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

McComb Children's Clinic, LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.** 5:24-cv-00048-LG-ASH
	)	
Xavier Becerra, et al.,	)	**ORAL ARGUMENT REQUESTED**
	)	
Defendants.	)	

PLAINTIFF'S REBUTTAL IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT

In July 2024, this Court stayed the enforcement of HHS's Section 1557 rule. The rule is a radical attempt to reimagine Title IX and Section 1557 of the Affordable Care Act ("ACA") to address gender identity in healthcare. The rule forces medical clinics to perform and affirm harmful "gender-transition procedures" on kids or else lose Medicaid and CHIP funding. *Tennessee v. Becerra*, No. 1:24cv161, 2024 WL 3283887, at *13–14 (S.D. Miss. July 3, 2024), staying Nondiscrimination in Health Programs and Activities, 89 FR 37522 (May 6, 2024). But, as this Court held, Congress never, "with a 'clear voice,' adopted an ambiguous or evolving definition of 'sex' when it acted to promote educational opportunities for women in 1972." *Id.* at *13.

This Court now finds itself in good and growing company. Ten other district courts and three circuit courts have issued rulings to confirm that Title IX protects women's equal opportunities in education and athletics. Collectively these courts have preliminarily enjoined HHS and the Department of Education from rewriting Title IX and the ACA to address gender identity. *Id.*; *see also Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *1–2, *1 n.2 (11th Cir. Aug. 22, 2024) (per curiam) (collecting Title IX injunctions); *Texas v. Becerra*, No. 6:24-cv-211, 2024

WL 3297147 (E.D. Tex. July 3, 2024); *Florida v. HHS*, No. 8:24-cv-1080, 2024 WL 3537510 (M.D. Fla. July 3, 2024); Ord. Modifying Stay, *Texas v. Becerra*, ECF No. 41, No. 6:24-cv-00211-JDK (E.D. Tex. Aug. 30, 2024). And all nine Supreme Court justices "accept[ed] that the plaintiffs were entitled to preliminary injunctive relief as to . . . the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity." *Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507, 2509–10 (2024) (per curiam) (refusing to stay Title IX injunctions).

Seeking to stave off vacatur of this unlawful rule, HHS opposes partial summary judgment for Plaintiff McComb Children's Clinic, LTD. (MCC). But nothing in HHS's [40] Response to Plaintiff's Motion for Partial Summary Judgment or [41] Brief in Opposition (Opp'n) shows that this Court should abandon the legal consensus. HHS fails to grapple with the text, history, and precedent of Title IX and the ACA. HHS mostly re-raises, sometimes word-for-word, the same arguments about *Bostock v. Clayton County*, 590 U.S. 644 (2020), that this Court rejected. Partial summary judgment is appropriate for the reasons explained in MCC's [27] Motion for Partial Summary Judgment and [28] Memorandum in Support (MCC Br.).

ARGUMENT

I. The rule's operative provisions coerce gender-transition procedures.

Nowhere does HHS disavow the rule's requirement that clinics perform, refer for, and affirm harmful transition procedures on kids. Nor does HHS explain why its rule would not mean the end of healthcare focused on the unique needs of women.

Instead, HHS suggests that the rule *might* not mandate transition procedures, claiming that MCC argues against a speculative "straw man." Opp'n at 5, 16–18, 24.

But the rule's text does not lie, and elsewhere HHS stands by it. Under that text, MCC and clinics nationwide act illegally if they:

> Deny or limit health services sought *for purpose of gender transition or other gender-affirming care* that the covered entity would provide to an individual *for other purposes* if the denial or limitation is based on an individual's sex assigned at birth, gender identity, or gender otherwise recorded.

89 FR at 37701 (codified at 45 C.F.R. § 92.206(b)(4)) (emphasis added). Thus MCC, by providing services and referrals for medical reasons, must provide the same services or referrals for the "purpose of gender transition." § 92.206(b)(4)).

HHS suggests that the rule is a neutral nondiscrimination principle that does not "require the provision of any particular health service." Opp'n at 5, 29 n.18; 89 FR at 37701. But every time the rule tries to assert this caveat, it is immediately followed by bureaucratic lingo that negates the caveat: particular health services are not required only *if* "the covered entity has a legitimate, nondiscriminatory reason" for declining them. § 92.206(c); Opp'n at 5, 18–19, 24, 29 n.18. But as just quoted above in § 92.206(b)(4), offering a service "for other purposes" but not "for purpose of gender transition or other gender-affirming care" is discriminatory, and is thus not supported by a "legitimate, nondiscriminatory reason" in HHS's eyes. In other words, by saying the rule does not require providing a particular health service unless the refusal is discriminatory, and then defining the willingness to offer the service for non-gender-transition reasons but not for gender-transition reasons as discriminatory, the rule requires providing particular gender-transition services.

