

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

FRANCISCAN ALLIANCE, INC.;
SPECIALTY PHYSICIANS OF
ILLINOIS, LLC.;
CHRISTIAN MEDICAL &
DENTAL ASSOCIATIONS;

- and -

STATE OF TEXAS;
STATE OF WISCONSIN;
STATE OF NEBRASKA;
COMMONWEALTH OF
KENTUCKY, by and through
Governor Matthew G. Bevin;
STATE OF KANSAS; STATE OF
LOUISIANA; STATE OF
ARIZONA; and STATE OF
MISSISSIPPI, by and through
Governor Phil Bryant,

Plaintiffs,

v.

ALEX M. AZAR, II, Secretary of the
United States Department of Health
and Human Services; and UNITED
STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Defendants.

Civ. Action No. 7:16-cv-00108-O

**STATE PLAINTIFFS' RENEWED
MOTION FOR SUMMARY
JUDGMENT**

State Plaintiffs, by and through counsel, and pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 56, respectfully move the Court for summary judgment on all their claims in their First Amended Complaint (ECF No. 21).¹ There are no genuine issues of material fact and State Plaintiffs are entitled to judgment as a matter of law.

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

1. A declaratory judgment that the Rule is invalid under the Administrative Procedure Act;
2. A declaratory judgment that the Rule violates Article I, the Tenth Amendment, and the Eleventh Amendment to the United States Constitution;
3. A permanent injunction prohibiting Defendants from enforcing the Rule; and
4. An order vacating and setting aside the unlawful portions of the Rule.

In support of this Motion, State Plaintiffs adopt and incorporate by reference, as if fully stated herein, the arguments presented in support their prior motions for partial summary judgment and preliminary injunction, ECF Nos. 23, 25, 37, 56, and 57, as well as the evidence offered in support, ECF Nos. 26, 56-1, 57-1, 60, 83, and 84, and ask the Court to consider those filings and evidence in support of this Motion.

A brief in support of this Motion satisfying the requirements of Local Rule 56.3, an Appendix, a proposed order, and a proposed final judgment are filed contemporaneously with this Motion.

¹ Wisconsin joins the motion only as to Argument section I.D. in the accompanying brief, and to requests for remedy corresponding to that argument.

Wherefore, State Plaintiffs respectfully request that judgment be entered in their favor and against Defendants.

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

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OF KENTUCKY, by and through
Governor Matthew G. Bevin;
STATE OF KANSAS; STATE OF
LOUISIANA; STATE OF ARIZONA; and
STATE OF MISSISSIPPI, by and through
Governor Phil Bryant*

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

/s/ David J. Hacker
DAVID J. HACKER

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**[PROPOSED] ORDER GRANTING
STATE PLAINTIFFS' RENEWED
MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on State Plaintiffs' Renewed Motion for Summary Judgment. After reviewing the briefing on the matter, and the evidence offered in support, the Court finds that there are no genuine issues of material fact, and that State Plaintiffs are entitled to judgment as a matter of law.

For the reasons stated in the Court’s Order of Dec. 31, 2016 (ECF No. 62), the Court concludes that the United States Department of Health and Human Services’ regulation entitled “Nondiscrimination in Health Programs & Activities,” 81 Fed. Reg. 31,376–31,473 (May 18, 2016) (codified at 45 C.F.R. § 92) (“Rule”), which prohibits discrimination on the basis of “gender identity” and “termination of pregnancy” violates the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C).

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that that State Plaintiffs’ Motion for Summary Judgment is granted. The Rule is declared unlawful, set aside, and Defendants are permanently enjoined from enforcing the Rule. A final judgment will be entered separately.

SO ORDERED on this ___ day of _____, 2019.

HONORABLE REED O’CONNOR
UNITED STATES DISTRICT JUDGE

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**[PROPOSED] FINAL JUDGMENT
AND PERMANENT INJUNCTION**

The Court by previous order granted State Plaintiffs' Motion for Summary Judgment, concluding, for the reasons also stated in the Court's Order of Dec. 31, 2016 (ECF No. 62), that the provisions of the United States Department of Health and Human Services' ("HHS") regulation entitled "Nondiscrimination in Health

Programs & Activities,” 81 Fed. Reg. 31,376–31,473 (May 18, 2016) (codified at 45 C.F.R. § 92) (“Rule”), which prohibit discrimination on the basis of “gender identity” and “termination of pregnancy,” violate the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1)(A) & (C), and are therefore unlawful and must be set aside. The Court has determined that the Court’s preliminary injunction entered December 31, 2016 should be converted to a permanent injunction. The following judgment is, therefore, entered:

IT IS ORDERED, ADJUDGED, AND DECREED that the Rule is “not in accordance with law” and is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” under the APA, 5 U.S.C. § 706(1)(A) & (C), because it impermissibly redefines section 1557 of the Affordable Care Act (“ACA”) to extend Title IX’s definition of “sex” to include “gender identity,” and because, with respect to its prohibition on sex discrimination, including “gender identity” and “termination of pregnancy,” it fails to incorporate the relevant statutory exemptions regarding religious organizations, 20 U.S.C. §1681(a), and abortion, 20 U.S.C. § 1688.

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

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

- c. Enforcing the Rule in a way that would require State Plaintiffs to provide medical services or insurance coverage related to “gender identity” or “termination of pregnancy” in violation of their public policies;
- d. Construing section 1557 of the ACA to extend Title IX’s definition of “sex” to include “gender identity” or to mean something other than the immutable, biological differences between males and females as acknowledged at or before birth;
- e. Construing section 1557 of the ACA to extend Title IX’s definition of “sex” to include “termination of pregnancy” without also incorporating Title IX’s statutory exemptions regarding religious organizations, 20 U.S.C. § 1681(a), and abortion, 20 U.S.C. § 1688;
- f. Construing section 1557 of the ACA to require State Plaintiffs to provide medical services or insurance coverage related to “gender identity” or “termination of pregnancy” in violation of their public policies.

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

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

Dated this ___ day of _____, 2019.

HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE