (Entered: 11/20/2019)
11/20/2019	181 (p.4812)	RESPONSE filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re: 178 (p.4802) MOTION to Amend/Correct 176 (p.4800) Judgment,, (Goodrich, Luke) (Entered: 11/20/2019)
11/21/2019	182 (p.4814)	ORDER: Having considered the Defendants' motion and Plaintiffs' responses, the GRANTS in part the motion and MODIFIES the Final Judgment (ECF No. 176 (p.4800)), filed October 15, 2019, to confirm that, consistent with the Court's discussion in the accompanying Memorandum Opinion and Order (ECF No. 175 (p.4775)), the Court vacates only the portions of the Rule that Plaintiffs challenged in this litigation. Specifically, the Court VACATES the Rule insofar as the Rule defines "On the basis of sex" to include gender identity and termination of pregnancy, and the Court REMANDS for further consideration. The remainder of 45 C.F.R. § 92 remains in effect. (Ordered by Judge Reed C. O'Connor on 11/21/2019) (skg) (Entered: 11/21/2019)
11/21/2019		***Clerk's Notice of delivery: (see NEF for details) Docket No:182. Thu Nov 21 14:25:28 CST 2019 (crt) (Entered: 11/21/2019)

12/06/2019	183 (p.4816)	JUDGMENT/MANDATE of USCA as to 72 (p.1854) Notice of Appeal filed by River City Gender Alliance, American Civil Liberties Union of Texas. Under FED. R. APP. P. 42(b), the appeal is dismissed as of December 06, 2019, pursuant to the joint motion of the parties. Issued as Mandate: 12/6/2019. (Attachments: # 1 (p.42) USCA5 cover letter) (skg) (Entered: 12/06/2019)
01/17/2020	184 (p.4819)	MOTION Set Deadline for Filing Petition for Fees and Expenses filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC with Brief/Memorandum in Support. (Attachments: # 1 (p.42) Proposed Order) (Goodrich, Luke) (Entered: 01/17/2020)
01/21/2020	185 (p.4833)	NOTICE OF APPEAL as to 176 (p.4800) Judgment,, 175 (p.4775) Memorandum Opinion and Order,,,, Terminate Motions,,, 182 (p.4814) Order on Motion to Amend/Correct,, to the Fifth Circuit by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC. Filing fee $505, receipt number 0539-10560516. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Goodrich, Luke) (Entered: 01/21/2020)
01/30/2020		USCA Case Number 20-10093 in USCA5 for 185 (p.4833) Notice of Appeal filed by Specialty Physicians of Illinois, LLC, Franciscan Alliance, Inc., Christian Medical and Dental Society. (skg) (Entered: 01/30/2020)
02/06/2020	186 (p.5099)	Notice of Filing of Official Electronic Transcript of Preliminary Injunction Proceedings held on 12-20-2016 before Judge Reed C. O'Connor. Court Reporter/Transcriber Denver B. Roden, RMR, RPR, Telephone number 214-753-2298. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If the transcript contains personal identifiers that must be redacted under MO 61, Fed.R.Civ.P. 5.2 or Fed.R.Crim.P. 49.1, or if the transcript contains the name of a minor child victim or a minor child witness that must be redacted under 18 U.S.C. § 3509, file a Redaction Request - Transcript within 21 days. If no action is taken, the entire transcript will be made available through PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. (109 pages) Redaction Request due 2/27/2020. Redacted Transcript Deadline set for

		3/9/2020. Release of Transcript Restriction set for 5/6/2020. (dbr) (Entered: 02/06/2020)
02/07/2020	187 (p.4836)	RESPONSE filed by Thomas E. Price, River City Gender Alliance, U.S. Department of Health and Human Services re: 184 (p.4819) MOTION Set Deadline for Filing Petition for Fees and Expenses (Attachments: # 1 (p.42) Exhibit(s), # 2 (p.126) Exhibit(s), # 3 (p.128) Exhibit(s)) (Humphreys, Bradley) (Entered: 02/07/2020)
02/10/2020	188 (p.4858)	Transcript Order Form: transcript not requested Reminder to appellant: this document must also be filed with the appeals court. (Davis, Joseph) (Entered: 02/10/2020)
02/18/2020	189 (p.4859)	MOTION to Withdraw as Attorney filed by Amy Anne Miller. (Attachments: # 1 (p.42) Proposed Order) (skg) (Entered: 02/18/2020)
02/20/2020	190 (p.4865)	ORDER granting 189 (p.4859) Motion to Withdraw as Attorney. Attorney Amy Anne Miller terminated. (Ordered by Judge Reed C. O'Connor on 2/20/2020) (skg) (Entered: 02/20/2020)
02/21/2020	191 (p.4866)	REPLY filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re: 184 (p.4819) MOTION Set Deadline for Filing Petition for Fees and Expenses (Goodrich, Luke) (Entered: 02/21/2020)
02/26/2020		Record on Appeal (related to 185 (p.4833) appeal): Record consisting of: 1 ECF electronic record on appeal (eROA) is certified, 186 Volume(s) electronic transcript. **PLEASE NOTE THE FOLLOWING:** Licensed attorneys must have filed an appearance in the USCA5 case and be registered for electronic filing in the USCA5 to access the paginated eROA in the USCA5 ECF system. (Take these steps immediately if you have not already done so. Once you have filed the notice of appearance and/or USCA5 ECF registration, it may take up to 3 business days for the circuit to notify the district clerk that we may grant you access to the eROA in the USCA5 ECF system.) To access the paginated record, log in to the USCA5 ECF system, and under the Utilities menu, select Electronic Record on Appeal. Pro se litigants may request a copy of the record by contacting the appeals deputy in advance to arrange delivery. EROA Access granted to: Attorney: Davis, Joseph Charles - Franciscan Alliance, Incorporated, Christian Medical and Dental Society, Specialty Physicians of Illinois, L.L.C. (Granted Access to 15, of 15 Volumes); Attorney: Goodrich, Luke William - Franciscan Alliance, Incorporated, Christian Medical and Dental Society, Specialty Physicians of Illinois, L.L.C. (Granted Access to 15, of 15 Volumes); Attorney: Rienzi, Mark - Franciscan Alliance, Incorporated, Christian Medical and Dental Society, Specialty Physicians of Illinois, L.L.C. (Granted Access to 15, of 15 Volumes); Attorney: Windham, Lori Halstead - Franciscan Alliance, Incorporated, Christian Medical and Dental Society, Specialty Physicians of Illinois, L.L.C. (Granted Access to 15, of 15 Volumes). (skg) (Entered: 02/26/2020)

04/21/2020	192 (p.4876)	NOTICE of Attorney Appearance by Rebecca Scout Richters on behalf of American Civil Liberties Union of Texas, River City Gender Alliance. (Filer confirms contact info in ECF is current.) (Richters, Rebecca) (Main Document 192 replaced on 4/21/2020) (cea). (Entered: 04/21/2020)
04/21/2020	193 (p.4877)	ORDER granting 184 (p.4819) Plaintiffs Franciscan Alliance, Inc.'s, Christian Medical and Dental Society's, Specialty Physicians of Illinois, LLC's Motion to Set Deadline for Filing Petition for Fees and Expenses. The Court further ORDERS the Private Plaintiffs to file a petition for attorneys' fees and expenses by 30 days after the final resolution of all claims. (Ordered by Judge Reed C. O'Connor on 4/21/2020) (skg) (Entered: 04/21/2020)
04/15/2021	194 (p.4888)	ORDER...On April 15, 2021, the Fifth Circuit remanded this case for further proceedings. Accordingly, the Court DIRECTS the parties to file a joint status report on or before April 22, 2021, detailing how they believe the case should proceed. (Ordered by Judge Reed C. O'Connor on 4/15/2021) (wxc) (Entered: 04/15/2021)
04/22/2021	195 (p.4889)	Received letter from United States Court of Appeals Fifth Circuit 20-10093. Enclosed is a copy of the judgment issued as the mandate and a copy of the courts opinion. (tle) (Entered: 04/22/2021)
04/22/2021	196 (p.4891)	JUDGMENT/MANDATE of USCA 20-10093 as to 185 (p.4833) Notice of Appeal, filed by Specialty Physicians of Illinois, LLC, Franciscan Alliance, Inc., Christian Medical and Dental Society. IT IS ORDERED and ADJUDGED that the case is REMANDED for further proceedings... IT IS FURTHER ORDERED that each party bear its own costs on appeal. Issued as Mandate: 4/22/2021. (tle) (Entered: 04/22/2021)
04/22/2021	197 (p.4893)	Opinion of USCA 20-10093 in accordance with USCA judgment re 185 (p.4833) Notice of Appeal, filed by Specialty Physicians of Illinois, LLC, Franciscan Alliance, Inc., Christian Medical and Dental Society. We REMAND for further proceedings. If a party to this case later files a notice of appeal, the appeal shall return to this panel. (tle) (Entered: 04/22/2021)
04/22/2021		Case Reopened per USCA5 196 (p.4891) Judgment, 197 (p.4893) Opinion Mandate. (tle) (Entered: 04/22/2021)
04/22/2021	198 (p.4897)	Joint STATUS REPORT *Regarding Proceedings on Remand* filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC. (Davis, Joseph) (Entered: 04/22/2021)
04/23/2021	199 (p.4902)	ORDER... Private Plaintiffs intend to continue to seek judgment as a matter of law, and the parties suggest supplemental briefing on the specific issues highlighted in the Fifth Circuits remand order. See ECF No. 198. Accordingly, the Court ORDERS the following supplemental briefing schedule: See order for specifics.

		(Ordered by Judge Reed C. O'Connor on 4/23/2021) (wxc) (Entered: 04/23/2021)
05/14/2021	200 (p.4903)	Supplemental Document by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC *: Plaintiffs' Supplemental Brief on Remand*. (Attachments: # 1 (p.42) Proposed Order Proposed Order Granting Permanent Injunction, # 2 (p.126) Proposed Amendment Proposed Amended Final Judgment) (Goodrich, Luke) (Entered: 05/14/2021)
06/04/2021	201 (p.4941)	Intervenors' Memorandum of Law in Opposition to Plaintiffs' Supplemental Brief on Remand, by American Civil Liberties Union of Texas, River City Gender Alliance. (Kaley, Lindsey) Modified text on 6/7/2021 (dsr). (Entered: 06/04/2021)
06/04/2021	202 (p.4970)	Defendants' Supplemental Brief on Remand by Thomas E. Price, U.S. Department of Health and Human Services . (Humphreys, Bradley) Expanded text on 6/7/2021 (dsr). (Entered: 06/04/2021)
06/18/2021	203 (p.4998)	REPLY filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re: 200 (p.4903) Supplemental Document, (Goodrich, Luke) (Entered: 06/18/2021)
06/29/2021	204	The Clerk's Office for the Wichita Falls division has relocated to Fort Worth. Any future mailings or paper filings should be directed to the Clerk of Court, Wichita Falls Division, 501 W. 10th Street, Room 310, Fort Worth, Texas 76102. Wichita Falls will continue to be a designated place for holding court in the Northern District of Texas, despite not having full-time Clerk's Office staff onsite at the courthouse. (cea) (Entered: 06/29/2021)
08/09/2021	205 (p.5025)	Memorandum Opinion and Order... Before the Court are Plaintiffs Supplemental Brief on Remand (ECF No. 200 (p.4903)), filed May 14, 2021; Intervenors Memorandum of Law in Opposition to Plaintiffs Supplemental Brief on Remand (ECF No. 201 (p.4941)), filed June 4, 2021; Defendants Supplemental Brief on Remand (ECF No. 202 (p.4970)), filed June 4, 2021; and Plaintiffs Supplemental Reply Brief on Remand (ECF No. 203 (p.4998)), filed June 18, 2021. Having considered the motion, briefing, and applicable law, the Court GRANTS the motion. The Court shall retain jurisdiction as necessary to enforce this order. Plaintiffs shall file any petition for attorneys fees and expenses by thirty (30) days after the final resolution of all claims, including any appeals. (Ordered by Judge Reed C. O'Connor on 8/9/2021) (wxc) (Entered: 08/09/2021)
08/16/2021	206 (p.5048)	Memorandum Opinion and Order...Before the Court are Plaintiffs Supplemental Brief on Remand (ECF No. 200 (p.4903)), filed May 14, 2021; Intervenors Memorandum of Law in Opposition to Plaintiffs Supplemental Brief on Remand (ECF No. 201 (p.4941)), filed June 4, 2021; Defendants Supplemental Brief on Remand (ECF No. 202 (p.4970)), filed June 4, 2021; and Plaintiffs Supplemental Reply Brief on Remand (ECF No. 203 (p.4998)),

		filed June 18, 2021. Having considered the motion, briefing, and applicable law, the Court GRANTS the motion. (Ordered by Judge Reed C. O'Connor on 8/16/2021) (wxc) (Entered: 08/16/2021)
08/16/2021	207 (p.5071)	ORDER...The Court is entering an Amended Memorandum to correct grammatical and typographical errors. No substantive changes have been made from the original order. (Ordered by Judge Reed C. O'Connor on 8/16/2021) (wxc) (Entered: 08/16/2021)
09/13/2021	208 (p.5072)	MOTION to Amend/Correct 206 (p.5048) Memorandum Opinion and Order, *Pursuant to Rule 60(b)* filed by Thomas E. Price, U.S. Department of Health and Human Services with Brief/Memorandum in Support. (Attachments: # 1 (p.42) Proposed Order) (Humphreys, Bradley) (Entered: 09/13/2021)
09/24/2021	209 (p.5078)	RESPONSE filed by Christian Medical and Dental Society, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC re: 208 (p.5072) MOTION to Amend/Correct 206 (p.5048) Memorandum Opinion and Order,, *Pursuant to Rule 60(b)* (Goodrich, Luke) (Entered: 09/24/2021)
09/28/2021	210 (p.5081)	REPLY filed by Thomas E. Price, U.S. Department of Health and Human Services re: 208 (p.5072) MOTION to Amend/Correct, 206 (p.5048) Memorandum Opinion and Order, *Pursuant to Rule 60(b).* (Humphreys, Bradley) (Entered: 09/28/2021)
10/01/2021	211 (p.5084)	ORDER: The 208 (p.5072) Motion being unopposed, the Court finds it should be GRANTED. The following language is hereby added to the Conclusion of the Court's August 16, 2021 Memorandum Opinion and Order (ECF No. 206 (p.5048)). (See order for further specifics) (Ordered by Judge Reed C. O'Connor on 10/1/2021) (pef) (Entered: 10/04/2021)
11/21/2021	212 (p.5086)	NOTICE OF INTERLOCUTORY APPEAL as to 206 (p.5048) Memorandum Opinion and Order, 211 (p.5084) Order on Motion to Amend/Correct, to the Fifth Circuit by Thomas E. Price, U.S. Department of Health and Human Services. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Humphreys, Bradley) (Entered: 11/21/2021)
11/30/2021	213 (p.5088)	NOTICE OF INTERLOCUTORY APPEAL as to 206 (p.5048) Memorandum Opinion and Order, 211 (p.5084) Order on Motion

		to Amend/Correct, to the Fifth Circuit by American Civil Liberties Union of Texas, River City Gender Alliance. Filing fee $505, receipt number 0539-12417498. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Kaley, Lindsey) (Entered: 11/30/2021)
12/06/2021	214 (p.5091)	USCA Case Number 21-11174 in United States District Court for 212 (p.5086) Notice of Appeal, filed by Thomas E. Price, U.S. Department of Health and Human Services. (tle) (Entered: 12/06/2021)
12/06/2021	215 (p.5095)	USCA Case Number 21-11174 in United States District Court for 213 (p.5088) Notice of Appeal, filed by River City Gender Alliance, American Civil Liberties Union of Texas. (tle) (Entered: 12/06/2021)

2. Defendants' Notice of Appeal

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

FRANCISCAN ALLIANCE, INC., *et al.* *Plaintiffs*, v. XAVIER BECERRA, Secretary of Health and Human Services, *et al.*, *Defendants*.	Case No. 7:16-cv-00108-O

NOTICE OF APPEAL

Defendants in the above-captioned case, Xavier Becerra, Secretary of the United States Department of Health and Human Services, and the United States Department of Health and Human Services, hereby give notice that they appeal to the United States Court of Appeals for the Fifth Circuit from all aspects of this Court's Memorandum Opinion and Order, ECF No. 206, as modified by the Court's Order granting Defendants' Rule 60(b) Motion to Modify Order, ECF No. 211, and all prior orders and decisions that merge into those orders.

Dated: November 21, 2021

Respectfully Submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

MICHELLE BENNETT
Assistant Branch Director, Federal Programs Branch

/s/ Bradley P. Humphreys
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Counsel for Defendants

3. Intervenors' Notice of Appeal

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

FRANCISCAN ALLIANCE, INC., *et al.*, *Plaintiffs,* v. XAVIER BECERRA, Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants,* - and - AMERICAN CIVIL LIBERTIES UNION OF TEXAS; and RIVER CITY GENDER ALLIANCE, *Intervenors-Defendants.*	Civ. Action No. 7:16-cv-00108-O

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Proposed Intervenors River City Gender Alliance and the American Civil Liberties Union of Texas hereby appeal to the United States Court of Appeals for the Fifth Circuit from this Court's Memorandum Opinion and Order, ECF No. 206, as modified by the Court's Order granting Defendants' Rule 60(b) Motion to Modify Order, ECF No. 211, and all prior orders and decisions that merge into those orders.

Dated: November 30, 2021

Respectfully submitted,

/s/ *Lindsey Kaley*

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Counsel for Intervenors-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2021, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. I hereby certify that I have served counsel of record for all parties through the Court's ECF system.

By: /s/ *Lindsey Kaley*
LINDSEY KALEY

4. Memorandum Opinion & Order Granting Permanent Injunction

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

FRANCISCAN ALLIANCE, INC. et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00108-O**
	§	
XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendants.	§	
	§	
v.	§	
	§	
AMERICAN CIVIL LIBERTIES UNION OF TEXAS et al.,	§	
	§	
Intervenors.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs' Supplemental Brief on Remand (ECF No. 200), filed May 14, 2021; Intervenors' Memorandum of Law in Opposition to Plaintiffs' Supplemental Brief on Remand (ECF No. 201), filed June 4, 2021; Defendants' Supplemental Brief on Remand (ECF No. 202), filed June 4, 2021; and Plaintiffs' Supplemental Reply Brief on Remand (ECF No. 203), filed June 18, 2021. Having considered the motion, briefing, and applicable law, the Court **GRANTS** the motion.

I. BACKGROUND

Five years ago as part of the implementation of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), the Department of Health & Human Services ("HHS") promulgated a rule

requiring medical providers to perform and insure abortions and gender-transition procedures[1] or face penalties for unlawful discrimination on the basis of "termination of pregnancy" and "gender identity," respectively. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,467 (May 18, 2016) (formerly codified as 45 C.F.R. § 92.4 (2016)) (the "2016 Rule"); *see also* 20 U.S.C. § 1681 ("Title IX"). Already facing legal challenges,[2] a Catholic hospital association and a Christian healthcare professional association ("Christian Plaintiffs") objected to performing abortions and gender-transition procedures, which they view as harmful. Along with several states ("State Plaintiffs"), Christian Plaintiffs sued HHS to enjoin the enforcement of Section 1557 and the 2016 Rule in such a way that would violate their religious beliefs. Compl., ECF No. 1.

After a hearing, the Court concluded that it had jurisdiction over the dispute, that the 2016 Rule violated the APA by contradicting existing law and exceeding statutory authority, and that the 2016 Rule likely violated RFRA as applied to the Christian Plaintiffs. *See* Order, ECF No. 62. Accordingly, the Court granted a preliminary injunction, enjoining "Defendants from enforcing the [2016] Rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy." Order 46, ECF No. 62. In light of an HHS notice of upcoming rulemaking proceedings addressing the 2016 Rule, the Court granted a stay of the case, retained jurisdiction, and maintained the full effect of its preliminary injunction in the interim. Order 10, ECF No. 108.

For sixteen months, the case remained stayed until the parties jointly requested the case be re-opened, which the Court allowed. *See* ECF Nos. 125, 126. In the former half of 2019, the parties

[1] As used in this order, the term "gender-transition procedures" includes surgery, counseling, provision of pharmaceuticals, or other treatments sought in furtherance of a gender transition.

[2] Beginning in 2015, transgender individuals began suing hospitals and other providers for declining to perform or cover transition procedures. *See, e.g.*, *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015).

fully briefed the Intervenors' Motion to Intervene (ECF No. 129) and both State Plaintiffs' and Christian Plaintiffs' Motions for Partial Summary Judgment and Permanent Injunction (ECF Nos. 132, 135), addressing their APA and RFRA claims only. The Court granted the motion to intervene; granted in part Plaintiffs' motions for summary judgment, finding the 2016 Rule violative of both the APA and RFRA; denied in part the motion, declining to grant a permanent injunction nationwide; and issued a final judgment to that effect. Mem. Op. 25, ECF No. 175; *see also* Final Judgment, ECF No. 176. Soon thereafter, the Court modified the Final Judgment to clarify that it vacated the 2016 Rule insofar as it defined "on the basis of sex" to include gender identity and termination of pregnancy. *See* Order, ECF No. 182. The Christian Plaintiffs appealed the denial of injunctive relief. Not. of Appeal, ECF No. 185.

While pending appeal, the landscape drastically shifted. HHS repealed the 2016 Rule and finalized a new rule in 2020. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020) (the "2020 Rule"). The Supreme Court interpreted Title VII's prohibition of "sex discrimination" to include gender identity and sexual orientation in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). Two district courts extended *Bostock*'s reasoning to Title IX as applied through Section 1557, entering injunctions modifying the 2020 Rule and purportedly restoring certain provisions of the 2016 Rule. *See Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020) ("As a result [of the district court's injunction], the definitions of 'on the basis of sex,' 'gender identity,' and 'sex stereotyping' currently set forth in [the 2016 Rule] will remain in effect."); *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 64 (D.D.C. 2020) ("HHS will be preliminarily enjoined from enforcing the repeal of the 2016 Rule's definition of discrimination '[o]n the basis of sex' insofar as it includes 'discrimination on the basis of . . . sex stereotyping.'"). President Biden issued an executive order

declaring that his administration would apply *Bostock*'s interpretation of Title VII to other statutes prohibiting sex discrimination. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021). The Department of Justice issued guidance instructing federal agencies to apply *Bostock*'s definition of sex discrimination to Title IX. Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, C.R. Div., Memorandum re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021). HHS began considering a new rule. *See* Order, *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-5331 (D.C. Cir. Feb. 18, 2021) (staying the appeal from the preliminary injunction in light of ongoing agency proceedings).

The shifting landscape led the Fifth Circuit panel to remand the case to this Court for further consideration and to retain jurisdiction over the matter if again appealed. The panel offered this mandate:

> On appeal, the providers argue that the district court should have granted them injunctive relief against the 2016 rule and the underlying statute, that they still suffer a substantial threat of irreparable harm under the 2016 rule, and that the subsequent developments have only made it clear that an injunction should have been granted in the first place. In response, the government contends that the case is moot and that the providers never asked the district court for relief against the underlying statute. On remand, the district court should consider these issues, and we express no view as to their relative merits at this time.

Franciscan All., Inc. v. Becerra, 843 F. App'x 662, 663 (5th Cir. 2021). Since the Fifth Circuit's remand and presumably spurred by the President's executive order and DOJ's guidance, HHS issued guidance documentation that it would now interpret Section 1557 to prohibit "gender identity" discrimination. "Notification of Interpretation and Enforcement" Dep't of Health and Hum. Servs., *Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972* (May 10, 2021), https://www.hhs.gov/sites/default/files/ocr-bostock-notification.pdf (the "2021 Interpretation").

The Court ordered supplemental briefing, through which the Christian Plaintiffs asked the Court to permanently enjoin HHS

> from interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), or any implementing regulations thereto against Plaintiffs . . . in a manner that would require them to perform or provide insurance coverage for gender-transition procedures or abortions . . ..

