No. _____

In the Supreme Court of the United States

SUSAN NEESE AND JAMES HURLY, PETITIONERS

v.

ROBERT F. KENNEDY JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES OF AMERICA, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

REED RUBINSTEIN
DANIEL Z. EPSTEIN
America First Legal Foundation
611 Pennsylvania Ave SE #231
Washington, DC 20003
(202) 964-3721
reed.rubinstein@aflegal.org
daniel.epstein@aflegal.org

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Petitioners

QUESTION PRESENTED

The petitioners are challenging the legality of a Notification issued by former HHS Secretary Xavier Becerra in May of 2021, which declares that section 1557 of the Affordable Care Act prohibits "discrimination on the basis of gender identity" by health-care providers that receive federal funding. The court of appeals dismissed the petitioners' claims for lack of Article III standing. After the court of appeals issued its ruling, the Trump Administration took office and rescinded the Notification that the petitioners were challenging, mooting the petitioners' lawsuit. The question presented is:

> Should the Court summarily vacate the court of appeals' judgment under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and remand with instructions to dismiss the case?

PARTIES TO THE PROCEEDING

Petitioners Susan Neese and James Hurly were the plaintiffs-appellees in the court of appeals.

Respondents Robert F. Kennedy Jr. and the United States of America were the defendants-appellants in the court of appeals.

A corporate disclosure statement is not required because neither Dr. Neese nor Dr. Hurly is a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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In the Supreme Court of the United States

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The petitioners are challenging the legality of a Notification issued by former HHS Secretary Xavier Becerra in May of 2021, which declares that section 1557 of the Affordable Care Act prohibits "discrimination on the basis of sexual orientation" and "discrimination on the basis of gender identity" by health-care providers that receive federal funding.[1] The district court certified a class of health-care providers subject to section 1557 of the ACA

1. *See* Department of Health and Human Services, *Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972*, 86 Fed. Reg. 27,984–85 (May 25, 2021), http://bit.ly/3SHkle9 [https://perma.cc/P54K-L65Q].

and awarded classwide relief that set aside the Notification under section 706 of the APA. App. 50a–51a. But the court of appeals reversed, holding that the petitioners lacked Article III standing to challenge the Notification. App. 1a–6a. After the court of appeals' ruling, the Trump Administration took office and rescinded the Notification that the petitioners were challenging. App. 52a–53a. The case is now moot, and the Court should summarily vacate the court of appeals' judgment and remand with instructions to dismiss the case. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

OPINIONS BELOW

The opinion of the court of appeals is available at 123 F.4th 751 (5th Cir. 2024), and is reproduced at App. 1a–6a. The court of appeals' order denying rehearing en banc and the accompanying opinions are available at 127 F.4th 601 (5th Cir. 2024), and are reproduced at App. 7a–16a. The district court's opinion is available at 640 F. Supp. 3d 668 (N.D. Tex. 2022), and is reproduced at App. 17a–49a.

JURISDICTION

The court of appeals issued its opinion on December 16, 2024. App. 1a. Although none of the parties petitioned for rehearing en banc, one of the Fifth Circuit judges *sua sponte* called for an en banc poll. On January 31, 2025, the court of appeals denied rehearing en banc by a 16-1 vote. App. 7a–8a. On March 3, 2025, Justice Alito extended the deadline for seeking certiorari until May 31, 2025. Dr. Neese and Dr. Hurly timely filed this petition on May 27, 2025.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2, ¶ 1 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . .

U.S. Const. art. III, § 2, ¶ 1.

STATEMENT

In May of 2021, then-Secretary Xavier Becerra issued a "Notification of Interpretation and Enforcement," which declared that section 1557 of the Affordable Care Act prohibits "discrimination on the basis of sexual orientation" and "discrimination on the basis of gender identity" by health-care providers that receive federal funding. *See* Department of Health and Human Services, *Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972*, 86 Fed. Reg. 27,984–85 (May 25, 2021), http://bit.ly/3SHkle9 [https://perma.cc/P54K-L65Q]. The Notification not only announced the Department's views, but also threatened to enforce this interpretation of section 1557 against every health program or activity receiving federal funds. *See id.* at 27,984 ("[B]eginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity.").

I. THE DISTRICT-COURT PROCEEDINGS

On August 25, 2021, petitioners Susan Neese and James Hurly filed a class-action lawsuit on behalf of all health-care providers subject to section 1557 of the Affordable Care Act, and they asked the district court to hold unlawful and set aside Secretary Becerra's Notification. *See* 5 U.S.C. § 706(2)(A). They also requested declaratory and injunctive relief that would restrain the federal government from enforcing the interpretation of section 1557 that appears in the Notification of May 2021.

The federal government sought to dismiss for lack of Article III standing, but the district court held that each of the plaintiffs had established injury from the Secretary's threatened enforcement of the Notification. *See Neese v. Becerra*, No. 2:21-cv-00163-Z, 2022 WL 1265925, **3–7 (N.D. Tex. Apr. 26, 2022). The district court also certified a class of all health-care providers subject to section 1557 of the Affordable Care Act. *See Neese v. Becerra*, 342 F.R.D. 399 (N.D. Tex. 2022). Then it granted summary judgment in part to Dr. Neese and Dr. Hurly. App. 17a–49a. The district court agreed that Secretary Becerra's Notification of May 10, 2021, should be held unlawful and set aside under section 706 of the APA. *Id.* at 50a. Then it issued a declaratory judgment announcing that the holding of *Bostock v. Clayton County*, 590 U.S. 644 (2020), is categorically inapplicable to Title IX and section 1557 of the ACA. *Id.* at 50a–51a; *see also id.* at 25a ("*Bostock* does not apply to Section 1557 or Title IX."). The district court, however, denied the plaintiffs' request for injunctive relief because the plaintiffs did not brief the factors relevant to the propriety of an injunction. *Id.* at 51a; *id.* at 43a ("The

Court, however, will not assess the propriety of injunctive relief because Plaintiffs do not brief factors relevant to the appropriateness of injunctive relief.").

The government appealed the district court's judgment to the U.S. Court of Appeals for the Fifth Circuit.

II. THE COURT OF APPEALS PROCEEDINGS

On December 20, 2024, the court of appeals held that the plaintiffs lacked Article III standing to challenge Secretary Becerra's Notification. App. 1a–6a. The court of appeals *sua sponte* withheld the issuance of its mandate because one of its members requested a poll on rehearing en banc, even though none of the parties had petitioned for rehearing. On January 31, 2025, the court of appeals denied rehearing en banc by a 16-1 vote. App. 7a–8a.

III. THE POST-RULING DEVELOPMENTS THAT MOOT THE PLAINTIFFS' LAWSUIT

After the panel's ruling of December 20, 2024, the Trump Administration took office and rescinded Secretary Becerra's Notification of May 10, 2021. The Trump Administration also disavowed the notion that federal statutes prohibiting "sex" discrimination incorporate a ban on discrimination based on "gender identity." On January 20, 2025, President Trump signed Executive Order No. 14168, entitled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." *See* http://bit.ly/43hm0fn [https://perma.cc/2N65-ZEVC]. Section 2(a) of Executive Order No. 14168 prohibits federal agencies from interpreting the word "sex" in federal statutes to include "gender identity," as Secretary Becerra's Notification had done:

> "Sex" shall refer to an individual's immutable biological classification as either male or female. "Sex" is not a synonym for and does not include the concept of "gender identity."

Executive Order No. 14168, § 2(a); *see also id.* at § 3(b) ("Each agency should therefore give the term[] "sex" . . . the meanings set forth in section 2 of this order when interpreting or applying statutes . . . .").

On May 14, 2025, in compliance with this executive order, Secretary Kennedy formally rescinded Secretary Becerra's Notification of May 10, 2021:

> I hereby order that the following documents be rescinded, effective immediately: . . .
>
> * Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 FR 27984 (May 25, 2021).

Department of Health and Human Services, *Notification of HHS Documents Identified for Rescission*, 90 Fed. Reg. 20,393, 20,394 (May 14, 2025), http://bit.ly/3SGlliK [https://perma.cc/AFP9-7S8X] (App. 54a).

REASONS FOR GRANTING THE PETITION

The case has become moot now that Secretary Kennedy has rescinded the Notification of May 10, 2021. App. 53a. The case is doubly moot in light of Executive Order 14168, which prohibits the executive branch from interpreting section 1557 or Title IX in a manner that equates "sex" with "gender identity." *Id.* at 9a–10a. The Court should therefore grant the petition and summarily

vacate the court of appeals' judgment and opinion under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). And it should remand with instructions to dismiss the case. *See Azar v. Garza*, 584 U.S. 726, 729 (2018) (per curiam) ("When 'a civil case from a court in the federal system . . . has become moot while on its way here,' this Court's 'established practice' is 'to reverse or vacate the judgment below and remand with a direction to dismiss.'" (quoting *Munsingwear*, 340 U.S. at 39)); *see also Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam) ("Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.").