HHS's brief reads similarly: "The rule [does not] displace the judgment of providers as to the medical necessity of gender-affirming care …, *so long as a refusal of care is not based on animus or bias or a pretext for discrimination*." Opp'n at 5, 19–20, 29 n.18 (emphasis added). The rule says that "animus," "bias," or "discrimination" consists of "a categorical coverage exclusion or limitation for all health services related to gender transition or other gender-affirming care." § 92.207(b)(4), (c). That means, as the proposed rule explained in greater detail and as HHS never disavowed,

"a provider's belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a State or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate." 89 FR at 37597; *see* Opp'n at 5. That standard is a gender-transition mandate whether applied in insurance or in a clinic like MCC.

HHS propounds the same two-sided view about programs and facilities. HHS suggests the rule might not affect sex-specific programs and facilities like lactation rooms and exam rooms. Opp'n at 16, 24. But HHS also says, a clinic "must not deny a nonbinary individual access to a health program or facility on the basis that the program or facility separates patients based on sex or offers separate male and female programs or facilities." 89 FR at 37593. So MCC may only reserve its lactation rooms for breastfeeding moms if it allows "chestfeeding" men to use them. MCC can have female spaces, *if* it admits men who say they are women.

HHS also suggests that the rule might not compel using self-selected pronouns or refraining from telling patients that transition procedures are harmful. Opp'n at 6, 18, 24–26. But the rule says otherwise: covered entities must "refer or provide accurate information about gender-affirming care." 89 FR at 37598. The rule considers it discriminatory to cause more than *de minimis* harm, including by having a policy preventing "an individual from participating in a health program or activity consistent with the individual's gender identity." § 92.206(b)(3). (The rule says that merely "experiencing … distress" is enough to cross that *de minimis* threshold. 89 FR at 37593.) When commenters asked HHS to disavow its pronoun requirement, HHS confirmed that the wrong pronouns can constitute harassment. 89 FR at 37596.

II. MCC challenged the rule's operative provisions for lack of authority.

HHS claims that MCC's brief focuses on agency actions that do not exist, like a purported provision "redefin[ing] sex to mean gender identity" and prohibiting

clinics from making "sex distinctions." Opp'n at 8, 20–21. But the rule redefines sex discrimination to include gender-identity discrimination, 89 FR at 37698–99, 37701 (codified at 45 C.F.R. §§ 92.101(a)(2), 92.208, 92.209)). Elsewhere in its brief HHS admits MCC challenged that provision. Opp'n at 8, 12.

HHS suggests that it does not know what MCC means when MCC also challenges every theory by which HHS may impose this rule. Opp'n at 21–22 n.13. But MCC's Complaint [ECF No. 1] explains that the rule defines "gender-identity" discrimination to be sex discrimination, and separately defines "sex stereotypes" discrimination to encompass gender-identity discrimination. Compl. ¶ 74, ECF No. 1; *see* 89 FR at 37699. None of these theories fit the statute, so MCC challenges any such mandate.

III. MCC has standing to sue before enforcement.

HHS refuses to directly disavow this coercion because coercion is the rule's purpose. HHS seeks to enforce this rule through "layers of process," wholesale investigations, "formal agency adjudication procedures," a "full written report" publicized to Congress, and Department of Justice lawsuits, unless targeted clinics like MCC agree to "a voluntary resolution" in the face of that regulatory onslaught. Opp'n at 3–4, 26–28. This gives MCC standing to sue. MCC Br. at 7–8.

HHS suggests the only way to know how the rule applies to MCC is after enforcement. Opp'n at 5–6, 16, 24–25. But everyone can read the rule. MCC must drop its gender-identity policy, remove its signs on lactation rooms, and speak differently to patients when the rule goes into effect. MCC Br. at 6. Yet HHS cannot leave "potential penalties hang[ing] over plaintiffs' heads like Damocles's sword." *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 927–28 (5th Cir. 2023). Or else, HHS's unprecedented litigation position would preclude regulated entities from challenging final rules that regulate them, upending decades of administrative law.