Pls.' Proposed Order. ECF No. 200-1; *see also* Pls.' Supp. Reply 2, ECF No. 203 ("an injunction here would merely protect Plaintiffs, leaving HHS free to promulgate any rules it wants."). The government and Intervenors ("the ACLU") opposed the motion, and it is ripe for the Court's consideration. *See* Ints.' Supp. Resp., ECF No. 201; Defs.' Supp. Resp., ECF No. 202; Pls.' Supp. Reply, ECF No. 203.

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is proper when the pleadings and evidence show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record that reveal there are no genuine material-fact issues. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When reviewing the evidence on a motion for summary judgment, the court must resolve all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255,

106 S.Ct. 2505. And if there appears to be some support for the disputed allegations, such that "reasonable minds could differ as to the import of the evidence," a court must deny the motion for summary judgment. *Id.* at 250, 106 S.Ct. 2505.

B. Permanent Injunction

A "court may grant a permanent injunction without a trial on the merits if there are no material issues of fact and the issues of law have been correctly resolved." *Calmes v. United States*, 926 F. Supp. 582, 591 (N.D. Tex. 1996). The standard is "essentially the same" as the standard for a preliminary injunction. *Id.* "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). But unlike for a preliminary injunction, a plaintiff seeking a permanent injunction "must demonstrate actual success on the merits." *Millennium Rests. Grp., Inc. v. City of Dallas*, 191 F. Supp. 2d 802, 809 (N.D. Tex. 2002).

C. Mootness

"The doctrine of mootness arises from Article III of the Constitution, which provides federal courts with jurisdiction over a matter only if there is a live 'case' or 'controversy.'" *Dierlam v. Trump*, 977 F.3d 471, 476 (5th Cir. 2020), *cert. denied sub nom. Dierlam v. Biden*, 141 S. Ct. 1392 (2021) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). "Accordingly, to invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013) (cleaned up). This case-or-controversy requirement

persists "through all stages of federal judicial proceedings." *Id.* Thus, "[i]f an intervening event renders the court unable to grant the litigant 'any effectual relief whatever,' the case is moot." *Dierlam*, 977 F.3d at 476 (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012). "Further, a case is not necessarily moot because it's uncertain whether the court's relief will have any practical impact on the plaintiff." *Dierlam*, 977 F.3d at 477 (citing *Chafin*, 568 U.S. at 175) ("Courts often adjudicate disputes where the practical impact of any decision is not assured.")). "When conducting a mootness analysis, a court must not 'confuse[] mootness with the merits.'" *Dierlam*, 977 F.3d at 477 (quoting *Chafin*, 568 U.S. at 174). A court "need only ask whether the plaintiff's requested relief is 'so implausible that it may be disregarded on the question of jurisdiction[,]'" leaving for later "to decide whether [the plaintiff] is in fact entitled to the relief he seeks.'" *Id.* (quoting *Chafin*, 568 U.S. at 177).

The Fifth Circuit recognizes two voluntary actions by a party that typically moot a case: (1) "if the plaintiff represents to a court that it is no longer seeking relief on its claim," and (2) "if the defendant credibly pledges to the court that it will provide the plaintiff's requested relief . . .." *D.C. v. Klein Indep. Sch. Dist.*, No. 20-20339, 2021 WL 2492842, at *10 (5th Cir. June 17, 2021) (citing *Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 211–15 (1st Cir. 1987); 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice And Procedure § 3533.2 (3d ed. 1998); *Lee ex rel. MacMillan v. Biloxi Sch. Dist.*, 963 F.2d 837, 839 (5th Cir. 1992)). But the "well settled rule" is that "a defendant's voluntary cessation of a challenged practice" will moot a case only if the defendant carries "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again" *Friends of the Earth, Inc. v.*

Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (internal quotation marks, alteration, and citations omitted); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 285 (5th Cir. 2012).

D. Ripeness

"The ripeness inquiry reflects 'Article III limitations on judicial power' as well as 'prudential reasons for refusing to exercise jurisdiction.'" *DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218 (5th Cir. 2021) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). "Ripeness ensures that federal courts do not decide disputes that are 'premature or speculative.'" *Id.* (quoting *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002)); *see also Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) ("[The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977)).

"[A] challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.'" *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 681 (N.D. Tex. 2016) (quoting *Texas*, 497 F.3d at 498–99). "An additional consideration is 'whether resolution of the issues will foster effective administration of the statute.'" *Texas*, 497 F.3d at 498–99 (quoting *Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 920 (5th Cir. 1993). A "purely legal" question must still involve some hardship, which may include legal harms, practical harms, or the harm of

being "force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences." *Oh. Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998); *see Texas*, 497 F.3d at 499; *see also Union Carbide*, 473 U.S. at 581 (finding hardship where the plaintiffs "suffer[ed] the continuing uncertainty and expense of depending for compensation on a process whose authority is undermined because its constitutionality is in question").

III. ANALYSIS

> *The greater a man's talents, the greater his power to lead astray. It is better that one should suffer than that many should be corrupted. Consider the matter dispassionately, Mr. Foster, and you will see that no offense is so heinous as unorthodoxy of behavior.*[3]

Christian Plaintiffs ask to be exempted from the government's orthodoxy. Specifically, they ask the Court for a permanent injunction based on their RFRA claim to be exempt from the government's requirement to perform abortions and gender-transition procedures. *See* Pls.' Supp. Br. 2, ECF No. 200. The government alone argues that the promulgation of the 2020 Rule rendered this case moot or unripe. *See* Defs.' Supp. Br. 10–21, ECF No. 202. And, even if the case is justiciable, the government contends, together with the ACLU, that the Court should not or cannot grant injunctive relief because Christian Plaintiffs cannot show a permanent injunction is warranted, the Court's relief granted thus far is sufficient, and the Court lacks the authority to grant the relief requested. *See* Defs.' Supp. Br. 12–13, 18, ECF No. 202; Ints.' Supp. Br. 9–22, ECF No. 201. To provide clarity, the Court first reconstructs the Section 1557 regulatory scheme as it stands today and then turns to the justiciability and merits of the injunction requested.

[3] Aldous Huxley, *Brave New World*, ch. 10 (1932) ("Ending is better than mending.").

Justice Alito was right: an intense battleground emerged.[4] Left in the rubble is Section 1557, its injunction-modified HHS implementing rule, and Section 1557's *Bostock*-based HHS interpretation—all still applying to Christian Plaintiffs in this case. Section 1557(a) provides

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. § 18116(a). Through its plain language, Section 1557 incorporates, as relevant here, Title IX's prohibition on discrimination "on the basis of sex." 20 U.S.C. § 1681(a).

During the final year of the Trump administration, HHS issued the 2020 Rule. 85 Fed. Reg. 37,160 (June 19, 2020). Departing from the 2016 Rule, the 2020 Rule incorporated Title IX's

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[4] Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery. Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.

Such claims present difficult religious liberty issues because some employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore requiring them to pay for or to perform these procedures will have a severe impact on their ability to honor their deeply held religious beliefs.

Bostock, 140 S. Ct. at 1781–82 (2020) (Alito, J. dissenting).

abortion-neutrality exception[5] and religious exemption.[6] *Id.* at 37,162, 37,207. The 2020 Rule further eliminated the 2016 Rule's definition of "sex" discrimination, reasoning that repeal would permit "application of the Supreme Court's construction" in *Bostock*. *Id.* at 37,178. Three days later, the Supreme Court ruled that, in the Title VII context, employment discrimination "on the basis of sex" encompasses "fir[ing] someone simply for being homosexual or transgender." *Bostock*, 140 S. Ct. at 1753 (2020).

After *Bostock*, numerous courts enjoined portions of the 2020 Rule and HHS modified its interpretation. On May 10, 2021, HHS issued the 2021 Interpretation of Section 1557 to put the Humpty-Dumpty scheme back together again. The 2021 Interpretation reads into Title IX's prohibition on discrimination "on the basis of sex" (as incorporated into Section 1557) as including "(1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity" and asserts that the interpretation is "consistent with the Supreme Court's decision in *Bostock* and Title IX . . .." *See* 2021 Interpretation. HHS assured the public that

> In enforcing Section 1557, as stated above, [the Office of Civil Rights] will comply with [RFRA] and all other legal requirements [and] with all applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020); *Asapansa-Johnson Walker v. Azar*, No. 20-CV-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020); and *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021).

[5] "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. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion." 20 U.S.C. § 1688.

[6] Title IX exempts from its prohibitions any "educational institution which is controlled by a religious organization if the application of this action would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3), and further defines educational institution as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department." *Id.* § 1681(c).

Id. HHS injected *Bostock*'s interpretation of Title VII's "on the basis of sex" language into Section 1557's incorporation of Title IX while, in the same breath, assuring compliance with all relevant and court-ordered vacaturs and injunctions, which seems to stand at odds.

Even assuming the HHS Secretary has the power to reimagine Section 1557(a)—or the 2020 Rule for that matter—by administrative fiat,[7] the 2021 Interpretation, while succinct, did little for clarity. According to the 2021 Interpretation, incorporating all of HHS's compliance measures, Section 1557(a) should be interpreted to read, in relevant part, as follows:

> [A]n individual shall not, **(1) on the basis of sexual orientation or (2) on the basis of gender identity,** be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments) **except**
>
> **(1) the statute's implementing rule may not define sex discrimination to include "gender identity" as the 2016 Rule had, *see Franciscan*, 414 F. Supp. 3d 928; *see also* Order, ECF No. 182;**
>
> **(2) the statute's implementing rule must define sex discrimination to include "sex stereotyping," which should encapsulate "gender identity," and may not incorporate Title IX's religious exemption until it is revisited in another round of rulemaking,[8] *see Whitman-Walker*, 485 F. Supp. 3d 1;**
>
> **(3) the statute's implementing rule must require the 2016 Rule's definitions of "on the basis of sex," "gender identity," and "sex stereotyping" to remain in effect. And the statute's implementing rule must require "healthcare providers to 'treat individuals consistent with their gender identity' and prohibit[] them from 'deny[ing] or limit[ing] health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such**

[7] The Court doubts this premise. *See* 42 U.S.C. § 18116(c) (granting the HHS Secretary power to promulgate Section 1557's implementing regulations through notice and comment).

[8] Even absent the *Whitman-Walker* nationwide injunction, query whether the incorporation of Title IX's religious exemption captured all religion-burdening enforcement against citizens like Christian Plaintiffs here, as that provision exempts only "religious organization['s]" "educational operation[s]." 85 Fed. Reg. at 37,207–08.

> **health services are ordinarily or exclusively available,'" *Walker*, 2020 WL 6363970 (quoting 45 C.F.R. § 92.206); and**
>
> **(4) the statute may not be applied or enforced by HHS against the Religious Sisters of Mercy, Sacred Heart Mercy Health Care Center (Alma, MI), SMP Health System, and University of Mary in a manner that would require them to perform or provide insurance coverage for gender-transition procedures, *see Religious Sisters*, 2021 WL 191009.**
>
> (5) And the Office of Civil Rights plans to "comply with the Religious Freedom Restoration Act . . . and all other legal requirements."[9]

If this sounds entirely unworkable or, at worst, materially indistinguishable from the 2016 Rule, you're not alone. *Compare* the 2020 Rule and 2021 Interpretation, 86 Fed. Reg. 27,984, 27,984 (May 25, 2021); *with* the 2016 Rule, 81 Fed. Reg. 31,376, 31,466, 31,467 (May 18, 2016) (defining "sex" discrimination under Section 1557 to include discrimination based on "gender identity," and promising "[i]nsofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required."). The 2021 Interpretation effectuates a legal Penrose staircase to enforce Section 1557 in the near identical way as, if not an enhanced version of, how the 2016 Rule dictated.[10] Having deciphered the current state of Section 1557, the Court turns to justiciability.

A. Justiciability

Mandated by the Fifth Circuit, the Court must decide whether "the case is moot[.]" *Franciscan*, 843 F. App'x at 663. In its supplemental brief, the government contends that

[9] The un-bolded portion is the original text of the 2021 Interpretation; the emphasized portions are added to supplement the 2021 Interpretation with the actual holdings of the referenced court orders.

[10] To the extent that, after years of studying the law and record in this case, the Court's reconstruction does not comport with other court's or HHS's, the Court fears the Kafkaesque burden a consciously objecting doctor faces in even deciding whether the statute applies to her—much less how and to what extent it applies.

"Plaintiffs' claims are either moot—because HHS has repealed the challenged portions of the 2016 Rule—or unripe to the degree [that] any alleged injury is based on a[] possible future regulatory or enforcement action." Defs.' Supp. Br. 11, ECF No. 202. Christian Plaintiffs and the ACLU disagree with the government's justiciability conclusion. *See* Pls.' Supp. Reply 3, ECF No. 203 ("[N]either this Court's 'vacatur of the 2016 Rule [nor] the ensuing promulgation of the 2020 Rule' fully 'cured . . . Plaintiffs' injuries.'") (quoting *Religious Sisters*, 2021 WL 191009, at *15); *see also* Ints.' Supp. Br. 11, ECF No. 201 ("[T]he government's compliance with this Court's declaratory judgment does not technically *moot* Plaintiffs' request for injunctive relief."). In reply, Plaintiffs maintain that the mootness argument fails because they "are 'challenging' not only the 2016 Rule but also HHS's act of imposing the same RFRA-violating burden by other regulatory means." Pls.' Supp. Reply 6, ECF No. 203. The Court concludes that before it is a justiciable case or controversy.

The government relies on four cases to support its proposition that promulgation of the 2020 Rule automatically mooted this case, all of which are distinguishable. Defs.' Supp. Br. 11–15, ECF No. 202. In one, the Fifth Circuit found a part of an appeal moot by the agency's express request of "a voluntary vacatur of the agency's final rules" satisfying the petitioner's vacatur request. *See Louisiana Env't Action Network v. U.S. E.P.A.*, 382 F.3d 575, 581 (5th Cir. 2004). Defendants also cite *Sannon v. United States*, 631 F.2d 1247, 1250 (5th Cir. 1980). There, the court found the case moot where petitioners, barred originally by a prior regulation, sought to present their claims for political asylum to an immigration judge, but under newly promulgated regulations, they had the right to exactly the hearings they sought. *Id.* Here, while HHS's 2016 Rule has been modified and supplanted in many respects by the 2020 Rule, the nationwide injunction, and the 2021 Interpretation, HHS has made no voluntary request to vacate the

offending portions of the 2021 Interpretation or 2020 Rule, the means by which Section 1557 operates today. HHS has only made assurance that it would "voluntarily" vacate the offending portions of the 2016 Rule in compliance with the Court's order. As outlined above, the promise is hollow and contradicted by the plain terms of the 2021 Interpretation.[11] As it currently stands, Christian Plaintiffs have no relief—including this Court's 2019 order—which provides exactly the scope of what Plaintiffs seek here. *See* Order, ECF No. 182. Thus, the Fifth Circuit precedents are materially distinguishable from the present case.

Left are two cases from outside this circuit. In the first, then-Judge Gorsuch found an appeal moot because "[b]y its terms . . . the district court's order ha[d] expired" once a new rule had been promulgated. *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1252 (10th Cir. 2009). In the other, a 1975 Ninth Circuit panel summarily dismissed a case without prejudice, finding the issues "moot or not ripe" after enforcement of a statute had been "indefinitely suspended" but urged re-filing once a new rule was promulgated or the suspension lifted. *State of Alaska v. Env't Prot. Agency*, 521 F.2d 842, 843–44 (9th Cir. 1975). Here, even assuming the Court found the cases to be more than persuasive, the Court's 2019 order had no such automatic expiration as did the order in the case before then-Judge Gorsuch. *See* Order, ECF No. 182. Similarly, enforcement of Section 1557 as the 2016 Rule proscribed has not been "indefinitely suspended." Indeed, the facts suggest a threat well beyond the "mere risk that [HHS might] repeat its allegedly wrongful conduct" of the enforcement of Section 1557 against Christian Plaintiffs in the same religion-burdening way as the 2016 Rule proscribed. *See Opulent Life Church*, 697 F.3d at 285. In light of the *Whitman-Walker* and *Walker* nationwide injunctions and their incorporation via the 2021 Interpretation,

[11] For this same reason, the Court need not reach the voluntary cessation doctrine.

HHS has practically "already done so[.]" *City of Jacksonville*, 508 U.S. at 662. The Office of Civil Rights need only say the word.

Because the injunctive relief Christian Plaintiffs now seek is plainly within the Court's power to grant and the current Section 1557 regulatory scheme credibly threatens the same RFRA-violating religious-burden that the application of the 2016 Rule threatened, this case is not moot. *See infra* Part III(B); *see, e.g., DeOtte v. Azar*, 393 F. Supp. 3d 490, 495-98 (N.D. Tex. 2019) (granting a permanent injunction where the plaintiffs faced a credible threat of enforcement of the Affordable Care Act's contraceptive mandate).

As for ripeness, even assuming the Fifth Circuit's remand mandate required its consideration, the Court has rejected the government's nearly identical argument in the past and again rejects the argument. *See* Mem. Op. 20–24, ECF No. 62. Like before, the Court concludes that the current regulatory scheme for Section 1557 "clearly prohibits" Plaintiffs' conduct, thus, putting them to the "impossible choice" of either "defying federal law" and risking "serious financial and civil penalties," or else violating their religious beliefs. Mem. Op. 20–24, ECF No. 62; *see Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007).[12] The Court also declines to heighten the harm required for ripeness by blurring it with the irreparable harm required for a permanent injunction. *See Oh. Forestry*, 523 U.S. at 734 (1998) (for the purposes of ripeness, being "force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences" constitutes a practical harm); *Dierlam*, 977 F.3d at 477 (declining to blur the jurisdictional inquiry

[12] For similar reasons, the Court declines to relitigate HHS's standing arguments, as they fail for the same reason as before. *See* Mem. Op. 15–20, ECF No. 62; Mem. Op. 16–17, ECF No. 175; *Texas v. EEOC*, 933 F.3d 433, 448 (5th Cir. 2019) ("courts look exclusively to the time of filing."); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988) (The "law of the case" doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.").

with the merits). Accordingly, the Court finds neither mootness nor ripeness to bar justiciability in this case and turns to the permanent injunction.

B. Permanent Injunction

Mandated by the Fifth Circuit panel, the Court must decide whether it "should [] grant[] [Christian Plaintiffs] injunctive relief against the 2016 rule and the underlying statute" by considering whether "they still suffer a substantial threat of irreparable harm under the 2016 rule" and "the subsequent developments." *Franciscan*, 843 F. App'x at 663. Christian Plaintiffs contend they are entitled to a permanent injunction. Pls.' Supp. Br. 9–21, ECF No. 200. The ACLU disagrees, maintaining Christian Plaintiffs have not demonstrated irreparable harm and the Court lacks authority to grant the requested relief. Ints.' Supp. Br. 9–22, ECF No. 201. The government suggests that, because Christian Plaintiffs have not suffered sufficient harm for ripeness (an argument rejected above), *ipso facto* the Christian Plaintiffs fall short of irreparable harm for a permanent injunction. Defs.' Supp. Br. 12–13, 18, ECF No. 202.

"[T]he standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must show actual success on the merits." *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 847-48 (5th Cir. 2004). A "court may grant a permanent injunction without a trial on the merits if there are no material issues of fact and the issues of law have been correctly resolved." *Calmes*, 926 F. Supp. At 591. Thus, a permanent injunction is proper if the plaintiff shows: "(1) that it has succeeded on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021); *see also eBay*, 547 U.S.

at 391. Unlike for a preliminary injunction, a plaintiff seeking a permanent injunction "must demonstrate actual success on the merits." *Millennium*, 191 F. Supp. 2d at 809. Central to the disposition of this case are the intertwined questions of success on the merits and irreparable injury.

A RFRA claimant may "obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). The question of whether injunctive relief should be granted in RFRA cases typically "begins and ends" with "success on the merits[.]" *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013); *see DeOtte*, 393 F. Supp. 3d at 511–12; *see, e.g., O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1025-29 (10th Cir. 2004) (en banc) (McConnell, J., concurring), *aff'd*, 546 U.S. 418 (2006) (RFRA "express[es Congress's] view of the proper balance between" religious liberty and governmental interests, so the balance of equities and "the balance of harms . . . favor protecting the moving party's burdened rights."); *Opulent Life Church*, 697 F.3d at 294–96 ("Injunctions protecting First Amendment freedoms are always in the public interest"—a principle that "applies equally to injunctions protecting" RFRA plaintiffs).

Here, the RFRA violation, the success on the merits, is all but conceded. No party disputes that the current Section 1557 regulatory scheme threatens to burden Christian Plaintiffs' religious exercise in the same way as the 2016 scheme: namely, by placing substantial pressure on Christian Plaintiffs, in the form of fines and civil liability, to perform and provide insurance coverage for gender-transition procedures and abortions. Like before, the current scheme continues to fall short of the "more focused" RFRA inquiry. *See Franciscan*, 414 F. Supp. 3d at 944 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006)). The government asserts no "harm [in] granting *specific* exemptions" to Christian Plaintiffs. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014). Accordingly, for these reasons and those laid out in greater detail in the Court's October 15, 2019, Order, the Court holds that Christian Plaintiffs

have shown success on the merits for its RFRA claim because the current Section 1557 regulatory scheme substantially burdens Christian Plaintiffs' religious exercise in clear violation of RFRA.[13] *Franciscan*, 414 F. Supp. 3d at 941–44.

For irreparable injury, the mere "possibility" of injury is not enough. Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original). In the context of RRFA, if a plaintiff demonstrates a violation, that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (internal quotation marks omitted)); *Opulent Life Church*, 697 F.3d at 294–96 (equating the First Amendment irreparable injuries to RFRA irreparable injuries).

Here, Christian Plaintiffs contend that violation of their statutory rights under RFRA is an irreparable harm. The Court agrees and concludes that enforcement of the 2021 Interpretation forces Christian Plaintiffs to face civil penalties or to perform gender-transition procedures and abortions contrary to their religious beliefs—a quintessential irreparable injury. *See DeOtte*, 393 F. Supp. 3d at 512 ("Plaintiffs rights will be violated day after day."); *see also* 45 C.F.R. §§ 86.4, 92.4 ("false" certification claims trigger false-claims liability, "exposing [them] to civil penalties," treble damages, and the possibility of "up to five years' imprisonment."); *Sisters of Mercy*, 2021 WL 191009, at *2 n.1. When the RFRA violation is clear and the threat of irreparable harm is present, a permanent injunction exempting Christian Plaintiffs from that religion-burdening

[13] The lack of briefing on this issue from the government, despite the Fifth Circuit's specific mandate, is concerning and speaks to, at best, the authenticity of HHS and the 2021 Interpretation's generalized promise to "comply with the Religious Freedom Restoration Act . . . and all other legal requirements," *see* 2021 Interpretation, and, at worst, may suggest some sort of religious animus in the failure to include reasonable religious exemptions in the formation and promulgation of the 2021 Interpretation.

conduct is the appropriate relief. *See ODonnell v. Harris Cnty.*, 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)) ("When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'"). Because the Court finds the permanent-injunction factors weigh in favor of granting an injunction in this instance, the Court concludes that Christian Plaintiffs are "entitled to an exemption" from HHS's religion-burdening conduct. *Hobby Lobby*, 573 U.S. at 694–95; *see* 42 U.S.C. § 2000bb-1(c).

The Court need not speculate whether another lesser remedy would be adequate in providing Christian Plaintiffs' relief because a vacatur was already insufficient as it led to an identical RFRA violation. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) ("If a less drastic remedy . . . [i]s sufficient to redress [plaintiff's] injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted."). The changing landscape of Section 1557's regulatory scheme left the Court's 2019 order wholly inadequate compared to the relief the Court sought to provide. *Franciscan*, 414 F. Supp. 3d at 946; *contra Monsanto*, 561 U.S. 139, 165–66 (finding a permanent injunction overbroad where the court's vacatur based on an APA claim rendered the added injunctive relief superfluous—lacking "any meaningful practical effect independent of the vacatur."). The Court finds no reason to depart from its charge to Christian Plaintiffs two years ago "inviting [them] to return if further relief independent of vacatur is later warranted." *Franciscan*, 414 F. Supp. 3d at 946. Thus, the Court concludes that the permanent injunctive relief requested is the adequate remedy at this juncture.