This has long been the Court's established practice when a challenged policy expires or is rescinded before this Court can review a lower court's decision. *See, e.g.*, *Speech First, Inc. v. Sands*, 144 S. Ct. 675 (2024) (summarily vacating under *Munsingwear* after the challenged "bias protocol" was discontinued by new university leadership); *Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (summarily vacating under *Munsingwear* after the challenged executive order expired); *Trump v. Hawaii*, 583 U.S. 941 (2017) (mem.) (summarily vacating under *Munsingwear* after the provisions of a challenged executive order "expired by [their] own terms" (citation and internal quotation marks omitted)); *Trump v. Int'l Refugee Assistance*, 583 U.S. 912 (2017) (mem.) (same); *Burke v. Barnes*, 479 U.S. 361, 365 (1987) (vacating under *Munsingwear* after the challenged bill "expired by its own terms"). The Court has also em-

phasized that vacatur under *Munsingwear* is especially appropriate when mootness arises from the "unilateral action of the party who prevailed in the lower court." *Garza*, 584 U.S. at 729 (citation and internal quotation marks omitted); *see also id.* ("One clear example where '[v]acatur is in order' is 'when mootness occurs through . . . the unilateral action of the party who prevailed in the lower court.'" (citation and some internal quotation marks omitted)). That is precisely what has happened here: The government prevailed in the court of appeals when the panel held that the petitioners lacked standing to challenge Secretary Becerra's Notification,[2] and then the government rescinded the challenged Notification before the petitioners sought certiorari in this Court.[3]

There is no reason to depart from this Court's longstanding practice. The case is indisputably moot, as the rescission of Secretary Becerra's Notification moots any litigation over its legality. *See Akiachak Native Community v. United States Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) ("[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot."); *see also id.* (citing authorities). And this mootness is entirely attributable to the actions of the government, which unilaterally repealed the Notification after it had defeated the petitioners' claims in the court of appeals. App. 52a–54a. Nothing more is needed to show that summary vacatur is warranted, and there is no requirement that petitioners seeking vacatur under *Munsingwear* demonstrate that

2. App. 1a–6a.

3. App. 52a–54a.

the court of appeals' ruling would have been independently certworthy in the absence of the post-ruling developments that mooted the lawsuit. *See, e.g.*, *Speech First*, 144 S. Ct. 675 (summarily vacating under *Munsingwear* without discussing whether the court of appeals' ruling would have been certworthy in the absence of mootness); *Planned Parenthood Center for Choice*, 141 S. Ct. 1261 (same).

It also does not matter that the court of appeals dismissed the petitioners' claims for lack of Article III standing rather than rejecting those claims on the merits. App. 1a–6a. In *Speech First*, the court of appeals had ruled that the petitioners lacked Article III standing to challenge Virginia Tech's "bias protocol," which remained in existence at the time of the court of appeals' ruling, and neither the court of appeals nor the district court in *Speech First* had ever reached or resolved the merits of the petitioners' claims. *See Speech First, Inc. v. Sands*, 69 F.4th 184, 196 (4th Cir. 2023) ("Speech First's members have not demonstrated the injury in fact necessary to establish standing."), cert. granted, judgment vacated in *Speech First, Inc. v. Sands*, 144 S. Ct. 675 (2024); *see also id.* at 188 ("The district court held that Speech First . . . lacked standing to challenge the Bias Policy because its members had suffered no injury in fact"). When Virginia Tech repealed its bias policy, this Court granted certiorari and summarily vacated the court of appeals' judgment and opinion with respect to those claims, and remanded with instructions to dismiss the claims as moot. *See Speech First*, 144 S. Ct. at 675 ("Judgment with respect to the Bias Policy claims is vacated, and the case is remanded to

the United States Court of Appeals for the Fourth Circuit with instructions to dismiss those claims as moot. See *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).”). The Court took this step even though the lower courts had never ruled on the merits and dismissed Speech First’s claims for lack of an Article III case or controversy. And rightly so, as the point of *Munsingwear* vacatur is to “strip[] the decision below of its binding effect”[4]—even when the lower court’s decision disposes of the claims on jurisdictional grounds without reaching the merits.

The court of appeals’ analysis of the Article III standing issues is now a precedent that binds future three-judge panels in the Fifth Circuit. App. 1a–6a. *Munsingwear* vacatur is both necessary and appropriate to “strip[]”[5] this decision of its precedential effect, even though it will not alter the ultimate disposition of the plaintiffs’ claims, which must be dismissed for lack of subject-matter jurisdiction no matter how this Court disposes of the petition. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023) (courts may dismiss a case as moot even when Article III standing is doubtful or non-existent).

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4. *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988); *see also id.* (“When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint. See *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39–40, 71 S. Ct. 104, 106–107 (1950). This disposition strips the decision below of its binding effect.”).

5. *Id.*

CONCLUSION

The petition for writ of certiorari should be granted. The Court should summarily vacate the court of appeals' judgment and opinion under *Munsingwear* and remand with instructions to dismiss the case.

Respectfully submitted.

REED RUBINSTEIN
DANIEL Z. EPSTEIN
America First Legal Foundation
611 Pennsylvania Ave SE #231
Washington, DC 20003
(202) 964-3721
reed.rubinstein@aflegal.org
daniel.epstein@aflegal.org

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

May 27, 2025

APPENDIX

United States Court of Appeals
Fifth Circuit
FILED
December 16, 2024

Lyle W. Cayce
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10078

SUSAN NEESE; JAMES HURLY,

Plaintiffs–Appellees,

versus

XAVIER BECERRA, *in his official capacity as Secretary of Health and Human Services*; UNITED STATES OF AMERICA,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-CV-163

Before JONES, HAYNES, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

Dr. Susan Neese and Dr. James Hurly ("Plaintiffs") brought a pre-enforcement challenge to the Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972 ("Notification"), which was issued by the Department of Health and Human Services

("HHS") in May 2021. The district court granted summary judgment for Plaintiffs. Because Plaintiffs lack Article III standing, we VACATE the district court's judgment and REMAND with instructions to dismiss Plaintiffs' claims for lack of jurisdiction.

The Notification at issue states that "[c]onsistent with the Supreme Court's decision in Bostock[1] and Title IX, beginning today, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex[2] to include: (1) [d]iscrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity." Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984, 27985 (May 25, 2021) (to be codified at 45 C.F.R. pts. 86, 92). Plaintiffs filed this case in August 2021 to challenge the Notification.

Both Plaintiffs are doctors in Amarillo, Texas. Dr. Neese practices general internal medicine for patients from age 16 to 105 years old. Dr. Hurly is a pathologist who diagnoses patients based on laboratory analyses. They both claim to be "unwilling to provide gender-affirming care, in at least some situations, to patients who assert a gender identity that departs from their biological sex."[3] For Dr. Neese, these situations include: (1) her categorical unwillingness to assist minors with transitioning or prescribe them puberty blockers or hormone

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1. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).
2. *See* 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a).
3. The parties agree that Plaintiffs only assert an injury caused by the portion of the Notification that prohibits discrimination based on gender orientation.

therapy (which she explained is not within her medical specialty); and (2) her insistence that transgender patients or patients with gender dysphoria obtain preventive care consistent with their biological sex, such as a biological female who identifies as a man (but whose body remains female) undergoing a pelvic examination to check for cervical or ovarian cancer. For Dr. Hurly, these situations include informing a biological male who identifies as a woman of her prostate cancer diagnosis and need for treatment. Put another way, the doctors want to be sure that the physical bodies of their patients are cared for properly.

Neither Plaintiff believes that their medical practices constitute gender-identity discrimination. However, they are fearful that HHS will view their practices as violating the Notification. Plaintiffs fear that HHS will bring an enforcement proceeding against them and terminate their federal funding if they do not "provide everything a transgender patient might demand" (even if it is not doable in their body) or "unconditionally play along with a patient's asserted gender identity." The Government disagrees with the assertion that it would prosecute a doctor who, under the circumstances presented in this case, treated a biological male or female according to the medical needs of the physical body.

We always have jurisdiction to determine jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Questions of standing are reviewed de novo. *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 236 (5th Cir. 2010). In order to have standing, a plaintiff must have suffered an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation omitted).

The right to pre-enforcement review is qualified and permitted only "under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *see Whole Woman's Health v. Jackson*, 595 U.S. 30, 49 (2021).

Plaintiffs have not met their burden to establish standing in this case because they have not shown how their conduct constitutes gender-identity discrimination under any plausible reading of the Notification. Plaintiffs themselves do not view their conduct as gender-identity discrimination, nor do they offer any evidence that HHS will view it as such. They have valid, non-discriminatory reasons for their medical practices, including that acting otherwise would be malpractice or would require them to provide services outside of their specialty areas. Lastly, their current practices have not been chilled or otherwise affected, and there is no evidence that an enforcement proceeding is imminent. *Cf. Braidwood Mgmt. Inc. v. EEOC*, 70 F.4th 914, 929 & n.27 (5th Cir. 2023) (holding plaintiffs had standing to bring pre-enforcement challenge where the EEOC previously brought an enforcement action under similar circumstances).

Plaintiffs have thus failed to show that they are actually violating the Notification, much less that they face a credible threat of enforcement. They therefore do not have standing.[4] Accordingly, we VACATE the district

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4. Among other things, the Government challenged the district court's conclusion that the Notification was a final agency action and that *Bostock*, 140 S. Ct. at 1754, where the Supreme Court held that Title VII's ban on discrimination "because of . . . sex" prohibits an employer from firing an employee because that employee is homosexual or transgender, does not apply to Title

(continued…)

court's judgment and REMAND with instructions to dismiss Plaintiffs' claims for lack of jurisdiction.

Edith Hollan Jones, concurring:

Based on representations by counsel for the government during oral argument and in brief, I concur in dismissing plaintiffs' case for lack of Art. III standing. I agree with the majority's conclusions that the plaintiffs "do not view their conduct as gender-identity discrimination" because each of them treats patients who "identify" as members of the opposite sex. Further, as we hold, "[t]hey have valid, non-discriminatory reasons for their medical practices." I would add that the government readily affirms the plaintiffs are not facing any "credible threat" of prosecution for treating biological men or women according to their physical characteristics. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 536 (2021). Nor do they face any credible threat of prosecution for failing to treat patients inconsistent with their medical training and practice specialties.