HHS dismisses as "trifling" HHS's censorship of MCC's website policy on gender, HHS's threat to MCC's funding, and other HHS-imposed unrecoverable compliance costs. Opp'n at 25–27. But a single dollar of injury provides standing. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 291 (2021). And HHS's position ignores the incalculable harms to kids from these dangerous procedures.

IV. *Bostock* does not apply to the ACA and Title IX.

For over 50 years it was well-settled that Title IX allows sex distinctions in locker rooms, lactation rooms, and athletics. MCC Br. at 8–20. But HHS insists on applying *Bostock* to the ACA and Title IX—even after this Court held that HHS "unreasonably" relied on *Bostock* to "conflate the phrase 'on the basis of sex' with the phrase 'on the basis of gender identity.'" *Tennessee*, 2024 WL 3283887, at *10.

In its brief, HHS urges this Court to change its mind and extend *Bostock* to the ACA on the theory that sex discrimination necessarily "encompasses discrimination on the basis of gender identity." Opp'n at 2, 8. HHS contends that if sex is a cause of or a motivating factor in a treatment decision—if a clinic ever considers sex—it is sex discrimination. *Id.* at 8–13, 16–18. And HHS sees no way for a clinic to decline or not affirm transition procedures without considering sex or making sex distinctions.

But HHS's post hoc rationalizations of the rule fail "to acknowledge the different language in Title VII and Title IX" and make no serious attempt to reconcile the male/female language in these statutes with *Bostock*. *Tennessee*, 2024 WL 3283887, at *9. Rather than wrestle with these statutes' texts, history, and precedent, HHS cites decisions that reflexively applied *Bostock* without appreciating Title IX's rule of construction or seeing that Title IX allows consideration of sex. Opp'n at 9, 20.

Because the ACA and Title IX allow and sometimes require sex distinctions, HHS's position is unworkable. "Title IX and its implementing regulations prohibit discrimination on the basis of sex, but they also explicitly permit differentiating

between the sexes in certain instances." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 814 (11th Cir. 2022) (en banc). No evidentiary standard of causation can change the scope of what the statute prohibits, allows, or requires.

In this respect, the rule goes far beyond *Bostock* in defining sex discrimination to include considerations like "sex stereotypes," "gender identity" and "sex characteristics." 89 FR at 37698–99, 37701 (codified at 45 C.F.R. §§ 92.101(a)(2), 92.208, 92.209)). *Bostock* did not create any new protected classes—as this rule attempts to do. *See, e.g.*, *Texas v. EEOC*, 633 F. Supp. 3d 824, 831 (N.D. Tex. 2022); *Stollings v. Tex. Tech Univ.*, No. 5:20-CV-250-H, 2021 WL 3748964, at *10 (N.D. Tex. Aug. 25, 2021).

HHS argues that the Court was wrong to conclude that the difference between Title IX's "on the basis of sex" and Title VII's "because of … sex" renders *Bostock* inapplicable. This difference comes from *Bostock*, which relied on Title VII's nondiscrimination mandate as applying to "individuals, not groups." 590 U.S. at 658, unlike "sex discrimination" laws like Title IX that "focus on differential treatment between the two sexes as groups," *id.* at 659. Not only is "sex discrimination" in Title IX's title and headings, Pub. L. No. 92-318, 86 Stat. 235, 373, but a group-based understanding explains the many provisions requiring comparable treatment of men and women as groups. Housing for each sex must be "[c]omparable in quality and cost to the student." 34 C.F.R. § 106.32(b)(2)(ii); *see id.* § 106.32(c)(2)(ii) (similar). "[T]oilet, locker room, and shower facilities" must be comparable. 34 C.F.R. § 106.33. And schools must "provide equal athletic opportunity for members of both sexes." *Id.* § 106.41(c). The list goes on. *E.g.*, *id.* §§ 106.31(c) 106.34(b)(2), 106.37(c).

As this Court held, "[i]nterpreting the word 'sex' to include gender identity would create contradictions and ambiguity within Title IX and its regulations." *Tennessee*, 2024 WL 3283887, at *10. After all, a school necessarily considers sex when assigning girls and boys to separate dormitories, P.E. classes, locker rooms, and

sports teams. Courts should not discount regulations that were "issued roughly contemporaneously with [Title IX's] enactment" and have "remained consistent over time." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258 (2024). HHS errs in superimposing *Bostock*'s individualistic approach when Title IX allows schools to "treat[ ] males and females comparably as groups." *Bostock*, 590 U.S. at 665.