If the Court found a permanent injunction appropriate in this case, the ACLU and the government offered an alternative argument: the scope of the injunctive relief requested would exceed the Court's authority by addressing relief outside the 2016 Rule. *See* Ints. Resp. 12, ECF

No. 201; *see also Franciscan*, 843 F. App'x at 663 (instructing the Court to determine whether "the providers never asked the district court for relief against the underlying statute" and presumably, if so, whether it affects the Court's power to grant the requested injunction). The Court finds the argument unpersuasive.[14]

The ACLU and the government narrowly read Plaintiffs' live pleading as challenging just the 2016 Rule and not Section 1557 itself; thus, limiting the possible scope of injunctive relief to the 2016 Rule. *See* Ints.' Supp. Resp. 12, ECF No. 201. But Rule 54(c) provides no such limit. Under Federal Rule of Civil Procedure 54(c), "district courts [may] grant any appropriate relief following a general prayer by the plaintiff, even if the plaintiff did not specifically seek it, but only where relief is otherwise legally permitted." *Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 340 (5th Cir. 2015); *see also Sapp v. Renfroe*, 511 F.2d 172, 176 n.3 (5th Cir. 1975) (Rule 54(c) "has been construed liberally[.]"). "Rule 54(c) does not permit unrequested relief when it operates to the prejudice of the opposing party, such as when relief is finally sought at a late stage of the proceedings." *Portillo v. Cunningham*, 872 F.3d 728, 735 (5th Cir. 2017) (cleaned up); *see also id.* ("The discretion afforded by Rule 54(c) [] assumes that a plaintiff's entitlement to relief not specifically pled has been tested adversarially, tried by consent, or at least developed with meaningful notice to the defendant."). But when a district court permits the parties to "present[] . . . arguments" concerning the specific relief, and when a party "ha[s] every reason to expect that the court might" grant such relief, "there [is] no prejudice" under Rule 54(c). *Id.* at 735.

Here, in the Amended Complaint, Plaintiffs identified the substantial burden on their religious exercise as resulting from HHS's attempt to "forc[e] them to choose between federal

[14] The Court wonders how the injunctive relief requested can be both superfluous in light of the Court's vacatur of portions of the 2016 Rule and, at the same time, outside the Court's authority because its scope reaches beyond the 2016 Rule. These positions seem at odds.

funding and their livelihood as healthcare providers and their exercise of religion." Am. Compl. ¶ 314, ECF No. 21. That was the alleged RFRA violation then. That was the alleged RFRA violation before the Court in 2019. And that is the same RFRA violation the Court found today. Plaintiffs repeatedly challenge that same RFRA violation—no matter HHS's Section 1557 interpretation du jour. To ignore this pattern would be to face the Neuralyzer. Thus, the Court concludes that, under Rule 54(c), the permanent injunction request is the appropriate relief for these Plaintiffs and that the relief has been sufficiently adversarially tested for nearly five years so as to provide meaningful notice to the government and to be a legally permitted remedy, as required by Rule 54(c). Accordingly, the Court will grant Plaintiffs' requested permanent injunctive relief.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' request for a permanent injunction and **PERMANENTLY ENJOINS** HHS, Secretary Becerra, their divisions, bureaus, agents, officers, commissioners, employees, and anyone acting in concert or participation with them, including their successors in office, from interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), or any implementing regulations thereto against Plaintiffs, their current and future members, and those acting in concert or participation with them, including their respective health plans and any insurers or third-party administrators in connection with such health plans, in a manner that would require them to perform or provide insurance coverage for gender-transition procedures or abortions, including by denying Federal financial assistance because of their failure to perform or provide insurance coverage for such procedures or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions.

The Court shall retain jurisdiction as necessary to enforce this order. Plaintiffs shall file any petition for attorneys' fees and expenses by thirty (30) days after the final resolution of all claims, including any appeals.

SO ORDERED on this **16th day** of **August, 2021**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

5. Order Modifying Aug. 16, 2021 Memorandum Opinion & Order

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

FRANCISCAN ALLIANCE, INC. et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00108-O**
	§	
XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Motion to Amend/Correct Memorandum Opinion and Order, (ECF No. 208), filed September 13, 2021; Plaintiffs' Response (ECF No. 209) filed September 24, 2021; and Defendants' Reply (ECF No. 210), filed September 28, 2021. The Court notes, as pointed out in Plaintiffs' Response (ECF No. 209), the contradictions between Defendants' previous arguments in this litigation, claiming enforcement of Section 1557 "is purely speculative" (ECF. No. 202, 18), and Defendants' current argument, claiming it has a "statutory obligation[]" to "enforce Section 1557" (ECF No. 208, 4). Regardless, the Motion being unopposed, the Court finds it should be **GRANTED**. The following language is hereby added to the Conclusion of the Court's August 16, 2021 Memorandum Opinion and Order (ECF No. 206):

> HHS does not violate this order by taking any of the above-described actions against Plaintiffs, their current or future members, or those acting in concert or participation with them, including their respective health plans and any insurers or third-party administrators in connection with such health plans, if the agency officials directly responsible for taking these actions are unaware that an entity is a member of one of the Plaintiffs or has a relevant relationship to one of the Plaintiffs/Plaintiff-members.

However, if HHS, unaware that an entity is a member of one of the Plaintiffs or has the relevant relationship to one of the Plaintiffs/Plaintiff-members, takes any of the above-described actions, the member and the relevant Plaintiff may promptly notify a directly responsible agency official of the fact of the member's membership or the entity's relevant relationship to the member and its protection under this order. Once such official receives such notice from the member and verification of the same by the relevant Plaintiff, the agency shall promptly comply with this order with respect to such member or related entity.

SO ORDERED on this **1st day of October, 2021**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

6. Final Judgment

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

FRANCISCAN ALLIANCE, INC., et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00108-O**
	§	
ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

The Court issued its Order granting Putative Intervenors' Motion to Intervene and partially granting Plaintiffs' Motions for Summary Judgment (ECF No. 175). It is therefore **ORDERED, ADJUDGED, and DECREED** that Putative Intervenors' Motion to Intervene (ECF No. 129) should be and is hereby **GRANTED.** It is **further ORDERED** that Plaintiffs' Motions for Summary Judgment (ECF Nos. 132, 135) are hereby **GRANTED in part**.

The Court **SEVERS** Plaintiffs' APA and RFRA claims from their Title VII, Spending Clause, First Amendment, Tenth Amendment, and Eleventh Amendment claims. The Court **ADOPTS** the reasoning from its December 31, 2016 Order granting Plaintiffs' request for a preliminary injunction (ECF No. 62) and now **HOLDS** that Nondiscrimination in Health Programs & Activities ("the Rule"), 81 Fed. Reg. 31376 (May 18, 2016), codified at 45 C.F.R. § 92, violates the APA and RFRA and enters this Final Judgment on those claims. Accordingly, the Court **VACATES and REMANDS** the Rule for further consideration.

SO ORDERED on this **15th day** of **October, 2019.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

7. Order Modifying Final Judgment

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

FRANCISCAN ALLIANCE, INC., et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00108-O**
	§	
ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Motion to Modify Final Judgment (ECF No. 178), filed November 12, 2019; State Plaintiffs' Response (ECF No. 180), filed November 20, 2019; and Private Plaintiffs' Response (ECF No. 181), filed November 20, 2019.

Defendants state that they "do not believe the Court intended to or, in fact, did vacate the Rule in its entirety, based on the Court's clear statement in the accompanying Memorandum Opinion and Order that it was vacating only 'the *unlawful portions* of the Rule,'" but "out of an abundance of caution, and to remove any doubt," they ask the Court to modify its Final Judgment (ECF No. 176), dated October 15, 2019. Defs.' Mot. 1, ECF No. 178 (emphasis in original) (quoting Mem. Op. & Order 23, ECF No. 175). Defendants ask the Court to specify that the Court vacates "the portion of the definition of '*On the basis of sex*' at 45 C.F.R. § 92.4 that refers to 'termination of pregnancy' and 'gender identity.'" Defs.' [Proposed] Order 1, ECF No. 178-1.

Neither State Plaintiffs nor Private Plaintiffs believe that modification of the Final Judgment is necessary given the Court's severability analysis in its Memorandum Opinion and

Order. *See* State Pls.' Resp. 1–2, ECF No. 180; Private Pls.' Resp. 1, ECF No. 181. However, State Plaintiffs and Private Plaintiffs agree that, "[i]f the Court is inclined to modify its judgment," the modification should clarify that the Court "vacates the Rule 'insofar as the Rule defines "on the basis of sex" to include gender identity or termination of pregnancy.'" State Pls.' Resp. 2, ECF No. 180; *see also* Private Pls.' Resp. 1, ECF No. 181 (agreeing that the State Plaintiffs' "proposed language . . . better captures the conclusion of the Court's summary-judgment order"). State Plaintiffs argue that this language avoids any potential confusion regarding the particular words in the Rule. *See* State Pls.' Resp. 2, ECF No. 180.

Having considered the Defendants' motion and Plaintiffs' responses, the **GRANTS in part** the motion and **MODIFIES** the Final Judgment (ECF No. 176), filed October 15, 2019, to confirm that, consistent with the Court's discussion in the accompanying Memorandum Opinion and Order (ECF No. 175), the Court vacates only the portions of the Rule that Plaintiffs challenged in this litigation. Specifically, the Court **VACATES** the Rule insofar as the Rule defines "*On the basis of sex*" to include gender identity and termination of pregnancy, and the Court **REMANDS** for further consideration. The remainder of 45 C.F.R. § 92 remains in effect.

SO ORDERED on this **21st day** of **November, 2019.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

8. Memorandum Opinion & Order Granting Summary Judgment

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

FRANCISCAN ALLIANCE, INC., et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00108-O**
	§	
ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Putative Intervenors American Civil Liberties Union of Texas's and River City Gender Alliance's (collectively, "Putative Intervenors") Renewed Motion to Intervene, Brief in Support, and Appendix in Support (ECF Nos. 129–31), filed February 1, 2019; Plaintiffs' Response (ECF No. 140), filed February 25, 2019; Defendants' Response (ECF No. 141), filed February 25, 2019; and Putative Intervenors' Reply (ECF No. 144), filed March 11, 2019. Also before the Court are Plaintiff States' Renewed Motion for Summary Judgment, Brief in Support, and Appendix in Support (ECF Nos. 132–34), filed February 4, 2019; Private Plaintiffs' Renewed Motion for Partial Summary Judgment, Brief in Support, and Appendix in Support (ECF Nos. 135–37), filed February 4, 2019; Defendants' Response (ECF No. 154), filed April 5, 2019; Putative Intervenors' Response (ECF No. 155), filed April 5, 2019; Plaintiff States' Reply (ECF No. 157), filed May 3, 2019; and Private Plaintiffs' Reply (ECF No. 158), filed May 3, 2019.

I. BACKGROUND

In its December 31, 2016 Order granting Plaintiffs' motions for a preliminary injunction and applying the injunction throughout the country, the Court set forth the extensive statutory, regulatory, and procedural background to this case. *See* Order 1–12, ECF No. 62. Since that time, there have been several important procedural developments. On January 24, 2017, the Court deferred ruling on Putative Intervenors' original motion to intervene because it was not yet clear whether Defendants would adequately represent Putative Intervenors' interest. Order 7, ECF No. 69. On March 15, 2017, Plaintiffs filed a motion for summary judgment. Pls.' Mot. Summ. J., ECF No. 82. On March 27, 2017, Putative Intervenors filed a motion to stay proceedings pending appeal of the Court's denial of their motion to intervene. Putative Intervenors' Mot. Stay, ECF No. 85. On May 2, 2017, Defendants filed a motion to remand and stay litigation pending the United States Department of Health and Human Services' ("HHS") reconsideration of the regulation at issue, entitled Nondiscrimination in Health Programs & Activities ("the Rule"), 81 Fed. Reg. 31376 (May 18, 2016), codified at 45 C.F.R. § 92. Defs.' Mot. Remand & Stay, ECF No. 92. On June 30, 2017, the Fifth Circuit declined to rule on Putative Intervenors' motion to intervene as of right because this Court had not yet ruled on the motion for permissive intervention. Fifth Circuit's J., ECF No. 104. On July 10, 2017, after a hearing, the Court stayed the case in order to allow HHS to review the Rule. Order, ECF No. 105. The Court deferred ruling on Putative Intervenors' pending motion to intervene based on Defendants' contention that a change to the Rule could moot the case and on Putative Intervenors' own concerns cited in their motion to stay. *Id.* On December 17, 2018, Plaintiffs and Defendants filed a joint motion to lift the stay and set a briefing schedule.[1]

[1] On April 5, 2019, Defendants changed their position and asked the Court to postpone ruling on the motions to intervene and for summary judgment. *See* Defs.' Resp. 1–2, ECF No. 154. Defendants requested more time to complete the ongoing efforts to amend the Rule. *Id.* Defendants asked that, alternatively, any relief would be limited to redressing the injuries of the named Plaintiffs. *Id.*

Joint Mot. Lift Stay, ECF No. 125. The Court granted the parties' requests, lifting the stay and setting a briefing schedule for Putative Intervenors' renewed motion to intervene, as well as the parties' renewed motions for summary judgment. Order, ECF No. 126. Those motions are now fully briefed and ripe for ruling. The Court granted HHS two years to complete its review and amend the Rule at issue. Despite HHS's better efforts, the rule remains on the books. 45 C.F.R. § 92 (2016). Accordingly, the Court finds that principles of equity and judicial economy favor ruling on the pending motions, allowing the other parties in this case to conclude two years of litigation on these issues.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 24(a) permits a party to seek intervention as of right, while Rule 24(b) allows a party to seek permissive intervention. FED. R. CIV. P. 24. "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (citation omitted). "Federal courts should allow intervention when no one would be hurt and the greater justice could be attained." *Id.* (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)) (internal quotation marks omitted).

A. Intervention as of Right

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that:

> [o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

A proposed intervenor is entitled to intervene if all the following elements are satisfied:

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action;

> (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co. (NOPSI)*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc)). "Failure to satisfy one requirement precludes intervention of right." *Haspel & Davis Milling & Planting Co. Ltd. v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007); *see also Espy*, 18 F.3d at 1205.

B. Permissive Intervention

Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3). Permissive intervention under Rule 24(b) "is wholly discretionary with the [district] court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987). Intervention is appropriate when: "(1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *Frazier v. Wireline Sols., LLC*, No. C-10-3, 2010 WL 2352058, at *4 (S.D. Tex. June 10, 2010) (citation omitted); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 229 F.R.D. 126, 131 (S.D. Tex. 2005).

C. Summary Judgment

Summary judgment is proper when the pleadings and evidence show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record that reveal there are no genuine material-fact issues. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When reviewing the evidence on a motion for summary judgment, the court must resolve all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. And if there appears to be some support for the disputed allegations, such that "reasonable minds could differ as to the import of the evidence," the court must deny the motion for summary judgment. *Id.* at 250.

D. Vacatur

When reviewing an agency action, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Further, the court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 706(2)(A). Because Congress "provided vacatur as a standard remedy for APA violations," courts typically "invalidate—without

qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agencies can take further action." *Pennsylvania v. President United States*, 930 F.3d 543, 575 (3d Cir. 2019).

III. ANALYSIS

A. Intervention

In its Order staying proceedings and remanding to HHS for reconsideration of the Rule, the Court stated that it would "rule on the motion for permissive intervention, as necessary, after the stay is lifted and before consideration of Plaintiffs' motion for summary judgment." Order 9 n.9, ECF No. 105. The Court also stated that, upon lifting the stay, it would "allow the parties an opportunity to brief the issue" of whether the Court correctly found that "Putative Intervenors have a legally protectable interest in the proceedings as the intended beneficiaries of the Rule." *Id.* at 3 n.5 (internal citation omitted). Furthermore, Defendants recently declined to defend the Rule, which forces the Court to also reconsider the forth prong of intervention as of right: whether Putative Intervenors' interest is inadequately represented by the existing parties. *See* Defs.' Resp. 1–2, ECF No. 154. Accordingly, the Court now considers whether Putative Intervenors may intervene under Rule 24(a) or (b).

1. Intervention as of Right

Unlike in their original motion to intervene, Putative Intervenors no longer ask to intervene permissively. *Compare* Putative Intervenors' Br. Supp. Mot. Int. 23–24, ECF No. 8, *with* Putative Intervenors' Br. Supp. Mot. Int. 7–11, ECF No. 130. Instead, they ask the Court to "reconsider its earlier denial of intervention as of right and grant [Putative] Intervenors' renewed request to intervene in light of the government's subsequent actions." Putative Intervenors' Br. Supp. Mot. Int. 8, ECF No. 130. Thus, the Court first addresses whether Putative Intervenors are entitled to

intervene as of right under Rule 24(a). FED. R. CIV. P. 24. To intervene as of right, Putative Intervenors must show: (1) their intervention application is timely; (2) they have an interest relating to the property or transaction that is the subject of the action; (3) they are situated so that disposition may, as a practical matter, impair or impede their ability to protect that interest; and (4) their interest is inadequately represented by the existing parties. *Haspel & Davis*, 493 F.3d at 578. "Failure to satisfy any one requirement precludes intervention of right." *Id.* The Court finds that Putative Intervenors now satisfy each of the four prongs and are entitled to intervene.

a. Inadequate Representation

The Court previously denied Putative Intervenors' request based on the fourth prong. *See* Order 7, ECF No. 69. Though the Court found that (1) the intervention application was timely, (2) Putative Intervenors had a legally protectable interest in the proceedings, and (3) the disposition of this action would impair their ability to protect members' interests if not allowed to intervene, there was no indication that Defendants would (4) inadequately represent Putative Intervenors' interest. *Id.* at 5–7. Indeed, the Court noted that "Putative Intervenors share[d] the same ultimate objective as Defendants—namely, a finding that the Rule is lawful." *Id.* at 7. Defendants had "demonstrated no adversity of interest, collusion, or nonfeasance." *Id.* And "[u]p to th[at] point, Defendants ha[d] taken no action out of step with their original position . . . that the Rule is lawful." *Id*. Thus, the Court denied the motion, stating, "Putative Intervenors may not presently intervene as of right." *Id.*

Two years later, Defendants *have* taken actions out of step with their original position, demonstrating they will not adequately represent Putative Intervenors' interests. Defendants now "agree with Plaintiffs and the Court that the Rule's prohibitions on discrimination on the basis of gender identity and termination of pregnancy conflict with Section 1557 and thus are substantively

unlawful under the APA." Defs.' Resp. 1, ECF No. 154. In fact, Defendants argue that Plaintiffs "are entitled to summary judgment on their APA claim," but urge the Court not to resolve any other claim. *Id*. And importantly, Defendants "do not oppose the [Putative] Intervenors' renewed Motion to Intervene." Defs.' Resp. 1, ECF No. 141. Under the reasoning of the Court's January 24, 2017 Order, Defendants' actions now clearly allow Putative Intervenors to satisfy the forth prong and presumably entitle Putative Intervenors to intervene as of right.

b. Legally Protectable Interest

Inadequate representation aside, Plaintiffs still contend that Putative Intervenors are not entitled to intervene as of right. Specifically, Plaintiffs argue that Putative Intervenors do not have the "legally protectable interest" needed to satisfy the second and third prongs. Pls.' Resp. 5, ECF No. 140.[2] What the Court stated in its January 2017 order, it now reiterates in response: "Putative Intervenors have a legally protectable interest in the proceedings and . . . disposition in this action will impair their ability to protect members' interests if not allowed to intervene, as several of their members wish to avail themselves of rights provided under the Rule." Order 5–6, ECF No. 69.

Plaintiffs provide two reasons why the Court should reconsider this conclusion. First, they claim that the evidence included in Putative Intervenors' motion to intervene "lacks a proper evidentiary foundation, is speculative, and is based on inadmissible hearsay." Pls.' Resp. 6, ECF No. 140. Second, Plaintiffs argue that "even if the Court considers the evidence, it shows that intervenors lack a legally protectable interest in the legality and constitutionality of the Rule and are attempting to assert the rights of others." *Id.* Rather than asserting a "direct, substantial, legally protectable interest," *id.* at 5 (quoting *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir.

[2] Plaintiffs concede that Putative Intervenors' motion was timely. Pls.' Br. Opp'n Mot. Int. 5, ECF No. 140 ("While their motion was timely, Order 3, ECF No. 20, they lack a legally protectable interest that may be impaired by an adverse ruling, and it remains unclear whether their interests are inadequately represented by the federal defendants.").

1996)), Plaintiffs allege that Putative Intervenors "assert only 'ideological, economic, or precedential' interests that are insufficient for intervention." *Id.* at 9 (quoting *Texas*, 805 F.3d at 657–58). The Court addresses each contention in turn.

First, the facts asserted in Putative Intervenors' declarations are admissible at the intervention stage. As Putative Intervenors correctly note, "the Federal Rules of Evidence do not apply to motions to intervene." Putative Intervenors' Reply 1, ECF No. 144. Rather, motions to intervene are judged under the liberal pleading standard, and all "allegations are accepted as true." *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 56 n.2 (5th Cir. 1977); *see also* 7C Charles Alan Wright, et al., *Federal Practice & Procedure* § 1914 (3d ed. 2007) ("The general rules on testing a pleading are applicable here. The pleading is construed liberally in favor of the pleader-intervenor and the court will accept as true the well-pleaded allegations in the pleading."). Though the case itself has progressed well beyond the pleading stage, Putative Intervenors have been stuck in a three-year limbo—participating in real time as amici, but all the while awaiting resolution of their motions to intervene. Accordingly, the Court must analytically return to the pleading stage, considering the facts alleged in Putative Intervenors' renewed motion to intervene as if they were included in the original parties' pleadings.

Putative Intervenors' motion to intervene includes declarations from leaders of each organization. *See* App. Supp. Putative Intervenors' Mot. Int., ECF No. 131. The deputy director of the ACLU of Texas claims to have members seeking transition surgeries and abortions, and she refers to one unnamed member seeking each procedure. *Id.* at 2. Likewise, the president of the River City Gender Alliance claims to have members also seeking transition services, and she too refers to one unnamed individual. *Id.* at 5. Because these statements come from leadership rather than the organizations' allegedly harmed members, Plaintiffs assert that the statements are

inadmissible hearsay. Pls.' Resp. 6, ECF No. 140. But at the pleading stage, this is not true. *See* 7C Charles Alan Wright, et al., *Federal Practice & Procedure* § 1914 (3d ed. 2007). The Court finds that Putative Intervenors' declarations plead sufficient facts to establish that "the disposition of the action 'may' impair or impede their ability to protect their interests," to the extent necessary at the motion-to-intervene stage. *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014).

When taking these declarations as true, the Court finds that Putative Intervenors' have shown a "direct, substantial, legally protectable interest" in the outcome of the case, as they have alleged specific harm to particular members. *Edwards*, 78 F.3d at 1004. Plaintiffs argue that this cannot be true because "[t]he Rule does not regulate the conduct of the ACLU of Texas or the River City Gender Alliance." Pls.' Resp. 8, ECF No. 140. Plaintiffs point the Court to *NOPSI*, 732 F.2d 452, and *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), both of which the Court finds distinguishable.

In *NOPSI*, the Fifth Circuit held that "an economic interest alone is insufficient, as a legally protectable interest is required for intervention under Rule 24(a)(2)." 732 F.2d at 466. Here, Putative Intervenors do not allege an economic interest at all, much less a solely economic interest. Rather, they claim to have an interest "as the intended beneficiary of a government regulatory system." Putative Intervenors' Br. Supp. Mot. Int. 10, ECF No. 130 (quoting *Wal-Mart Stores,* 834 F.3d at 569). They assert that, if HHS is prevented from enforcing the Rule, Putative Intervenors' members will be denied access to healthcare. *Id.* at 5.

