Nos. 20-3580, 20-3827

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TANYA ASAPANSA-JOHNSON WALKER
and CECILIA GENTILI,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANTS

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INTRODUCTION

Section 1557 of the Patient Protection and Affordable Care Act prohibits any federally funded health program or activity from discriminating on the basis of several grounds defined in other statutes, one of which is Title IX's prohibition of discrimination "on the basis of sex." In 2016, the Department of Health and Human Services (HHS) adopted regulations interpreting Section 1557's prohibition of sex discrimination to prohibit discrimination on the basis of gender identity. But those regulations were stayed or enjoined by two courts and later vacated. In light of those decisions, the agency adopted a new Rule that simply paraphrases the statutory text. And although HHS agreed with those courts' conclusion that the statute did not cover transgender discrimination, it chose not to adopt any new regulatory definitions of the relevant statutory terms, leaving further interpretation to the courts.

The district court preliminarily enjoined and stayed the provision of the new Rule that restates the statute, concluding that plaintiffs had standing and were likely to succeed in showing that the provision was unlawful and arbitrary and capricious. The court held that the provision was contrary to law because certain statements in the new Rule's preamble were, in the court's view, inconsistent with the Supreme Court's later decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). It further held that the agency acted arbitrarily and capriciously by not delaying the new Rule until after the Court decided *Bostock* and not revising the preamble in light of *Bostock*. That decision was mistaken on many levels.

As an initial matter, the two individual plaintiffs have not alleged any plausible theory of standing for multiple reasons: (1) plaintiffs argue that the statute protects them from discrimination and concede that the new regulation merely restates the statute, (2) plaintiffs live in a State that independently prohibits transgender discrimination by medical providers, and (3) the prior regulatory provisions that plaintiffs prefer have been vacated by a district court in a different circuit in a decision that the district court in this case recognized it has no authority to overturn.

On the merits, the agency was well within its discretion to restate the statutory text and leave the application and interpretation of the statute's prohibition of sex discrimination for another day. In light of several ongoing lawsuits, the fact that its prior regulations had been partially vacated, and the Supreme Court's consideration of similar issues in *Bostock* and two other cases involving Title VII of the Civil Rights Act of 1964, HHS reasonably decided not to adopt any new interpretation of that prohibition by regulation. Instead, it adopted a regulation that merely restates that statute, ensuring that its regulations would be consistent with any future judicial decision on the subject. That decision was not arbitrary or capricious. The district court's contrary holding improperly supplants the discretion of the agency to choose between several reasonable alternatives, and establishes an unprecedented and burdensome new rule that agencies must always await the outcome of judicial proceedings that may be relevant even before issuing new regulations that merely paraphrase the statutory text.

At a minimum, the district court abused its discretion by issuing nationwide relief. The two individual plaintiffs in this case do not represent a class, and the district court erred in granting injunctive relief beyond what was necessary to remedy their alleged injuries.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331, raising claims under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Constitution. Joint Appendix (JA) 8. Plaintiffs' standing is contested. *See infra* Part I. The district court entered stays and preliminary injunctions on August 17, 2020 and October 29, 2020. JA284-85, 295. The government filed timely notices of appeal on October 16, 2020, and November 10, 2020. JA286, 296. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether plaintiffs have standing to challenge the new Rule.

2. Whether the new Rule is contrary to law or arbitrary or capricious.

3. Whether the district court abused its discretion by granting relief beyond what is necessary to remedy plaintiffs' alleged harm.

STATEMENT OF THE CASE

This appeal arises out of a challenge to HHS's promulgation of a final rule implementing the anti-discrimination provision found in Section 1557 of the Patient Protection and Affordable Care Act (Affordable Care Act), 42 U.S.C. § 18116(a).

Plaintiffs sought a preliminary injunction and stay under 5 U.S.C. § 705 that would bar HHS from implementing the rule. On August 17, 2020, and October 29, 2020, the district court (Block, J.) entered nationwide preliminary injunctions (and associated stays under 5 U.S.C. § 705) enjoining HHS from enforcing certain aspects of the rule. JA284-85, 295. The government appeals under 28 U.S.C. § 1292(a)(1).

A. Statutory, Regulatory, and Factual Background

1. Section 1557

Section 1557 of the Affordable Care Act prohibits, as relevant here, "any health program or activity" "receiving Federal financial assistance" from discriminating against an individual based on "ground[s] prohibited under" several other statutes. 42 U.S.C. § 18116(a). One of the specified statutes is Title IX of the Education Amendments of 1972, *id.*, which prohibits, in part, discrimination "on the basis of sex." 20 U.S.C. § 1681(a). HHS "may promulgate regulations to implement" Section 1557, but is not required to do so. 42 U.S.C. § 18116(c).

2. The 2016 Rule and Subsequent Litigation

In 2016, HHS promulgated a rule implementing the anti-discrimination requirements of Section 1557, including the prohibition of sex discrimination incorporated from Title IX. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016) (2016 Rule). As relevant here, the 2016 Rule defined discrimination "on the basis of sex" to include discrimination on the basis of "gender identity." *Id.* at 31,467.

Soon afterward, various plaintiffs filed three lawsuits challenging that aspect of the 2016 Rule. *See Franciscan All., Inc. v. Burwell*, No. 16-cv-00108 (N.D. Tex. Aug. 23, 2016); *Religious Sisters of Mercy v. Burwell*, No. 16-cv-386 (D.N.D. Nov. 7, 2016); *Catholic Benefits Ass'n v. Burwell*, No. 16-cv-432 (D.N.D. Dec. 28, 2016). As relevant here, those plaintiffs alleged that the 2016 Rule violated the Religious Freedom Restoration Act and exceeded statutory authority by defining sex discrimination to include discrimination based on gender identity.

On December 31, 2016, the Northern District of Texas issued a nationwide preliminary injunction barring enforcement of the challenged parts of the 2016 Rule, concluding that the *Franciscan Alliance* plaintiffs were likely to succeed on all of their claims. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). The District of North Dakota consolidated the two cases in that district and similarly stayed the challenged aspects of the 2016 Rule. *See* Am. Order Staying Enforcement, *Religious Sisters of Mercy*, No. 16-cv-386 (D.N.D. Jan. 23, 2017), Dkt. No. 36.

3. HHS Proposes a New Rule

HHS began reconsidering its implementation of Section 1557 in light of those courts' reasoning and the pending litigation. *See* Mot. for Voluntary Remand and Stay at 1-2, *Franciscan All.*, No. 16-cv-00108 (N.D. Tex. May 2, 2017), Dkt. No. 92.

In June 2019, HHS issued a notice of proposed rulemaking soliciting comments on a new implementation of Section 1557. *See* Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019). As relevant

here, the proposed rule would implement Section 1557's prohibition of sex discrimination solely by paraphrasing the statutory text, without attempting to interpret how the statute would apply to discrimination on the basis of gender identity. *Id.* at 27,857. It therefore would rescind the provisions challenged in the various lawsuits, which HHS hoped would "minimize litigation risk." *Id.* at 27, 849, 27, 857.