The rule in short threatens to change the ACA and Title IX "from one sort of scheme of regulation into an entirely different kind." *West Virginia v. EPA*, 597 U.S. 697, 728 (2022) (cleaned up). Indeed, half of the states have laws restricting transition procedures for minors and protecting women's sports. The rule tries to settle these important political issues, and it does so by threatening to cut billions of dollars in federal funding. That's a major question if there ever was one.[1]

V. The Court should vacate the rule and order final relief.

HHS argues that as a matter of equitable discretion this Court should decline to vacate the rule or should limit vacatur to MCC only. Opp'n at 3, 23, 28–32. But as this Court pointed out, this is not the standard in the Fifth Circuit. *Tennessee*, 2024 WL 3283887, at *13 (discussing *Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024)). Moreover, the circuit's rule is correct. Unlike the equitable remedy of an *in personam* injunction, the legal remedy of *in rem* vacatur is not party-specific or subject to equitable considerations. MCC Br. at 20–21. "Universal remedies under the APA . . . remain within Article III limits because they are legal, not equitable, remedies created by Congress."[2] And that explains why the

[1] HHS claims that other, unspecified statutes justify the rule. Opp'n at 31–32. But as MCC explained, no other statute saves the rule. MCC Br. at 17.

[2] T. Elliot Gaiser et al., *The Truth of Erasure: Universal Remedies for Universal Agency Actions*, U. Chi. L. Rev. Online (Aug. 28, 2024), at *11, https://lawreview.uchicago.edu/sites/default/files/2024-08/The%20Truth%20of%20Erasure%20UCLR.pdf.

APA's "broad statutory remedies . . . are not subject to the traditional limits of equity": stays and vacatur "simply are not equitable remedies.[3]

HHS seeks to avoid this precedent by any means, no matter how contradictory. HHS touts how vacatur precludes the beneficial percolation of issues in multiple courts. Opp'n at 31. This policy argument rings hollow. HHS says the simultaneous percolation of this rule in other courts should bar MCC's relief, Opp'n at 34, and indeed, should prevent MCC from even filing this case. *See* Defs.' Mem. Supp. Mot. Dismiss at 11–12, ECF No. 36. Thus, HHS appears to favor "duplicative" litigation when it urges the Court to deny MCC the relief to which it is entitled under the APA against this unlawful rule, but it opposes the "multiplicity" of litigation when it asks the Court to dismiss MCC's case just because other lawsuits are pending. *Id.*[4]

HHS likewise seeks to avoid APA vacatur by urging the Court to adopt a standard from constitutional law not applicable to APA cases, contending MCC must show that the rule is invalid in every application. *E.g.*, Opp'n at 7, 16, 20, 25, 35. That burden is the standard for some "facial challenge[s] to the constitutionality of a statute," *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006), a standard that reflects equitable considerations. But under the APA, MCC need only show that the rule exceeds HHS's statutory authority. 5 U.S.C. § 706(2). This Court already held it does. Holding it unlawful and setting it aside is what the APA says the Court "shall" do. The APA can no more be amended to require showing that a rule is invalid in all its applications than Title IX and the ACA can be amended to encompass a gender-identity nondiscrimination mandate.

HHS claims that partial summary judgment is unwarranted and deviates from APA practice. Opp'n at 6, 21–22, 32–35. But courts can resolve APA cases through

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[3] Gaiser et al., *supra* n.2, at *12.

[4] MCC addressed HHS's other arguments for dismissing the case, Opp'n at 8 & n.5, 23–24, 35, in MCC's [43] Memorandum in Opposition to Defendants' Motion to Dismiss.

"partial final judgment" on one legal theory and stay other theories until resolution become necessary. *Texas v. Becerra*, 89 F.4th 529, 537 (5th Cir. 2024). HHS offers no reason not to proceed that way here. HHS admits that this case "hinges on a single legal question." Opp'n at 8. HHS neither points to any missing facts from the administrative record, nor disputes *any* of MCC's evidence and expert opinions. HHS also sees that a Rule 54(b) certification ensures that a judgment is not "interlocutory and thus ineffective," and HHS too values "clear notice" of finality. Opp at 35.

Finally, HHS smears MCC and other clinics by saying that without this illegal rule doctors would abandon kids with broken bones. Opp'n at 2, 7, 16. But as MCC explained, this rule is not about broken bones. MCC Br. at 17–18. HHS lacks authority for a nationwide gender-identity mandate throughout healthcare. It is HHS's rule that hurts children—not pediatric clinics like MCC.

CONCLUSION

The Court should grant partial summary judgment.

Respectfully submitted October 31, 2024.

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