Factually, *Northland Family Planning Clinic* is more similar. There, STOPP, a public-interest group "created and continu[ing] to exist only for the purposes of advocating the passage and continued viability" of Michigan's Legal Birth Definition Act, sought to intervene to defend the Act. *Northland Family Planning Clinic*, 487 F.3d at 344. The Sixth Circuit upheld the district

court's denial of intervention because "the organization had 'only an ideological interest in the litigation, and the lawsuit d[id] not involve the regulation of [the organization's] conduct in any respect.'" *Texas*, 805 F.3d at 658 (quoting *Northland Family Planning Clinic*, 487 F.3d at 343). Appearing on behalf of their organizational entities, Putative Intervenors would also have only an ideological interest. But unlike STOPP, they "do not seek to intervene in their capacity as advocacy groups." Putative Intervenors' Br. Supp. Mot. Int. 11, ECF No. 130 (internal citation omitted). Instead, "they seek to intervene based on their associational standing to assert the 'concrete, particularized, and legally protectable' interests of their individual members." *Id.* (citing *Texas*, 805 F.3d at 657–58). Since the Court must take the facts alleged in Putative Intervenors' declarations as true, it finds that Putative Intervenors have pleaded sufficient facts to demonstrate a "legally protectable interest" such that they are entitled to intervene as of right.

However, this is *not* to say that Putative Intervenors have pleaded sufficient facts to prove standing to assert claims on behalf of their members. Indeed, should Putative Intervenors seek to appeal, they will need to show more than just a sufficiently pleaded legally protectable interest in the case; they will need to prove they have Article III standing. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) ("As the Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing."); *Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal."). Putative Intervenors already claim to satisfy this requirement under the theory of associational standing. Putative Intervenors' Br. Supp. Mot. Int. 14, ECF No. 130. In order to demonstrate associational standing, Putative Intervenors must prove three elements: "(1) the association[s'] members would independently meet the Article III standing

requirements; (2) the interests the association[s] seek[] to protect are germane to the purpose of the organization[s]; and (3) neither the claim asserted nor the relief requested requires participation of individual members." *Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency*, 937 F.3d 533, 536 (5th Cir. 2019) (internal citation omitted). But because they do not "seek relief" at this stage of the litigation, the Court need not address whether they have associational standing.[3]

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[3] Following the Supreme Court's opinion in *Town of Chester v. Laroe County Estates, Inc.*, 137 S. Ct. 1645 (2017), the Court noted in its July 10, 2017 Order that, once the stay was lifted, it would consider *Town of Chester*'s application to this case. *See* Order 3 n.5, ECF No. 105. On August 7, 2019, Court ordered briefing, and on September 16, 2019, it held a hearing. Order, ECF No. 164; Order, ECF No. 168. Specifically, the Court asked the parties to address whether Putative Intervenors, as defendant-intervenors, were "pursu[ing]" or "seeking relief" such that they must demonstrate standing. Order 2, ECF No. 164; Hr'g Tr. The Court now concludes that Putative Intervenors do not seek relief and need not demonstrate standing at this stage of the litigation.

In *Town of Chester*, the Supreme Court stated, "[f]or all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." 137 S. Ct. at 1651. Addressing the plaintiff-intervenor's claim that it was entitled to intervene irrespective of its standing, the Supreme Court held that "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Id.* Though the Supreme Court purported to resolve a circuit split involving both intervenor-plaintiffs, *see, e.g.*, *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980 (7th Cir. 2011), and intervenor-defendants, *see, e.g.*, *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014), it appears that the holding applies only to intervenor-plaintiffs. *See Town of Chester*, 137 S. Ct. at 1650 ("[a]cknowledging a division among the Courts of Appeals on whether an intervenor of right must meet the requirements of Article III"). In *DeOtte v. Azar*, the Court concluded the opposite: that any intervenor, regardless of the side it intends to join, must establish standing if no existing party seeks the same relief. *See* No. 4:18-cv-00825-O, 2019 WL 3796432, at *2 (N.D. Tex. July 29, 2019) (denying the State of Nevada's motion to intervene as of right after finding that it did not have standing). After further briefing and oral arguments in this case—neither of which occurred in *DeOtte*—the Court has determined that defendant-intervenors need not establish standing because they generally do not "pursue relief" within the meaning of *Town of Chester*. 137 S. Ct. at 1651. However, this Court agrees with the parties and with other courts that have found that the opinion applies in both the intervention-as-of-right and permissive-intervention contexts. *See* Pls.' Suppl. Br. Resp. Ct.'s Order 2, ECF No. 165; Defs.' Resp. Order Ct. 1, ECF No. 166; Putative Intervenors' Suppl. Br. Supp. Mot. Int. 1, ECF No. 167; *United States v. Bayer Cropscience LP*, No. 15-13331, 2018 WL 3553413 (S.D. W. Va. July 24, 2018); *Seneca Res. Corp. v. Highland Twp.*, No. 16-289, 2017 WL 4171703 (W.D. Pa. Sept. 20, 2017); *but see Vazzo v. City of Tampa*, No. 17-2896, 2018 WL 1629216 (M.D. Fla. Mar. 15, 2018).

For three reasons, this Court now concludes that Putative Intervenors, as defendant-intervenors, do not "seek relief" and therefore do not need to demonstrate standing in this case. First, the term "relief" is linked to affirmative claims, not defenses. Black's Law Dictionary defines relief as "redress or benefit . . . that a party asks of the court" and synonymizes it to a "remedy." *Relief*, BLACK'S LAW DICTIONARY 606 (3d Pocket ed. 1996). One type of relief is "affirmative relief," which is defined as "the relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action." *Id.* Here, Plaintiffs ask the Court to issue declaratory judgments that declare the Rule

Putative Intervenors have shown that (1) their intervention application is timely; (2) they have an interest relating to the property or transaction that is the subject of the action; (3) they are situated so that disposition may, as a practical matter, impair or impede their ability to protect that interest; and (4) their interest is inadequately represented by the existing parties. *Haspel & Davis*, 493 F.3d at 578. Accordingly, the Court **GRANTS** their motion to intervene as of right.

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invalid and to permanently enjoin Defendants from enforcing the Rule. State Pls.' Mot. Summ. J. 2, ECF No. 132; Private Pls.' Mot. Partial Summ. J. 2, ECF No. 135. This is a form of redress or remedy. Putative Intervenors, on the other hand, do not ask the Court to do anything; they do not raise a counterclaim, cross-claim, or any other claim for relief. Rather, they state that their "objective [is] defending the lawfulness of the regulation." Putative Intervenors' Br. Supp. Mot. Int. 1–2, ECF No. 130. The Federal Rules of Civil Procedure's differentiation between "claim[s] for relief" and "defenses" further enforces this distinction. FED. R. CIV. P. 8. In this case, all claims for relief have been pleaded by Plaintiffs, leaving Defendants—or, instead, Putative Intervenors—to defend the Rule against those claims.

Second, plaintiffs, not defendants, generally must demonstrate standing. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Town of Chester*, 137 S. Ct. at 1650 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)). Accordingly, plaintiffs must "alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf." *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements."). *Town of Chester* does not seem to depart from this longstanding principle. *See* 137 S. Ct. at 1651 ("At least one plaintiff must have standing to seek each form of relief requested in the complaint.").

Finally, *Town of Chester* can be read in conjunction with Fifth Circuit precedent. "[F]or a Supreme Court decision to change our Circuit's law, it 'must be more than merely illuminating with respect to the case before [the court]' and must 'unequivocally' overrule prior precedent." *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 405 (5th Cir. 2012) (citing *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001)). Here, the Supreme Court opinion does not seem to "explicitly or implicitly overrul[e]" the Fifth Circuit's seminal case. *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999). In *Ruiz v. Estelle*, the Fifth Circuit joined the pre-*Town of Chester* circuit split by concluding the intervenors need not establish standing. *Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998). Undoubtedly, *Town of Chester* abrogated *Ruiz* in part, insofar as it clarified that plaintiff-intervenors must establish standing in order to intervene as of right when seeking different relief than the existing parties. *See Town of Chester*, 137 S. Ct at 1651. But the opinion keeps intact the Fifth Circuit's pronouncement that "Article III does not require intervenors to independently possess standing where *the intervention is into a subsisting and continuing Article III case or controversy* and *the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so*." *Ruiz*, 161 F.3d at 380 (emphasis added). Accordingly, if Putative Intervenors sought relief that was not being sought by another party with standing, they would be required to demonstrate their own standing. But because Plaintiffs retain standing to bring their claims for injunctive relief, there is still a "subsisting and continuing Article III case or controversy." *Id.* Putative Intervenors may join in defense. And as long as they do not also intend to add an affirmative claim for relief during the district court proceedings, Putative Intervenors need not establish standing to intervene.

2. Permissive Intervention

Even if Putative Intervenors could not establish that they are entitled to intervene as of right, the Court would allow them to intervene permissively under Rule 24(b). FED. R. CIV. P. 24(b). "[T]he court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1). This decision is "wholly discretionary with the court," *Kneeland*, 806 F.2d at 1289, but "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3).

Here, Putative Intervenors have a "defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1). Indeed, Putative Intervenors' defense is directly related to the underlying controversy, especially at the current summary-judgment stage, where Putative Intervenors respond directly to Plaintiffs' arguments. *See generally* Putative Intervenors' Br. Opp'n Mots. Summ. J., ECF No. 155. Further, as discussed above, Putative Intervenors' interest is no longer "adequately represented by other parties." *NOPSI*, 732 F.2d at 472. And now that Defendants do not defend the Rule, Putative Intervenors' arguments will "significantly contribute" to the development of the issues. *Id.*

Moreover, the parties agree to Putative Intervenors' permissive intervention. Defendants "do not oppose [Putative] Intervenors' renewed Motion to Intervene." Defs.' Resp. 1, ECF No. 141. And though Plaintiffs do not "conced[e] their satisfaction of the requirements for permissive intervention," they are "willing . . . to consent to permissive intervention provided that the Court prevents [P]utative [I]ntervenors from conducting discovery, moving to stay the litigation or the preliminary injunction, and disrupting the dispositive motion schedule." Pls.' Resp. 1, 5, ECF No.

140. Essentially, no party objects to Putative Intervenors' involvement; Plaintiffs just ask that the intervention not bring the case back to square one. This request aligns with Rule 24's guidelines. When determining whether to permit a prospective party to intervene, the Court is required to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3). If it determines that intervention would cause such undue delay or prejudice, "a federal district court is able to impose almost any condition, including the limitation of discovery." *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992); *see also Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987) ("refus[ing] to find that the grant of permissive intervention, even though subject to conditions, should be treated as a complete denial of the right to participate" when the intervenor could still raise its claims on post-judgment appeal). But importantly, a court may also place reasonable conditions on intervenors as of right. *See Beauregard v. Sword Servs., LLC*, 107 F.3d 351, 352–53 (5th Cir. 1997).

3. Limitations on Intervention

Though the Court finds that Putative Intervenors are entitled to intervene as of right, it finds that reasonable limitations are necessary to avoid a further delay in litigation. *See id.* ("[I]t is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right."); FED. R. CIV. P. 24(a) advisory committee's note to 1966 amendment ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."). Here, Plaintiffs and Putative Intervenors agree that the issues in this case are primarily legal. *See* Pls.' Resp. 12, ECF No. 140; Putative Intervenors' Br. Supp. Mot. Int. 3, ECF No. 130. Accordingly, there is no need for factual discovery. Furthermore, because Putative

Intervenors have been allowed to participate in nearly every stage of the litigation, including in the current summary-judgment stage, there is no need for further briefing. *See, e.g.*, Putative Intervenors' Answer, ECF No. 10; Putative Intervenors' Mot. Stay, ECF No. 27; Putative Intervenors' Mot. Expedited Recons., ECF No. 38; Putative Intervenors' Br. Opp'n Mots. Summ. J, ECF No. 53; Putative Intervenors' Mot. Ruling Int. & Stay, ECF No. 63; Notice of Appeal, ECF No. 72; Putative Intervenors' Mot. Stay, ECF No. 85; Putative Intervenors' Resp. Pls.' Mot. Status Conference, ECF No. 122; Putative Intervenors' Mot. Int., ECF No. 129; Putative Intervenors' Opp'n Mots. Summ. J., ECF No. 155; Putative Intervenors' Suppl. Br. Supp. Mot. Int., ECF No. 167. As a result, the Court is ready to rule on Plaintiffs' motions for summary judgment.

B. Summary Judgment

Plaintiffs ask the Court to vacate the Rule and convert its previously entered preliminary injunction to a permanent injunction. State Pls.' Br. Supp. Mot. Summ. J. 37, ECF No. 133; Private Pls.' Br. Supp. Mot. Summ. J. 50, ECF No. 136. Given how little the parties' legal claims have changed, the Court is inclined to do so. But Plaintiffs must show they are entitled to judgment as a matter of law, and the Court must assess whether Putative Intervenors' arguments compel reconsideration of its original analysis and determine the appropriate remedy for this stage of the litigation.

1. Merits

Individual Plaintiffs argue they are entitled to judgment as a matter of law on their (1) APA claim; (2) RFRA claim; and (3) Free Exercise claim. *See* Private Pls.' Br. Supp. Mot. Summ. J., ECF No. 136. State Plaintiffs argue they are entitled to judgment as a matter of law on their APA claim or, alternatively, their stand-alone constitutional claims. *See* State Pls.' Br. Supp. Mot. Summ. J., ECF No. 133. Defendants concede these points but ask the Court to go no further than

ruling on Plaintiffs' APA claim.[4] *See* Defs.' Resp., ECF No. 154. Putative Intervenors—now defending the Rule as parties to the case—argue that Plaintiffs have not proved an injury in fact and therefore cannot succeed on their claims.[5] Putative Intervenors' Br. Opp'n Mots. Summ. J. 1–3, ECF No. 155.

When the Court granted the preliminary injunction, it found that Plaintiffs (1) proved that the Rule violates the APA and (2) demonstrated that the Rule likely violates RFRA. Order 2, ECF No. 62. The Court finds no reason to depart from its analysis on the APA claim. *See id.* at 27–38 (holding that the Rule is "contrary to law" under the APA due to its conflict with Title IX, its incorporated statute). But because it previously only concluded that Private Plaintiffs' demonstrated a "substantial likelihood of success on their [RFRA] claims," the Court must now address whether Plaintiffs have proved that the Rule, as applied to them, also violates RFRA.[6] *Id.* at 42.

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[4] No matter Defendants' position, whether Plaintiffs are entitled to the judgment they seek is a decision that rests with the Court. "A motion for summary judgment cannot be granted simply because there is no opposition," but "a court may grant an unopposed summary judgment motion if the undisputed facts show that the movant is entitled to judgment as a matter of law." *Day v. Wells Fargo Bank Nat. Ass'n*, 768 F.3d 435, 435 (5th Cir. 2014) (unpublished) (quoting *Hibernia Nat. Bank v. Administracion Cent. S.A.*, 776 F.2d 1277, 1279 (5th Cir. 1985)).

[5] Putative Intervenors' arguments defending the Rule and opposing Plaintiffs' request for a permanent injunction are largely consistent with arguments Defendants originally raised when defending the rule and opposing the request for preliminary injunction. *Compare* Defs.' Response, ECF No. 50, *with* Putative Intervenors' Opp'n Mots. Summ. J., ECF No. 155. The Court has already addressed most of these arguments. *See* Order, ECF No. 62. To the extent that the Court has not addressed Putative Intervenors' arguments, the issues are not pertinent to the Court's conclusion. *See, e.g.*, Putative Intervenors' Opp'n Mots. Summ. J. 27–32, 35–37, ECF No. 155 (arguing that the Rule does not violate state sovereignty or the Free Exercise Clause).

[6] Putative Intervenors assert that the Court must review the administrative record to adjudicate Plaintiffs' claims. Putative Intervenors' Opp'n Mots. Summ. J. 4, 33–34, ECF No. 155. The Court disagrees. The Court need not consider the record on the APA claim because it requires a purely legal statutory-interpretation analysis. As State Plaintiffs correctly note, "[s]ex discrimination in section 1557 either includes gender identity and termination of pregnancy as a matter of law, or it does not." State Pls.' Reply 8, ECF No. 157. Further, the Court need not consider the record on the RFRA claim because the APA's "record rule does not apply to RFRA claims." *N. Arapaho Tribe v. Ashe*, 925 F. Supp. 2d 1206, 1211 (D. Wyo. 2012); *see also O Centro Espirita Beneficiente Uniao do Vegetal v. Duke*, 286 F. Supp. 3d 1239,

Congress—noting that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution" and that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," 42 U.S.C. § 2000bb(a)(1), (2)—enacted RFRA "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). RFRA reinstated "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," which Congress deemed "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5), (b)(1). When applying RFRA's test to a federal agency rule, a court must first determine whether the rule "imposes a substantial burden on the exercise of religion." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). If so, the court applies the two-prong compelling interest test. It asks whether the government "has shown that the [rule] both '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Id.* (quoting 42 U.S.C. § 2000bb–1(b)). "RFRA thus applies strict scrutiny to government regulations that substantially burden a person's religious exercise." *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013). Importantly, "a 'categorical approach'" to RFRA's strict-scrutiny analysis "is insufficient." *Id.* at 331 (citing *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 430–37 (2006)). Instead, the government must analyze RFRA claims on a case-by-case basis and must "explain how applying the statutory burden 'to the person' whose sincere exercise of religion is

1260–62 (D.N.M. 2017) (distinguishing APA claims and RFRA claims, and concluding that "the APA's procedural requirements, including the record rule, do not apply" to RFRA claims); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, No. 3:08-cv-616-LRH-RAM, 2009 WL 73257, at *1–3 (D. Nev. Jan. 7, 2009) (concluding that "limiting [the court's] review of the RFRA claim to the administrative record [wa]s inappropriate").

being seriously impaired furthers the compelling governmental interest." *Tagore*, 735 F.3d at 330–31 (citing *Gonzales*, 546 U.S. at 430–31).

In its December 31, 2016 Order, the Court concluded that "the Rule imposes a substantial burden on Private Plaintiffs' religious exercise." Order 40, ECF No. 62. After explaining that "the Court is careful not to weigh or evaluate the relevant doctrines of faith," the Court concluded that "Private Plaintiffs' refusal to perform, refer for, or cover transitions or abortions is a sincere religious exercise." *Id.* at 39. Because the Rule "[1] places substantial pressure on Plaintiffs to perform and cover transition and abortion procedures . . . [2] forces Plaintiffs to provide the federal government a nondiscriminatory and 'exceedingly persuasive justification' for their refusal to perform or cover such procedures [and] . . . [3] requires them to remove the categorical exclusion of transitions and abortions," the Rule substantially burdens Private Plaintiffs' religious exercise by making the practice of religion more expensive in the business context. *Id.* at 39–40 (citing *Hobby Lobby*, 573 U.S. at 710).

Accordingly, the Court applied strict scrutiny based on Defendants' briefing. *Id.* at 40–42. First, the Court noted that "Defendants d[id] not provide a compelling interest in their briefing and Private Plaintiffs dispute[d] that one exists." *Id.* at 40; *see also id.* at 38 ("Defendants did not address Plaintiffs' RFRA claim in their briefing but asserted at the hearing that more factual development was necessary to evaluate the claim."). Nevertheless, the Court stated that, even if Defendants had a compelling interest, they "failed to prove the Rule employs the least restrictive means." *Id.* at 41. The Court provided examples of other less restrictive means the government could use to ensure access to transition procedures and abortions, including assisting individuals seeking such procedures by finding healthcare providers who offer those services and then

assuming the cost. *Id.* at 41–42. Accordingly, the Court determined that Private Plaintiffs successfully demonstrated a substantial likelihood of success on their RFRA claim. *Id.*

Once again, Defendants have failed to address Private Plaintiffs' RFRA claim. *See generally* Defs.' Resp., ECF No. 154. However, Putative Intervenors urge the Court to find for Defendants a compelling interest in the preamble to the Rule, which states, "the government has a compelling interest in ensuring that individuals have nondiscriminatory access to health care and health coverage." Putative Intervenors' Resp. 33, ECF No. 155 (citing 81 Fed. Reg. at 31380). Putative Intervenors also reject Private Plaintiffs' and the Court's previously stated alternative means to achieve this interest. *Id.* at 34 n.7. However, RFRA's text and this Court's binding precedent make clear that Putative Intervenors cannot carry Defendants' burden; the "[g]overnment may substantially burden a person's exercise of religion only if *it* demonstrates that application of the burden to the person" satisfies strict scrutiny. 42 U.S.C. § 2000bb–1(b) (emphasis added); *see also Hobby Lobby*, 573 U.S. at 721 (refusing to consider RFRA arguments raised by parties other than the government).

Regardless, the Court considered and rejected these arguments in its December 31, 2016 Order. *See* Order 40–41, ECF No. 62. And the Court's analysis—like Private Plaintiffs' claims and Defendants' lack of response—has not changed. Though the preamble's broadly stated purpose, implemented through universal application of the Rule, could arguably satisfy a categorical application of strict scrutiny, it cannot satisfy RFRA's "more focused" inquiry. *Gonzales*, 546 U.S. at 430. Defendants, the only parties fit to carry the government's burden, have twice failed to demonstrate that applying the Rule to Private Plaintiffs, "the particular claimant[s] whose sincere exercise of religion is being substantially burdened," would achieve a compelling governmental interest through the least restrictive means. *Id.* at 430–31. Indeed, though the Rule

states that any "explicit, categorical (or automatic) exclusion or limitation of coverage" for these procedures is "unlawful on its face," 81 Fed. Reg. at 31429, Defendants have asserted no "harm [in] granting *specific* exemptions" to Private Plaintiffs. *Hobby Lobby*, 573 U.S. at 726–27 (emphasis added). Accordingly, the Court holds that the Rule, which expressly prohibits religious exemptions, substantially burdens Private Plaintiffs' religious exercise in violation of RFRA.

Settling this dispute requires resolving questions of law. Plaintiffs have already presented their legal arguments to the Court and, notably, explained why they were entitled to not only a preliminary injunction but also judgment as a matter of law. *See* Private Pls.' Reply, ECF No. 158. Now, they support those arguments with more evidence. *See* App. Supp. State Pls.' Mot. Summ. J., ECF No. 134; App. Supp. Private Pls.' Mot. Summ. J., ECF No. 137. Defendants do not object to the relevant facts, arguments, or evidence. *See* Defs.' Response, ECF No. 154. And though Putative Intervenors' do object, their arguments are largely duplicative of those the Court has already addressed. *Compare* Order, ECF No. 62, *with* Putative Intervenors' Opp'n Mots. Summ. J., ECF No. 155. Accordingly, the Court finds that Plaintiffs' motions for partial summary judgment should be and are hereby **GRANTED in part**.

2. Relief

Plaintiffs request two forms of relief: (1) vacatur of the Rule and (2) a permanent injunction enjoining Defendants from applying the Rule nationwide. *See* State Pls.' Br. Supp. Mot. Summ. J. 37, ECF No. 133; Private Pls.' Br. Supp. Mot. Summ. J. 50, ECF No. 136. Though the Court maintains that Plaintiffs were entitled to the preliminary injunction granted in its December 31, 2016 Order, it now concludes that the proper remedy at this stage is vacatur of the Rule, not a permanent injunction.