The agency explained that it sought "to avoid further litigation and uncertainty regarding the implementing regulations." 84 Fed. Reg. at 27,850. It noted that two district courts had held that the 2016 Rule's provisions on sex discrimination likely exceeded its statutory authority, and that the Department of Justice had taken the position that "the ordinary meaning of the word 'sex' for purposes of Federal nondiscrimination laws does not encompass sexual orientation or gender identity." *Id.* at 27,856. HHS also explained that "the underlying civil rights laws cited in Section 1557," including Title IX, had already been implemented in regulations promulgated by HHS and other agencies, and the 2016 Rule's provisions "were inconsistent with (or, at a minimum, unnecessarily duplicated)" those existing regulations. *Id.* at 27,849, 27,873. "To ensure that [the agency's] civil rights regulations are consistent with the views of the Department of Justice, other Federal agencies, and internally," HHS "propose[d] to repeal the definition of 'on the basis of sex' that had been adopted in its [2016 Rule]." *Id.* at 27,857.

In light of conflicting court decisions and pending litigation, the agency further proposed to restate the statutory text without adopting a new regulatory definition of

"sex," which would "allow the Federal Courts" to resolve the statute's meaning. 84 Fed. Reg. at 27,855, 27,873. HHS observed that the Supreme Court had recently "granted three petitions for writs of certiorari" regarding the proper interpretation of the prohibition of sex discrimination in a different statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). 84 Fed. Reg. at 27,855. HHS explained that "a holding by the U.S. Supreme Court on the definition of 'sex' under Title VII will likely have ramifications for the definition of 'sex' under Title IX." *Id.* at 27,855. For that reason, although the agency agreed with the judicial decisions holding that the 2016 Rule had adopted an incorrect definition of "sex" under Title IX and Section 1557, it "decline[d], at this time, to propose its own[] definition of 'sex' for purposes of discrimination on the basis of sex in the regulation." *Id.* at 27,849, 27,857.

4. The *Franciscan Alliance* Vacatur

Several months later, while HHS was considering comments on its proposed rulemaking, the Northern District of Texas issued a final judgment vacating "the portions of the [2016] Rule that Plaintiffs challenged." Order at 2, *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019) (No. 16-cv-00108), Dkt. No. 182; *see Franciscan All.*, 414 F. Supp. 3d at 947. The court declined to issue injunctive relief, however, in part because the agency was in the midst of reconsidering its implementation of Section 1557. *See* 414 F. Supp. 3d at 946. The *Franciscan Alliance* plaintiffs appealed, seeking injunctive relief in addition to the vacatur. *See Franciscan All., Inc. v. Azar*, No. 20-10093 (5th Cir. Jan. 24, 2020). The agency did not appeal the

order vacating the challenged 2016 provisions. Meanwhile, the cases in the District of North Dakota were stayed pending HHS's reconsideration of the challenged provisions. *See* Order Granting Mot. to Stay at 2-3, *Religious Sisters of Mercy*, No. 16-cv-386 (D.N.D. Aug. 24, 2017), Dkt. No. 56.

5. The New Rule

a. On June 12, 2020, after three years of consideration and review of nearly 200,000 comments on its proposed rulemaking, HHS finalized its new Rule implementing Section 1557 and submitted it to the Office of the Federal Register for publication. *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,160, 37,164 (June 19, 2020) (the new Rule). Based on the "policy rationales" explained in its proposed rulemaking a year earlier and to bring "the provisions of the Code of Federal Regulations … up-to-date as to the effect of the [*Franciscan Alliance*] court's order," HHS adopted its proposed rule without significant change. *See id.* at 37,162-65. As relevant here, the new Rule restated Section 1557's statutory text, without further interpreting the statute's prohibition of sex discrimination. *Id.* at 37,178, 37,244 (codified at 45 C.F.R. § 92.2); *see id.* at 37,178 ("This final rule repeals the 2016 Rule's definition of 'on the basis of sex,' but declines to replace it with a new regulatory definition. Instead, the final rule reverts to, and relies upon, the plain meaning of the term in the statute." (citation omitted)). The new provision reads as follows:

> (a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.
>
> (b) The grounds are the grounds prohibited under the following statutes:
>
> … Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (sex); . . . .

45 C.F.R. § 92.2.

In the new Rule's preamble, HHS responded to commenters who argued that the agency should delay its changes until after the Supreme Court decided the pending Title VII cases that HHS had mentioned in its proposed rule. *See* 85 Fed. Reg. at 37,168. The agency explained that it did not need to "delay … based on speculation as to what the Supreme Court might say about a case dealing with related issues." *Id.* The new regulations restated statutory text, so "to the extent that a Supreme Court decision is applicable in interpreting the meaning of a statutory term," the new regulations "would not preclude application of the Court's construction." *Id.* In addition, although the Supreme Court's interpretation of Title VII would "likely have ramifications for the definition of 'on the basis of sex' under Title IX" and Section 1557, the agency noted that a decision regarding employment discrimination under Title VII would not be directly controlling on Section 1557, especially since the

"biological character of sex … takes on special importance in the health context." *Id.* at 37,168, 37,183-86.

b. Three days after HHS submitted the new Rule for publication in the Federal Register, but before the Rule was published, the Supreme Court decided its pending cases concerning the proper interpretation of Title VII. *See Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). The Court held that Title VII's prohibition of discrimination "because of" sex extends to discrimination because of sexual orientation and transgender status. *Id.* at 1737-41. In doing so, the Court stated that its holding did not necessarily "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Id.* at 1753. The Court explained that "none of these other laws [were] before [it]," that it had "not had the benefit of adversarial testing about the meaning of their terms," and that the Court therefore "d[id] not prejudge any such question." *Id.*

HHS's new Rule implementing Section 1557 was formally published in the Federal Register four days later, on June 19, 2020.

B. Prior Proceedings

1. Various individuals, organizations, and States challenged HHS's new Rule in five district courts across the country. *See Asapansa-Johnson Walker v. Azar*, No. 20-cv-2834 (E.D.N.Y.); *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-cv-1630 (D.D.C.); *New York v. HHS*, No. 20-cv-5583 (S.D.N.Y.); *Boston All. of Gay, Lesbian, Bisexual &*

Transgender Youth, No. 20-cv-11297 (D. Mass); *Washington v. HHS*, No. 20-cv-1105 (W.D. Wash.).

Plaintiffs in this case are two transgender individuals who reside in New York City. JA7. In July 2020, plaintiffs moved for a preliminary injunction and stay of HHS's new Rule. Plaintiffs alleged that, in light of the Supreme Court's decision in *Bostock*, the agency had acted arbitrarily and contrary to law by replacing the 2016 provisions regarding sex discrimination with a provision restating the statute, and that the change would likely cause them to avoid care or suffer discrimination by healthcare providers. *See* JA114-16.

2. On August 17, 2020, the district court issued a nationwide preliminary injunction and stay of the new Rule to the extent that the Rule repealed the 2016 regulatory definition of sex discrimination. *See* JA284.

a. The district court concluded that the two individual plaintiffs had standing to challenge HHS's new Rule because "plaintiffs attest that they have … suffered past discrimination in receiving healthcare," which the court said "alone constitutes an injury in fact." JA273-74. "In addition," the court relied on the fact that "both plaintiffs state that the threat of future discrimination will lead them to avoid seeking treatment for extant medical conditions, with possibly life-threatening consequences." JA274. The court further held that any discrimination by healthcare providers could be "fairly traceable" to the new Rule. JA275.