Specifically, HHS judicially admits and confirmed at oral argument that "[P]laintiffs do not explain how a medical provider's care based on a transgender patient's physiological sex characteristics could be considered gender-identity discrimination, and HHS has never taken the position that such conduct constitutes gender-identity discrimination." HHS further acknowledges that the proposed rule interpreting section 1557 [the rule was stayed before it took effect] would not "'prohibit a cov-

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IX or § 1557 of the Affordable Care Act. Because we conclude Plaintiffs lack standing, we do not reach the other issues raised in this appeal.

ered entity from treating an individual for conditions that may be specific to their sex characteristics,' such as treating a transgender man with a pregnancy test." [citing 87 Fed. Reg. at 47,866]. HHS also reaffirmed at oral argument that "nothing in Section 1557 has ever been taken to mean that a physician must provide services outside their [sic] area of specialty." In sum, nothing in the briefing or argument by HHS implies that the plaintiffs faced a credible threat of investigation or losing federal funds based on their described medical practices.

United States Court of Appeals
Fifth Circuit
FILED
January 31, 2025

Lyle W. Cayce
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10078

SUSAN NEESE; JAMES HURLY,

Plaintiffs–Appellees,

versus

XAVIER BECERRA, *in his official capacity as Secretary of Health and Human Services*; UNITED STATES OF AMERICA,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-CV-163

ORDER ON REHEARING EN BANC

Before JONES, HAYNES, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

At the request of one of its members, the court was polled on a rehearing en banc. However, the rehearing en banc is DENIED because the court was polled, and a majority of the judges did not vote in favor of rehearing.

In the en banc poll, one judge voted in favor of rehearing (JUDGE HO), and sixteen judges voted against rehearing (CHIEF JUDGE ELROD, AND JUDGES JONES, SMITH, STEWART, RICHMAN, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, DUNCAN, ENGELHARDT, OLDHAM, WILSON, DOUGLAS, and RAMIREZ).

STUART KYLE DUNCAN, *Circuit Judge*, joined by JONES, SMITH, WILLETT, OLDHAM, ENGELHARDT, and WILSON, *Circuit Judges*, concurring in the denial of rehearing en banc:

Even though the losing side chose not to seek en banc rehearing, one judge called for an en banc poll. The poll failed 16–1. That should surprise no one, because there was no plausible reason to rehear this case.

To begin with, the panel unanimously held the plaintiff physicians lacked standing to challenge the guidance at issue.[1] *Neese v. Becerra*, 123 F.4th 751, 753–54 (5th Cir. 2024). As JUDGE JONES's concurrence emphasized, the United States itself "readily affirm[ed]," "judicially admit[ted]," and "confirmed at oral argument" that the guidance exposed the plaintiffs to no "credible threat of investigation or losing federal funds based on their described medical practices." *Id.* at 754 (Jones, J., concurring).

But let's suppose, as our dissenting colleague argues, that there was some way to make a case for Dr. Neese's standing. *Post* at 3–6. Even so, en banc would have been

1. *See* HHS, *Notification of Interpretation and Enforcement of Section 1557 of the Affordable Acre Act and Title IX of the Education Amendments of 1972*, 86 FED. REG. 27984 (May 25, 2021).

pointless. That is for the simple reason that the challenged guidance has been superseded, not once but twice.

Over six months ago, the Biden Administration codified the guidance in a Final Rule, effective July 5, 2024. *See* HHS, *Final Rule: Nondiscrimination in Health Programs and Activities*, 89 FED. REG. 37522 (May 6, 2024). That new rule is now under challenge in at least three district courts, two in this circuit. *See Texas v. Becerra*, 2024 WL 3297147 (E.D. Tex. July 3, 2024); *Tennessee v. Becerra*, 2024 WL 3283887 (S.D. Miss. July 3, 2024); *Florida v. Dep't of Health & Human Servs.*, 8:24-CV-0108 (M.D. Fla. July 3, 2024). Those courts can address the issues posed here, but on a full administrative record and without the standing pitfalls presented by this case.

None of this may matter, however, in light of actions already taken by the new Administration. On his first day in office, President Trump ordered a reorientation of the Executive Branch around the "immutable biological reality of sex," and, in doing so, rescinded the guidance challenged here. *See* Exec. Order, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* §§ 1, 7 (Jan. 20, 2025).[2]

The Order directs the Executive Branch to "enforce all sex-protective laws" in accordance with the "fundamental and incontrovertible reality" that sex is an "im-

2. *See* https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/ (last accessed Jan. 30, 2025).

mutable biological classification" and that there are only "two sexes, male and female." *Id.* at § 2. Pursuant to this policy, the Order directs the Attorney General to "correct" the Biden Administration's extension of *Bostock v. Clayton County*, 590 U.S. 644 (2020), to all "sex-based distinctions in agency activities," including in Title IX, which the Order deems "legally untenable." *Id.* at § 3(f). The Order further directs all agency heads to "promptly rescind all guidance documents inconsistent with" the policies announced in the Order. *Id.* at § 7(c).

President Trump's Order binds the entire Executive Branch to embrace the "biological reality" that there are only "two sexes, male and female," and that these are "immutable." That moots this case.[3]

I concur in the denial of en banc rehearing.

JAMES C. HO, *Circuit Judge*, dissenting from denial of rehearing en banc:

In *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Supreme Court held that transgender discrimination constitutes sex discrimination under Title VII of the Civil Rights Act of 1964. *Bostock* has been heralded by some as a landmark decision—and derided by others as an act of judicial "legislation." *Id.* at 683 (Alito, J., dissenting). *Cf. Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 333 (5th Cir. 2019) (Ho, J., concurring). Of course, we are duty-bound to faithfully apply *Bostock* as an inferior court, regardless of one's views on the matter. *See, e.g.*, *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595 (5th Cir. 2021) (applying *Bostock*). But we are not required to extend it. To the

3. It remains to be seen what effect the executive order will have on pending litigation against the Final Rule noted above.

contrary, "we should decide every case faithful to the text to the maximum extent permitted by a faithful reading of binding precedent." *Hamilton v. Dallas County*, 79 F.4th 494, 506 (5th Cir. 2023) (Ho, J., concurring).

I agree with the district court that nothing in federal law (or *Bostock*) requires physicians to help enable minors to transition from their biological sex to the opposite sex. A panel of our court vacated that judgment, however, for lack of Article III standing. I disagree and accordingly dissent from the denial of rehearing en banc in this obviously important case.[1]

I.

Section 1557 of the Affordable Care Act incorporates and applies Title IX of the Educational Amendments of 1972 to any health program or activity that receives fed-

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1. A brief response to my concurring colleagues: The fact that Executive Branch officials have dutifully done their job doesn't mean that we needn't do ours. Nor is our job obviated by the fact that Plaintiffs calculated (correctly, as it turns out) that a rehearing petition would not be an efficient use of their resources. Our rules plainly authorize us to rehear cases en banc on our own motion, precisely to alleviate litigants of unnecessary litigation burdens. *See* FED. R. APP. PROC. I.O.P. 40 ("Requesting A Poll On Court's Own Motion"). The only question is whether a particular case warrants en banc.

   By denying rehearing en banc, our court today leaves on the books a published, precedential ruling that overturns the district court's dutiful efforts and validates administrative overreach in an area of profound sensitivity. I've previously expressed my concerns about allowing government officials to engage in procedural stratagems to avoid judicial review. *See U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677 (5th Cir. 2023) (Ho, J., dissenting) (citing *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring)). Our decision today continues the pattern.

eral financial assistance. *See* 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a).

These provisions simply forbid "discrimination" "on the basis of sex." 20 U.S.C. § 1681(a). They impose no affirmative obligation on physicians to provide minor patients with puberty blockers, hormone therapy, or referrals for sex reassignment surgery.

This conclusion flows naturally from *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Supreme Court there addressed—and rejected—the suggestion that excluding treatment of pregnancy constitutes sex discrimination. "While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.* at 496 n.20. *See also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022) (quoting *Geduldig*, 417 U.S. at 496 n. 20).

And the same logic applies here. "[T]he fact that only transgender individuals experience gender dysphoria does not mean the exclusions discriminate based on transgender status, any more than the fact that 'only women can become pregnant' made the exclusion in Geduldig facially discriminatory." *Kadel v. Folwell*, 100 F.4th 122, 174 (4th Cir. 2024) (Richardson, J., dissenting). *See also id.* ("As in *Geduldig*, the challenged exclusions do not deny coverage to anyone because of their sex or transgender status. Instead, they merely decline coverage for a particular risk: gender dysphoria. And *Geduldig* held that a health plan that declines to cover a risk that only members of a protected class face does not facially classify people based on their membership in that class.") (cleaned up); Oral Arg. Tr. 21, *United States v. Skrmetti*, No. 23-477 (2024) ("The Court has ad-

dressed . . . how an equal protection claim should be analyzed when the law in question treats a medical condition or procedure differently based on a characteristic that is associated with just one sex. And that was *Geduldig* in 1974, reaffirmed in *Dobbs* in 2022.") (quoting Justice Alito).

II.

So it's not surprising that the district court granted summary judgment to Dr. Susan Neese.

Dr. Neese is a physician of general internal medicine, with patients ranging in age from 16 to 105. According to her sworn declaration, Dr. Neese is able and willing to provide hormone treatments to transgender patients "who have come to me . . . already transitioned and I maintain their care."

But she is "categorically unwilling to prescribe hormone therapy to minors who are seeking to transition." *Neese v. Becerra*, 640 F. Supp. 3d 668, 673 (N.D. Tex. 2022). In addition, she is "equally unwilling to provide referrals to minors seeking a sex-change operation." *Id.*

Dr. Neese is concerned, however, that her unwillingness to do so will cause the Secretary of Health and Human Services to exclude her from health programs that receive federal financial assistance.

Her concern is well taken. In 2021, HHS issued a formal notification that it would construe section 1557 consistent with the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 in *Bostock*. 86 Fed. Reg. 27984 (2021). And there is little doubt what that means. During the course of this litigation, HHS has not denied that it reads *Bostock* in the manner that Dr. Neese fears. To the contrary, it has been the official position of the United States that physicians who are able

but unwilling to enable minors to transition to the opposite sex are guilty of sex discrimination.