Under Section 706 of the APA, 5 U.S.C. § 706, when a reviewing court finds that an agency rule violates the APA, it "'shall'—not may—'hold unlawful and set aside' [the] agency action." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1022 (5th Cir. 2019) (citing *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994)) [hereinafter *Southwestern*]. When a court "hold[s] unlawful and set[s] aside" agency rules that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation omitted). The Fifth Circuit has applied Section 706 and accordingly vacated agency rules both in whole and in part. For example, where "the comprehensive regulatory package [wa]s plainly not amenable to severance," the Fifth Circuit concluded that a Department of Labor rule's "overreaching definition" and "conflict[] with the plain text" of ERISA—among other flaws—required vacatur of the rule "*in toto*." *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 379, 388 (5th Cir. 2018). In contrast, the Fifth Circuit vacated and remanded only severable portions of an Environmental Protection Agency rule enacted through arbitrary and capricious rulemaking. *Southwestern*, 920 F.3d at 1022.[7] Section 706 is not limited to appellate courts; district courts have a duty to vacate unlawful agency actions as well. *See Nio v. United States*, 385 F. Supp. 3d 44, 68–69 (D.D.C. 2019) (vacating arbitrary and capricious Department of Defense requirements rather than issuing

[7] "'[T]he agency action . . . found to be in excess of statutory authority,' 5 U.S.C. § 706(2)(C), can encompass only 'a part of an agency rule.' And courts may 'set aside' only the part of a rule found to be invalid—for that is the only 'agency action' that exceeds statutory authority. It would, therefore, exceed the statutory scope of review for a court to set aside an entire rule where only a part is invalid, and where the remaining portion may sensibly be given independent life." *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994). As the Court noted in its December 31, 2016 Order, "the Rule includes a severability provision," which allowed the Court to enjoin only the challenged provisions. Order 45–46, ECF No. 62 (citing 45 C.F.R. § 92.2(c)). Now, the Court **VACATES** only the portions of the Rule that are unlawful under the APA and RFRA.

a permanent injunction, and stating that "[g]enerally, when a court finds that a challenged action is arbitrary and capricious, the remedy is vacatur"); *Am. Stewards of Liberty v. Dep't of Interior*, 370 F. Supp. 3d 711, 728 (W.D. Tex. 2019) (vacating a Department of the Interior conclusion that did not follow Congress's set standard, and noting that "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking" (quoting *Judulang v. Holder*, 565 U.S. 42, 53 (2011)); *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 880 (E.D. Cal. 2018) (vacating an agency report that violated the National Environmental Policy Act, and stating that vacatur is the "presumptive remedy" for unlawful agency action).

Since the Court concludes that "the Rule's conflict with its incorporated statute—Title IX—renders it contrary to law under the APA," the appropriate remedy is vacatur. Order 38, ECF No. 62. Accordingly, the Court **VACATES and REMANDS** the unlawful portions of the Rule for Defendants' further consideration in light of this opinion and the Court's December 31, 2016 Order.

Finally, though "[i]t is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction," these circumstances do not justify such a remedy. *Texas*, 809 F.3d at 188. Rather, vacatur redresses both the APA violation and the RFRA violation. The Third Circuit discussed the distinctions between nationwide injunctions and vacatur in *Pennsylvania v. President United States*, 930 F.3d 543. There, the circuit court affirmed a district court's order granting a preliminary nationwide injunction against the enforcement of final rules the district court found *likely* violated the APA and *likely* were not authorized by nor required by the ACA or RFRA. *Id.* at 556. In upholding the remedy, however, the circuit emphasized that the nationwide injunction was issued "not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Id.* at 575 (quoting *Trump v. Int'l Refugee Assistance*

Project, 137 S. Ct. 2080, 2087 (2017)). Indeed, "[w]hile vacatur [wa]s the ultimate remedy the States s[ought]," the preliminary injunction merely provided temporary relief until the rules' validity could be "finally adjudicated." *Id.* at 575–76. But because "Congress . . . provided vacatur as a standard remedy for APA violations," the circuit clarified that courts in similar situations ultimately "invalidate—without qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agencies can take further action." *Id.* at 575.

The District Court for the District of Columbia encountered the issue this Court now faces: whether, after vacatur of an unlawful rule, "issuance of an injunction is also warranted." *O.A. v. Trump*, No. 18-2838, 2019 WL 3536334, at *29 (D.D.C. Aug. 2, 2019). The D.C. district court determined it was not. *Id.* It first noted that "[t]he Supreme Court has cautioned that a district court vacating an agency action under the APA should not issue an injunction unless doing so would 'have [a] meaningful practical effect independent of its vacatur.' *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)." *O.A.*, 2019 WL 3536334, at *29. It also noted that the defendants had "represented that they w[ould] abide by th[e c]ourt's order." *Id.* Accordingly, the court denied the plaintiffs' request for issuance of an injunction, but it also stated that the plaintiffs were "free, however, to return to the [c]ourt for further relief if warranted." *Id.*

Because the Court finds the circumstances here similar and the D.C. district court's analysis persuasive, the Court follows suit—vacating the Rule and inviting Plaintiffs to return if further relief independent of vacature is later warranted. There is currently no indication that, once the Rule is vacated, Defendants will defy the Court's order and attempt to apply the Rule against Plaintiffs or similarly situated non-parties. Rather, Defendants now "agree with Plaintiffs and the Court that the Rule's prohibitions on discrimination on the basis of gender identity and termination of pregnancy conflict with Section 1557 and thus are substantively unlawful under the APA."

Defs.' Resp. 1, ECF No. 154. Defendants correctly state that they have been "conscientiously complying with the injunction" and ask the Court to postpone ruling due to their "ongoing efforts to amend the Rule." *Id.* at 2. Considering Defendants' prior actions and current statements, the Court concludes that issuance of an injunction would not have a "meaningful practical effect independent of its vacatur" because vacatur and remand will likely prevent Defendants from applying the Rule. *Monsanto*, 561 U.S. at 165. However, should Defendants attempt to apply the vacated Rule—in violation of the APA, RFRA, and this Court's Order—Plaintiffs may return to the Court for redress. As it stands, neither Plaintiffs nor similarly situated non-parties need injunctive relief from the vacated Rule.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Putative Intervenors' Motion to Intervene (ECF No. 129) should be and is hereby **GRANTED**. The Court also finds that Plaintiffs' Motions for Summary Judgment and Permanent Injunction (ECF Nos. 132, 135) should be and are hereby **GRANTED in part**. The Court **SEVERS** Plaintiffs' APA and RFRA claims from their Title VII, Spending Clause, First Amendment, Tenth Amendment, and Eleventh Amendment claims. The Court **ADOPTS** its prior reasoning from the preliminary injunction (ECF No. 62) and now **HOLDS** that the Rule violates the APA and RFRA. Accordingly, the Court **VACATES and REMANDS** the Rule for further consideration.

SO ORDERED on this **15th day** of **October, 2019**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

9. Order Granting Preliminary Injunction

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

FRANCISCAN ALLIANCE, INC. et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00108-O**
	§	
SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Plaintiffs' Motions for Preliminary Injunction and Briefs and Appendix in Support (ECF Nos. 22–26), filed October 21, 2016; Defendants' Response (ECF No. 53), filed November 23, 2016; and Plaintiffs' Replies (ECF Nos. 56, 57), filed December 2, 2016. Additionally, the parties appeared at a hearing on the request for a preliminary injunction and presented oral arguments on December 20, 2016. ECF No. 61.

The Plaintiffs challenge a regulation enacted pursuant to the Patient Protection and Affordable Care Act ("ACA") that covers nearly every healthcare provider in the country and reaches into one of the most intimate relationships: that between a physician and her patient. The ACA forbids discriminating on the basis of sex. Pursuant to this statutory provision, Defendants enacted a regulation that forbids discriminating on the basis of "gender identity"[1] and "termination of pregnancy." 42 U.S.C. § 18116(a); 45 C.F.R. § 92.4. Plaintiffs argue the new regulation will

[1] The challenged regulation defines "gender identity" as "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." 45 C.F.R. § 92.4.

require them to perform and provide insurance coverage for gender transitions and abortions, regardless of their contrary religious beliefs or medical judgment. *See* Am. Compl., ECF No. 21. While this lawsuit involves many issues of great importance—state sovereignty, expanded healthcare coverage, anti-discrimination protections, and medical judgment—ultimately, the question before the Court is whether Defendants exceeded their authority under the ACA in the challenged regulations' interpretation of sex discrimination and whether the regulation violates the Religious Freedom Restoration Act as applied to Private Plaintiffs. Before reaching this question however, the Court is obligated to determine whether it has authority to hear the matter.

For the following reasons, the Court concludes that jurisdiction is proper, the regulation violates the Administrative Procedure Act ("APA") by contradicting existing law and exceeding statutory authority, and the regulation likely violates the Religious Freedom Restoration Act ("RFRA") as applied to Private Plaintiffs. Accordingly, Plaintiffs' Motions for Preliminary Injunction should be and are hereby **GRANTED**.

I. BACKGROUND

The following factual recitation is taken from Plaintiffs' First Amended Complaint (ECF No. 21) unless stated otherwise.[2] Plaintiffs are composed of eight states (collectively "State Plaintiffs")[3] and three private healthcare providers, Franciscan Alliance, Inc. ("Franciscan"), its wholly owned entity Specialty Physicians of Illinois, LLC ("Specialty Physicians"), and the Christian Medical & Dental Society ("CMDA"), doing business as the Christian Medical & Dental

[2] Page numbers cited throughout the Court's Order refer to the page numbers assigned by the Court's electronic docket.

[3] State Plaintiffs include: (1) the State of Texas; (2) the State of Wisconsin; (3) the State of Nebraska; (4) the State of Kansas; (5) the State of Louisiana; (6) the State of Arizona; (7) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin; and (8) the State of Mississippi, by and through Governor Phil Bryant. Am. Compl. 4–6, ECF No. 21.

Associations (collectively "Private Plaintiffs"). Am. Compl. 4–8, ECF No. 21. They have sued the U.S. Department of Health and Human Services ("HHS"), and HHS Secretary Sylvia Burwell ("Burwell") (collectively "Defendants"), challenging a new rule issued by HHS entitled Nondiscrimination in Health Programs & Activities (the "Rule"). 81 Fed. Reg. 31376–31473, (May 18, 2016) (codified at 45 C.F.R. § 92).

The Rule implements Section 1557 of the ACA ("Section 1557"), which prohibits discrimination by any health program or activity receiving federal financial assistance on the grounds prohibited under four federal nondiscrimination statutes incorporated by Section 1557. 45 C.F.R. § 92.1. The ground at issue in this case is Section 1557's incorporation of the prohibited sex discrimination under Title IX of the Education Amendments of 1972 ("Title IX"). Plaintiffs challenge the Rule's interpretation of discrimination "on the basis of sex" under Title IX as encompassing "gender identity" and "termination of pregnancy." 45 C.F.R. § 92.4; State Pls.' Br. 10, ECF No. 23. Plaintiffs argue that because Section 1557 incorporates the statutory prohibition of sex discrimination in Title IX, its scope should be limited by Title IX's unambiguous definition of "sex" as the immutable, biological differences between males and females "as acknowledged at or before birth." *Id.* at 13, 27. The Plaintiffs also assert that the Rule's definition of sex does not apply to them because the text of Section 1557 incorporates the religious and abortion exemptions of Title IX, and the Rule's failure to incorporate those exemptions renders it contrary to law. *See* Priv. Pls.' Br. 31–34, ECF No. 25.

On October 21, 2016, Plaintiffs moved for partial summary judgment, or in the alternative, a preliminary injunction. ECF Nos. 22, 24. To resolve the matter before the Rule's insurance provision goes into effect on January 1, 2017, at which time Plaintiffs would be forced to "make significant, expensive changes to their insurance plans," the Court set an expedited briefing

schedule and held a hearing on the preliminary injunction motions on December 20, 2016. Priv. Pls.' Mot. 2, ECF No. 24; Nov. 1, 2016 Order 7, ECF No. 32; ECF No. 61. Plaintiffs' motions for preliminary injunction are now ripe for review.

A. The Rule

The challenged Rule was first proposed on September 8, 2015, pursuant to HHS's authority to implement Section 1557 of the ACA. Am. Compl. 10–11, ECF No. 21. After notice and comment, the final Rule was published on May 18, 2016. *Id.* The Rule took partial effect on July 18, 2016, and the insurance provisions will be effective on January 1, 2017. 81 Fed. Reg. at 31376. The Rule purports to implement Section 1557 which provides:

> [A]n individual shall not, *on the ground prohibited under* title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) ["Title VI"], title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) ["Title IX"], the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) ["ADA"], or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) ["Section 504"], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . . .

42 U.S.C. § 18116(a) (emphasis added). Section 1557 does not create new bases of prohibited discrimination, but rather incorporates the grounds of four longstanding federal nondiscrimination statutes: Title VI, Title IX, the ADA, and Section 504. 42 U.S.C. § 18116(a). The implementing Rule claims to merely "clarif[y] and codif[y] *existing* nondiscrimination requirements," incorporated in Section 1557. 81 Fed. Reg. at 31376 (emphasis added). A substantial portion of the Rule deals with discrimination on the basis of disability, but Plaintiffs limit their challenge to the Rule's definition of discrimination on the basis of sex. Priv. Pls.' Br. 24, ECF No. 25.

When implementing the Title IX portion of Section 1557, HHS defined discrimination "on the basis of sex" to include "termination of pregnancy" and "gender identity." 45 C.F.R. § 92.4. The Rule does not define termination of pregnancy but defines gender identity as "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." *Id.* The Rule explains that the "gender identity spectrum includes an array of possible gender identities beyond male and female." 81 Fed. Reg. at 31392.

Plaintiffs claim the Rule's interpretation of sex discrimination pressures doctors to deliver healthcare in a manner that violates their religious freedom and thwarts their independent medical judgment and will require burdensome changes to their health insurance plans on January 1, 2017. Priv. Pls.' Mot. 1–2, ECF No. 24; State Pls.' Br. 31–33, ECF No. 23. Plaintiffs argue that Defendants define prohibited sex discrimination to include: (1) refusing to provide abortion-related services and health insurance coverage of abortion-related services; and (2) refusing to provide transition-related services and health insurance coverage of transition-related services. *See* Am. Compl., ECF No. 21. Defendants claim the Rule does not mandate any particular procedure, rather it requires only that covered entities provide nondiscriminatory health services and health insurance in a nondiscriminatory manner. Defs.' Resp. 35, ECF No. 50; Hr'g Tr. 49:25–50:3, Dec. 20, 2016.

1. Health Coverage

One of the "discriminatory actions prohibited" under the Rule is "hav[ing] or implement[ing] a categorical [insurance] coverage exclusion or limitation for all health services related to gender transition." 45 C.F.R. § 92.207(b). The Rule declares that categorizations of all transition-related treatment as cosmetic or experimental are now "outdated and not based on current standards of care." 81 Fed. Reg. at 31429. The "range of transition-related services"

contemplated by the Rule includes treatment for gender dysphoria[4] and is "not limited to surgical treatments and may include, but is not limited to, services such as hormone therapy and psychotherapy, which may occur over the lifetime of the individual." 81 Fed. Reg. at 31435–36.

Because the Rule contains no age limitation, Plaintiffs are concerned it may require health insurance coverage of transitions for children and they note that transition-related procedures are viewed by many in the medical community as harmful, including HHS's own medical experts.[5] Priv. Pls.' Br. 40, ECF No. 25. They argue the Rule prohibits covered entities from categorically excluding transition-related procedures from insurance coverage plans even though TRICARE, the military's insurance program, categorically excludes all coverage of surgical transition procedures and widespread debate about the medical risks and ethics associated with transition procedures continues within the medical community. *Id.* at 40–42.

2. Health Services

Plaintiffs also allege the Rule requires doctors or healthcare providers to perform (or refer patients for) transition-related procedures if the entity provides an analogous service in a different context. Am. Compl. 12–13, ECF No. 21. For example, the Rule's preamble explains that "[a] provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy [removal of the uterus] for a transgender man would have to revise its

[4] Gender dysphoria is defined as "a distressed state arising from conflict between a person's gender identity and the sex the person has or was identified as having at birth." MERRIAM-WEBSTER MEDICAL DICTIONARY (2016) https://www.merriam-webster.com/medical/gender%20dysphoria.

[5] *See* Priv. Pls.' App. 648, ECF No. 26; Centers for Medicare & Medicaid Services, Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (June 2, 2016) ("Based on a thorough review of the clinical evidence available at this time, there is not enough evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria. There were conflicting (inconsistent) study results—of the best designed studies, some reported benefits while others reported harms.").

policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." 81 Fed. Reg. at 31455.

HHS stressed that some procedures "related to gender transition" may be required even if not "strictly identified as medically necessary or appropriate." *Id.* at 31435. Plaintiffs interpret this to mean that if a doctor performs mastectomies as part of a medically necessary treatment for breast cancer, he would be forced to perform the same procedure for a gender transition, even if the doctor believed removing healthy breast tissue was contrary to the patient's medical interest. Am. Compl. 14, ECF No. 21. Private Plaintiffs also perform certain procedures for a miscarriage (such as dilation and curettage) and they fear the Rule will require them to perform those procedures for abortions to avoid discrimination on the basis of "termination of pregnancy." Am. Compl. 33, 38–39, ECF No. 21.

Plaintiffs claim the Rule pressures covered entities to perform and provide insurance coverage for abortion- and transition-related procedures. Priv. Pls.' Br. 18–19, ECF No. 25. But Defendants argue the Rule does not require the performance or insurance coverage of any procedure, but merely prohibits policies from "operating in a discriminatory manner, both in design and implementation." Defs.' Resp. 27, ECF No. 50. Defendants claim that "neutral nondiscriminatory application of evidence-based criteria" can be used to "make medical necessity or coverage determinations" and that "a legitimate nondiscriminatory reason" can justify a limitation of services. Defs.' Resp. 55, 24–25, ECF No. 50. At the hearing on this matter however, Defendants' Counsel argued it would be "very difficult to imag[in]e" *any* medical justification for a categorical exclusion of health services or coverage of *all* transition-related procedures. Hr'g Tr. 75:9–12.

3. Enforcement

Although Title IX provides the grounds of prohibited sex discrimination, covered entities who violate the Rule's prohibition of sex discrimination are subject to the penalties associated with a violation of Title VI of the Civil Rights Act of 1964. 45 C.F.R. § 92.302(a). Those in violation of the Rule face the loss of federal funding, debarment from doing business with the government, and false claims liability.[6] 45 C.F.R. §§ 92.301, 92.302. Covered entities are required to record and submit compliance reports upon request to HHS's Office of Civil Rights ("OCR") and post public notices of compliance. 45 C.F.R. § 92.8; 81 Fed. Reg. at 31439. The Rule also provides for enforcement proceedings by the Department of Justice ("DOJ") and private lawsuits for damages and attorney's fees. 81 Fed. Reg. at 31440–41.

4. Plaintiffs

Franciscan and CMDA's members are covered entities under the Rule because they both receive federal financial assistance and provide employee health insurance.[7] Franciscan is a Roman Catholic faith-based hospital system founded by a Roman Catholic order, the Sisters of St. Francis of Perpetual Adoration. Am. Compl. 7, ECF No. 21. Healthcare and religion have been inextricably intertwined in the delivery of their services since their first hospital building opened, serving as both a convent and a hospital. *Id.* Since opening their doors in 1875, they have been focused on serving the most vulnerable of society with the values of the Sisters of St. Francis,

[6] Franciscan would risk losing $900 million in federal funds; Texas would risk losing more than $42.4 billion in federal funds; and CMDA members would risk losing a significant amount of federal funds. Am. Compl. 7–8, ECF No. 21; Am. Compl. 28–29, ECF No. 21; *See* Hr'g Tr. 89:10–20, Dec. 20, 2016.

[7] The Rule applies to "every health program or activity, any part of which receives Federal financial assistance provided or made available by the Department; every health program or activity administered by the Department; and every health program or activity administered by a Title I entity." 45 C.F.R. § 92.2(a). HHS estimated the Rule would "likely cover almost all licensed physicians because they accept Federal financial assistance . . . ." 81 Fed. Reg. at 31445.

including: respect for life, fidelity to Franciscan's mission, compassionate concern, and Christian stewardship. *Id.* at 7, 35. Franciscan's hospitals provide many resources to accommodate the spiritual needs of their employees, patients, and their families—including daily Mass and 24-hour access to a chapel for individuals of all faith to pray and meditate. *Id.* at 34. Franciscan now provides $900 million in Medicare and Medicaid services annually to the poor, disabled, and elderly; and stands to lose that funding and significantly more if federal funding is withdrawn. *Id.* at 7–8.

Franciscan provides all of its standard medical services to every individual, including those who identify as transgender. Am. Compl. 36, ECF No. 21. But Franciscan's religious beliefs do not allow them to perform or cover transition-related procedures. *Id.* at 3.

> Franciscan holds religious beliefs that sexual identity is an objective fact rooted in nature as male or female persons. Like the Catholic Church it serves, Franciscan believes that a person's sex is ascertained biologically, and not by one's beliefs, desires, or feelings. Franciscan believes that part of the image of God is an organic part of every man and woman, and that women and men reflect God's image in unique, and uniquely dignified, ways.

Am. Compl. 37, ECF No. 21. Indeed, Franciscan tailors care according to the biological differences between men and women and credits this approach as part of the success behind its award-winning heart-health treatment program.[8] *Id.* Franciscan does not believe transition-related procedures are *ever* in the best interests of its patients and providing or covering *any* transition-related service would violate their deeply held religious beliefs. *Id.* at 37–38.

CMDA is the nation's largest faith-based organization of doctors, including nearly 18,000 members who sign a statement of faith to join and rely on CMDA to advocate on behalf of their

[8] Franciscan believes that "optimal patient care—including in patient education, diagnosis, and treatment—requires taking account of the biological differences between men and women" and that "optimal prevention of and treatment for heart disease in women requires monitoring for different warning signs, accounting for different risk factors, and providing different counseling than it would for men." Am. Compl. 37, ECF No. 21.

religious beliefs and medical judgments in the public square. Am. Compl. 29–30, ECF No. 21; App. 17, Dr. Stevens' Decl., ECF No. 26. Accordingly, CMDA is bringing suit on behalf of its members. Am. Compl. 6–7, ECF No. 21.[9] CMDA members hold values similar to Franciscan and CMDA's approved Ethics Statement affirms the "obligation of Christian healthcare professionals to care for patients struggling with gender identity with sensitivity and compassion" but states clear opposition to medical assistance with gender transition and abortion. *Id.* at 30. CMDA members treat transgender individuals for health issues ranging from the common cold to cancer, and several members have already received requests for transition-related procedures that they cannot provide without violating their religious beliefs. App. 25, Dr. Stevens' Decl., ECF No. 26. Like Franciscan, CMDA members tailor care according to biological sex phenotype and believe that "[t]ransgender designations may conceal biological sex differences relevant to medical risk factors, recognition of which is important for effective healthcare and disease prevention." Am. Compl. 31, ECF No. 21. Private Plaintiffs provide a variety of services specifically and exclusively for women (e.g., obstetrics and gynecology; hysterectomies; hormone treatments; reconstructive surgery) that the Rule requires they "demonstrate an exceedingly persuasive justification" to maintain. Am. Compl. 36, ECF No. 21; 45 C.F.R. § 92.101(b)(3)(iv).[10]

Private Plaintiffs' religious beliefs also prevent them from being able to participate in, refer for, or cover elective sterilizations or abortion-related procedures. Am. Compl. 33, 38–39, ECF No. 21. Because the Rule prohibits discrimination on the basis of "termination of pregnancy" and

[9] Although the Amended Complaint stated CMDA was bringing suit on behalf of itself and its members, Private Plaintiffs indicated at the December 20, 2016 hearing that CMDA is not a covered entity and is bringing suit on behalf of its members only. Am. Compl. 6–7, ECF No. 21; Hr'g Tr. 89:10–20.

[10] "A covered entity may operate a sex-specific health program or activity [] only if the covered entity can demonstrate an exceedingly persuasive justification, that is, that the sex-specific health program or activity is substantially related to the achievement of an important health-related or scientific objective." 45 C.F.R. § 92.101(b)(3)(iv).

fails to incorporate the blanket religious and abortion exemptions of Title IX, Private Plaintiffs are concerned that their blanket exclusion of abortion or elective sterilization services and coverage of such procedures puts them at risk of losing federal funding and facing civil liability. *See* Priv. Pls.' Br. 31, ECF No. 25.[11]

Franciscan and CMDA's members also provide health insurance coverage for their employees in accordance with their religious beliefs. *See* Am. Compl., ECF No. 21. For example, both groups exclude coverage for services related to gender transition, sterilizations, and abortions. *Id.* at 34, 39. Franciscan's employee health benefit plan specifically excludes coverage for any "[t]reatment, drugs, medicines, services, and supplies related to gender transition; sterilizations; abortions." Am. Compl. 39, ECF No. 21; Am. Compl. 34, ECF No. 21 ("CMDA has members who currently provide healthcare coverage for employees, coverage which excludes medical transition procedures."). Private Plaintiffs sincerely believe that participating in, referring for, or providing insurance coverage of gender transitions, sterilizations, or abortions would constitute "impermissible material cooperation with evil." Am. Compl. 39, 33, ECF No. 21.

The State Plaintiffs receive billions in federal financial assistance each year, and are subject to the Rule as providers of both health care and health insurance. *See id.* at 4–6. State Plaintiffs prohibit insurance coverage for abortions and gender transition procedures, but to comply with the Rule, State Plaintiffs must rescind these categorical exclusions. *See* State Pls.' Reply 17, ECF No. 56. Texas, one of the named State Plaintiffs, is already being forced to comply with an investigation by HHS's Office of Civil Rights and stands to lose more than $42.4 billion in federal healthcare funding—jeopardizing the availability of healthcare for the nation's most vulnerable

[11] The Rule cites to federal religious protections outside of Title IX and they are discussed at length below. 45 C.F.R. § 92.2(b)(2).

citizens if it does not change its policies. State Pls.' Reply 16–17, ECF No. 56; Am. Compl. 4, ECF No. 21. State Plaintiffs claim the Rule "undermines the longstanding sovereign power of the States to regulate healthcare, ensure appropriate standards of medical judgment, and protect its citizens' constitutional and civil rights." Am. Compl. 3, ECF No. 21. State Plaintiffs also argue the Rule forces them to incur significant costs to post required notices of compliance, train personnel, adjust insurance coverage, and increase service offerings to include transition-related procedures. *Id.* at 27–28. HHS estimates that states will need to contribute $17.8 million to train 7,637,306 state workers under the new Rule. 81 Fed. Reg. at 31465, 31449.

Together, Plaintiffs claim the Rule violates the Administrative Procedure Act ("APA") because its definition of prohibited sex discrimination is contrary to law and arbitrary and capricious. *See* Am. Compl., ECF No. 21. Accordingly, the Court begins with the law governing APA claims and the relevant standards in considering a preliminary injunction.

II. LEGAL STANDARDS

A. The Administrative Procedure Act

"The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004) (quoting 5 U.S.C. § 702). "Where no other statute provides a private right of action, the 'agency action' complained of must be *final* agency action." *Id.* at 61–62 (quoting 5 U.S.C. § 704). An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process"; and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113

(1948); and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). "In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50 (1967)). When final agency actions are presented for judicial review, the APA provides that reviewing courts should "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law." 5 U.S.C. § 702(2).

B. Preliminary Injunction

The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.*; *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001). A movant who obtains a preliminary

injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (citing *Canal*, 489 F.2d at 572). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). Even when a movant satisfies each of the four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light*, 760 F.2d at 621.

III. ANALYSIS

Plaintiffs argue the Rule should be enjoined because it violates: (1) the Administrative Procedure Act; (2) the Religious Freedom Restoration Act; (3) the First Amendment's Free Speech Clause; and (4) the Spending Clause of Article I. *See* Priv. Pls.' Mot., ECF No. 25.

Defendants contend that Plaintiffs are not entitled to a preliminary injunction because they are unlikely to succeed, arguing: (1) the Court lacks jurisdiction; (2) the Rule is entitled to *Chevron* deference; (3) the Rule does not compel or curtail speech; (4) Plaintiffs failed to assert a sufficient facial pre-enforcement vagueness challenge; and (5) Plaintiffs failed to assert a sufficient substantive due process claim. *See* Defs.' Resp., ECF No. 50. Defendants also argue Plaintiffs are not entitled to a preliminary injunction because (1) Plaintiffs failed to establish irreparable injury and (2) the balance of equities and public interest favor denying injunctive relief. *Id.*

A. Jurisdiction

The Court must first assess jurisdiction, for "without proper jurisdiction, a court cannot proceed at all." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 84 (1998).[12] Defendants argue the Court lacks jurisdiction because (1) Plaintiffs lack standing; (2) Plaintiffs' claims are not ripe; and (3) Section 1557 requires Plaintiffs adhere to its specified mechanisms for administrative and judicial review. Defs.' Resp. 36–37, ECF No. 50. The Court addresses each of these arguments in turn.

Article III confines the federal judicial power to actual "cases" and "controversies." U.S. CONST. art. III, § 2. The case-or-controversy requirement plays a critical role in ensuring the federal judiciary respects "the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Article III standing enforces the case-or-controversy requirement and must be established by the party invoking federal jurisdiction as to each claim asserted. *DaimlerChrysler*, 547 U.S. at 342 (citing *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004)).

1. Standing

To establish standing Plaintiffs must show: (1) an injury in fact; (2) fairly traceable to Defendants' challenged conduct; and (3) likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). A plaintiff must support each standing element "with the manner and degree of evidence required at the successive stages of the

[12] It is undisputed that this case presents a federal question, giving the Court subject matter jurisdiction pursuant to 28 U.S.C. § 1331. It is also undisputed the Court has authority to review administrative actions pursuant to 5 U.S.C. § 702 of the APA and authority to grant injunctive relief pursuant to Federal Rule of Civil Procedure 65.

litigation." *Lujan*, 504 U.S. at 561. But it is not necessary for all Plaintiffs to demonstrate standing; rather, "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. United States*, 809 F.3d 134, 151 (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). For an injury to be particularized it must "affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548. In this case, the Rule will affect each of the Plaintiffs in different ways and varying degrees, but each will be required to make changes to their health insurance coverage (to rescind their current categorical exclusion of transitions) or risk the loss of federal funding and face potential civil liability.[13]

Defendants argue Plaintiffs failed to satisfy the first element of standing because their alleged injuries are conjectural and hypothetical. Defs.' Resp. 39–40, ECF No. 50. Defendants also contend CMDA lacks associational standing to sue on behalf of its members because CMDA members would not have standing to sue in their own right and the claims asserted require their individual participation. *Id.* at 40–42.

Here, the injuries alleged by Plaintiffs are particularized because they distinctly affect each Plaintiff. For example, the Rule will affect how CMDA members communicate with patients, what insurance coverage they offer to their employees, and their hiring prospects because the Rule

[13] While the Rule cites "[f]ederal statutory protections for religious freedom and conscience" potentially available to Plaintiffs, Defendants refused to agree the protections would apply to Private Plaintiffs or that Private Plaintiffs would be able to maintain their current categorical exclusions. 45 C.F.R. § 92.2(b)(2); *see* Hr'g Tr. 70:10–71:13. Accordingly, Private Plaintiffs must remove their categorical exclusion the Rule declares is "unlawful on its face" or roll the dice and risk the withdrawal of federal funding and civil liability. 81 Fed. Reg. at 31429.

imposes potential liability on hospitals for a doctor's discrimination. Priv. Pls.' Br. 44–49, 19, ECF No. 25; 81 Fed. Reg. at 31384. The Rule will affect Franciscan's ability to continue operations because with no assurance that they will be exempt from the Rule's provisions that contradict their religious beliefs, Franciscan must either maintain their current insurance coverage plan that violates the Rule and risk debilitating consequences or violate their religious beliefs. *See* Priv. Pls.' Br. 22–23, ECF No. 25. Because State Plaintiffs enforce categorical exclusions of transition-related procedures, and have no religious defense to assert, the Rule mandates revision of their policies and forces State Plaintiffs to conduct individualized inquiries into whether a particular transition procedure is medically necessary. *See* State Pls.' Reply 17, ECF No. 56. The Rule also forces State Plaintiffs to cooperate with ongoing investigations, expend millions on training personnel under the Rule, and adjust physical facilities to accommodate what the Rule describes as "an array of possible gender identities." 81 Fed. Reg. at 31392; *see* State Pls.' Reply 20, ECF No. 56.

To satisfy the injury in fact requirement, the injury must also be concrete. *Spokeo*, 136 S. Ct. at 1548. The Supreme Court has emphasized that a concrete injury "must actually exist," meaning it is "real" and "not abstract." *Id.* When seeking a preliminary injunction, in addition to past injury, a plaintiff must show he or she faces "an imminent threat of future injury." *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210–11 (1995). For example, in *Los Angeles v. Lyons*, the Supreme Court held the plaintiff lacked standing to seek an injunction against a police chokehold policy because he faced "no realistic threat" from the policy. 461 U.S. 95 (1983). The Supreme Court noted that "[t]he reasonableness of [plaintiff's] fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct." *Id.* at 107 n.8.

Here, Plaintiffs' fear of being subjected to penalties under the challenged Rule is reasonable given they are all covered entities whose insurance plans include a categorical exclusion of transition-related procedures that is forbidden by the Rule.[14] Further, the likelihood that Plaintiffs will suffer further harm from the Rule is strengthened by the current HHS investigation into some of the Plaintiffs' potential noncompliance.[15] State Pls.' Reply 16–17, ECF No. 56. Accordingly, Plaintiffs have presented concrete evidence to support their fears that they will be subject to enforcement under the Rule.

The second and third elements of standing, causation and redressability, are easily established here because the Plaintiffs are themselves the subject of the challenged government action. *Lujan*, 504 U.S. at 561–62 (stating that when a plaintiff challenges the legality of government action or inaction, and is himself an object of the action at issue, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it").

Because Plaintiffs bring claims under the APA, in addition to Article III standing requirements, "the interest [they] assert[] must be 'arguably within the zone of interests to be protected or regulated by the statute' that [they] say[] was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). As covered entities required to make expensive changes to their insurance coverage plans, Plaintiffs' asserted interests fall

[14] 45 C.F.R. § 92.207(b)(4).

[15] HHS's Office for Civil Rights ("OCR") contacted Texas's Health and Human Services Commission on September 29, 2016 to investigate a complaint concerning the Texas Medicaid Program and is currently investigating whether Texas covers "sex change therapy," who determines the "medical necessity" for such therapy, and whether there is a different process for determining medical necessity criteria for hormonal fertility treatment and cosmetic surgery. State Pls.' Reply 16, ECF No. 56 (quoting Decl. of Dana Williamson Ex. 1, Dec. 2, 2016).

squarely within the zone of interests regulated by the Rule. Accordingly, Private Plaintiffs and State Plaintiffs have standing to pursue this lawsuit.

CMDA also asserts associational standing on behalf of its 18,000 members. Am. Compl. 6–7, 59, ECF No. 21. It is well established that an association is permitted to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). An organization lacks standing if it fails to adequately allege that there is a threat of injury to any individual member of the association and thus fails to identify even one individual member with standing. *Funeral Consumers Alliance, Inc. v. Serv. Corp. Intern.*, 695 F.3d 330, 344 (5th Cir. 2012) (citing *Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury*, 25 F.3d 237, 242 (5th Cir. 1994)). The Supreme Court has held that standing cannot be established by "accepting the organization's self-description of the activities of its members" and determining that "there is a statistical probability that some of those members are threatened with concrete injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Plaintiff-organizations must make specific allegations establishing that at least one identified member has suffered or would suffer harm. *Id.* at 498.

As to the first prong, Defendants argue CMDA lacks associational standing because its members have not established their "religious or conscience-based objections to performing [transition or abortion] services." Defs.' Resp. 40, ECF No. 50. But a plaintiff-organization need only establish that one member would suffer harm under the Rule, and CMDA has satisfied that requirement by providing the declaration of Dr. Hoffman. Priv. Pls.' App. 467–70, Hoffman Decl., ECF No. 26. Dr. Hoffman declared that "CMDA's ethical statements are consistent with my own

medical and religious beliefs." App. 468, ECF No. 26. Dr. Hoffman currently provides standard medical services to transgender patients and performs a variety of procedures that could be used in connection with a gender transition but that, in light of his medical judgment and religious beliefs, he would not offer for that purpose. *Id.* at 468–69.

Defendants take no issue with the second prong, and the Court finds that the interests CMDA seeks to protect in this suit are germane to its purpose. Am. Compl. 29, ECF No. 21. As to the third prong, Defendants argue CMDA lacks associational standing as to the asserted RFRA claim because it would require the participation of individual members. Defs.' Resp. 41, ECF No. 50. CMDA is not required to detail the specific religious views of each member however, and the record is sufficiently developed from Dr. Hoffman's Declaration, CMDA's Ethics Statement, and Private Plaintiffs' briefing, to consider the RFRA claim at the preliminary injunction stage. Because CMDA alleges there is a real and immediate threat that one of its members will be injured by the Rule, it has established standing on behalf of its members.

2. Ripeness

Defendants also argue this suit is not ripe because Plaintiffs' injuries are speculative, Plaintiffs face no significant hardship in the absence of review, and the issues presented would be significantly aided by further factual development. Defs.' Resp. 37–39, ECF No. 50.

The Court looks primarily at two considerations in determining whether a case is ripe for judicial review: (1) fitness of the issues for judicial decision; and (2) hardship to the parties of withholding court consideration. *Abbott Labs.*, 387 U.S. at 149. In the same vein, a challenge to administrative regulations is fit for review if (1) the questions presented are "purely legal one[s]," (2) the challenged regulations constitute "final agency action," and (3) further factual development would not "significantly advance [the court's] ability to deal with the legal issues presented."

Texas v. United States, 497 F.3d 491, 498–99 (5th Cir. 2007) (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003)).

Because the present case involves primarily questions of law, the Court finds that it would not be significantly aided by further factual development. The parties do not dispute that Plaintiffs are covered entities under the Rule or that they currently exclude all insurance coverage of transition-related procedures. However, the parties disagree as to the Rule's exact application and effect on Plaintiffs. Defendants refuse to indicate whether any of the religious defenses cited by the Rule would allow Private Plaintiffs to maintain their categorical exclusions, and insist more facts are needed to determine whether Private Plaintiffs' insurance policies violate the Rule. Hr'g Tr. 51:20–24, 61:1–62:25. Absent an applicable religious defense, the Rule clearly forbids categorical exclusions of health insurance coverage for transition-related procedures. 45 C.F.R. § 92.207(b)(4); Defs.' Resp. 26, ECF No. 50. As the Rule clearly prohibits categorical exclusions of transition coverage and Private Plaintiffs have articulated their religious beliefs forbidding coverage of transitions in *any* case, it is not clear what additional facts would aid resolution of the suit, and Defendants' counsel struggled to articulate any at the hearing. 45 C.F.R. § 92.207(b)(4); *see* Hr'g Tr. 61:1–62:25, 93:14–95:16.

But even assuming that Private Plaintiffs would eventually find safe harbor under one of the federal religious protections cited by the Rule, Defendants do not dispute that Private Plaintiffs are covered by the Rule or that it directly affects their conduct. Therefore on January 1, 2017, Private Plaintiffs will be forced to either violate their religious beliefs or maintain their current policies which seem to be in direct conflict with the Rule and risk the severe consequences of enforcement.

Further, even if Defendants eventually agree Private Plaintiffs are covered by one of the referenced religious protections, State Plaintiffs would have no such defense available. The Rule requires State Plaintiffs to rescind their categorical exclusions of transition procedures and evaluate requests for insurance coverage of transitions on a case-by-case basis. *See* 45 C.F.R. § 92.207(b)(4). The parties do not dispute that State Plaintiffs' categorical exclusions of transition-related insurance coverage will be in violation of the Rule on January 1, 2017. *See* Hr'g Tr. 92:4–8. Therefore, the Court finds no further factual development would aid resolution of the case and what little value a more developed factual record would provide is strongly outweighed by the significant hardship Plaintiffs face in the absence of immediate judicial review.

Substantial hardship is typically satisfied when a party is forced to choose between refraining from allegedly lawful activity or engaging in the allegedly lawful activity and risking significant sanctions. *Abbott Labs.*, 387 U.S. at 136 (finding the suit ripe because denying review would force plaintiffs to undergo significant hardship in an effort to comply with the challenged FDA regulation or risk serious civil and criminal penalties); *Steffel v. Thompson*, 415 U.S. 452 (1974) (finding the suit ripe because denying review would force plaintiff to choose between forgoing possibly protected speech (distributing anti-Vietnam War literature) and risking criminal punishment). Plaintiffs should not be forced to choose between forgoing conduct they believe is protected or risking substantial sanctions and liability. *Steffel*, 415 U.S. at 462.

Courts have departed from this general principle—that this impossible choice imposes a substantial hardship worthy of pre-enforcement review—only when the alleged injury is hypothetical or speculative. *See, e.g.*, *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Renee v.* Geary, 501 U.S. 312 (1991). In *Toilet Goods*, the choice faced by cosmetic manufacturers challenging an FDA regulation was complying

and allowing FDA employees to inspect their facilities or refusing to comply and risking a reviewable suspension of certification services. *Toilet Goods*, 387 U.S. at 165. The Supreme Court concluded the case was not ripe for review because the challenged regulation did not immediately impact plaintiffs in "conducting their day-to-day affairs" and complying required "no advance action." *Id.* at 164. The Court also declined to find ripeness because "no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge." *Id.* In this case however, the challenged Rule affects Plaintiffs' day-to-day affairs—the provision of healthcare services for their patients and healthcare coverage for their employees. The Rule requires Plaintiffs to incur significant expense in complying with the Rule and assessing their potential noncompliance. Further, because Private Plaintiffs claim the Rule substantially burdens their exercise of religion in violation of RFRA, the Court finds that irremediable adverse consequences would result from a delay of review.

Claims are often ripe when denying review would place "the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462. Plaintiffs in the present case face a similar impossible choice: between the Scylla of intentionally defying federal law and the Charybdis of forgoing specific conduct they believe is constitutionally protected to avoid serious financial and civil penalties. The Court finds the impossible choice faced by Plaintiffs constitutes substantial hardship and with the issues fit for review, the case is accordingly ripe.

Defendants also claim Plaintiffs' alleged injuries are too speculative to warrant injunctive relief because the Rule incorporates "applicable Federal statutory protections for religious freedom

and conscience." Defs.' Resp. 22–23, ECF No. 50.[16] For example, RFRA forbids the government from "substantially burden[ing] a person's exercise of religion" unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Weldon Amendment forbids discriminating against "any institutional or individual health care entity . . . on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 114–113, Div. H, § 507(d), 129 Stat. 2242, 2649 (2015) ("Weldon Amendment"). The Coats Amendment forbids discriminating against an entity that refuses to undergo training in performance or referrals for abortions. 42 U.S.C. § 238n(a) ("Coats Amendment"). The Church Amendment forbids requiring any individual "to perform or assist in the performance of any part of a health service program . . . if his performance or assistance in the performance of such part of such program . . . would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d) ("Church Amendment").

The Court addresses Plaintiffs' RFRA argument below, but the remaining federal protections are insufficient to assure Plaintiffs of either their compliance with the Rule or safety from enforcement proceedings. The Weldon and Coats Amendments deal exclusively with abortions and do not reach religious objections to providing or covering transition-related procedures. The Church Amendment is limited to specific federal funding streams, providing no assurance that the Rule's enforcement mechanisms will not be employed to give "maximum effect to the provision[s] permitted by law." 45 C.F.R. § 92.2(b)(c); *see* Hr'g Tr., 19:1–20.

[16] The Rule provides that "applicable Federal statutory protections for religious freedom and conscience" are available, which Defendants identify as RFRA, the Weldon Amendment, the Coats Amendment, and the Church Amendment. Defs.' Resp. 22–23, ECF No. 50 (quoting 45 C.F.R. § 92.2(b)(2)).

3. Administrative Exhaustion

Defendants also allege that Congress intended to forbid pre-enforcement review of the Rule, as evidenced by the statutory enforcement scheme enacted by Section 1557. Defs.' Resp. 42–46, ECF No. 50. "The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004) (quoting 5 U.S.C. § 702). This right of judicial review extends to agency actions "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (quoting 5 U.S.C. § 701(a)). The "strong presumption" favoring judicial review of administrative action "fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015). Defendants bear a "heavy burden" to establish the Rule's unreviewability, and "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Texas v. United States*, 809 F.3d 134, 164 (5th Cir. 2015) (quoting *Block v. Cmty. Nutrition Inst.*, 467, U.S. 340, 351 (1984)).

Defendants argue that Section 1557's "comprehensive scheme of administrative and judicial review" indicates Congress intended to preclude initial judicial review. Defs.' Resp. 44, ECF No. 50. Section 1557 incorporates Title VI's enforcement mechanisms for allegations of sex discrimination under the Rule, so Title VI is the relevant statute to evaluate and determine if Congress intended to divest the Court of original federal question jurisdiction over Plaintiffs' claims.[17] Defendants are unable to offer any binding authority that Title VI's enforcement

[17] Plaintiffs discuss Title IX as the applicable enforcement statute. Priv. Pls.' Reply 20, ECF No. 57. But the Rule provides: "The procedural provisions applicable to *Title VI* apply with respect to administrative

mechanisms (incorporated by Section 1557) indicate Congress intended to forbid judicial review of agency actions under Section 1557.[18] In fact, as Plaintiffs point out, several courts have held that Title VI does not always require exhaustion of administrative remedies before judicial review.[19] Because Plaintiffs have presented ripe claims and Section 1557 contains no explicit or implicit bar to judicial review, the APA's basic presumption of reviewability applies. The Supreme Court has held that when a legal issue is "fit for judicial resolution" and a regulation "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance." *Abbott Labs.*, 387 U.S. at 153. "Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. Absent an explicit or implicit statutory bar to judicial review, the APA's presumption of reviewability applies to Plaintiffs' ripe claims.

Further, while Section 1557 establishes a thorough enforcement process for the individuals it seeks to protect, it provides no similar avenue of relief for Plaintiffs' current claims. Priv. Pls.' Reply 12, ECF No. 57. Plaintiffs must either change course to bring their insurance and physician policies in accordance with the Rule, bearing compliance costs and violating their religious views

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enforcement actions concerning discrimination on the basis of race, color, national origin, *sex*, and disability discrimination under Section 1557 or this part." 45 C.F.R. § 92.302(a) (emphasis added).

[18] Defendants rely on authority from the Fourth and Ninth Circuits (*Taylor v. Cohen*, 405 F.2d 277, 279 (4th Cir. 1968); *Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621, 624 (9th Cir. 1979)) for the contention that Title VI's comprehensive plan of enforcement divests district courts of jurisdiction over pre-enforcement challenges. Defs.' Resp. 44–46, ECF No. 50. The remaining authorities cited by Defendants deal with statutory schemes outside of Title VI (such as Title VII and Title IX). *Id.*

[19] *See, e.g.*, *Montgomery Improvement Ass'n, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 645 F.2d 291, 297 (5th Cir. 1981) ("[W]e hold that plaintiffs have a private cause of action under . . . Title VI . . . ."); *Freed v. Consol. Rail Corp.*, 201 F.3d 188, 191 (3d Cir. 2000) ("Title VI . . . does not require that plaintiffs exhaust the administrative process before bringing suit.").

and medical judgment; or roll the dice and risk the loss of federal funding or massive liability to private parties. The Court finds nothing in the Affordable Care Act—including Section 1557—precludes this action.

Because Plaintiffs have standing and allege ripe claims properly subject to judicial review, the Court next evaluates whether a preliminary injunction is appropriate.