The district court acknowledged that "it ha[d] no power to revive a rule vacated by another district court," and therefore that it could not grant "plaintiff's requested remedy" and "revive the 'gender identity' portion of the 2016 definition vacated by the district court in *Franciscan Alliance*." JA277. "Nevertheless," the court decided that a preliminary injunction could provide meaningful relief by reviving the portion of the 2016 definition regarding "sex stereotyping," which the court concluded had not been addressed by *Franciscan Alliance* and could be construed to prohibit discrimination on the basis of gender identity. *Id.*

b. The district court went on to conclude that plaintiffs were likely to succeed in showing that the new Rule's restatement of the statute was arbitrary and capricious in light of *Bostock*. JA280-84. The court stated that "[w]hen the Supreme Court announces a major decision, it seems a sensible thing to pause and reflect on the decision's impact," and "[s]ince HHS has been unwilling to take that path voluntarily, the Court now impose[d] it." JA284. In particular, the court stated that HHS's "reasoning was based upon its pre-*Bostock* understanding" that distinctions on the basis of biological sex "may, and often must, play a part in the decision-making process" in "the field of health services." JA282-83 (quoting 85 Fed. Reg. at 37,185). In the court's view, "the unmistakable basis for HHS's action was a rejection of the position taken in the 2016 Rules that sex discrimination includes discrimination on gender identity and sex stereotyping," and *Bostock* was relevant to that determination. JA283.

The district court acknowledged that the new Rule "merely restate[s] the statutory bases for prohibited discrimination," but stated that "whether or not" *Bostock* was "dispositive of" the interpretation of Section 1557, HHS should have waited and addressed *Bostock*'s impact because the agency "knew that the case was pending and would have 'ramifications.'" JA281, 283. Moreover, although HHS had already submitted the new Rule for publication when the Supreme Court decided *Bostock*, the court determined that HHS was unreasonable in failing to prevent publication of its new Rule because it had "an (admittedly brief) opportunity to re-evaluate its proposed rule[]" before the Rule appeared in the Federal Register. JA283.

Although the district court "agree[d]" that HHS's new regulations "merely restate" the statute, the court concluded that the new Rule is contrary to law because "the preamble" expressed a view of Title IX that "was effectively rejected by the Supreme Court['s]" decision in *Bostock*. JA281. The court acknowledged that "language in the preamble of a regulation is not controlling over the regulation itself," and that "it is more typical to say that a rule is contrary to law because an agency has attempted to promulgate a rule that countermands a higher authority." JA281-82 (quotation marks omitted). Nonetheless, the court determined that the provision restating the statute is contrary to law because "motivation informs the inquiry," because the agency "continued on the same path even after *Bostock* was decided," and because "the premise of the repeal [of the 2016 provisions] was a disagreement with a concept of sex discrimination later embraced by the Supreme Court." JA282.

c. The district court also held that plaintiffs had met the other requirements for a preliminary injunction. The court determined that "the detrimental effect of discrimination on [plaintiffs'] health and, perhaps, their lives" was an irreparable harm that monetary damages "could hardly compensate." JA279. The court stated that "the same can be said for the balance of equities and public interest." *Id.* Although the court recognized that "HHS surely has an interest in its preferred policy," the court stated that the agency's interest "cannot outweigh the harm," not just to the two individual plaintiffs, but "to the many non-gender conforming members of the public for whom discrimination imposes a very concrete cost." JA279-80.

d. The district court granted a nationwide preliminary injunction and stay of "the repeal of the 2016 definition of discrimination on the basis of sex," but did not specify why nationwide relief was necessary to redress the injuries of the two plaintiffs. JA284-85.

3. Shortly after the district court issued its order, plaintiffs filed a letter asking the court to enjoin the new Rule in its entirety. JA289. The district court granted the request in part and issued a second nationwide preliminary injunction and stay against the agency's repeal of another provision of the 2016 Rule, 45 C.F.R. § 92.206. JA295. That provision stated that "[a] covered entity shall provide individuals equal access to its health programs or activities without discrimination on the basis of sex," that "a covered entity shall treat individuals consistent with their

gender identity," and that "a covered entity may not deny or limit health services … to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available." 81 Fed. Reg. at 31,471. The district court concluded that this provision was "a specific implementation of the 2016 Rule's definition of sex discrimination" and "therefore" that provision's "repeal … requires reconsideration in light of *Bostock* for the same reasons the repeal of the definition does." JA294-95. *See also* 81 Fed. Reg. at 31,376, 31,427-28 (stating that this provision was a "specific application" of the prohibition on sex discrimination as defined by the 2016 Rule).

4. The government filed notices of appeal from both preliminary injunctions, and this Court consolidated the appeals. *See* JA286, 296. The district court thereafter stayed proceedings pending this Court's resolution of the government's appeals. *See* Order, No. 20-cv-2834 (E.D.N.Y. Nov. 2, 2020).

C. Developments in Other Courts

Plaintiffs in two other cases also moved for preliminary injunctions against the new Rule. The district court for the Western District of Washington denied the State of Washington's motion for lack of Article III standing because Washington could not show that "the [new] Rule's decision not to define on the basis of sex will yield an increase in discrimination against LGBTQ individuals." *See Washington v. HHS*, No. 20-cv-1105, 2020 WL 5095467, at *1, *8-9 (W.D. Wash. Aug. 28, 2020). The court

observed that "if Washington is correct that *Bostock* means that Title IX and Section 1557 must incorporate protection for gender identity and sexual orientation discrimination, then that means that the 2020 Rule does, in fact, extend protection against discrimination to LGBTQ individuals via the Rule's incorporation of Title IX by reference." *Id.* at *8-9. Washington voluntarily dismissed its claims shortly after the court's decision. *See* Notice of Voluntary Dismissal, *Washington v. HHS*, No. 20-cv-1105 (W.D. Wash. Sept. 8, 2020), Dkt. No. 73.

The district court for the District of Columbia issued a nationwide preliminary injunction barring HHS from enforcing its repeal of the 2016 definition of sex discrimination "insofar as it includes discrimination on the basis of … sex stereotyping," as well as from enforcing a new provision incorporating Title IX's religious exemption that is not at issue in this case. *See Whitman-Walker Clinic, Inc. v. HHS*, No. 20-1630, 2020 WL 5232076, at *45 (D.D.C. Sept. 2, 2020) (quotation marks omitted). Although the court accepted the plaintiff organizations' allegation that the enjoined provisions would likely increase the costs of their operations, the court denied plaintiffs' request for an injunction against other provisions for lack of standing because "[p]laintiffs ha[d] not established that any future discrimination … would be sufficiently imminent to qualify as a valid injury-in-fact." *Id.* at *18, *20 (quotation marks omitted). The government has appealed the preliminary injunction. *See Whitman-Walker Clinic, Inc. v. HHS*, No. 20-5331 (D.C. Cir. Nov. 9, 2020).

