

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*

Defendants.

1:20-cv-5583-APH

DEFENDANTS' RESPONSE TO PLAINTIFFS' LOCAL RULE 56.1 STATEMENT

Pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule 56.1, Defendants respectfully submit this statement responding to "Plaintiffs' Local Rule 56.1 Statement of Undisputed Material Facts." ECF No. 110.

Plaintiffs' Statement has no place in this litigation. In cases brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, review of the challenged agency action is based on the administrative record rather than extra-record material. *See, e.g., Nat. Res. Def. Council, Inc. v. U.S. Dep't of Agric.*, 613 F.3d 76, 83-84 (2d Cir. 2010). This is because "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). There are no factual disputes for the court to resolve, and "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Accordingly, Plaintiffs' claims should be evaluated based on the administrative record that the agency Defendant produced as set forth at ECF No. 103. *See Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 n.2 (S.D.N.Y. 2012) (cases based on the review of an administrative

record “present[] only a question of law”). To the extent the Plaintiffs make factual assertions going to their standing, those facts are not relevant or necessary to the resolution of the merits of their claims. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves.

Thus, a Local Civil Rule 56.1 statement is neither necessary nor appropriate in APA cases. *See, e.g., Just Bagels*, 900 F. Supp. 2d at 372 n.7 (directing parties not to submit Local Rule 56.1 statements in APA case); *Glara Fashion, Inc. v. Holder*, No. 11 Civ. 889 (PAE), 2012 WL 352309, at *1 n. 1 (S.D.N.Y. Feb. 3, 2012) (no 56.1 statement required in administrative record review case); *Student X v. New York City Dep’t of Educ.*, No. 07-cv-2316, 2008 WL 4890440, at *11 (E.D.N.Y. Oct. 30, 2008) (declining to require counter-statement of undisputed material facts in APA case because “the 56.1 Statement will not aid the court in its independent review of the [administrative] record”); *Karpova v. Snow*, 402 F. Supp. 2d 459, 465 (S.D.N.Y. 2005) (summary judgment appropriate without submission of statements of undisputed facts in APA cases); *Brodsky v. U.S. Nuclear Regulatory Comm’n*, No. 09-cv-10594 (LAP), 2015 WL 1623824, *3 (S.D.N.Y. Feb. 26, 2015) (in record review case, rejecting contention that agency’s “failure to file a Local Rule 56.1 Statement of Undisputed Facts is a fatal procedural defect”; the “record before the Court is complete and appropriate for a summary judgment ruling”).

Even if a Local Rule 56.1 Statement were appropriate, Plaintiffs’ Statement does not comply with Local Rule 56.1. Plaintiffs’ Statement is not a “short and concise statement . . . of material facts,” Local Civ. R. 56.1(a), nor are the asserted “facts” “followed by citation to evidence which would be admissible,” because the Statement is replete with statements that are not material to the questions presented as well as inadmissible legal conclusions, argument, unauthenticated hearsay statements, and other non-factual allegations. *See* Local Civ. R. 56.1(d). The Court should disregard the Statement because it relies on supposed facts that are inadmissible in any circumstances, especially in an APA action, and, further, are not material to the issues in dispute in this litigation. *See, e.g., All. Sec. Prod., Inc. v. Fleming Co.*, 471 F. Supp. 2d 452, 454 (S.D.N.Y. 2007), *aff’d sub nom. All. Sec. Prod., Inc. v. Fleming & Co.*, 290 F. App’x 380 (2d Cir. 2008).

Subject to the foregoing objections and discussion, and in an abundance of caution, the Defendants' responses to Plaintiffs' Local Rule 56.1 Statement follow in correspondingly numbered paragraphs.

1. Plaintiffs' claims are brought under the APA, and the Court's role is to adjudicate whether the challenged agency action is arbitrary, capricious, or contrary to law based on the administrative record. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on the administrative record, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants do not object to facts to the extent they are consistent with the administrative record. To the extent Plaintiffs are relying on information outside the administrative record, that information is not before the Court and the Court should decline to consider or rely upon it for purposes of resolving Plaintiffs' claims.

2. *See* Response No. 1.

3. *See* Response No. 1.

4. *See* Response No. 1. To the extent Plaintiffs wish to provide witness declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, this paragraph is Plaintiffs' description and characterization of provisions of law, not a statement of fact.