B. Preliminary Injunction

1. Likelihood of Success on the Merits

The first consideration in determining whether to grant Plaintiffs' motions for preliminary injunction is whether Plaintiffs have shown a likelihood of success on the merits for their claims. This requires Plaintiffs to present a prima facie case. *Daniels Health Scis., LLC v. Vascular Health Scis.*, 710 F.3d 579, 582 (5th Cir. 2013) (citing *Janvey v. Alguire*, 647 F.3d 585, 595–96 (5th Cir. 2011)). A prima facie case does not mean Plaintiffs must prove they are entitled to summary judgment. *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009). A party "is not required to prove his case in full at a preliminary injunction hearing." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

a. Administrative Procedure Act

Plaintiffs claim the Rule violates the APA because it is contrary to law and exceeds statutory authority by (1) interpreting Title IX's prohibition of sex discrimination to include gender identity; (2) failing to include the religious and abortion exemptions of Title IX; (3) contradicting the commands of Title VII; and (4) attempting to commandeer the states in violation of the Tenth Amendment. Priv. Pls.' Br., ECF No. 25. In response, Defendants argue the Rule is lawful and

argue the Rule's interpretation of sex discrimination is entitled to *Chevron* deference.[20] *See* Defs.' Resp., ECF No. 50.

In evaluating agency action under the APA, courts must "hold unlawful and set aside" agency actions that are "not in accordance with the law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). For "the authority of administrative agencies is constrained by the language of the statute they administer." *Texas v. United States*, 497 F.3d 491, 500–01 (5th Cir. 2007) (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)). "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (emphasis in original).

The Court begins analysis of Plaintiffs' likelihood of success by considering Defendants' first and primary defense: whether HHS's interpretation of sex discrimination is entitled to deference under *Chevron*.

i. Chevron Deference

In reviewing an agency's construction of a statute it administers, courts follow the familiar two-step framework articulated in *Chevron* and ask first whether Congress has directly spoken to the precise question at issue. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If so, this is the end of the matter as the court and agency must give effect to Congress's unambiguously expressed intent. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000); *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874

[20] Defendants also argue Plaintiffs are unlikely to succeed on their First or Fifth Amendment claims, but because the Court is working on an expedited briefing schedule it does not reach Plaintiffs' constitutional arguments or Defendants' constitutional defenses.

(2013) (quoting *Chevron*, 467 U.S. at 842–43). If not, the court must defer to the agency's construction of the statute so long as it is permissible. *Brown & Williamson*, 529 U.S. at 121.

Step one of *Chevron* analysis includes both whether the statute confers the agency jurisdiction over an issue, as well as challenges to an agency's interpretation of a statute. *Texas v. United States*, 497 F.3d at 500–01.[21] For *Chevron* deference to apply, an agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. *City of Arlington*, 133 S. Ct. at 1874 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)). When a statute is silent or ambiguous with respect to a specific issue, courts assume the implementing agency has been granted an implicit delegation from Congress to fill in the statutory gaps, and proceed to ask whether the agency's construction is permissible. *Brown & Williamson*, 529 U.S. at 123 (citing *Chevron*, 467 U.S. at 844). "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). When considering whether a statute is ambiguous under *Chevron*, a court must: (1) begin with the statute's language; (2) give undefined words their ordinary, contemporary, common meaning; (3) read the statute's words in proper context and consider them based on the statute as a whole; and (4) consider a statute's terms in light of the statute's purposes. *Contender Farms, L.L.P. v. U.S. Dep't. of Agric.*, 779 F.3d 258, 269 (5th Cir. 2015).

Courts use traditional means of statutory interpretation to determine if a statute is ambiguous: the text, its history, and its purpose. *Calix v. Lynch*, 784 F.3d 1000, 1005 (5th Cir. 2015) (quoting *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005)). When the words are unambiguous, the "judicial inquiry is complete." *Desert Palace, Inc. v. Costa*, 539 U.S.

[21] State Plaintiffs refer to the agency's purported jurisdiction over the issue as "*Chevron* Step Zero" but the Court evaluates both agency jurisdiction and challenges to the agency's interpretation in *Chevron* step one. State Pls.' Reply 8, ECF No. 56.

90, 98 (2003) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Legislation is ambiguous if it is susceptible to more than one accepted meaning. *Calix*, 784 F.3d at 1005. But multiple accepted meanings do not exist merely because a statute's "authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." *Id.* (citing *Moore v. Hannon Food Servs., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003)).

Because the authority to issue the Rule was given in Section 1557 of the ACA, the Court begins with the language of Section 1557.[22] Section 1557 clearly incorporates Title IX's prohibition of sex discrimination.[23] Therefore, with no ambiguity in the statute as to what is prohibited sex discrimination, the Court next analyzes the incorporated text to determine whether HHS's interpretation of the incorporated statute was in line with the text of Title IX. 42 U.S.C. § 18116 (a), (c). Title IX provides that "[n]o person in the United States shall, *on the basis of sex,* be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (emphasis added).

Plaintiffs assert that the plain language of Title IX (incorporated by Section 1557) is clear and unambiguously prohibits biological sex discrimination. State Pls.' Br. 10, ECF No. 23. They argue Congress spoke directly to the contested issue—the meaning and scope of prohibited sex discrimination—and urge the Court to decide this issue at the first step of the *Chevron* analysis. State Pls.' Reply 12–14, ECF No. 56. Defendants assert that Section 1557's definition of sex

[22] "The [HHS] Secretary may promulgate regulations to implement this section." 42 U.S.C. § 18116(c).

[23] "[A]n individual shall not, on the ground prohibited under . . . [T]itle IX of the Education Amendments of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . . ." 42 U.S.C. § 18116(a).

discrimination is ambiguous because it fails to explicitly address transgender individuals and the Rule simply fills the statutory gap, implementing Section 1557. Hr'g Tr. 56:5–10.

The precise question at issue in this case is: What constitutes Title IX sex discrimination? The text of Section 1557 is neither silent nor ambiguous as to its interpretation of sex discrimination. Section 1557 clearly adopted Title IX's existing legal structure for prohibited sex discrimination. 42 U.S.C. § 18116(a). For the reasons set out more fully below, this Court has previously concluded: the meaning of sex in Title IX unambiguously refers to "the biological and anatomical differences between male and female students as determined at their birth." *Texas v. United States*, No. 7:16-cv-00054, 2016 WL 4426495, at *14 (N.D. Tex. Aug. 21, 2016); *see Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016) ("Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute."); *see infra* III.B.1.a.ii. In promulgating the Rule, HHS revised the core of Title IX sex discrimination under the guise of simply incorporating it.

In addition to the statutory text, the Supreme Court has emphasized a common-sense approach when determining whether Congress was likely to delegate a "policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133. The challenged Rule undoubtedly implicates significant policy questions—namely, the scope and meaning of sex discrimination prohibited by Title IX and incorporated by Section 1557. If Congress wished to assign that decision to HHS, it surely would have done so expressly. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

The Court does not discount Defendants' stated goal, question the seriousness of the problem the Rule seeks to address, or weigh into the merits of the issue. But no matter how "important, conspicuous, and controversial the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson*, 529 U.S. at 161. Because Congress clearly addressed the question at issue by incorporating Title IX's existing legal structure, and HHS had no authority to interpret such a significant policy decision—the scope of sex discrimination under Title IX—*Chevron* deference does not apply and the Court need not reach step two of the analysis. *See Brown & Williamson*, 529 U.S. at 160, 121.

ii. Title IX Sex Discrimination

Because HHS is not entitled to *Chevron* deference, the Court now considers whether Plaintiffs have demonstrated a likelihood of success on their claim that the Rule violates the APA. Plaintiffs claim the Rule is contrary to law under the APA because its definition of prohibited sex discrimination conflicts with that incorporated by Section 1557. Priv. Pls.' Br., ECF No. 25. Congress's intent in enacting Section 1557 is clear because the statute explicitly incorporates Title IX's prohibition of sex discrimination. *See* 42 U.S.C. § 18116(a). It is also clear from Title IX's text, structure, and purpose that Congress intended to prohibit sex discrimination on the basis of the biological differences between males and females. *See* 20 U.S.C. § 1681.

The text of Title IX indicates Congress's binary definition of "sex." *See* 20 U.S.C. § 1681 (referring to "students of one sex," "both sexes," "students of the other sex"). When interpreting a statute, courts look to its ordinary meaning at the time it was enacted. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word 'now,' as understood when the [statute] was enacted."); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512

U.S. 218, 228 (1994) (finding the relevant time for determining a statutory term's meaning is when the statute became law); *Baker Botts L.L.P. v. ASARCO L.L.C.*, 135 S. Ct. 2158, 2165 n.2 (2015) (interpreting "services" at the time the word was first used in the statute). When Title IX was enacted in 1972, the term "sex" was commonly understood to refer to the biological differences between males and females.[24] Even the early users of the term "gender identity" recognized the distinction between "sex" and "gender identity."[25] If Congress had intended to enact a new, different, or expansive definition of prohibited sex discrimination in Section 1557, it knew how to do so and would not have chosen to explicitly incorporate its meaning from Title IX. The structure of 20 U.S.C. § 1681 et seq. (Title IX) supports this conclusion. For example, in § 1686 Congress authorized covered institutions to provide different arrangements for each of the sexes. 20 U.S.C. § 1686. These authorized distinctions based on sex can only reasonably be interpreted to be necessary for the protection of personal privacy, and confirm Congress's biological view of the term "sex." *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723, 734 (4th Cir. 2016), *recalling mandate & issuing stay*, 136 S. Ct. 2442 (2016). Accordingly, the text, structure, and purpose reveal that the definition of sex in Title IX's prohibition of sex discrimination

[24] *See, e.g.*, AMERICAN HERITAGE DICTIONARY 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) ("The sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); 9 OXFORD ENGLISH DICTIONARY 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.").

[25] *See, e.g.*, Robert Stroller (UCLA psychoanalyst who coined the term "gender identity") believed "sex was biological but gender was social" David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles*, 1945–2001, ARCHIVES OF SEXUAL BEHAVIOR 93 (Apr. 2004); Virginia Prince (Transgender activist who coined the term "transgender") stated that "I, at least, know the difference between sex and gender" Virginia Prince, *Change of Sex or Gender*, 10 TRANSVESTIA 53, 60 (1969).

unambiguously prevented discrimination on the basis of the biological differences between males and females.

But even if, as Defendants argue, the definition of sex discrimination was determined in 2010 when the ACA incorporated Title IX's prohibition of sex discrimination, the Court is not persuaded it was passed with the Rule's expansive scope in mind because: (1) Congress knew how but did not use language indicating as much, and (2) in 2010 no federal court or agency had interpreted Title IX sex discrimination to include gender identity.[26] That Congress did not understand "sex" to include "gender identity" when it passed the ACA is evidenced by the employment of the phrase "gender identity" by the same Congress to include protections against crimes motivated by gender identity. *See* 18 U.S.C. § 249(a)(2)(A) (hate crimes legislation passed by Congress in 2010 protecting "gender identity" and "sexual orientation");[27] *see also Brown & Williamson*, 529 U.S. at 143 (subsequent analogous statutes more specifically addressing a topic in an earlier statute shape the focus of the earlier statute's meaning). In addition, the 2013 amendments to the Violence Against Women Act, legislation designed to protect women, added protections for "gender identity" and simultaneously reinforced the longstanding, binary definition of "sex" by employing both terms as separate and distinct bases of discrimination prohibited by the statute. *See* 42 U.S.C. § 13925(b)(13)(A) (specifically addressing *both* sex and gender identity,

[26] Defendants argued at the hearing that Section 1557's definition of prohibited sex discrimination determined in 2010 when the ACA was passed. Hr'g Tr. 79:4–7.

But even if the definition of sex discrimination was determined in 2010, promulgation of the proposed Rule five years later included a new and expanded definition, as evidenced by commentators' depictions of the Rule as "groundbreaking." Lena H. Sun & Lenny Bernstein, *U.S. Moves to Protect Women, Transgender People in Health Care*, Washington Post, Sept. 3, 2015 (The new Rule "for the first time includes bans on gender identity discrimination as a form of sexual discrimination, language that advocacy groups have pushed for and immediately hailed as groundbreaking.").

[27] The 2010 legislation defines "gender identity" as "actual or perceived gender-related characteristics." 18 U.S.C. § 249(c)(4).

declaring: "No person . . . shall, on the basis of . . . race, color, religion, national origin, sex, gender identity. . . be subjected to discrimination . . . ."). These subsequent enactments confirm that Title IX and Congress's incorporation of it in the ACA unambiguously adopted the binary definition of sex. *See Brown & Williamson*, 529 U.S. at 143.

Finally, the government's usage of the term sex in the years since Title IX's enactment bolsters the conclusion that its common meaning in 1972 and 2010 referred to the binary, biological differences between males and females. Prior to the passage of the ACA in 2010 and for more than forty years after the passage of Title IX in 1972, no federal court or agency had concluded sex should be defined to include gender identity.[28] Accordingly, HHS's expanded definition of sex discrimination exceeds the grounds incorporated by Section 1557.

iii. Title IX Unincorporated Religious Exemptions

Plaintiffs also claim the Rule's failure to incorporate Title IX's religious exemptions renders the Rule arbitrary, capricious, and contrary to law under the APA. Priv. Pls.' Br. 31, 33, ECF No. 25. Title IX does not apply to covered entities controlled by a religious organization if its application would be inconsistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3) (the "religious exemption"). Title IX also states that it cannot be "construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service,

[28] Defendants' briefing and the Rule's preamble relied on *Price Waterhouse* to show that "sex" discrimination encompasses "gender identity." *See* 81 Fed. Reg. at 31387–90; Defs.' Resp. 16, 49, ECF No. 50; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that Title VII's prohibition of sex discrimination included discrimination based on stereotypical notions of appropriate behavior, appearance, or mannerisms for males and females). But *Price Waterhouse* dealt with the definition of "sex" in the Title VII context, not the incorporated statute at issue here: Title IX. *Price Waterhouse* was decided in 1989, twenty years before the ACA was enacted. If Congress intended to prohibit the newly-expanded version of sex discrimination that Defendants claim includes "gender identity" it could have incorporated Title VII's prohibition of sex discrimination instead of Title IX. But even in *Price Waterhouse*, the Supreme Court seems to acknowledge the binary nature of sex and focuses mainly on sex stereotypes. 490 U.S. at 251 ("[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes").

including the use of facilities, related to an abortion." 20 U.S.C. § 1688 (the "abortion exemption"). The Rule did not incorporate Title IX's religious or abortion exemption even though it incorporated the exemptions of the other three federal nondiscrimination statutes.[29]

Defendants argue the Title IX religious and abortion exemptions were not incorporated because Section 1557 was doing a "new work," i.e., applying the education statute to the healthcare context, and the other three incorporated statutes had already been applied to the healthcare context. Hr'g Tr. 84:18–21. Defendants argue not incorporating the Title IX exemptions is of no moment because the other religious and abortion exemptions cited by the Rule are available. Defs.' Resp. 56–57, ECF No. 50.

As outlined above, the Court declines to give HHS *Chevron* deference, and when determining whether the failure to incorporate the exemptions is contrary to law, the Court must examine the text of Section 1557. This examination requires the Court to again apply well settled rules of construction which include giving the statutory text its plain and ordinary meaning, construing the statute as a whole, and giving effect to every word of the statute. *Taniguchi v. Kan Pac. Saipan*, Ltd., 132 S. Ct. 1997, 2002 (2012); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *Corley v. United States*, 556 U.S. 303, 314 (2009). The canon disfavoring surplusage is "one of the most basic interpretive canons." *Corley*, 556 U.S. at 314. In construing a statute, courts are obligated to give effect to all its provisions "so that no part will be inoperative or superfluous, void or insignificant." *Id.* at 315 (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

[29] "The exceptions applicable to Title VI apply to discrimination on the basis of race, color, or national origin under this part. The exceptions applicable to Section 504 apply to discrimination on the basis of disability under this part. The exceptions applicable to the Age Act apply to discrimination on the basis of age under this part." 45 C.F.R. § 92.101(c).

The text of Section 1557 prohibits discrimination "on the ground prohibited under . . . [T]itle IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . ." 42 U.S.C. § 18116(a). Congress specifically included in the text of Section 1557 "20 U.S.C. 1681 et seq." That Congress included the signal "et seq.," which means "and the following," after the citation to Title IX can only mean Congress intended to incorporate the entire statutory structure, including the abortion and religious exemptions.[30] Title IX prohibits discrimination on the basis of sex, but exempts from this prohibition entities controlled by a religious organization when the proscription would be inconsistent with its religious tenets. 20 U.S.C. § 1681(a)(3). Title IX also categorically exempts any application that would require a covered entity to provide abortion or abortion-related services. 20 U.S.C. § 1688. Therefore, a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the ground prohibited by Title IX.[31] Failure to incorporate Title IX's religious and abortion exemptions nullifies Congress's specific direction to prohibit only the ground proscribed by Title IX. That is not permitted. *Corley*, 556 U.S. at 314. By not including these exemptions, HHS expanded the "ground prohibited under" Title IX that Section 1557 explicitly incorporated. *See id.* The Rule's failure to include Title IX's religious exemptions renders the Rule contrary to law.

Defendants' argument that Section 1557 was "new work" does not save this failure. Hr'g Tr. 56:11–57:18. Congress dictated that an entity would be liable under Section 1557 on the ground prohibited by Title IX. 42 U.S.C. § 18116(a). A religious organization that meets the specification of § 1681(a)(3) or any entity seeking the protection of § 1688 would not be liable for discriminating on the basis of sex under Title IX. HHS could not add additional prohibitions

[30] BLACK'S LAW DICTIONARY (10th ed. 2014).

[31] The same reasoning also exempts any covered entity from having to provide abortion or abortion-related services.

simply because it was engaged in "new work." Further, HHS knew how to adapt Title IX from the education realm to the healthcare context because it provides that when cross-referencing the provisions of Title IX's use of "student," the term "individual" should be used in the healthcare context. *See* 45 C.F.R. 92.101(b)(3)(i). Accordingly, the Court finds the Rule's conflict with its incorporated statute—Title IX—renders it contrary to law under the APA.[32]

b. Religious Freedom Restoration Act

The Court next evaluates in the alternative whether Plaintiffs have established a substantial likelihood of success on their RFRA claim. Private Plaintiffs allege the Rule violates RFRA because it substantially burdens their exercise of religion. Priv. Pls.' Br. 23–32, ECF No. 25. Defendants did not address Plaintiffs' RFRA claim in their briefing but asserted at the hearing that more factual development was necessary to evaluate the claim. Hr'g Tr. 61:1–62:25. The Court addressed the argument that more facts are needed above and finds the record is sufficiently developed to consider Private Plaintiffs' RFRA claim. *See supra*, III.A.2.

RFRA provides that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling government interest." 42 U.S.C. § 2000bb-1(b). RFRA was passed by a broad coalition of legislators in direct response to a Supreme Court decision that Congress viewed as curbing longstanding constitutional protections for religious liberty and was enacted to work a "substantive change in constitutional protections." *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L.

[32] Both parties agree that if the Court resolves the APA or RFRA claim, there is no need to reach the remaining constitutional issues. Hr'g Tr. 57:22–25, 30:1–3.

Rev. 209, 210, 244 (1994). Courts evaluating a claim under RFRA must first determine if the challenged rule imposes a "substantial burden" on plaintiffs' religious exercise and if so, then whether the rule satisfies strict scrutiny.

As to the first prong, the Court must (a) identify a sincere religious exercise, and (b) determine whether the government has placed substantial pressure on Plaintiffs to abstain from that religious exercise. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). Defendants do not question or contest the sincerity of Private Plaintiffs' religious beliefs or exercise, and the Court is careful not to weigh or evaluate the relevant doctrines of faith.[33] As discussed above, the Court finds that Private Plaintiffs' refusal to perform, refer for, or cover transitions or abortions is a sincere religious exercise. Private Plaintiffs have demonstrated they sincerely believe such procedures would harm their patients and force their employees to "engage in material cooperation with evil." Priv. Pls.' Br. 24, ECF No. 25. The Supreme Court has explained that the exercise of religion includes "business practices that are compelled or limited by the tenets of a religious doctrine." *Hobby Lobby*, 134 S. Ct. at 2770.

In regards to whether the Rule places substantial pressure on Plaintiffs to abstain from religious exercise, the Court finds—and the parties agree—that the Rule's prohibition of categorical exclusions of transitions and abortions forces Plaintiffs to make an individualized assessment of every request for performance of such procedures or coverage of the same. The Rule therefore places substantial pressure on Plaintiffs to perform and cover transition and abortion procedures. The Rule's prohibition of categorical exclusions also forces Plaintiffs to provide the

[33] *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *see also* Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious Employer Exemption*, TEXAS REVIEW OF LAW & POLITICS (2016) (stressing the importance that courts avoid unconstitutional entanglement with religion when asked to weigh different doctrines of faith).

federal government a nondiscriminatory and "exceedingly persuasive justification" for their refusal to perform or cover such procedures. 45 C.F.R. § 92.101. Private Plaintiffs' long-held view that such procedures are immoral and inappropriate in every circumstance is now at odds with the Rule's interpretation of sex discrimination because it requires them to remove the categorical exclusion of transitions and abortions (a condition they assert is a reflection of their religious beliefs and an exercise of their religion) and conduct an individualized assessment of every request for those procedures. "A law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." *Hobby Lobby*, 134 S. Ct. at 2770 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). Accordingly, the Rule imposes a substantial burden on Private Plaintiffs' religious exercise.

As to the second prong, the government bears the burden to show the Rule satisfies strict scrutiny—i.e., "demonstrate[] that the application of the burden to the person represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006). The Fifth Circuit has held that to satisfy strict scrutiny under RFRA, the government "must show by specific evidence that [Private Plaintiffs'] religious practices jeopardize its stated interests." *Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009). Defendants do not provide a compelling interest in their briefing and Private Plaintiffs dispute that one exists. Priv. Pls.' Br. 38–42, ECF No. 25. Although the preamble to the Rule claims broadly that the government has "a compelling interest in ensuring that individuals have nondiscriminatory access to health care and health coverage," Defendants have failed to brief the basis of its compelling interest, leaving the Court unable to determine whether Private Plaintiffs' religious practices jeopardize its purpose. *See* 81 Fed. Reg. at 31380. A compelling interest is one

the government would be willing to pursue itself. Yet, the government's own health insurance programs, Medicare and Medicaid, do not mandate coverage for transition surgeries; the military's health insurance program, TRICARE, specifically excludes coverage for transition surgeries; and the government's own medical experts reported "conflicting" study results of transition procedures—"some reported benefits while others reported harms." Centers for Medicare & Medicaid Services, *Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery* (June 2, 2016); *see* Pls.' App. 648, ECF No. 26; *see Hobby Lobby*, 134 S. Ct. at 2780 (significant carve outs and exceptions may indicate the government lacks a compelling interest). Therefore, it appears the government has failed to adequately carry its burden and show the Rule advances a compelling interest.[34]

Nevertheless, the Court assumes the Rule pursues a compelling interest, because even if it does, the government has failed to prove the Rule employs the least restrictive means. The least-restrictive-means standard requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S. Ct. at 2780. If the government wishes to expand access to transition and abortion procedures, "[t]he most straightforward way of doing this would be for the government to assume the cost of providing the [procedures] at issue to any [individuals] who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* The government could also assist transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and

[34] While Putative Intervenors proposed several compelling interests in their briefing (including "eradicating all forms of invidious discrimination," "making sure that federal funds are not used to subsidize discrimination," "making sure people are able to access healthcare coverage and services on a nondiscriminatory basis," and "safeguarding the public health") it is the government's view that controls. *Hobby Lobby*, 134 S. Ct. at 2776; Putative Intervenors' Resp. 42, ECF No. 53.

specialize in those services. The government has failed to demonstrate how exempting Private Plaintiffs pursuant to their religious beliefs would frustrate the goal of ensuring "nondiscriminatory access to health care and health coverage," and the government has numerous less restrictive means available to provide access and coverage for transition and abortion procedures. *See* 81 Fed. Reg. at 31380. Accordingly, Private Plaintiffs have demonstrated a substantial likelihood of success on their claim that the challenged Rule violates RFRA.

2. Threat of Irreparable Harm

Next, Plaintiffs must demonstrate they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). "[H]arm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d at 600 (5th Cir. 2009). An injunction is appropriate only if the anticipated injury is imminent and not speculative. *Winter*, 555 U.S. at 22.