Litigation involving the now-repealed and partially vacated 2016 Rule is also ongoing. In the Fifth Circuit, the *Franciscan Alliance* plaintiffs seek a "permanent injunction enjoining HHS from construing Section 1557 … to require that Appellants perform or provide insurance coverage for gender-transition procedures or abortions in violation of their religious beliefs." Appellants' Opening Br. at 55, *Franciscan All.*, No. 20-10093 (5th Cir. Sept. 21, 2020). Plaintiffs in the District of North Dakota have filed motions for summary judgment seeking the same. *See* Mots. Summ. J., *Religious Sisters of Mercy*, No. 16-cv-386 (D.N.D. Nov. 23, 2020), Dkt. Nos. 96, 98.

SUMMARY OF ARGUMENT

I. The district court's preliminary injunctions and stays go far beyond the bounds of Article III. The two individuals in this case seek relief against a new HHS Rule that merely restates the anti-discrimination provision in Section 1557 of the Affordable Care Act, arguing that HHS should not have revoked prior regulations that had explicitly interpreted the statutory text to prohibit discrimination on the basis of gender identity. But these individuals have not satisfied the minimum requirements of injury, causation, and redressability necessary to demonstrate standing.

The district court erred in multiple ways by simply accepting plaintiffs' unsupported assertions that the new Rule will likely cause healthcare providers to discriminate against plaintiffs on the basis of gender identity. First, plaintiffs themselves argue that the statutory text clearly prohibits such discrimination, and all agree that the challenged regulation simply restates the statutory text. Second,

plaintiffs live in New York, whose law already prohibits the kind of discrimination that plaintiffs say they fear. Finally, the prior regulatory provisions that plaintiffs say they need to avoid injury have already been vacated nationwide by a district court in a different circuit that the district court here recognized it had no authority to overturn. Plaintiffs therefore cannot show that the new Rule will imminently cause providers to discriminate against them, much less that the injunction they seek would redress their asserted injuries.

II. The district court likewise erred in holding that plaintiffs had satisfied the requirements for a preliminary injunction.

A. In determining that plaintiffs were likely to succeed on the merits, the district court improperly substituted its own judgment for the agency's. When faced with multiple reasonable options, an agency is entitled to choose any of those paths so long as it provides a reasonable explanation for its choice. Here, HHS was reconsidering its implementation of the anti-discrimination provision in Section 1557 of the Affordable Care Act after years of rulemaking and litigation that led a court to vacate part of its prior regulations on the subject. The agency agreed with the court decision vacating its prior regulations as inconsistent with the statute, but was faced with the prospect that the Supreme Court could decide a case dealing with a similar, though not directly controlling, question of statutory interpretation in the near future. Based in part on the pendency of a Supreme Court decision on a related issue, the agency reasonably chose not to adopt any interpretation of the statute by regulation.

Instead, it adopted a regulation that merely restates the statutory text of Section 1557, leaving further interpretation for another day. That decision was neither arbitrary nor capricious.

The district court incorrectly concluded that HHS was either required to postpone its years-long rulemaking after the Supreme Court granted certiorari in the Title VII cases, or should have rescinded its final rule when the Court issued a decision a few days after the agency had submitted the rule for publication. No principle of administrative law required either action. To the contrary, the Supreme Court has long held that agencies have discretion whether to carry out their duties by rulemaking or instead proceed through case-by-case adjudication. HHS was entitled to leave interpretation of the Supreme Court's decision for a later date, and move forward with a rule that simply restated the relevant statutory text.

B. The other preliminary injunction factors also weigh against the district court's orders. For the same reasons that plaintiffs lack standing, they also have not identified any plausible basis for concluding that they are imminently likely to suffer irreparable harm. And plaintiffs' speculative theory of injury does not outweigh the agency's legitimate interest in adopting a rule that directly tracks the text of Section 1557 and accordingly leaves in place the full protection against discrimination afforded by the statute.

III. The district court also abused its discretion when it granted a preliminary injunction covering all fifty states to redress injuries asserted by two individuals in

New York. It is well-established that equitable relief should extend no further than necessary to remedy injuries to the parties before the court, and the district court identified no basis for awarding nationwide relief here. The court's nationwide injunction was particularly inappropriate given the pendency of ongoing litigation in other district courts, which resulted in one district court in Washington deciding that the new Rule should not be enjoined.

STANDARD OF REVIEW

Challenges to the district court's jurisdiction are reviewed de novo. *Sharkey v. Quarantillo*, 541 F.3d 75, 82 (2d Cir. 2008). When reviewing a district court's decision on a preliminary injunction, this Court reviews the district court's legal conclusions de novo. *Malkentzos v. DeBuono*, 102 F.3d 50, 54 (2d Cir. 1996). Otherwise, the district court's entry of a preliminary injunction is reviewed for abuse of discretion. *Id.*

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Those factors also apply to a grant of a stay under 5 U.S.C. § 705. *See New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 58 & n.14 (2d Cir. 2020) (analyzing a stay under § 705 "under the preliminary injunction framework"); *Cook County v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020) (same). None of these factors is satisfied here.

Section 1557 of the Affordable Care Act prohibits any federally funded health program or activity from discriminating on the basis of several grounds defined in other statutes, one of which is Title IX's prohibition of discrimination "on the basis of sex." In 2016, HHS adopted regulations interpreting Section 1557's prohibition of sex discrimination to prohibit discrimination based on gender identity. But those regulations were stayed or enjoined by two courts and later vacated. In light of those decisions, the agency adopted a new Rule that simply paraphrases the statutory text. And although HHS made some statements in the preamble to the Rule endorsing those courts' view that the statute did not cover transgender discrimination, it chose not to adopt that view by regulation, leaving the question for another day.

The district court erred by staying and enjoining the provision of the new Rule that merely paraphrases the statutory definition of sex discrimination. The court concluded that the agency's failure to delay or rescind the new Rule in order to address how the Supreme Court's decision in *Bostock* would potentially affect Section 1557's application to transgender discrimination was likely arbitrary and capricious. That decision contravenes basic principles of standing and administrative law.

I. The District Court Erred in Concluding That Plaintiffs Have Standing To Challenge the New Rule.

As a threshold matter, the district court erred in holding that plaintiffs have standing to challenge HHS's new Rule restating the anti-discrimination requirements of Section 1557. Plaintiffs assert that healthcare providers are likely to discriminate

against plaintiffs because the Rule merely restates Section 1557's language without expressly defining the statutory terms to prohibit transgender discrimination, as HHS's prior regulatory provisions had done. That theory fails to establish standing for several reasons.

A. Plaintiffs Have Failed To Show Imminent Harm.

1. Plaintiffs have not shown any imminent or certainly impending harm. As the Supreme Court has "said many times before," "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). "A threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). And that showing is "substantially more difficult to establish" when "a plaintiff's asserted injury … hinge[s] on the response of [a] third party to the government action or inaction." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks omitted).

No plausible basis exists to conclude that the agency's restatement of the statute will cause "imminent" discrimination against transgender persons. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The provision of the new Rule that plaintiffs challenge merely restates the statute, and plaintiffs themselves contend that the statutory text clearly protects against transgender discrimination. In particular, they assert that the Supreme Court's intervening decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), makes clear that Section 1557's text "literally and logically

encompasses discrimination against LGBTQ persons." JA27; *see also* JA2, 5, 25, 55-56 (arguing that *Bostock* settles the interpretation of Section 1557). Given plaintiffs' arguments about the plain meaning of the statute after *Bostock*, it is inconsistent and implausible for them simultaneously to assert that a provision merely restating the statutory terms will cause imminent discrimination.