Last year, HHS promulgated a rule indicating that doctors receiving federal funds "must not" "[d]eny 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." 45 C.F.R. § 92.206(b)(4).

And just weeks ago, the Solicitor General argued before the Supreme Court that a Tennessee law that takes the exact same view as Dr. Neese that doctors should not be in the business of providing puberty blockers, hormone therapy, or sex reassignment surgery to minors—is unconstitutional sex discrimination. To quote the Solicitor General, Tennessee law discriminates on the basis of sex because it "restricts medical care only when provided to induce physical effects inconsistent with birth sex. Someone assigned female at birth can't receive medication to live as male, but someone assigned male can." Oral Arg. Tr. 5, *United States v. Skrmetti*, No. 23-477 (2024). It's "facial sex classification, full stop, and a law like that can't stand." *Id.*

If, as argued by the United States, Tennessee is indeed guilty of sex discrimination, then so is Dr. Neese. If Tennessee law discriminates because it "categorically bans treatment when and only when it's inconsistent with the patient's birth sex," *id.* at 4–5, then Dr. Neese likewise discriminates because she is "categorically unwilling to . . . assist a minor with transitioning" for the same reason.

III.

The United States contends that Dr. Neese lacks Article III standing to bring this suit. It does so by analogizing Dr. Neese to a podiatrist.

The theory goes something like this: HHS would never exclude a physician for refusing to offer services outside her specialty—for example, a podiatrist lacks the relevant medical training to help a patient transition to the opposite sex. During oral argument before our court, counsel for HHS claimed that Dr. Neese "says that she's unwilling to—she doesn't provide transition services to teenagers. But then she's no different than someone like a podiatrist, right? A podiatrist might be categorically unwilling to provide transition services. But it's not discriminatory, because a podiatrist doesn't provide those services. And so there's no discrimination there, because there's a legitimate, non-discriminatory reason for that person not to provide that service." Oral Arg. Audio 40:50–41:15.

HHS's podiatrist analogy is unpersuasive. Unlike a podiatrist, Dr. Neese is a physician of general internal medicine who is fully able to prescribe hormone treatments or puberty blockers. As her declaration makes clear, Dr. Neese provides hormone treatments to transgender patients "who have come to me . . . already transitioned and I maintain their care." She's just unwilling to do so when it comes to minors.

To be sure, her declaration also says that providing these services to 16- and 17-year olds is "not my area of specialty." But Dr. Neese explains what she means by that. She says that she is "not comfortable . . . due to the complexity of the medical and emotional issues." After all, "I do not believe the brains of minors are fully ma-

ture or that they fully understand the ramifications of their actions. Most of the other transgender patients who have come to me have already transitioned and I maintain their care."

So Dr. Neese is fully capable of providing such services to minors. She just thinks it's wrong to do so. She's says she's "not comfortable"—not that she's "not qualified."

And tellingly, the panel has acknowledged as much: Dr. Neese is "'unwilling to provide gender-affirming care, in at least some situations, to patients who assert a gender identity that departs from their biological sex.'" *Neese v. Becerra*, 123 F.4th 751, 753 (5th Cir. 2024).

IV.

Moreover, separate and apart from her ability (but unwillingness) to provide puberty blockers or hormone therapy to 16- and 17-year olds, there's also the simple fact that Dr. Neese is obviously able but categorically unwilling to refer minors to other doctors who specialize in sex reassignment surgery. *See Neese*, 640 F. Supp. 3d at 673 (noting that Dr. Neese is "categorically unwilling . . . to provide referrals to minors seeking a sex-change operation").

If there's a plausible basis for theorizing that it's somehow outside of Dr. Neese's specialty to simply make a referral of a minor patient to another doctor who specializes in the field, the United States has not offered one.

* * *

I respectfully dissent from the denial of rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

SUSAN NEESE, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	2:21-CV-163-Z
	§	
XAVIER BECERRA, in his official capacity as the Secretary of the United States Department of Health and Human Services, *et al.*,	§	
	§	
Defendants.	§	

OPINION AND ORDER

In his *Bostock* dissent, Justice Alito foresaw how litigants would *stretch* the majority opinion like an elastic blanket to cover categories, cases, and controversies expressly not decided. Justice Alito warned: "The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning." 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting); *see also id.* at 1781 (Alito, J., dissenting) ("Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.").

And here we are . . . .

Before the Court is Plaintiffs Susan Neese and James Hurly's Motion for Summary Judgment ("Plaintiffs' Motion") (ECF No. 46) and Defendants' Motion for Summary Judgment ("Defendants' Motion") (ECF No.

55).[1] Having considered the pleadings and applicable law, the Court **GRANTS IN PART** Plaintiffs' Motion and **GRANTS IN PART** Defendants' Motion.

BACKGROUND

Section 1557 of the Affordable Care Act prohibits discrimination "on the basis of sex." *See* 42 U.S.C. § 18116(a) (incorporating, among other things, Title IX's prohibition of discrimination "on the basis of sex," 20 U.S.C. § 1681(a), into Section 1557). In *Bostock*, the Supreme Court held Title VII's "because of . . . sex" terminology prohibits "sexual orientation" and "gender identity" discrimination in employment.[2] *See generally* 140 S. Ct. 1731. Citing *Bostock*, the United States Department of Health and Human Services ("HHS") announced it would "interpret and enforce" Section 1557's prohibition on discrimination "on the basis of sex" to include "on the basis of sexual orientation" and "on the basis of gender identity." *See generally* United States Department of Health and Human Services, Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021) ("Notification").

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1. Defendants are Xavier Becerra, in his official capacity as Secretary of the United States Department of Health and Human Services, and the United States of America.

2. In this litigation, Plaintiffs and Defendants intermittently use the terms "homosexual," "bisexual," and "transgender" to refer to the disputed categories "sexual orientation" and "gender identity" referenced in *Bostock* and Notification. Though the terminology is potentially underinclusive, overinclusive, inexact, and inaccurate, this Court will refer to "sexual orientation" and "gender identity" as collective of the aforementioned categories — unless particularity is necessary for the Court's analysis.

Plaintiffs—two Texas-based physicians—allege Defendants misread *Bostock* and argue that healthcare providers may continue sex-specific medical decisions relevant to "gender identity" "so long as one does not engage in 'sex' discrimination when doing so." ECF No. 11 at 5. Specifically, Plaintiffs allege neither Section 1557 nor *Bostock* prohibits such discrimination, "as long as they would have acted in the exact same manner if the patient had been a member of the opposite biological sex." ECF No. 17 at 16. Plaintiffs "object only to the Secretary's claim that *Bostock* defined 'sex' discrimination to encompass all forms of discrimination on the basis of sexual orientation or gender identity." *Id.* Plaintiffs state they "fully intend to comply with *Bostock* and its interpretation of 'sex.'" *Id.*

Plaintiffs make sex-specific decisions relevant to "gender identity" in their medical practices—and both receive federal money subject to Section 1557. *See generally* ECF No. 11. Dr. Neese "has treated patients suffering from gender dysphoria in the past and has on occasion prescribed hormone therapy for them." *Id.* at 5–6. But Dr. Neese "does not believe that hormone therapy or sex-change operations are medically appropriate for everyone who asks for them, even if those individuals are suffering from gender dysphoria, and she will on occasion decline to prescribe hormone therapy or provide referrals for sex-change operations." *Id.* at 6. "Dr. Neese is categorically unwilling to prescribe hormone therapy to *minors* who are seeking to transition, and she is equally unwilling to provide referrals to minors seeking a sex-change operation." *Id.* She "believes that it is unethical to provide 'gender affirming' care to transgender pa-

tients in situations where a patient's denial of biological realities will endanger their life or safety." *Id.*

Plaintiffs allege "Dr. Neese has treated many transgender patients . . . in the past, and she expects to continue doing so in the future." *Id.* Dr. Neese claims she "is likely to encounter minor transgender patients who will request hormone therapy and referrals for sex-change operations that she is unwilling to provide, as well as adult transgender patients who will deny or dispute their need for preventive care that corresponds to their biological sex, and she intends to provide care to these individuals in a manner consistent with her ethical beliefs." *Id.*

Dr. Hurly "recognizes that some biological men may identify as women (and vice versa)." *Id.* at 7. In his practice, Dr. Hurly "has encountered situations . . . when he must insist that a patient acknowledge his biological sex rather than the gender identity that he asserts." *Id.* Plaintiffs provide an example: Dr. Hurly "once diagnosed a biological male patient with prostate cancer, but the patient refused to accept Dr. Hurly's diagnosis because he identified as a woman and insisted that he could not have a prostate." *Id.* Dr. Hurly "explain[ed] to this patient that he was indeed a biological man with a prostate, and that he needed to seek urgent medical treatment for his prostate cancer." *Id.* Plaintiffs claim, "Dr. Hurly has treated transgender patients in the past, and he expects to continue doing so in the future." *Id.* They allege: "Dr. Hurly is likely to encounter transgender patients who will deny or dispute their need for health care that corresponds to their biological sex, and he intends to provide care to these individuals in a manner consistent with his ethical beliefs." *Id.*

Plaintiffs bring two causes of action: one under the Administrative Procedure Act ("APA") and one under the Declaratory Judgment Act ("DJA"). *Id.* at 10. Plaintiffs argue Section 1557 only prohibits "sex" discrimination, which means a provider would have acted differently towards an identically situated member of the opposite biological sex. *Id.* As for relief, Plaintiffs ask that the Court "hold unlawful and set aside" the Notification, "enjoin" Defendants "from using or enforcing the interpretation of [S]ection 1557 that appears in the Notification," "declare that [S]ection 1557 does not prohibit discrimination on account of sexual orientation and gender identity, . . . but that it prohibits only 'sex' discrimination, which means that provider would have acted differently toward an identically situated member of the opposite biological sex." ECF No. 11 at 10–11.