Defendants argue Plaintiffs' asserted injuries are speculative because Plaintiffs misunderstand the scope and effect of the Rule and its incorporated religious protections. *See* Defs.' Resp. 33–36, ECF No. 50. The State Plaintiffs claim they are currently suffering injury under the ongoing HHS investigation into their insurance plans and all Plaintiffs will suffer irreparable harm on January 1, 2017, when they are forced to alter their insurance coverage plans. State Pls.' Reply 16–17, ECF No. 56. Plaintiffs also point out several entities with similar insurance policies that have already been sued under the Rule since it was issued on May 18, 2016.[35] State Plaintiffs allege the Rule is in direct conflict with state law that mandates a

[35] Priv. Pls.' Br. 37, ECF No. 25 (citing Compl., *Prescott v. Rady Children's Hosp. – San Diego*, No. 16-2408 (S.D. Cal. Sept. 26, 2016); Compl., *Dovel v. Pub. Library of Cincinnati and Hamilton Cty.*, No. 16-955 (S.D. Ohio Sept. 26, 2016); Compl., *Robinson v. Dignity Health*, No. 16-3035 (N.D. Cal. June 6, 2016)).

physician's independent medical judgment be given paramount consideration when providing treatment because the Rule makes a physician's independent medical judgment one of many factors in evaluating compliance. State Pls.' Reply 18–19, ECF No. 56. *See* TEX. OCC. CODE §§ 162.0021–0022 (mandating deference to the "independent medical judgment" of physicians).

A state suffers irreparable harm anytime it is prevented from enforcing a statute enacted by representatives of its people. *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")).

Because the Rule is in conflict with state law, one of the State Plaintiffs is already undergoing investigation by the HHS's OCR, and entities similarly situated to Private Plaintiffs have already been sued under the Rule since it took partial effect on May 18, 2016, the Court finds Plaintiffs have demonstrated that they face a substantial threat of irreparable harm in the absence of an injunction.

3. Balance of Hardships and Public Interest

The Court next considers whether the threatened injury to Plaintiffs outweighs any damage the proposed injunction may cause Defendants and its impact on the public interest.[36] The threatened injury to Plaintiffs outweighs any potential harm to Defendants. Without an injunction,

[36] The Court considers the balance of hardships and public interest factors together as they overlap considerably. *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

Plaintiffs will be threatened with substantial harm, including the risk of federal funding withdrawal and civil liability.

On the other hand, HHS will suffer no harm from delaying implementation of the challenged portion of the Rule. The agency's six-year delay in issuing the Rule strengthens the Court's conclusion that the delay imposed by the injunction would work no significant harm on Defendants. The injunction would merely maintain the status quo—allowing HHS to prohibit sex discrimination in healthcare services as defined by Title IX and incorporated by Section 1557. If the Rule is invalid, it will be set aside in its entirety and the public interest will be served by the injunction. But even if the Rule is valid, the injunction will merely delay its implementation, pending final review on the merits.

Defendants allege that Plaintiffs delay in seeking relief should weigh in favor of denying the injunction. Defs.' Resp. 64, ECF No. 50. But the Court finds that filing suit one month after the first parts of the Rule became effective constitutes prompt action, notwithstanding the inadvertent mistake that led to a delay in serving the U.S. Attorney for the Northern District of Texas. *See* Defs.' Resp. 64, ECF No. 50. Further, Defendants' six-year delay in promulgating the Rule since the ACA's enactment demonstrates that Defendants and the public interest would suffer no irreparable injury in the face of an injunction to maintain the status quo.

For the foregoing reasons, the Court finds that Plaintiffs have satisfied all prerequisites for a preliminary injunction.

C. Scope of Injunction

Finally, the Court must determine the scope of the injunction. Plaintiffs seek a nationwide injunction as to the challenged portions of the Rule—prohibiting discrimination on the basis of "gender identity" and "termination of pregnancy." Priv. Pls.' Reply 24–25, ECF No. 57. Defendants argue the injunction should be limited to Plaintiffs. Defs.' Resp. 49–50, ECF No. 50.

"[D]istrict courts enjoy broad discretion in awarding injunctive relief." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998). "[T]he Constitution vests the District Court with 'the judicial power of the United States.' That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (quoting U.S. CONST. art. III, §1). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). A nationwide injunction is appropriate when a party brings a facial challenge to agency action under the APA. *See, e.g.*, *Nat'l Mining*, 145 F.3d at 1407–08 (invalidating an agency rule and affirming the nationwide injunction); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

CMDA's membership extends across the country and the Rule applies broadly to "almost all licensed physicians."[37] 81 Fed. Reg. at 31445. Accordingly, the Rule's harm is felt by healthcare providers and states across the country, including all of CMDA's members, and the Court finds a nationwide injunction appropriate. Because the Rule includes a severability

[37] CMDA has members "in all [the] states." Hr'g Tr. 93:5.

provision, none of the unchallenged provisions are enjoined. 45 C.F.R. § 92.2(c). Only the Rule's command this Court finds is contrary to law and exceeds statutory authority—the prohibition of discrimination on the basis of "gender identity" and "termination of pregnancy"—is hereby enjoined.

D. Bond

Rule 65(c) provides that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any part found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The amount of security required "is a matter for the discretion of the trial court," and the Fifth Circuit has held district courts have discretion to "require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (citing *Corrigan Dispatch Company v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)). The Court finds no evidence that Defendants will suffer any financial loss requiring Plaintiffs to post security. Accordingly, the Court grants Plaintiffs' request to waive the bond requirement. State Pls.' Mot. 3, ECF No. 22; Priv. Pls.' Mot. 2, ECF No. 24.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' motions for preliminary injunction (ECF Nos. 22, 24) should be and are hereby **GRANTED**. *See* Fed. R. Civ. P. 65. Defendants are hereby **ENJOINED** from enforcing the Rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy.

SO ORDERED on this **31st day** of **December, 2016**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

10. First Amended Complaint (Excerpts)

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*.	Civ. Action No. 7:16-cv-00108-O **FIRST AMENDED COMPLAINT**

INTRODUCTION AND NATURE OF THE ACTION

This lawsuit challenges a new Regulation ("Regulation" or "Rule") issued by the Department of Health and Human Services ("HHS") that seeks to override the medical judgment of healthcare professionals across the country. On pain of significant financial liability, the Regulation forces doctors to perform controversial and sometimes harmful medical procedures ostensibly designed to permanently change an individual's sex—including the sex of children. Under the new Regulation, a doctor must perform these procedures even when they are contrary to the doctor's medical judgment and could result in significant, long-term medical harm. Thus, the Regulation represents a radical invasion of the federal bureaucracy into a doctor's medical judgment.

HHS attempts to impose these dramatic new requirements by redefining a single word used in the Affordable Care Act: "sex." For decades, across multiple federal statutes, Congress has consistently used the term "sex" to refer to an individual's status as male or female, as determined by a person's biological sex at birth. But in the Regulation, HHS redefines "sex" to include "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." 45 C.F.R. § 92.4. Thus, with a single stroke of the pen, HHS has created a massive new liability for thousands of healthcare professionals unless they cast aside their medical judgment and perform controversial and even harmful medical transition procedures. And HHS has done this despite the fact that Congress has repeatedly rejected similar

attempts to redefine "sex" through legislation, and federal courts have repeatedly rejected attempts to accomplish the same goal through litigation.

The Regulation not only forces healthcare professionals to violate their medical judgment, it also forces them to violate their deeply held religious beliefs. Plaintiffs include the Christian Medical & Dental Associations, which includes almost 18,000 healthcare professionals, and Franciscan Alliance, a network of religious hospitals founded by the Sisters of St. Francis of Perpetual Adoration. These religious organizations are deeply committed to the dignity of every human person, and their doctors care for everyone with joy and compassion. They eagerly provide comprehensive care to society's most vulnerable populations, but their religious beliefs will not allow them to perform medical transition procedures that can be deeply harmful to their patients. Tragically, the Regulation would force them to violate those religious beliefs and perform harmful medical transition procedures or else suffer massive financial liability.

The Regulation also undermines the longstanding sovereign power of the States to regulate healthcare, ensure appropriate standards of medical judgment, and protect its citizens' constitutional and civil rights. Under this Rule, States are now required to force all healthcare professionals at state-run facilities to participate in medical transition procedures (including hormone therapy, plastic surgery, hysterectomies, and gender reassignment surgery), and to cover those procedures in the States' health insurance plans, even if a doctor believes such procedures are harmful to the patient. The Rule exposes the States to litigation by its employees and

patients, despite the fact that neither Congress nor the States expressed any intent to waive the States' sovereign immunity in this area. And the Rule threatens to strip the States of billions of dollars in federal healthcare funding—over $42.4 billion a year for Texas alone—jeopardizing the availability of healthcare for the nation's most vulnerable citizens.

Ultimately, this case boils down to a very simple question of statutory interpretation: May HHS redefine the term "sex" to thwart decades of settled precedent and impose massive new obligations on healthcare professionals and sovereign States? The answer is "no," and the new Regulation must be set aside as a violation of the Administrative Procedure Act and multiple other federal laws and constitutional provisions.

I. PARTIES

1. Texas has a significant role to play in regulating and protecting the integrity of the medical profession within its borders. Moreover, Texas zealously protects the physician-patient relationship through numerous laws and regulations ensure that physicians honor their duties to their patients and exercise appropriate medical judgment when treating patients under their care. Texas also employs thousands of healthcare employees through its constituent agencies. As an employer, generally, Texas provides health benefits to hundreds of thousands of its employees and their families through its constituent agencies. Moreover, Texas oversees and controls several agencies and healthcare facilities that receive federal funding subject to Title IX and the new Rule. Specifically, Texas operates healthcare facilities,

277. Absent injunctive and declaratory relief against the Transgender Mandate, the Plaintiffs have been and will continue to be harmed.

278. The Regulation exposes the Plaintiffs to civil suits that would hold them liable for practicing and expressing their sincerely held religious beliefs.

279. The Regulation furthers no compelling governmental interest.

280. The Regulation is not the least restrictive means of furthering Defendants' stated interests.

COUNT XI

Violation of the Religious Freedom Restoration Act Compelled Medical Services

281. The Plaintiffs incorporate by reference all preceding paragraphs.

282. The Religious Plaintiffs' sincerely held religious beliefs prohibit them from deliberately offering services and performing (or referring for) operations or other procedures required by the Regulation. The Plaintiffs' compliance with these beliefs is a religious exercise.

283. The Plaintiffs' sincerely held religious beliefs prohibit them facilitating medical transition procedures. The Plaintiffs' compliance with these beliefs is a religious exercise.

284. The Plaintiffs' sincerely held religious beliefs prohibit them facilitating sterilization procedures. The Plaintiffs' compliance with these beliefs is a religious exercise.

285. The Plaintiffs' sincerely held religious beliefs prohibit them facilitating abortion-related services. The Plaintiffs' compliance with these beliefs is a religious exercise.

286. The Regulation creates government-imposed coercive pressure on the Plaintiffs to change or violate their religious beliefs.

287. The Regulation chills the Plaintiffs' religious exercise.

288. The Regulation exposes the Plaintiffs to the loss of substantial government funding as a result of their religious exercise.

289. The Regulation exposes the Plaintiffs to substantial penalties under the False Claims Act, 31 U.S.C. § 3729 *et seq*.

290. The Regulation exposes the Plaintiffs to criminal penalties under 18 U.S.C. § 1035.

291. The Regulation exposes the Plaintiffs to civil suits that would hold them liable for practicing their sincerely held religious beliefs.

292. The Regulation thus imposes a substantial burden on the Plaintiffs' religious exercise.

293. The Regulation furthers no compelling governmental interest.

294. The Regulation is not the least restrictive means of furthering Defendants' stated interests.

295. The Regulation violates the Plaintiffs rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

COUNT XII

Violation of the Religious Freedom Restoration Act
Compelled Insurance Coverage

296. The Plaintiffs incorporate by reference all preceding paragraphs.

297. For the same reasons discussed above, Plaintiffs' sincerely held religious beliefs prohibit them from deliberately offering health insurance that would cover gender transition procedures, sterilization procedures, or abortion-related procedures.

298. Plaintiffs specifically exclude coverage of any services related to gender transition procedures, sterilization procedures, or abortion-related procedures in their insurance plans.

299. The Plaintiffs' compliance with these beliefs by maintaining these exclusions is a religious exercise.

300. Under the Regulation, insurance exclusions related to gender transition are facially invalid.

301. Under the Regulation, insurance exclusions related to sterilization are facially invalid.

302. Under the Regulation, insurance exclusions related to abortion services are facially invalid.

303. The Regulation exposes the Plaintiffs to the loss of substantial government funding as a result of their religious exercise.

304. The Regulation also makes it much more expensive for Franciscan and Specialty Physicians to do business with a third party administrator for a health

benefits plan. The Regulation subjects third party administrators to potential liability for administering religious health plans like Franciscan's, and thus Franciscan and Specialty Physicians will be forced to indemnify any third party administrator from this liability. This constitutes an additional substantial burden on its religious exercise.

305. The Regulation exposes the Plaintiffs to substantial penalties under the False Claims Act, 31 U.S.C. § 3729 *et seq*.

306. The Regulation exposes the Plaintiffs to criminal penalties under 18 U.S.C. § 1035.

307. The Regulation exposes the Plaintiffs to civil suits that would hold them liable for practicing their sincerely held religious beliefs.

308. The Regulation thus imposes a substantial burden on the Plaintiffs' religious exercise.

309. The Regulation furthers no compelling governmental interest.

310. The Regulation is not the least restrictive means of furthering Defendants' stated interests.

311. The Regulation violates the Plaintiffs rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

COUNT XIII

Violation of the First Amendment to the United States Constitution Free Exercise Clause

312. The Plaintiffs incorporate by reference all preceding paragraphs.

commandeering the State Plaintiffs and their employees as agents of the federal government's regulatory scheme at the States' own cost.

382. The Defendants' actions thus violate the Tenth Amendment to the United States Constitution.

383. Absent injunctive and declaratory relief against the Regulation, the Plaintiffs have been and will continue to be harmed.

V. PRAYER FOR RELIEF

Wherefore, Plaintiffs pray the Court:

a. Declare that the challenged Regulation is invalid under the Administrative Procedure Act;

b. Declare that the challenged Regulation is invalid under the Religious Freedom Restoration Act;

c. Declare that the challenged Regulation is invalid under the First Amendment to the United States Constitution;

d. Declare that the challenged Regulation is invalid under the Fifth Amendment of the United States Constitution;

e. Declare that the challenged Regulation is invalid under the Fourteenth Amendment of the United States Constitution;

f. Declare that the challenged Regulation is invalid under the Spending Clause of Article I of the United States Constitution;

g. Declare that the challenged Regulation is invalid under the Tenth Amendment to the United States Constitution;

h. Declare that the challenged Regulation is invalid under the Eleventh Amendment to the United States Constitution;

i. Issue a permanent injunction enjoining Defendants from enforcing the challenged Regulations against Plaintiffs, their current and future members, those acting in concert with Plaintiffs, and all States;

j. Award actual damages;

k. Award nominal damages;

l. Award Plaintiffs the costs of this action and reasonable attorney's fees; and

m. Award such other and further relief as it deems equitable and just.

VI. JURY DEMAND

Plaintiffs hereby request a trial by jury on all issues so triable.

11. Plaintiffs' Motion for Partial Summary Judgment

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. ALEX M. AZAR, II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants*.	**PRIVATE PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT** Civ. Action No. 7:16-cv-00108-O

Plaintiffs Christian Medical & Dental Associations, Franciscan Alliance, Inc., and Specialty Physicians of Illinois, LLC ("Private Plaintiffs"), by and through their counsel, and pursuant to Federal Rule of Civil Procedure 56(a) and LR 56, respectfully move the Court for summary judgment on Counts I, II, XI, XII, and XIII of their First Amended Complaint (ECF No. 21).

This lawsuit challenges a 2016 Rule issued by the Department of Health and Human Services ("HHS") entitled Nondiscrimination in Health Programs & Activities, 81 Fed. Reg. 31375, 31392, 31384 (May 18, 2016) (codified at 45 C.F.R. pt. 92). Private Plaintiffs are entitled to summary judgment as a matter of law because HHS's attempt to redefine "sex" violates the Administrative Procedure Act, and its attempt to force doctors to violate their religious beliefs violates the Religious Freedom Restoration Act and Free Exercise Clause of the First Amendment. At the preliminary-injunction stage, this Court already agreed that these aspects of the Rule were "contrary to law and exceed[ed] statutory authority," ECF No. 62 at 46, and the Defendants' position has only become weaker since this Court entered its preliminary injunction. There are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law.

Plaintiffs specifically request the following relief against the Defendants, their officers, agents, employees, and attorneys:

1. A declaratory judgment that the Rule is invalid under the Administrative Procedure Act;
2. A declaratory judgment that the Rule violates the Religious Freedom Restoration Act;
3. A permanent injunction prohibiting Defendants from enforcing the Rule; and
4. An order vacating and remanding the unlawful portions of the Rule.

A brief in support of this Motion satisfying the requirements of Local Rule 56.3,

an Appendix—consisting of the same evidence submitted to the Court at the preliminary injunction stage—and a proposed order are filed contemporaneously with this Motion.

Wherefore, Private Plaintiffs respectfully request that summary judgment on Counts I, II, XI, XII, and XIII of Plaintiffs' First Amended Complaint be entered in their favor and against Defendants.

Respectfully submitted this the 4th day of February, 2019.

/s/ Luke W. Goodrich
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Counsel for Plaintiffs Christian Medical & Dental Associations, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, the foregoing Motion was served on all parties via ECF.

/s/ Luke W. Goodrich
Luke W. Goodrich

12. Plaintiffs' Proposed Order Granting Summary Judgment

**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. ALEX M. AZAR, II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants*.	**[PROPOSED] ORDER GRANTING PRIVATE PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT** Civ. Action No. 7:16-cv-00108-O

This matter came before the Court on Private Plaintiffs' Renewed Motion for Partial Summary Judgment on Counts I, II, XI, XII, and XIII of the First Amended Complaint (ECF No. 21). After reviewing the briefing on the matter, and the evidence offered in support of the motion, the Court finds that there are no genuine issues of material fact, and that Private Plaintiffs are entitled to judgment as a matter of law.

For the reasons stated in the Court's Order of Dec. 31, 2016 (ECF No. 62), the Court concludes that the United States Department of Health and Human Services Rule entitled "Nondiscrimination in Health Programs & Activities," 81 Fed. Reg. 31376–31473 (May 18, 2016) (codified at 45 C.F.R. § 92) ("Rule"), which prohibits discrimination on the basis of "gender identity" and "termination of pregnancy," violates the Administrative Procedure Act, 5 U.S.C. § 706(1)(A) & (C), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. The Court also concludes that the Rule, insofar as it pressures Private Plaintiffs to perform and provide insurance coverage for gender transition and abortion services in violation of their religious beliefs, violates the Free Exercise Clause of the First Amendment, because it is neither neutral and generally applicable nor narrowly tailored to advance a compelling government interest.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that the Rule is "not in accordance with law" and is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" under the APA, 5 U.S.C. § 706(1)(A) & (C), because it impermissibly redefines Section 1557 of the

Affordable Care Act ("Section 1557") to extend Title IX's definition of "sex" to include "gender identity," and because, with respect to its prohibition on sex discrimination, including "gender identity" and "termination of pregnancy," it fails to incorporate the relevant statutory exemptions regarding religious organizations, 20 U.S.C. § 1681(a), and abortion, 20 U.S.C. § 1688.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Rule's requirements regarding provision of medical services and insurance coverage related to "gender identity" and "termination of pregnancy" violate RFRA, 42 U.S.C. § 2000bb *et seq.*, because they substantially burden Private Plaintiffs' religious exercise and are not the least restrictive means of furthering a compelling governmental interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Rule's requirements regarding provision of medical services and insurance coverage related to "gender identity" and "termination of pregnancy" also violate the Free Exercise Clause of the First Amendment, because these requirements are not neutral and generally applicable and because they are not narrowly tailored to a compelling governmental interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States of America, its departments, agencies, officers, agents, and employees, including Alex M. Azar, II, Secretary of HHS, and HHS, are hereby permanently enjoined on a nationwide basis from:

a. Enforcing the Rule's prohibition against discrimination on the basis of "gender identity."

b. Enforcing the Rule's prohibition against discrimination on the basis of sex, including "termination of pregnancy," without also incorporating Title IX's statutory exemptions regarding religious organizations, 20 U.S.C. § 1681(a), and abortion, 20 U.S.C. § 1688;

c. Enforcing the Rule in a way that would require Private Plaintiffs to provide medical services or insurance coverage related to "gender identity" or "termination of pregnancy" in violation of their religious beliefs;

d. Construing Section 1557 to extend Title IX's definition of "sex" to include "gender identity" or to mean something other than the immutable, biological differences between males and females as acknowledged at or before birth;

e. Construing Section 1557 to extend Title IX's definition of "sex" to include "termination of pregnancy" without also incorporating Title IX's statutory exemptions regarding religious organizations, 20 U.S.C. § 1681(a), and abortion, 20 U.S.C. § 1688;

f. Construing Section 1557 to require Private Plaintiffs to provide medical services or insurance coverage related to "gender identity" or "termination of pregnancy" in violation of their religious beliefs.

The Court hereby vacates and remands to HHS for further consideration the unlawful portions of HHS's Rule, as set forth in this Court's order. *See Sierra Club v. EPA*, 705 F.3d 458, 469 (D.C. Cir. 2013) (vacating aspects of a final rule that exceeded the agency's statutory authority, and remanding to the agency for further proceedings). Vacatur of unlawful rules is the "normal remedy," particularly where, as here, the agency's rule has "serious deficiencies" and vacatur will not result in "disruptive consequences." *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *see also Texas v. EPA*, 690 F.3d 670, 686 (5th Cir. 2012) (vacating an unlawful final rule and remanding to the agency for further consideration); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) ("[Court intervention under the APA] may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the

agency in order to avoid the unlawful result that the court discerns.").

The Court will retain jurisdiction of this action to supervise compliance with its order and to receive any applications for costs and attorneys' fees that may be filed.

SO ORDERED on this____day of_____, 2019.

_____
HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

We hereby certify that on March 30, 2022, we electronically filed the foregoing Joint Record Excerpts with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

/s/ *Lindsey Kaley*
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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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March 29, 2022

Mr. Joshua A. Block
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No. 21-11174 Franciscan Alliance v. Becerra
USDC No. 7:16-CV-108

Dear Mr. Block, Ms. Kaley, Ms. Neumeister,

We filed your record excerpts. However, you must make the following correction(s) within the next 14 days.

You need to correct or add:

Signature of all counsel filing the record excerpts is needed. Signature needed for counsel representing parties American Civil Liberties Union of Texas and River City Gender Alliance.

Note: Once you have prepared your sufficient record excerpts, you must electronically file your 'Proposed Sufficient Record Excerpts' by selecting from the Briefs category the event, "Proposed Sufficient Record Excerpts", via the electronic filing system. Please do not send paper copies of the record excerpts until requested to do so by the clerk's office. The record excerpts are not sufficient until final review by the clerk's

office. If the record excerpts are in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient record excerpts filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient record excerpts **MUST** be dated on the actual date that service is being made. Also, if your record excerpts are sealed, this event automatically seals/restricts any attached documents, therefore, you may still use this event to submit a sufficient record excerpts.

Sincerely,

LYLE W. CAYCE, Clerk

Renee McDonough

By: _____
Renee S. McDonough, Deputy Clerk
504-310-7673

cc:
Mr. Daniel Chen
Mr. Joseph Charles Davis
Ms. Marleigh D. Dover
Mr. Luke William Goodrich
Mr. Bradley Philip Humphreys
Mr. Brian Klosterboer
Mr. Daniel Mach
Mr. Scout Richters
Mr. Mark Rienzi
Mr. Charles Wylie Scarborough
Mr. Andre Segura
Mr. Jack Starcher