At the very least, plaintiffs' arguments about *Bostock* (and those of plaintiffs in several other pending lawsuits against the new Rule) cast severe doubt on their assertion that healthcare providers will see the new Rule's restatement of the statute as a green light to discriminate. There is no reason to assume that providers in general will choose to discriminate despite the prospect that the statute will be interpreted to prohibit transgender discrimination in light of *Bostock*—particularly since several courts have already held that *Bostock*'s reasoning applies equally to Title IX. *See, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *Adams ex rel. Kasper v. School Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020); *Clark Cty. Sch. Dist. v. Bryan*, --F.3d--, Nos. 73856, 74566, 2020 WL 7686545, at *4 (Nev. Dec. 24, 2020). Plaintiffs have made no attempt to specify any provider that is likely to run this risk. Plaintiffs' speculation that some providers might do so anyway is not enough to establish a "certainly impending" injury—especially since standing is "substantially more difficult to establish" when "a plaintiff's asserted injury … hinge[s] on the response of [a] third party to the government action or inaction." *Lujan*, 504 U.S. at 562.

Accordingly, every other court to consider the theory of injury the district court accepted here has rejected it. For example, the district court for the Western District of Washington held that the plaintiff in that case (the State of Washington) lacked standing to challenge the provision of the new Rule repealing the prior rule's definition of the statutory term "on the basis of sex." The court "lack[ed] sufficient evidence to show that the 2020 Rule's decision not to define on the basis of sex will yield an increase in discrimination against LGBTQ individuals," especially because "if Washington is correct that *Bostock* means that Title IX and Section 1557 must incorporate protection for gender identity and sexual orientation discrimination, then that means that the 2020 Rule does, in fact, extend protection against discrimination to LGBTQ individuals via the Rule's incorporation of Title IX by reference." *Washington v. HHS*, No. 20-cv-1105, 2020 WL 5095467, at *8-9 (W.D. Wash. Aug. 28, 2020). In an observation equally applicable to the two plaintiffs in this case, the Washington district court noted that the State of Washington "ma[de] no effort to explain why providers or insurers would be willing to risk revising their practices or policies to discriminate against LGBTQ individuals in light of … *Bostock* and the very arguments that Washington advances in this case." *Id.* at *8. And like plaintiffs here, Washington failed to "provide specific evidence establishing that a third-party provider or insurer planned to discriminate against or limit its healthcare coverage for LGBTQ individuals once the 2020 Rule went into effect." *Id.*

The district court for the District of Columbia reached a similar conclusion. Although the court ultimately found that the plaintiff healthcare providers and organizations had standing to bring some of their claims based on a different theory of injury, it held that "[p]laintiffs ha[d] not established that any future discrimination … would be sufficiently imminent to qualify as a valid injury-in-fact," and that "simply asserting, without any elaboration, that individuals will experience discrimination … does not suffice to demonstrate the substantial probability that discrimination will actually occur as required to establish standing." *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-cv-1630, 2020 WL 5232076, at *18, *20 (D.D.C. Sept. 2, 2020) (alterations and quotation marks omitted). The allegations here are equally insufficient.

Indeed, plaintiffs' theory of injury in this case is even more implausible because they are already protected by state law. Plaintiffs live in New York City, and New York law independently prohibits transgender discrimination by hospitals and insurers. *See* JA7; 10 NYCRR § 405.7(b)(2) (A "hospital shall afford to each patient the right to treatment without discrimination as to race, color, religion, sex, gender identity, national origin, disability, sexual orientation, age, or source of payment."); 11 NYCRR § 52.72(b)(2) ("Discrimination because of sex shall include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, sexual orientation, gender identity or expression, and transgender status."). Because HHS's

new Rule does not preempt those state laws, *see* 85 Fed. Reg. at 37,182, 37,199 & n.236, there is no plausible basis for plaintiffs to assert that they are likely to suffer discrimination in medical care. They reside in a State that already expressly prohibits such discrimination, and they have not alleged any concrete plans to seek medical care in States that lack similar laws. For all of these reasons, plaintiffs cannot show that any discrimination is "imminent" and "certainly impending" as Article III requires. *See Clapper*, 568 U.S. at 409 (emphasis omitted).

2. The district court's contrary conclusion does not withstand scrutiny. The court relied exclusively on plaintiffs' allegations that they have "suffered past discrimination in receiving healthcare," and that "their medical conditions will require them either to interact with at least some of those same medical providers in the future, or to delay or forego treatment." JA273-75. Plaintiffs' alleged instances of past discrimination, however, all took place before the new Rule was even promulgated. *See* JA6; JA75-83 (alleging instances of discriminatory treatment in 1991, 2013, and 2017); JA93-99 (alleging instances of discrimination before 2004 and in 2018). Evidence that, in years past, some medical providers discriminated against plaintiffs for reasons unrelated to the new Rule is insufficient to show that the new Rule will imminently cause more discrimination. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) ("[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy."). That is particularly true where the new Rule simply eliminates prior regulatory definitions and

references the statutory prohibition of sex discrimination in Section 1557. At a minimum, the mere fact that plaintiffs will obtain medical care in the future is not enough to show an imminent likelihood that they will suffer discrimination because of the new Rule.

Nor was the district court on any firmer ground when it relied on plaintiffs' allegation that "the threat of future discrimination will lead them to avoid seeking treatment for extant medical conditions, with possibly life-threatening consequences." JA274. Since plaintiffs have not shown any imminent or likely injury, they also cannot establish standing "merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

The district court also suggested that plaintiffs are likely to suffer harm because the agency stated that its new Rule might have some effect. *See* JA275-76. In particular, the court cited statements that the agency made in its notice of proposed rulemaking and the new Rule's preamble, where the agency "anticipate[d]" that "some—but not all" providers "may revert" to prior policies and practices. *See* 84 Fed. Reg. at 27,876. As the Western District of Washington explained, however, such statements "do[] not 'admit' that discrimination will increase." *Washington*, 2020 WL 5095467, at *9. "[O]ff-handed" statements like those "do[] not measure up to the kind of detailed agency analysis about the expected impact of an agency regulation that courts have relied on to find standing." *Id.* Indeed, the agency expressly stated that it "lack[ed] the data necessary to estimate the number of individuals who

currently benefit from covered entities' policies governing discrimination on the basis of gender identity who would no longer receive those benefits." 85 Fed. Reg. at 37,255. In any event, even if the agency had made a finding that some providers somewhere would change their policies because of the new Rule, plaintiffs "bear[] the burden" to establish that they, in particular, are imminently likely to suffer harm, and this Court has an "independent obligation" to determine that plaintiffs' injury is likely to occur. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 499 (2009). For the reasons explained, plaintiffs have failed to do so—especially in light of their claims about the intervening decision in *Bostock* and the fact that state law already protects them.