The Court previously denied Defendants' motion to dismiss and granted Plaintiffs' motion for class certification. *See generally* ECF Nos. 30, 65. The Court certified a class of all healthcare providers subject to Section 1557. Plaintiffs now move for summary judgment on each claim. *See generally* ECF No. 46. Defendants also seek summary judgment, asking that the Court render judgment in Defendants' favor on Plaintiffs' two claims and dismiss this action. *See generally* ECF No. 55.

LEGAL STANDARD

A court "shall grant summary judgment if the movant shows that 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). A fact is "material" if its existence or non-existence "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he sub-

stantive law will identify which facts are material." *Id.* 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.* "'On cross-motions for summary judgment, [the Court] review[s] each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.'" *Texas v. Rettig*, 987 F.3d 518, 526 (5th Cir. 2021) (quoting *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010)).

When reviewing summary-judgment evidence, the court must resolve all reasonable doubts and draw all reasonable inferences in the light most favorable to the non-movant. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). A court cannot make a credibility determination when considering conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. If some evidence supports a disputed allegation, so that "reasonable minds could differ as to the import of the evidence," the court must deny the motion. *Id.* at 250.

ANALYSIS

The issues raised in the motions for summary judgment are whether: (1) Plaintiffs possess standing; (2) the Notification is not in accordance with the law; and (3) Section 1557 prohibits discrimination on the basis of SOGI. The Court will address standing before proceeding to the two merits arguments.

A. Plaintiffs Have Standing

The judicial power of federal courts is limited to certain "cases" and "controversies." U.S. CONST. art. III, § 2; *see also June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020). The case-or-controversy require-

ment requires a plaintiff to establish that he has standing to sue. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018); *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013) ("Every party that comes before a federal court must establish that it has standing to pursue its claims."). Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, the party invoking federal jurisdiction must establish he suffered: (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent"; (2) an injury that is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) an injury that is "likely" rather than "speculative[ly]" to be "redressed by a favorable decision." *Id.* at 560–61 (internal marks omitted).

The Court previously found Plaintiffs have standing because they face a "credible threat of enforcement" that creates an "injury in fact" that is "concrete and particularized" and "actual or imminent." ECF No. 30 at 9 (internal marks omitted); *see also* ECF No. 65 at 5 (same). The Court will not once again adjudicate standing here.

B. The Notification Is "Not in Accordance with the Law"

Congress enacted the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, collectively known as the Affordable Care Act ("ACA"), in March 2010. 111 Pub. L. No. 148 (March 23, 2010); 111 Pub. L. No. 152 (March 30, 2010). Under Section 1557 of the ACA:

> Except as otherwise provided for in this title (or an amendment made by this title), an indi-

> vidual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) . . . 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). Title IX, in turn, prohibits discrimination "on the basis of sex," among other things. *See* 20 U.S.C. § 1681(a) ("No 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, except [as provided throughout the statute].").

What does "on the basis of sex" mean as used in Title IX? Defendants offer a simple answer: apply *Bostock*. *Bostock* "proceed[ed] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female." 140 S. Ct. at 1739. Notwithstanding this assumption, the Supreme Court devised a "but-for cause" test and determined Title VII's "because of sex" terminology should be read to prohibit "sexual orientation" and "gender identity" discrimination in employment. *See id.* Applying *Bostock*, Defendants ask the Court to implement a "but-for cause" test and interpret Title IX's "on the basis of sex" terminology identically to Title VII's "because of . . . sex" language. *See* ECF No. 56 at 26.

For the reasons explained below, however, *Bostock* does not apply to Section 1557 or Title IX. And the Court will not export *Bostock*'s reasoning to Section 1557 or Title IX. Instead, the Court analyzes "on the basis of

sex," as used in Title IX (and incorporated into Section 1557), by giving the term its ordinary public meaning at the time of enactment and in the context of Title IX.

1. *Bostock* does not apply to Section 1557 or Title IX.

Bostock does not purport to interpret Section 1557, Title IX, or any other non-Title VII statute. As the majority opinion states:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. . . . But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and *we do not prejudge any such question today*. . . .
>
> The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'

Bostock, 140 S. Ct. at 1753 (emphasis added).

Bostock decided only what *Bostock* decided: under Title VII, "[a]n employer who fires an individual merely for being gay or transgender defies the law." *Id.* at 1754; *see also Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he rule in *Bostock* extends no further than Title VII."); *Adams v. Sch. Bd. of St. James Cnty., Fla.*, 3 F.4th 1299, 1336 (11th Cir. 2021) (Pryor, C.J., dissenting) (stating *Bostock*'s reasoning applies to Title VII, not Title IX). One cannot rely on the words and reasoning of *Bostock* itself to explain why the Court prejudged

what the Court expressly refused to prejudge. *See Pelcha*, 988 F.3d at 324 ("*Bostock* was clear on the narrow reach of its decision and how it was limited *only to Title VII itself*" (emphasis added)); *Washington v. U.S. Dep't of Health and Hum. Servs.*, 482 F. Supp. 3d 1104, 1115 (W.D. Wash. 2020) ("[I]t remains unclear whether, or to what extent, *Bostock*'s rationale will ultimately be applied to Title IX and Section 1557.").[3]

2. *Bostock* reasoning does not apply to Section 1557 or Title IX.

Defendants argue *Bostock* and its reasoning apply to Section 1557 and, accordingly, discrimination "on the basis of sex" includes discrimination on the basis of "sexual orientation" and "gender identity." *See* ECF No. 56 at 25 ("Section 1557's prohibition of discrimination 'on the basis of sex' can also be satisfied by showing but-for causation."). "Defendants do not argue that *Title IX* includes discrimination on the basis of sexual orientation and gender identity as distinct, additional grounds of prohibited discrimination." *Id.* at 25 n.5. They instead assert "Section 1557 prohibits discrimination on the basis of sexual orientation and discrimination on the basis of gender identity because discrimination on either of those grounds necessarily involves discrimination on the basis

3. Plaintiffs argue "the holding of *Bostock* applies to Title IX and [S]ection 1557." ECF No. 47 at 6. Plaintiffs, however, dispute Defendants' interpretation of *Bostock*. *See id.* at 6-7. Because the Court finds *Bostock* does not apply to Title IX or Section 1557, the Court will not adjudicate this debate. Accordingly, the Court stops addressing the substance of Plaintiffs' arguments here, as the Court disagrees with the premise of those arguments.

of sex." *Id.* Defendants support this proposition with three categories of case law: (1) Supreme Court; (2) Fifth Circuit; and (3) other circuits. None of the law Defendants cite persuades the Court to export *Bostock*'s reasoning into Section 1557 or Title IX.

a. No precedential authority exports *Bostock* to the Title IX context.

Defendants cite *Franklin v. Gwinnett County Public School* to argue the Supreme Court reads Title IX's "on the basis of" standard to be a "because of" standard. *See* ECF No. 56 at 26 (citing 503 U.S. 60, 75 (1992)). In *Franklin*, a case preceding *Bostock* by nearly three decades, the Supreme Court stated Title IX imposes "the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex.'" 503 U.S. at 75 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). Defendants' argument is unpersuasive for at least two reasons. First, in *Franklin*, the Supreme Court did not employ "but-for causation" analysis to find discrimination on the basis of sex. Because the discrimination at issue involved *biological* "sex," the Court need not and did not employ "but-for" causation analysis to find "sex" discrimination. Second, "Title IX does not use the word 'because.'" *Doe v. Manor Coll.*, 587 F. Supp. 3d 249, 255 (E.D. Pa. 2022). "The shorthand phrasing used in [*Franklin*] does not change the text of Title IX." *Id.* So, Defendants' argument centered on "statutory interpretation of the word 'because' [in *Bostock*] does not apply to Title IX." *Id.*

Defendants next cite two Fifth Circuit cases. *See* ECF No. 56 at 26–27 (citing *Lakoski v. James*, 66 F.3d

751, 757 (5th Cir. 1995), and *Pederson v. La. State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000)). Defendants rely on these cases (which, again, pre-date *Bostock* by decades) for the proposition that "the prohibitions of discrimination on the basis of sex of Title IX and Title VII [are] the same." Id. at 26 (quoting *Lakoski*, 66 F.3d at 757). Because, as the cases suggest, "Title IX's proscription of sex discrimination . . . does not differ from Title VII's," Defendants assert the Court must interpret "on the basis of sex" under title IX to include discrimination because of "sexual orientation" and "gender identity." *Lakoski*, 66 F.3d at 757; *see also Pederson*, 213 F.3d at 880 (explaining Title IX violated when an "institution intended to treat women differently because of their sex").

The Court is not persuaded that these pre-*Bostock* cases have much force here. Notably, these cases consider only Title IX's application to biological sex. *See generally Lakoski*, 66 F.3d 751; *Pederson*, 213 F.3d 858. And although the opinions invoke "because of" terminology in relation to "sex," they do not *hold* Title IX protects "sexual orientation" and "gender identity" status—or adopt the "but-for causation" test. *See Manor Coll.*, 587 F. Supp. 3d at 255 (Once more, "Title IX does not use the word 'because.'"). In essence, Defendants seek to retroactively apply *Bostock*'s interpretation of Title VII to judicial opinions predating *Bostock* by two decades and related to Title IX by incidental wordplay. It strains credulity to aver that the Fifth Circuit preemptively applied *Bostock*'s "but-for" reasoning to Title IX because two words overlap.