5. *See* Response No. 1. To the extent Plaintiffs wish to provide witness declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute Plaintiffs' statement that they have decided

to incur certain costs “[i]n response to the Final Rule” to the extent that it reflects a legal conclusion that any Plaintiff’s decision to incur costs is fairly traceable to any provision of the 2020 Rule.

6. *See* Response No. 1. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

7. *See* Response No. 1. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

8. *See* Response No. 1. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants object to Plaintiffs’ characterization of any administration of their own laws as “necessitated by the 2020 Rule.” Plaintiffs provide no support from the administrative record or otherwise suggesting that the 2020 Rule required them to take any such actions. Defendants dispute Plaintiffs’ statement that any action was “necessitated by the 2020 Rule” to the extent that it reflects a legal conclusion that any Plaintiff’s decision to incur costs is fairly traceable to any provision of the 2020 Rule.

9. *See* Response No. 1. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified

“undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

10. *See* Response No. 1. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

11. *See* Response No. 1. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

12. *See* Response No. 1. To the extent Plaintiffs wish to provide declarations in support of their standing, those declarations speak for themselves. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants object to Plaintiffs’ statement suggesting that there are “inconsistencies between the 2020 Rule and state-level non-discrimination protections” to the extent the statement represents a conclusion of law and not a statement of fact.

13. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are

inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants object to Plaintiffs' statement suggesting that there are "important differences between what the 2020 Rule requires and what Rhode Island state law requires" to the extent the statement represents a conclusion of law and not a statement of fact.

14. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the entirety of the paragraph as unsupported by anything other than conjecture, speculation, and inadmissible hearsay. Defendants also dispute Plaintiffs' statement that "[t]he 2020 Rule engenders substantial confusion and fear of discrimination among health care consumers" to the extent that it reflects a legal conclusion that any individual's subjective fear of speculative and hypothetical future harm at the hands of third parties or abstract confusion is a legally cognizable injury or that any abstract "confusion" and "fear" of hypothetical future harm is fairly traceable to any provision of the 2020 Rule. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any individual's lack of knowledge of state law is fairly traceable to any provision of the 2020 Rule.

15. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute Plaintiffs' statement that "[i]ncreased discrimination likely to result from the Rule and confusion about transgender-related legal protections will increase stress and internalized stigma among transgender people, and lead to the avoidance of needed care with significant health and financial costs to transgender people" to the extent it represents a legal conclusion that Plaintiffs have provided concrete evidence of non-speculative imminent future discrimination at

all, or that any hypothetical future discrimination is fairly traceable to any provision of the 2020 Rule.

To the extent that the first sentence of this paragraph is considered a statement of fact, it is not “followed by citation to evidence which would be admissible,” *see* Local Civil Rule 56.1(d), under Rules 401 and 702 of the Federal Rules of Evidence. Plaintiffs cite Hughto Declaration ¶ 49, which states that “[i]t is my professional opinion that the 2020 Rule will lead to poor health outcomes for transgender individuals through an increase in fear of discrimination and subsequent healthcare avoidance.” But as described in Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment, the cited expert opinion describes, at most, the subjective fears of third parties, *see, e.g.*, Hughto Decl ¶ 34. This declarant cites “research, which shows that transgender individuals avoid . . . medical care due to past and anticipated discrimination” but Hughto fails to tie those facts to anything in the 2020 Rule. Hughto Decl. ¶ 49. Given that Hughto’s analysis is based on the subjective fears of third parties, *see* Decl. ¶ 34, she provides no support for her conclusory statement that “the 2020 Rule is expected to increase both the fear of *and actual experiences of discrimination for transgender people.*” *See* Decl. ¶ 50 (emphasis added). Accordingly, her opinion must be rejected under Rule 702(b); *see also Major League Baseball Properties, Inc v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (“An expert’s opinions that are without factual basis and are based on speculation and conjecture are similarly inappropriate material for consideration on a motion for summary judgment.”); *Boucher v. United States Suzuki Motor Corp.*, 73 F.3d 18, 22 (2d Cir. 1996) (“expert testimony [that] was not ‘accompanied by a sufficient factual foundation’ . . . was inadmissible under Federal Rule of Evidence 702”) (citation omitted). Plaintiffs also cite Hughto’s testimony that “the 2020 Rule effectively sanctions discrimination toward transgender people,” Decl. ¶ 51, which is inadmissible because it is both an erroneous conclusion of law and unsupported speculation about the meaning of Section 1557 in the absence of a regulatory definition of the term “sex.” *See also* Decl. ¶ 65 (asserting without explanation or evidence that “the removal of [explicit] gender identity

protections in [the 2020 Rule] effectively sanctions healthcare providers, insurers, and other entities to discriminate against transgender people”).

16. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Plaintiffs cite no evidence in the administrative record or otherwise supporting their statement that the 2020 “Rule requires States to incur additional costs associated with hiring additional staff and/or training to address public confusion and fear of discrimination caused by the 2020 Rule.” The Rule includes no requirement for States to incur any costs. Defendants also dispute this statement to the extent it reflects a legal conclusion that “public confusion” or subjective “fear of discrimination” at the hands of third parties is a legally cognizable injury or that any such subjective fears or beliefs about hypothetical future discrimination at the hands of third parties are fairly traceable to any provision of the 2020 Rule.

17. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute Plaintiffs’ statement that “confusion triggered by the 2020 Rule will lead to additional calls” to the California Department of Insurance as unsupported by anything other than conjecture and speculation.

18. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute this paragraph to the extent it represents a legal conclusion that any of

California's Department of Fair Employment and Housing's education plans are fairly traceable to any provision of the 2020 Rule.

19. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context.

20. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context.

21. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants contend that the statement's suggestion that the 2020 Rule will have an "impact" on "Connecticut residents," is vague, conclusory and unsupported by a citation to evidence.

22. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the statement to the extent Illinois' plans "in light of the 2020 Rule" reflect a legal conclusion that any of the state's plans to incur costs are fairly traceable to any provision of the 2020 Rule. Defendants also dispute this paragraph to the extent it suggests that the 2020 Rule will result in "increases in stigma and discrimination" as unsupported by a citation to evidence.

23. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are

inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the statement "because the 2020 Rule will create a divergence between federal and District protections" as a legal conclusion not a statement of fact that is, in any event, unsupported by a citation to evidence or law. Defendants also dispute the paragraph to the extent it represents a legal conclusion that any of the costs Plaintiffs intend to incur are fairly traceable to any provision of the 2020 Rule.

24. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context.

25. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context.

26. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the paragraph's suggestion that New York law provides "more stringent state-level protections" as a conclusion of law not a statement of fact.

27. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the paragraph to the extent it represents a legal conclusion that any of the policies Virginia pursues are fairly traceable to any provision of the 2020 Rule.

28. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute the paragraph to the extent it represents a legal conclusion that any of the costs Wisconsin plans to incur are fairly traceable to any provision of the 2020 Rule.

29. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute the paragraph to the extent it represents a legal conclusion that any of the costs Maryland has incurred or plans to incur are fairly traceable to any provision of the 2020 Rule.

30. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute the paragraph to the extent it represents a legal conclusion that any of the costs Rhode Island plans to incur are fairly traceable to any provision of the 2020 Rule. Defendants also dispute the paragraph’s suggestion that the Rhode Island Department of Health will endure a discernable increase in calls or questions from the public as supported by nothing but speculation and contrary to the weight of Plaintiffs’ own evidence suggesting that most transgender Rhode Islanders are unaware of state policies and programs protecting them from discrimination. *See* Hughto Decl. ¶ 41.

31. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants

dispute Plaintiffs' statement that "[t]he 2020 Rule will lead some providers to refuse care to transgender individuals and will lead to an increase in denied insurance claims for medically necessary procedures" as unsupported by anything other than conclusory assertions, conjecture, and speculation, including speculative legal conclusions about the meaning of the term "sex" under Section 1557, and self-contradictory, conclusory assertions about what third parties will do in response to the 2020 Rule. *Compare* Hughto ¶ 32 (asserting that "HHS has been prohibited from enforcing discrimination claims on the basis of gender identity" since "a federal trial court judge in Texas issued a nationwide preliminary injunction" in 2016), *with, id.* ¶ 36 ("it is my professional opinion, that the repeal of legal repercussions provided by the 2020 Rule, including HHS's investigation of complaints of alleged discrimination against transgender individuals, will lead some providers to refuse care to transgender individuals"); *and id.* ¶ 37 ("in the wake of the 2020 Rule, it is my professional opinion, that some insurers who are seeking to maximize profits will elect to deny health insurance claims for transgender individuals"). *See* Response No. 15. Defendants dispute the second and third sentences of this paragraph as a conclusions of law not statements of fact. Defendants dispute the third sentence of this paragraph as speculative.

32. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute the paragraph's suggestion that CA DFEH will receive any increase in complaints in the future as unsupported. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

33. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular,

Defendants dispute the paragraph's statement that "OCR will not investigate sex discrimination complaints based on sexual orientation or gender identity" as nothing more than speculation about OCR's future enforcement actions—both unsupported by the administrative record or otherwise, and immaterial to the dispute. First, in promulgating the 2020 Rule, HHS merely "decline[d] . . . to propose its own definition of 'sex' for purposes of discrimination on the basis of sex in the regulation." 84 Fed. Reg. at 27,857 & n.75. "[T]he elimination of a regulatory definition of [the] term [does] not preclude application of [any] construction." 85 Fed. Reg. at 37,168. Just because the 2020 Rule "does not adopt a position on whether discrimination on the basis of" any particular ground "can constitute [*per se*] discrimination on the basis of sex, it does not mean that OCR could not consider such claims of discrimination." *See* 84 Fed. Reg. at 27,870 n.159. Second, HHS's enforcement practices and policies are immaterial to this case, in which Plaintiffs challenge HHS's promulgation of the 2020 Rule. Whether HHS pursues any particular enforcement action and how it prioritizes enforcement decisions is affected by HHS's limited resources and policy priorities which are not subject to judicial review at all, and Plaintiffs in any event do not challenge them here. Defendants also dispute the paragraph's suggestion that Illinois will receive any additional discrimination complaints as unsupported by anything other than speculation. *See, e.g.*, Planthold Decl. ¶ 14 ("If OCR no longer investigates or refers to the Equal Employment Opportunity Commission complaints of discrimination based on sexual orientation or gender identity in self-funded group health plans, the IL DOI could see an increase in these complaints about self-funded plans where IL DOI lacks authority to assist."). Defendants also dispute this paragraph to the extent it represents a legal conclusion that any hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

34. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the paragraph's suggestion that there is or will be an "enforcement gap created

by the 2020 Rule” as representing both a legal conclusion not a statement of fact as to the differences between federal and Minnesota antidiscrimination laws, as well as speculation about HHS’s future enforcement actions. *See* Response No. 33. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

35. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute the statement in this paragraph that “Connecticut CHRO expects to receive 45-55 new discrimination complaints due to the 2020 Rule,” to the extent that this purports to be a statement of fact about expected increases in future complaints, as unsupported by anything other than unadorned speculation and a declaration making a conclusory statement. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

36. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute the paragraph’s suggestion that there is or will be a “gap in federal enforcement created by the 2020 Rule” as representing both a legal conclusion not a statement of fact as to the differences between federal and Delaware antidiscrimination law as well as speculation about HHS’s future enforcement actions. *See* Response No. 33. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any of Delaware’s decisions to incur hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

37. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to

Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that any future decision by the Commonwealth of Massachusetts to incur hypothetical future costs administering state law would be fairly traceable to any provision of the 2020 Rule.

38. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the statement in this paragraph as unsupported by anything other than unadorned conclusory speculation; *see* Sneirson Decl. ¶ 11 ("While it is not possible to precisely quantify the number of additional complaints which will be filed with the MHRC as a result of the above changed in the 2020 Rule, it is likely that the increased number will not be insignificant."), or premised on unripe and speculative conclusions of law about the plain meaning of the term "sex" in Section 1557, *see* Amález ¶ 11 ("The elimination of protections for LGBTQ individuals under the Rule will likely result in an increase in administrative complaints to the Department under the Department's MaineCare provider agreements, which prohibit discrimination against MaineCare members on the basis of sexual orientation and sex (including pregnancy)."). Defendants dispute this paragraph to the extent it represents a legal conclusion that any future decision by the State of Maine to incur hypothetical future costs administering state law would be fairly traceable to any provision of the 2020 Rule.

39. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute the materiality of New Jersey's predictions. Defendants dispute this paragraph to the

extent it represents a legal conclusion that any prediction is fairly traceable to any provision of the 2020 Rule.

40. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute the paragraph’s vague reference to “non-enforcement by OCR as a result of the 2020 Rule,” to the extent it represents both a legal conclusion not a statement of fact as to the differences between federal and Nevada antidiscrimination law as well as speculation about HHS’s future enforcement actions. *See* Response No. 33. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any of Nevada’s decisions to incur hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

41. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. In particular, Defendants dispute the paragraph’s statement that “complaints of discrimination in healthcare that would have been filed with OCR must now be filed with DMAS” to the extent it represents both a legal conclusion not a statement of fact as to the differences between federal and Virginia antidiscrimination law. *See* Response No. 33. To the extent this is a statement of fact, it is entirely unsupported by any evidence; no cited evidence indicates that any complaints of discrimination in healthcare cannot be filed with OCR. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any of Virginia’s decisions to incur hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

42. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are

inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the paragraph's statement that "OCR will no longer accept discrimination complaints against insurers under the 2020 Rule" as an erroneous conclusion of law, not a statement of fact. Defendants dispute the paragraph as unsupported by evidence to the extent it suggests that Wisconsin will spend more time on health insurance discrimination complaints in the foreseeable future. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any of Wisconsin's decisions to incur hypothetical future costs would be fairly traceable to any provision of the 2020 Rule.

43. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute Pennsylvania's anticipated "increase in complaints and inquiries" as entirely unsupported by anything other than conclusory statements and unadorned speculation. *See* Miller Decl. ¶ 9; Altman Decl. ¶ 27.

44. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. In particular, Defendants dispute the statement that the 2020 "Rule is also forcing the States to incur costs to issue new regulations or legislation" as entirely unsupported by the administrative record or otherwise. Nothing in the 2020 Rule requires states to take any actions or incur any costs. Defendants also dispute Plaintiffs' unsupported characterization of the 2020 Rule—to the extent that is what they are characterizing—as "abdicat[ing] [HHS's] enforcement obligations in the health care context." *See* Response No. 33. Defendants also dispute this paragraph to the extent it represents a legal conclusion that any State's decision to create a legal code to protect its citizens

from hypothetical future discrimination at the hands of third parties is fairly traceable to any provision of the 2020 Rule.

45. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

46. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that OASAS’s decision to initiate a rulemaking to amend regulations is fairly traceable to any provision of the 2020 Rule.

47. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that Colorado’s decision to promulgate a regulation is fairly traceable to any provision of the 2020 Rule.

48. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that the Maryland General Assembly’s decision to enact a state statute is fairly traceable to any provision of the 2020 Rule.

49. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are

inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that the Virginia Legislature's decision to pass a state statute is fairly traceable to any provision of the 2020 Rule. Defendants also dispute the second and third sentences of this paragraph as conclusions of law not statements of fact.

50. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute the entirety of this paragraph as unsupported by the cited evidence, which describes implications of the subjective fears of third parties without substantiating the relationship between those fears and any provision of the 2020 Rule. *See, e.g.*, Hughto Decl. ¶ 34. *See* Response No. 15. Defendants dispute this paragraph to the extent it represents a legal conclusion that any harms derived from the subjective fears of third parties are fairly traceable to any provision of the 2020 Rule and to the extent it suggests that any purported harms to the health of third parties represent a legally cognizable injury to the Plaintiff States.

51. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute the entirety of this paragraph as unsupported by anything but conclusory assertions, conjecture, and speculation. *See, e.g.*, Cooper Decl. ¶ 7 ("I am also concerned that the Rule nonetheless may have a chilling effect"); *id.* ¶ 8 ("The Rule will put women at greater risk of unintended pregnancies" and "[f]or those individuals impacted by the Rule who are ineligible for state-funded or jointly funded federal-state funded programs . . . there is a risk that they will not receive appropriate care, resulting in unintended pregnancies and associated complications"); *id.* ¶ 10 ("The Rule harms women by removing express protections against discrimination"); Starr

Decl. ¶ 6 (stating that declarant is “concerned about the Rule’s elimination of regulatory provisions that [HHS] previously determined were necessary to ensure meaningful access to individuals with LEP” without providing any evidence that the 2020 Rule’s meaningful access provisions will result in a discernable increase in discrimination); *id.* ¶ 8-9 (asserting that the 2020 Rule’s elimination of an “explicit regulatory” definition of sex “may harm women” and that “[d]iscriminatory denials of services related to reproductive health “may also increase unintended pregnancies”). Defendants dispute this paragraph to the extent it represents a legal conclusion that any harms derived from the subjective fears of third parties are fairly traceable to any provision of the 2020 Rule and to the extent it suggests that any purported harms to the health of third parties represent a legally cognizable injury to the Plaintiff States.

52. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that any of the harms mentioned are fairly traceable to any provision of the 2020 Rule and to the extent it suggests that any purported harms to the health of third parties represent a legally cognizable injury to the Plaintiff States.

53. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that California’s “concern[s]” are a legally cognizable injury or fairly traceable to any provision of the 2020 Rule.

54. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants

dispute this paragraph to the extent it represents a legal conclusion that Pennsylvania's speculation is a legally cognizable injury or fairly traceable to any provision of the 2020 Rule.

55. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that California's worries and fears are a legally cognizable injury or fairly traceable to any provision of the 2020 Rule.

56. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that New Jersey's "particular concern" is a legally cognizable injury or fairly traceable to any provision of the 2020 Rule.

57. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that New Mexico's concern is a legally cognizable injury or fairly traceable to any provision of the 2020 Rule.

58. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that increased expenses because of individuals' subjective fear of hypothetical future harm at the hands of hypothetical third parties

is fairly traceable to any provision of the 2020 Rule without concrete evidence substantiating the link between those purported fears and any provision of the 2020 Rule.

59. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute this paragraph as a description and characterization of provisions of law, not a statement of fact.

60. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that Plaintiffs’ conjecture that their residents “may” suffer health and economic consequences of being denied coverage by third party insurers represents a legally cognizable injury or is fairly traceable to any provision of the 2020 Rule.

61. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

62. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document’s plain language, meaning, or context.

63. *See* Response No. 1. To the extent Plaintiffs have identified “undisputed” facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs’ alleged undisputed facts where they are argumentative, reflect legal conclusions, or are

inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that Massachusetts' exposure as a secondary payer to 146,000 MassHealth members is itself a legally cognizable imminent injury without concrete evidence substantiating Plaintiffs' conjecture that any of those members have primary insurance policies operated by insurers with intentions to modify their policies as a result of the 2020 Rule.

64. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute this paragraph to the extent it represents a legal conclusion that Pennsylvania's fears that it might fund gender transition services through its Medical Assistance program is itself a legally cognizable imminent injury without concrete evidence substantiating Plaintiffs' conjecture that any Pennsylvania resident has a primary insurance policy operated by an insurer with intentions to modify its policies as a result of the 2020 Rule.

65. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context.

66. *See* Response No. 1. To the extent Plaintiffs have identified "undisputed" facts that purport to be based on witness declarations to support their standing, Defendants object to Plaintiffs' alleged undisputed facts where they are argumentative, reflect legal conclusions, or are inconsistent with the referenced document's plain language, meaning, or context. Defendants dispute several aspects of this paragraph. First, Defendants dispute Plaintiffs' statement that "some health insurers marketing plans in several of the Plaintiff States and elsewhere have instituted new categorical prohibitions on certain health treatments for transgender people since the 2020 Rule went into effect" as unsupported by the cited witness declaration and supporting evidence, which,

as described in more detail in Defendants’ memorandum in opposition to Plaintiffs’ motion for summary judgment, indicate that only one insurer—Bright Health—has changed an insurance policy in two Plaintiff States, namely, Illinois and North Carolina. Second, Defendants dispute Plaintiffs’ statement that Bright Health’s policy change was “likely in response to the Rule.” As described in more detail in Defendants’ memorandum of law in opposition to Plaintiffs’ motion for summary judgment, the weight of the evidence in the administrative record indicates that there is no substantial likelihood that Bright Health changed its policy as a result of the 2020 Rule as opposed to insurance issuer choice. *See* 85 Fed. Reg. at 37,199 (“With respect to coverage for gender transition services, . . . [the 2020] Rule makes no changes to what has been the status quo since December 2016, when [HHS] was enjoined from enforcement of the gender identity provisions of the 2016 Rule; such provisions have now been vacated by a court. Any recent decrease in blanket exclusions for sex-reassignment coverage is therefore more likely to be attributable to health insurance issuer or plan sponsor choice.”). Defendants also dispute this paragraph to the extent it represents a legal conclusion that Bright Health’s planned policy change is itself a legally cognizable imminent injury to Plaintiffs North Carolina or Illinois or any other Plaintiff State.

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Respectfully submitted,

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