B. Plaintiffs Have Not Shown Causation Or Redressability.

1. Plaintiffs also failed to show that any injury is "fairly traceable" to the new Rule, or that such injury could be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (alterations and quotation marks omitted). Plaintiffs take issue with the new Rule's repeal of several provisions in the 2016 Rule, but those provisions had already been vacated by the district court for the Northern District of Texas. *See Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 947 (N.D. Tex. 2019). In that case, a group of providers and States challenged the 2016 Rule that plaintiffs seek to enjoin HHS from repealing. *See* Am. Compl. at 11-21, *Franciscan All.*, 414 F. Supp. 3d 928 (No. 16-cv-00108), Dkt. No. 21. The *Franciscan Alliance* court entered a final judgment vacating "the portions of the [2016] Rule that Plaintiffs challenged." Order at 2,

Franciscan All., 414 F. Supp. 3d 928 (No. 16-cv-00108), Dkt. No. 182; *see Franciscan All.*, 414 F. Supp. 3d at 947.

In short, the Northern District of Texas's vacatur, not HHS's new Rule, eliminated the provisions of the 2016 Rule that plaintiffs say they need to avoid injury. *See* 85 Fed. Reg. at 37,225 (explaining that the new Rule's "effects will be minimal, again due to the fact that the gender identity provisions were vacated from the 2016 Rule by the *Franciscan Alliance* court"). The new Rule's formal rescission of those provisions merely brought the Code of Federal Regulations "up-to-date as to the effect of the [*Franciscan Alliance*] court's order." *See id.* at 37,162-65. To the extent that plaintiffs would suffer injury from the fact that certain provisions of the 2016 Rule are no longer on the books, that injury could not be traced to the new Rule.

For the same reason, this lawsuit cannot redress any such injury. The district court's orders concern the repeal of provisions that the *Franciscan Alliance* court had already vacated. And as the district court recognized, neither the district court nor this Court can overturn the Northern District of Texas's vacatur. *See* JA277. The court's injunctions and stays thus have no real world effect. They merely eliminate the portions of HHS's new Rule that restate the statutory language and formally rescind the vacated provisions of the 2016 Rule. But the injunctions do not resuscitate the vacated provisions, and therefore leave plaintiffs no better off than they were before this lawsuit.

b. The district court nowhere explained why its second preliminary injunction has any effect given the *Franciscan Alliance* court's vacatur. *See* JA295. And as to the court's first preliminary injunction, in which it barred HHS from enforcing the repeal of the 2016 regulatory definition of sex discrimination, the court offered only speculation. It theorized that its injunction might have an effect because it could reinstate regulatory language regarding "sex stereotyping," which the court concluded had not been vacated in *Franciscan Alliance* and could be interpreted to prohibit transgender discrimination. *See* JA277.

Such conjecture provides an insufficient basis for the entry of a preliminary injunction. As the Supreme Court has frequently admonished, it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (quotation marks omitted). And when "a plaintiff's asserted injury … hinge[s] on the response of [a] third party to the government action or inaction," plaintiffs bear a "more difficult" "burden" "to adduce facts showing that [a third party's] choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* at 562 (quotation marks omitted).

Here there is no reason to think that restoring the 2016 regulatory language regarding "sex stereotyping" would redress plaintiffs' alleged injury. For one thing, it is not at all clear that such an application of the "sex stereotyping" language in the 2016 Rule would be consistent with the *Franciscan Alliance* court's order vacating the

2016 Rule's provisions "insofar as the [2016] Rule define[d] 'on the basis of sex' to include gender identity." Order at 2, *Franciscan All.*, 414 F. Supp. 3d 928 (No. 16-cv-00108), Dkt. No. 182 (quotation marks omitted). In any event, as the agency explained in the preamble to the new Rule, "[t]o the extent sex stereotyping is a recognized category of sex discrimination under longstanding Supreme Court precedent," whether or not the regulation explicitly mentions "sex stereotyping" "will not have any material effect on the scope of sex stereotyping claims." 85 Fed. Reg. at 37,239.

The district court's assertion that restoring the 2016 language about sex stereotyping might make some difference is thus too speculative to support plaintiffs' standing (much less injunctive relief). Indeed, even accepting the district court's view that transgender discrimination is a form of discrimination based on sex stereotypes, the court offered no reason to assume that reinstating the "sex stereotyping" language alone would actually ward off discrimination by healthcare providers who would otherwise have discriminated against plaintiffs. Under plaintiffs' theory, healthcare providers are more likely to discriminate against them based solely on the fact that the new Rule no longer explicitly mentions transgender discrimination—despite plaintiffs' view that Section 1557 itself clearly prohibits transgender discrimination after *Bostock*, and despite state law that expressly prohibits such discrimination. In short, plaintiffs' theory of injury is fundamentally incompatible with the district court's theory of redressability: it is simply implausible that providers who are willing to discriminate in

the face of both federal and state laws prohibiting such discrimination would change their minds just because the district court restored regulatory language that reiterates existing case law about sex stereotyping.

II. The District Court Erred in Concluding That Plaintiffs Satisfied the Requirements for a Preliminary Injunction.

A. Plaintiffs Are Not Likely To Succeed in Showing That HHS Acted Arbitrarily by Adopting a New Rule That Merely Paraphrases the Statutory Text.

Plaintiffs are unlikely to succeed on the merits because HHS's decision to eliminate the prior regulatory definition of "discrimination on the basis of sex" and instead rely solely on the statutory language in Section 1557 was reasonable and fully consistent with the statute.

Section 1557 of the Affordable Care Act prohibits federally funded programs and activities from discriminating on the basis of several statutory grounds, including Title IX's prohibition of sex discrimination. In 2016, HHS interpreted Section 1557's prohibition of sex discrimination to prohibit transgender discrimination and adopted regulatory provisions in accordance with that view. But those provisions were enjoined by two courts and later vacated by one of them. In light of that litigation and vacatur, the agency reasonably chose to formally rescind those already-vacated provisions. And although the new Rule's preamble contained statements agreeing with those courts that these provisions of the 2016 Rule were unlawful, HHS noted that the Supreme Court was considering several cases raising the question whether

Title VII's prohibition of employment discrimination "on the basis of sex" encompasses discrimination on the basis of sexual orientation or transgender status, and acknowledged that those cases could inform the future interpretation of Section 1557. For that reason, the agency opted not to have its regulations address whether Section 1557 prohibits transgender discrimination. Instead, the agency chose to paraphrase the statutory language, deferring the question whether the Supreme Court's resolution of this question under Title VII would apply equally to Title IX, and in turn to Section 1557.

1. a. HHS's decision to repeal the vacated 2016 provisions and replace them with a provision restating the statute was not "arbitrary" or "capricious" under the APA. 5 U.S.C. § 706. The standard of review for arbitrary-and-capricious claims is "deferential" and "'narrow'"; courts are to "determine only whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). That deferential standard continues to apply when an agency changes course, so the agency needs only to "display awareness that it is changing position … [and] show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis and citation omitted).

Consistent with that deferential standard of review, the Supreme Court has repeatedly made clear that courts cannot "substitute [their] judgment for that of the [agency]." *Department of Commerce*, 139 S. Ct. at 2569-70. "[T]he choice between reasonable policy alternatives in the face of uncertainty" is for the agency "to make." *Id.* at 2570. Courts therefore may not "ask whether [the agency's] decision was 'the best one possible' or even whether it was 'better than the alternatives.'" *Id.* at 2571.

The provision of the new Rule at issue here readily satisfies this deferential standard. After two courts held that certain provisions of the 2016 Rule interpreting Section 1557 were contrary to the statute, the agency carefully considered its options and, after significant deliberations in protracted notice-and-comment rulemaking, reasonably adopted a new Rule that simply paraphrases the statute. In proposing the new Rule, the agency explained that doing so would "ultimately allow the Federal courts … to resolve any dispute about the proper legal interpretation of [Title IX and] Section 1557 of the Affordable Care Act." *See* 84 Fed. Reg. at 27,873. In that way, the agency would "minimize litigation risk" and "avoid further litigation and uncertainty regarding the implementing regulations." *Id.* at 27, 849-50.

HHS also considered and addressed the fact that the Supreme Court had recently "granted three petitions for writs of certiorari" regarding the proper interpretation of the prohibition of sex discrimination in a different statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). 84 Fed. Reg. at 27,855. HHS acknowledged that "a holding by the U.S. Supreme Court on the definition of

'sex' under Title VII will likely have ramifications for the definition of 'sex' under Title IX." *Id.* But the agency viewed that pending Supreme Court case as yet another reason to "decline[], at this time, to propose its own, definition of 'sex' for purposes of discrimination on the basis of sex in the regulation." *Id.* at 27,849, 27,857.

In the meantime, HHS noted that its new Rule would eliminate the confusion caused by the inconsistencies between its 2016 Rule and the views of other agencies. The Department of Justice had taken the position that "the ordinary meaning of the word 'sex' for purposes of Federal nondiscrimination laws does not encompass sexual orientation or gender identity." 84 Fed. Reg. at 27,856. Moreover, the 2016 Rule's provisions "were inconsistent with (or, at a minimum, unnecessarily duplicated)" HHS's other regulations regarding sex discrimination, as well as regulations promulgated by other agencies. *Id.* at 27,849, 27,873. Repealing the 2016 provisions would therefore "ensure that [the agency's] civil rights regulations are consistent with the views of the Department of Justice, other Federal agencies, and internally." *Id.* at 27,857.

When HHS finalized its new Rule in 2020, theses rationales had only grown stronger. While the agency was considering the new Rule, a court had vacated the provisions in the 2016 Rule that had interpreted Section 1557 to prohibit transgender discrimination. The agency thus adopted the new Rule based on the "policy rationales" explained in its proposed rulemaking a year earlier and to bring "the provisions of the Code of Federal Regulations … up-to-date as to the effect of the [*Franciscan Alliance*] court's order." *See* 85 Fed. Reg. at 37,162-65.

Again, HHS acknowledged that the Supreme Court was considering several cases raising a related issue regarding the interpretation of Title VII, and addressed comments arguing that the agency should delay its changes until after the Supreme Court decided those cases. *See* 85 Fed. Reg. at 37,168. The agency reasonably explained that it did not need to "delay … based on speculation as to what the Supreme Court might say about a case dealing with related issues." *Id.* The new regulations restated statutory text, so the new regulations "would not preclude application of the Court's construction." *Id.* In addition, although the Supreme Court's interpretation of Title VII would "likely have ramifications for the definition of 'on the basis of sex' under Title IX" and Section 1557, the agency noted that a decision about Title VII would not be directly controlling on Section 1557. *See id.* at 37,168, 37,183-86.

The agency's extensive consideration of competing concerns and its explanation for the policy choices it ultimately made easily satisfy the requirements for "reasoned decisionmaking." *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 67 (2d Cir. 2018). On the one hand, HHS was faced with pending legal challenges against its 2016 Rule interpreting Section 1557, a court stay of those regulations, and a court decision that vacated them nationwide. On the other hand, HHS knew that the Supreme Court would likely decide several cases raising a related, though not directly controlling, legal issue in the near future. Under those circumstances, it was entirely reasonable for HHS to adopt a new Rule that simply restated the statute, without

attempting to further delineate the statute's potential application to transgender discrimination. That approach was consistent with the court decisions holding that the 2016 regulations were unlawful, and at the same time ensured that HHS's regulations would be consistent with any future judicial interpretation of Section 1557, including any interpretation following the Supreme Court's decision in *Bostock*.

b. The district court nonetheless held that HHS's new implementation of Section 1557 was arbitrary and capricious on the theory that the agency was required to postpone its rulemaking for the Supreme Court to decide *Bostock*, or was required to withdraw its new Rule from publication in the Federal Register after the Court decided *Bostock*. *See* JA283. In particular, the court faulted HHS because "[b]y its own admission, HHS knew that the case was pending and would have 'ramifications'" and because the agency "had an (admittedly brief) opportunity to re-evaluate its proposed rules after the case was decided." *Id.* The court asserted that the agency could not adopt a regulation that merely restates the statute "without addressing the impact of the Supreme Court's decision in *Bostock*," and that "[s]ince HHS has been unwilling to take that path voluntarily, the Court now imposes it." JA284.

The novel rule imposed by the district court is fundamentally inconsistent with the APA. A cardinal principle of administrative law is that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by

individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); *cf. Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015) (even under strict scrutiny, the government "need not address all aspects of a problem in one fell swoop"). After acknowledging that *Bostock* was pending, HHS was well within its discretion to restate the statute and leave interpretation of Section 1557, and the application of *Bostock* to the healthcare context, to the courts.

Under the APA, HHS was only required to acknowledge the "important aspect[s] of the problem" and provide "good reasons for [its] new policy" of declining to interpret the statute by regulation. *Fox*, 556 U.S. at 515, 552. The agency met those requirements here: it acknowledged prior court decisions holding its 2016 regulations unlawful, the *Franciscan Alliance* court vacatur, policy reasons weighing against duplicative regulations, pending litigation against the agency's 2016 interpretation of the statute (which is still ongoing), and the pending Supreme Court decision in *Bostock*. Having addressed all of the relevant circumstances, the agency made a reasonable choice not to announce a new regulatory definition of discrimination on the basis of sex in Section 1557.

The district court also failed to provide any support for the extraordinary proposition that an agency must always (or even normally) withdraw a rule it has previously submitted for publication when the Supreme Court decides a case that may bear on issues addressed in the rule. The question whether withdrawal and reconsideration are appropriate under the circumstances is a matter of degree that is

largely subject to the informed judgment of the agency. The district court erred in concluding that those actions were required here.

As discussed, *Bostock* and the related Title VII cases the Supreme Court decided on the same day did not address Section 1557. Indeed, the Supreme Court went out of its way to emphasize that "other federal or state laws that prohibit sex discrimination," such as Section 1557 and Title IX, were not "before [it]." *Bostock*, 140 S. Ct. at 1737, 1753. Moreover, as HHS explained in promulgating the new Rule, no matter how *Bostock*'s reasoning might apply to Section 1557, the new Rule is consistent with *Bostock* because it merely restates the statute. And *Bostock* also did not affect the agency's stated policy reasons for adopting the new Rule—including its desire to avoid confusion and duplication of other regulations, as well as valid concerns that a court had already vacated HHS's prior regulations and that HHS was facing litigation over its interpretation of Section 1557 in the *Franciscan Alliance* and *Religious Sisters of Mercy* cases (litigation that continues even now).