Finally, Defendants cite two cases from the Fourth and Ninth Circuits. *See* ECF No. 56 at 27 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020),

and Doe v. Snyder, 28 F.4th 103 (9th Cir. 2022)). Again, these cases do not persuade the Court to export *Bostock*'s reasoning to the Title IX context. In *Grimm*, the Fourth Circuit stated with scant analysis: "Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX." 972 F.3d at 616 (internal marks omitted). The Fourth Circuit simply cited *Jennings v. University of North Carolina* for this proposition but did not elaborate further. *See* 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

Likewise, the Ninth Circuit adopted *Bostock*'s reasoning because that circuit "construe[s] Title IX's protections consistently with those of Title VII." *Snyder*, 28 F.4th at 114. The Ninth Circuit did so despite expressly acknowledging that the statutes employ different language, reasoning that *Bostock* interchangeably used "because of sex" and "on the "basis of sex" throughout the majority opinion. *See id.* True enough. Yet just because a *judicial opinion* employs two phrases interchangeably in one context does not mean *Congress* employed those same terms interchangeably in a different context.[4]

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4. Just as Section 1557 expressly references and employs Title IX's definition of "on the basis of sex," Congress could have expressly adopted and codified Title VII's definition of "because of . . . sex" when enacting Title IX. Congress, of course, refused to do so. Congress also could have also referenced Title VII in Title IX or Section 1557, just as Section 1557 references Title IX. Again, Congress refused to do so. *Cf. Pennhurst Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (Courts may "insist[] that Congress speak with a clear voice" when it imposes conditions on the receipt of federal funds.).

In the Fifth Circuit, however, all Title VII case law does not unquestionably apply to Title IX. *See, e.g., Rosa H. v. San Elizario lndep. Sch. Dist.*, 106 F.3d 648, 655–56 (5th Cir. 1997); *Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993); *Beasley v. St. Tammany Par. Sch. Bd.*, No. 96-2333, 1997 WL 382056, at *3 (E.D. La. July 9, 1997) ("Unlike other circuits, this circuit does not blindly apply Title VII standards to the Title IX context."). Although the Fifth Circuit has held "transgender discrimination is a form of sex discrimination under Title VII," it has not held as much with respect to Title IX or Section 1557. *Olivarez v. T-mobile USA, Inc.*, 997 F.3d 595, 603 (5th Cir. 2021). The Court will not reflexively apply new Title VII precedent in the Title IX context.[5] Accordingly, the Court finds non-precedential opinions of other federal judicial circuits to be unpersuasive here.

b. "Based on sex" does not mean "based on SOGI."

Title IX reads no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education

5. Several other federal courts have considered whether "Section 1557's nondiscrimination requirements encompass gender-identity discrimination." *Tovar v. Essential Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018); *see also, e.g.*, *Joganik v. E. Tex. Med. Ctr.*, No. 6:19-CV-517-JCB-KNM, 2021 WL 6694455, at *6 (E.D. Tex. Dec. 14 2021), *report and recommendation adopted*, 2022 WL 243886 (E.D. Tex. Jan. 25, 2022); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 949–50 (W.D. Wis. 2018); *Prescott v. Rady Children's Hosp.–San Diego*, 265 F. Supp. 3d 1090, 1098–1100 (S.D. Cal. 2017) (holding Section 1557 extends to claims of gender identity based on its plain language). This Court, however, is not bound by those conclusions.

program or activity receiving Federal financial assistance [except as provided throughout the statute]." 20 U.S.C. § 168l(a). Because Title IX does not define "on the basis of sex," the Court must construe the phrase.[6]

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6. Congress enacted Title IX in 1972. 20 U.S.C. § 1681. At that time, "sex" was commonly understood to refer to physiological differences between men and women—particularly with respect to reproductive functions. *See, e.g.*, *Sex*, AMERICAN HERITAGE DICTIONARY 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); *Sex*, 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 . . . ."); *Sex*, 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."). The Court relies on the same definition of "sex" in this case.

Both parties proceed with the assumption that "sex," as used in Title IX, means biological sex. *See, e.g.*, ECF No. 47 at 8, 13; ECF No. 56 at 25 & n.5 (But "Defendants do not concede that this interpretation of 'sex' is correct."); *cf. Bostock*, 140 S. Ct. at 1746–47 ("We agree that homosexuality and transgender status are distinct concepts from sex."); *Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting) ("As several sources make clear, the term 'sex' in this context must be understood as referring to the traditional biological indicators that distinguish a male from a female, not the person's internal sense of being male or female, or their outward presentation of that internally felt sense."). Parties only dispute whether Title IX's prohibition of discrimination "on the basis of sex" prohibits discrimination on the basis of SOGI.

Notably, other federal entities—including the Department of Education—have proposed regulations redefining "sex" in Title IX to include "sexual orientation" and "gender identity." *See* Nondiscrimination on the Basis of Sex in Education Pro-

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The Court "begin[s] with the text." *United States v. Lauderdale County*, 914 F.3d 960, 961 (5th Cir. 2019). The Court construes statutory text to give effect to the ordinary public meaning conveyed when Congress enacted the statute. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69–92 (2012). When doing so, the Court "read[s] the statute as a *whole*, so as to give effect to each of its provisions without rendering any language superfluous." *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 397 (5th Cir. 2006) (emphasis added). And the Court must abide by judicially accepted principles of linguistics in reading the whole—including compositionality. *See generally* James C. Phillips, *The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality* (May 11, 2020) (unpublished manuscript); *see also Bostock*, 140 S. Ct. at 1769 n.22 (Alito, J., dissenting) (same).

"Title VII differs from Title IX in important respects." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). Title IX is not Title VII, and "on the basis of sex" is not "because of sex."[7] *See Manor Coll.*, 587 F.

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grams or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41391 (July 12, 2022). Those regulations are not at issue here and the Court does not opine on their validity or the correctness of their interpretation.

7. *See* James C. Phillips, *The Overlooked Evidence in the Title VII Cases: The linguistic (and Therefore Textualist) Principle of Compositionality* 1–2 (May 11, 2020) (unpublished manuscript) ("Compositionality is the notion that the meaning of a complex expression is a compositional function of the meaning of its semantic parts. Sometimes what you see is what you get: *apple pie* is a pie made from apples. But sometimes the combination of

(continued…)

Supp. 3d at 255 ("Title IX does not use the word 'because.' . . . Thus, . . . statutory interpretation of the word 'because' does not apply to Title IX."). The Court must give full effect to the difference in word choice. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 224 (1967) ("[W]hen Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things."). By failing to acknowledge the different phrases Title VII and Title IX employ, the Court "would risk amending [the] statutes outside the legislative process reserved for the people's representatives." *Bostock*, 140 S. Ct. at 1738.

Because Title IX prohibits "on the basis of sex," the Court cannot reflexively adopt Bostock's but-for causation analysis. 20 U.S.C. § 1681(a); *see also Meriwether*, 992 F.3d at 510 n.4 ("[I]t does not follow that principles announced in the Title VII context automatically apply in the Title IX context."); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 772 n.8 (9th Cir. 1999) (Title VII "precedents are not relevant in the context of collegiate athletics. Unlike most employment settings, athletic teams are gender segregated."); *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996) ("It is imperative to recognize that athletics presents a distinctly different situation from . . . employment and requires a different analysis in order to determine the existence *vel non* of discrimination.").

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words has a meaning of its own that is not a reliable amalgamation of the components at all, such as for good or at all." (internal marks omitted)).

Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each "sex." *See, e.g.*, 20 U.S.C. §§ 1681(a)(2) (allowing schools in some cases to change "from being an institution which admits only students of one sex to being an institution which admits students of *both sexes*" (emphasis added)), 1681(a)(8) (stating if father-son or mother-daughter activities are provided for "one sex," reasonably comparable activities must be provided for "the *other sex*" (emphasis added)). And Courts have long interpreted Title IX to prohibit federally funded education programs from treating men better than women (or vice versa). *See, e.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979). As written and commonly construed, Title IX operates in binary terms—male and female—when it references "on the basis of sex."

Title IX's prohibition against discrimination "on the basis of sex" cannot be reduced to a literalist but-for test. For instance, although not at issue here, Section 1686 states: "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The implementing regulations clarify educational institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. It is doubtful Section 1686 *permits* educational institutions to maintain separate living institutions for each "sexual orientation" and "gender identity," while a stand-alone Section 1681(a) *prohibits* same. The imple-

menting regulation highlights the sex binary by referencing "the other sex"—which speaks directly to *biological* sex. 34 C.F.R. § 106.33; *see also, e.g.*, 20 U.S.C. § 168l(a)(8) ("[I]f such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*." (emphasis added)). "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929). If "on the basis of sex" included "sexual orientation" and "gender identity," as Defendants envision, Title IX and its regulations would be nonsensical.

As evidenced above, Title IX expressly allows sex distinctions and sometimes even *requires* them to promote equal opportunity. Defendants' theory actively "undermine[s] one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports." *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting).[8] The effect of the Notification "may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in

8. *See Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting) ("[R]equiring the school to allow [the plaintiff], a biological female who identifies as male, to use the male restroom compromises the separation as explicitly authorized by Title IX."). Specific to athletics, Defendants' misapplication of the statute *inverts* the text, history, and purpose of Title IX while pretending to *expand* it: Title IX was enacted to promote and protect *women* in historically male-dominated sports, but Defendants misapply Title IX to promote and protect *men* who displace women.

order to transition from female to male." *Id.* at 1779–80 (Alito, J., dissenting).[9]

Although courts start with the words themselves, the text should be "interpreted in its statutory and historical

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9. In addition to promoting equal opportunity, Title IX also protects individuals' legitimate and important interest in bodily privacy implicated when a person is nude or partially nude and exposed to others. *See, e.g.*, *West v. Radtke*, No. 20-1570, 2022 WL 4285722, at *10–11 (7th Cir. Sept. 16, 2022); *Harris v. Miller*, 818 F.3d 49, 59 (2d Cir. 2016) (per curiam); *Doe v. Luzerne County*, 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing individuals have "a constitutionally protected privacy interest in his or her partially clothed body" and this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (stating "[t]he desire to shield one's unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity" (alterations in original) (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963))); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2009) (explaining "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining "[t]he right to bodily privacy is fundamental" and "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be overserved by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (recognizing, although prison inmates "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating"). An interest commonplace and universally accepted throughout history and across societies. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns").

context and with appreciation for its importance to the [statute] as a whole." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in part and dissenting in part) ("A sign that says 'men only' looks very different on a bathroom door than a courthouse door."). "[C]ontext always includes evident purpose." SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63. And "evident purpose always includes effectiveness." *Id.*

Title IX's "overarching purpose," which is "evident in the text" itself, is to prohibit the discriminatory practice of treating women worse than men and denying opportunities to women because they are women (and vice versa). *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). As many courts have recognized, "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 285 (2d Cir. 2004); *see also Cannon*, 441 U.S. at 704 & n.36.[10] "[I]t would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993).

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10. "[W]hatever approach" cases like *McCormick* or *Cannon* "may have used" to deduce Title IX's purpose, we may rely on them as "an integral part of our jurisprudence" on Title IX. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 286 n.17 (1983).

Defendants' reinterpretation of Title IX through the Notification imperils the very opportunities for women Title IX was designed to promote and protect—categorically forcing biological women to compete against biological men.[11] "A community made up exclusively of one sex is different from a community composed of both." *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996) (internal marks omitted). The "physical differences between men and women . . . are enduring: the two sexes are not fungible." *Id.* (internal marks omitted). Such "immutable" distinctions between the sexes are "determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). For example, "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs," because "equally fit men and women demonstrate their fitness differently." *Bauer v. Lynch*, 812 F.3d 340, 350- 51 (4th Cir. 2016); *see also Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" for the same teams.).

"'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *United Stales v. Virginia*, 518 U.S. 515, 533 (1996). Some

11. Defendants argue the Court should not consider "the aspects of Title IX that Congress chose not to incorporate into Section 1557" when interpreting Title IX. ECF No. 56 at 33 n.10. However, the Court considers Title IX provisions not expressly incorporated into Section 1557 because context is highly relevant when interpreting a statute.

"physical fitness standards suitable for men may not always be suitable for women, and accommodations addressing physiological differences between the sexes are not necessarily unlawful." *Bauer*, 812 F.3d at 350. Indeed, Title IX and its implementing regulations protect some such accommodations to promote equality of women. *See, e.g.*, 34 C.F.R. §§ 106.34(a)(l) (permitting "sex" separation in "physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact"), 106.41(b) (allowing discrimination on the basis of "sex" when operating or sponsoring separate teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport"), 106.41(c) (requiring schools to "provide equal athletic opportunity for members of both sexes" to "effectively accommodate the interests and abilities of members of both sexes").

Ironically, Defendants' interpretation *invites* SOGI discrimination by excluding student-athletes from participating on the women's or men's teams based solely on gender identity. Presumably, this would force biological women who identify as men to compete against biological men, even if the biological women have the same physiological characteristics as a typical biological woman.[12] Such an interpretation makes little sense given Title IX's

12. And the opposite may be true. *See Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring) ("[T]he transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex). Quite the opposite."); *see also id.* at 701 (Wilkins, J., concurring) (same).

text, structure, history, and purpose. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). There are, of course, outlier individuals with physical attributes above or below their sex's average. Yet sex-separated sports only exist to accommodate the average physiological differences between the sexes. Title IX is not written for individual, case-by-case sex separation. The statute instead applies to each sex as a whole.

Moreover, Title IX says nothing about "sexual orientation" and "gender identity." And why would it? Title IX's protections center on differences between the two biological sexes—not SOGI status.[13] Sure enough, members of Congress have attempted to amend Title IX to shield such categories from discrimination. *See, e.g.*, H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). But those members have repeatedly failed. By contrast, Congress has enacted hate-crimes legislation with enhanced penalties for crimes motivated by "sexual orientation" or "gender identity." *See, e.g.*, 18 U.S.C. § 249(a)(2); 34 U.S.C. § 12291(b)(13)(A) (prohibiting discrimination based on "sexual orientation" and "gender identity" separately from "sex").

Indeed, under Defendants' interpretation, Title IX and its regulations would protect behavior Defendants likely find abhorrent. Title IX exempts institutions "traditionally" limited to "only students of one sex," "youth

13. Indeed, "gender identity" was "a concept that was essentially unknown" fifty years ago. *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

service organizations" traditionally "limited to persons of one sex," and "living facilities for the different sexes." 20 U.S.C. §§ 1681(a)(5), 1681(a)(6)(B), 1686. Title IX's regulations exempt "separation of students by sex within physical education classes" for sports chiefly involving bodily contact" as well as human sexuality classes and choirs separated by "sex." 34 C.F.R. § 106.34(a)(l), (3)–(4). If "on the basis of sex" included "sexual orientation," these regulations would permit heterosexual-only choirs. *See* 20 U.S.C. § 1686; 20 C.F.R. § 106.34(a)(4). And if "on the basis of sex" included "gender identity," schools could not use a biology-based classification to separate physical education classes involving contact sports like boxing or rugby. 34 C.F.R. § 106.34(a)(1).

These contradictions and conflicts arise in the healthcare context to which Section 1557 applies. For example, a hospital could not tailor care to the biological differences between men and women. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 674 & n.8 (N.D. Tex. 2016). Importing *Bostock-style* reasoning or similar "but-for cause" analysis to Title IX would presumptively criminalize sex-specific treatments that discriminate against patients "on the basis of sex." When adopting Section 1557, Congress could have included "sexual orientation" and "gender identity" in the statutory text. Congress chose not to do so. Instead, Congress limited Section 1557's protections to those afforded by other federal statutes—including Title IX. Because Title IX does not protect "sexual orientation" or "gender identity" status, neither does Section 1557.

Title IX's ordinary public meaning remains intact until changed by Congress, or perhaps the Supreme Court. *See Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139

S. Ct. 1507, 1512 (2019) ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning."). As noted above, the ordinary public meaning of "sex" turned on reproductive function when Congress enacted Title IX. For an action to occur "on the basis of sex," biological sex must be the motivating factor. "On the basis of sex" does not connote a derivative, "but-for causation" analysis like the Supreme Court reasoned "because of sex" does. *See Bostock*, 140 S. Ct. at 1739. Consequently, the Court will not judicially import *Bostock*'s "but-for causation" test into Title IX. *See* SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (rejecting view that "when courts confront generally worded provisions, they should infer exceptions for situations that the drafters never contemplated and did not intend their general language to resolve"). And because the Court finds Title IX's "on the basis of sex" language does not include "sexual orientation" or "gender identity" status, the Court holds the Secretary cannot alter the phrase by administrative fiat. *See Franciscan Alliance, Inc. v. Becerra*, 553 F. Supp. 3d 361, 371 n.7 (N.D. Tex. 2016). "After all, only the words on the page constitute the law." *Bostock*, 140 S. Ct. at 1738; *see also Grimm*, 972 F.3d at 628 (Niemeyer, J., dissenting) (Reading "sexual orientation" and "gender identity" into Title IX and Section 1557 would "do[] no more than express disagreement with Title IX and its underlying policies, which is not, of course, the role of courts tasked with deciding cases and controversies.") .

C. Section 1557 Does Not Prohibit Discrimination on the Basis of SOGI Status

Plaintiffs seek three primary remedies: (1) "hold unlawful and set aside Secretary Becerra's Notification";

(2) "enjoin Secretary Becerra from using or enforcing the interpretation of [S]ection 1557 that appears in the Notification"; and (3) issue "declaratory relief." ECF No. 11 at 11.

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 Lab'ys v. Gardner*, 387 U.S. 136, 153 (1967). "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. Accordingly, the Court will assess the remedies Plaintiffs seek under the APA and DJA. The Court, however, will not assess the propriety of injunctive relief because Plaintiffs do not brief factors relevant to the appropriateness of injunctive relief. "It is not the court's job to divine the applicable law for the parties," nor is it the Court's job "to manufacture every possible argument [the parties] could conceivably make." *Spencer v. Texaco, Inc.*, No. 96-0228, 1996 WL 363540, at *2 (E.D. La. June 28, 1996); *Holz v. United States*, No. 3:09-CV-1568-P, 2009 WL 10704725, at *2 n.4 (N.D. Tex. Sept. 29, 2009); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (detailing injunction requirements).

The APA allows a litigant to seek judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. As the Court previously determined, the Notification constitutes "final agency action for which there is no other adequate rem-

edy in court." *See* ECF No. 30 at 21 (quoting 5 U.S.C. § 704); *see also Hinojosa v. Horn*, 896 F.3d 305, 310 (5th Cir. 2018) (per curiam) (stating 5 U.S.C. § 704 "limits the APA to the review of those agency actions which otherwise lack an 'adequate remedy in court'"). Under the APA, "[t]o the extent necessary to decision and when presented, 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. When doing so, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." *Id.*

Under the DJA, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). "Any such declaration shall have the force and effect of a final judgment or decree . . . ." *Id.* Section 2201(a) "allow[s] potential defendants to resolve a dispute without waiting to be sued." *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 397 (5th Cir. 2003). It is a defensive action "allowing prospective defendants to sue to establish their nonliability." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 45–46 (1982). When presented with a request to decide or dismiss a declaratory-judgment suit, a court must decide whether: (1) "the declaratory action is justiciable"; (2) "the court has the authority to grant declaratory relief"; and (3) "to exercise its discretion to decide or dismiss the action." *Sher-*

win-Williams, 343 F.3d at 387. This case satisfies all three factors.

1. This declaratory action is justiciable.

The DJA does not create an independent cause of action. *Harris County v. MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015). In a declaratory-judgment action, the relevant cause of action is the defendant's anticipated lawsuit against the plaintiff. *See Collin County v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 171 (5th Cir. 1990) ("Since it is the underlying cause of action of the defendant against the plaintiff that is actually litigated in a declaratory judgment action, a party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action."); *Lowe v. Ingalls Shipbuilding, A Div. of Litton Sys., Inc.*, 723 F.2d 1173, 1179 (5th Cir. 1984) ("[T]he underlying cause of action which is thus actually litigated is the declaratory defendant's, not the declaratory plaintiff's ...."); *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 500 (5th Cir. 2020) (Oldham, J., concurring) ("[T]he Declaratory Judgment Act ... does not create a standalone cause of action. Rather, ... [i]t allows parties who would otherwise be defendants to seek relief as plaintiffs.").

Because Defendants threaten to enforce their interpretation "on the basis of sex" found in the Notification, Plaintiffs can bring this declaratory-judgment action without waiting to see if Defendants will make good on their threats. *See Collin County*, 915 F.2d at 170 ("The Declaratory Judgment Act is designed to afford parties, threatened with liability, but otherwise without a satisfactory remedy, an early adjudication of an actual con-

troversy. . . . [A] party who has an interest in the outcome of future litigation can petition the court for a declaration of its rights and liabilities."); *Tex. Employers' Ins. Assoc. v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988) (Litigants need not "be put to the Hobson's choice of foregoing their rights or acting at their peril; nor, if they had already acted, would they be forced to wait, for perhaps many years, until the statute of limitations expired, to know whether they had been subjected to some significant liability."). And even if the DJA does not supply Plaintiffs a cause of action, they possess an independent cause of action under 5 U.S.C. § 704, as Plaintiffs may seek declaratory relief as part of their APA claim. *See* 5 U.S.C. § 702 (permitting plaintiffs to seek "relief other than money damages" when challenging agency action under APA).

2. The Court has the authority to grant declaratory relief.

A district court lacks authority to grant declaratory relief and "may not consider the merits of [a] declaratory judgment action when:" (1) "a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff"; (2) "the state case involves the same issues as those involved in the federal case"; and (3) "the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act." *Travelers Ins. Co. v. La. Farm Bureau Fed'n*, 996 F.2d 774, 776 (5th Cir. 1993) (emphasis removed). Nothing before the Court indicates there is a pending state-court proceeding between the patties whose existence divests this Court of its authority to grant declaratory relief.

In exercising its discretion to decide or dismiss a declaratory action, a district court should consider seven nonexclusive factors, including whether:

> (1) there is a pending state action in which all of the matters in controversy may be fully litigated;
>
> (2) the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
>
> (3) the plaintiff engaged in forum-shopping in bringing the suit;
>
> (4) possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
>
> (5) the federal court is a convenient forum for the parties and witnesses;
>
> (6) retaining the lawsuit would serve the purposes of judicial economy; and
>
> (7) the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams, 343 F.3d at 388 (quoting *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590–91 (5th Cir. 1994)).

The Court finds application of these factors favors exercise of the Court's discretion to grant declaratory relief. Regarding factor one, the Court is unaware of any pending state action involving the parties in which all the matters in controversy may be fully litigated. As to factor two, Plaintiffs admit they sued out of concern of fu-

ture enforcement actions by Defendants. *See* ECF No. 47-1 at 3–6; ECF No. 42-2 at 3–4. For factors three and four, "[m]erely filing a declaratory judgment action in a federal court with jurisdiction to hear it . . . is not in itself improper anticipatory litigation or otherwise abusive 'forum shopping.'" *Sherwin-Williams*, 343 F.3d at 391. Because Plaintiffs are not "using the declaratory judgment process to gain access to a federal forum on improper or unfair grounds," these factors favor Plaintiffs. Factor five also favors Plaintiffs, as witnesses are not a large concern in this case and have not been from the inception of this lawsuit. *Id.* As for factor six, to the Court's knowledge, there are no pending state procedures involving these parties and this controversy, persuading the Court declaratory relief is inappropriate. Finally, pertaining to factor seven, the Court is not being asked to construe a state judicial decree involving the same parties and entered by a court adjudicating a parallel proceeding between the parties.

CONCLUSION

Based on the above, the Court **GRANTS IN PART** Plaintiffs' Motion. The Court awards Plaintiffs' requested relief under the APA and DJA, excluding injunctive relief. The Court **GRANTS IN PART** Defendants' Motion and **DENIES** Plaintiffs' request for injunctive relief. The Court **DENIES** all other relief not expressly stated herein. The Court **ORDERS** parties to submit competing proposed judgments **within 10 days** of the date of this Opinion and Order.

SO ORDERED.

November 11, 2022

/s/ Matthew J. Kacsmaryk
MATTHEW J. KACSMARYK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

SUSAN NEESE, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	2:21-CV-163-Z
	§	
XAVIER BECERRA, in his official capacity as the Secretary of the United States Department of Health and Human Services, *et al.*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

On November 11, 2022, the Court issued an Opinion and Order (ECF No. 66) **GRANTING IN PART** Plaintiffs' Motion for Summary Judgment and **GRANTING IN PART** Defendants' Motion for Summary Judgment. The Court issues the following relief consistent with that Opinion and Order.

1. The Court awards Plaintiffs and the certified class relief under 5 U.S.C. § 706(2). The Court **HOLDS UNLAWFUL and SETS ASIDE** Defendant Becerra's Notification of Interpretation and Enforcement of May 10, 2021.

2. The Court awards Plaintiffs and the certified class declaratory relief under 28 U.S.C. § 2201. The Court **DECLARES**:

- Plaintiffs and members of the certified class need not comply with the interpretation of "sex" discrimination adopted by Defendant Becerra in his Notification of Interpretation and Enforcement of May 10, 2021; and
- Section 1557 of the ACA does not prohibit discrimination on account of sexual orientation and gender identity, and the interpretation of "sex" discrimination that the Supreme Court of the United States adopted in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), is inapplicable to the prohibitions on "sex" discrimination in Title IX of the Education Amendments of 1972 and in Section 1557 of the ACA.

3. The Court **GRANTS** summary judgment for Defendants insofar as Plaintiffs and the certified class seek injunctive relief on any claim.

This final judgment fully and finally resolves all remaining claims in this suit and is appealable. The Court **DENIES** all other relief not expressly granted herein.

Judgment is rendered accordingly.

November 22, 2022

/s/ Matthew J. Kacsmaryk
MATTHEW J. KACSMARYK
United States District Judge

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

21 CFR Part 291

42 CFR Part 8

45 CFR Parts 86 and 92

Notification of HHS Documents Identified for Rescission

AGENCY: Department of Health and Human Services.

ACTION: Notification of rescissions.

SUMMARY: The Department of Health and Human Services (HHS or the Department) provides notice that it is rescinding four informal guidance documents. This action will reduce the burdens on regulated parties and allow HHS to refocus on its core mission to Make America Healthy Again.

DATES: May 14, 2025.

FOR FURTHER INFORMATION CONTACT: Sean R. Keveney, Acting General Counsel, Office of the General Counsel, HHS. 200 Independence Avenue SW, Washington, DC 20201, 202-690-7741.

SUPPLEMENTARY INFORMATION: President Donald J. Trump has declared that the policy of the executive branch is to "alleviate unnecessary regulatory burdens placed on the American people." *Unleashing Prosperity Through Deregulation*, Executive Order 14192, 90 FR 9065, 9065 (Jan. 31, 2025). This burden does not come from formal regulations alone, but also

from "rules, memoranda, administrative orders, guidance documents, policy statements, and interagency agreements that are not subject to the Administrative Procedure Act." *Id.* The President has accordingly directed every agency to review and rescind all such agency actions which are unlawful or impose greater burdens than benefits. *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, Executive Order 14219, 90 FR 10583, 10583 (Feb. 19, 2025).

Independently, I have instructed HHS to launch the most sweeping deregulatory initiative in the history of the Department. We are eliminating bureaucratic red tape and refocusing on our core mission to Make America Healthy Again. Across the Department, we are aggressively deregulating to return the freedoms eroded over decades by unnecessary and burdensome regulations.

As part of this Department-wide initiative, I have determined that the documents identified below have been superseded, are unduly burdensome, no longer represent the considered legal judgment of HHS, and/or are otherwise appropriate for rescission. To the extent one of these documents should have been promulgated with notice and comment, but was not, that provides another basis for rescission. Accordingly, all documents identified below are hereby rescinded, effective immediately.

Because HHS promulgated these documents without notice and comment, HHS may rescind them in the same manner. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). Any effect on reliance interests could only be

positive since these guidance documents have already largely been superseded. Thus, formal rescission will reduce the burdens on regulated parties. To the extent there are negative effects on reliance interests, those interests are unreasonable or unwarranted. The American public knew that these informal documents could be rescinded at any time, especially following a change of administration now that they are defunct.

This is the beginning of a new era for HHS and American health more broadly. In this new era, patient choice and individual freedom will predominate over burdensome federal regulations. In this document, we are taking the first step towards making that a reality.

I hereby order that the following documents be rescinded, effective immediately:

* Extension of Designation of Scarce Materials or Threatened Materials Subject to COVID–19 Hoarding Prevention Measures; Extension of Effective Date With Modifications, 86 FR 35810 (July 7, 2021).

* Opioid Drugs in Maintenance and Detoxification Treatment of Opiate Addiction; Repeal of Current Regulations and Issuance of New Regulations: Delay of Effective Date and Resultant Amendments to the Final Rule, 66 FR 15347 (Mar. 19, 2001).

* Practice Guidelines for the Administration of Buprenorphine for Treating Opioid Use Disorder, 86 FR 22439 (Apr. 28, 2021).

* Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 FR 27984 (May 25, 2021).

Robert F. Kennedy, Jr.,

Secretary, Department of Health and Human Services.