At bottom, the district court's ruling reduces to a disagreement with the agency's choice between reasonable alternatives: on the one hand, declining to adopt new regulatory definitions of statutory terms and leaving statutory interpretation to the courts; on the other hand, continuing to wait for a potentially relevant Supreme Court decision and adopting a new interpretation of the statute by regulation in light of that decision. Both of those options were reasonable, but "the choice between reasonable policy alternatives in the face of uncertainty" is for the agency "to make."

Department of Commerce, 139 S. Ct. at 2569-70. Although the district court believed that HHS's choice was not "the best one possible," *id.* at 2570-71 (quotation marks omitted), the court had no license to "substitute its judgment for that of the agency," *Henley v. FDA*, 77 F.3d 616, 620 (2d Cir. 1996) (quotation marks omitted). *See Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985) (an agency action is not arbitrary and capricious unless its rationale "is so implausible that it cannot be ascribed to differing views").

The district court's decision also would lead to incongruous results. Under its reasoning, an agency is barred from taking any action—even as minimal as merely restating a controlling statute—when a pending court case might have "ramifications" for the interpretation of that statute. Such a theory would tie an agency's hands whenever any relevant litigation was pending—even if that litigation is not directly controlling on the issue at hand. And it would make it nearly impossible for an agency to react appropriately to claims of illegality, reasonably re-assess its interpretation of controlling statutes on an ongoing basis, and eliminate regulations that it concludes are unnecessary. Such results are fundamentally incompatible with the limited scope of judicial review under the APA. *See Catawba County v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009) ("The agency was not obliged to stop the entire process because a new piece of evidence emerged. If this were true then the administrative process could never be completed." (quotation marks omitted)); *cf. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 554-55 (1978)

("Administrative consideration of evidence … always creates a gap between the time the record is closed[,] the time the administrative decision is promulgated, and, we might add, the time the decision is judicially reviewed. If … litigants might demand rehearings as a matter of law because some new circumstance has arisen … there would be little hope that the administrative process could ever be consummated." (quoting *Interstate Commerce Comm'n v. Jersey City*, 322 U.S. 503, 514 (1944) (alterations omitted)).

2. The district court's holding that the new Rule is contrary to law is likewise based on a misapplication of the APA. As the district court acknowledged, the new Rule "merely restate[s]" Section 1557. JA281. The new Rule thus cannot possibly be contrary to Section 1557, and that should have been the end of the matter.

The district court acknowledged that this case was not a "typical" one in which "a rule is contrary to law because an agency has attempted to promulgate a rule that countermands a higher authority." JA282; *see* JA281 ("[I]f [the new Rule] merely restate[s] the statutory bases for prohibited discrimination, then how could they be contrary to law?"). But it nonetheless held that the challenged aspect of the Rule is contrary to Section 1557 on the theory that certain language in the new Rule's preamble is inconsistent with *Bostock*.

That conclusion is mistaken. The preamble published in the Federal Register states the agency's reasons for adopting its regulations, but it is not part of the regulations and is not codified in the Code of Federal Regulations. As the district

court itself noted, "language in the preamble of a regulation is not controlling over the regulation itself." JA281 (quoting *Halo v. Yale Health Plan*, 819 F.3d 42, 52 (2d Cir. 2016); *Saint Francis Med. Ctr. v. Azar*, 894 F.3d 290, 297 (D.C. Cir. 2018) (a regulation's preamble "lacks the force and effect of law"). The court asserted that the preamble still rendered the challenged provision contrary to Section 1557 because "the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules." JA281 (quotation marks omitted). But the preamble makes clear that HHS understood its new Rule to be restating the statute, so that it would be consistent with any future judicial interpretation of Section 1557, including the Supreme Court's decision in *Bostock*. *See* 85 Fed. Reg. at 37,168. There is no basis for concluding that the agency understood its regulation to be doing anything other than restating Section 1557.

The district court's other rationales appear to conflate the statutory challenge here with other legal theories. For example, the court stated that the agency "continued on the same path even after *Bostock* was decided," and that "the premise of the repeal was a disagreement with a concept of sex discrimination later embraced by the Supreme Court." JA282. These are arguments related to whether HHS acted arbitrarily and capriciously, not arguments that the new provision is contrary to Section 1557, and they fail for the reasons discussed above. The court similarly stated that "the notion that motivation informs the inquiry is hardly unprecedented," citing a case concerning the Equal Protection Clause. *Id.* (citing *Romer v. Evans*, 517 U.S 620,

632 (1996)). Even if motivation can be relevant in assessing whether a law is consistent with the Equal Protection Clause, the court cited no authority for the proposition that a regulation's consistency with statutory text depends on the agency's motives.

B. Plaintiffs Have Failed To Show Irreparable Harm, and the Balance of Equities and Public Interest Favor the Government.

The rest of the preliminary injunction factors also weigh against the district court's injunctions and stays. "[I]rreparable harm is the single most important prerequisite for the issuance of a preliminary injunction," so "the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (quotation marks omitted). Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not just that it would be "possib[le]." *Winter*, 555 U.S. at 22. For the same reasons that plaintiffs lack Article III standing, they also cannot show likely irreparable injury. As already discussed, the injunction cannot undo the *Franciscan Alliance* vacatur, so plaintiffs are still left without a regulation explicitly prohibiting transgender discrimination; plaintiffs' merits claims about the clear meaning of Section 1557 undercut their assertion that healthcare providers are likely to discriminate against them because of the new Rule simply restating that statute; and plaintiffs live in a State that independently prohibits transgender discrimination.

The balance of equities and the public interest weigh in the government's favor for related reasons. "These factors merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009), and plaintiffs' hypothetical assertion of injury cannot outweigh the harm to the government. "Any time [the government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration and quotation marks omitted). HHS determined that its new Rule was the best way to implement Section 1557 during a time of legal uncertainty, and that its prior regulations had led to confusion. *See* 84 Fed. Reg. at 27,849, 27,857, 27,873. Plaintiffs' implausible theory of irreparable harm does not outweigh the government's legitimate interest in adopting the new Rule.

III. The District Court Abused Its Discretion by Issuing a Nationwide Injunction That Was Not Necessary To Remedy Injuries to the Two Plaintiffs.

The scope of the district court's relief also violates well-established Article III and equitable principles. Nationwide injunctive relief is unnecessary to redress the asserted injuries of the two individual plaintiffs in this case, neither of whom has alleged concrete plans to obtain medical care outside New York City. And as this Court has recognized, unnecessarily broad relief is particularly inappropriate when courts are "confronted with … a volatile litigation landscape" and an unnecessarily broad injunction could "conflict with other courts" considering the same questions. *New York*, 969 F.3d at 88.

1. "The Art[icle] III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Accordingly, an "elementary principle" of standing is that, in the absence of class certification, plaintiffs are "not entitled to relief for people whom they do not represent." *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 730 n.1 (9th Cir. 1983); *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (plaintiffs "lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties"). The Supreme Court has for that reason repeatedly "caution[ed]" that "'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)).

Equitable principles likewise require that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (injunctions should "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" (quotation marks omitted)). It is well established that the scope of a court's statutory authority to enter injunctive relief is circumscribed by the type of relief that was "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). And the tradition of equity inherited from English law was

premised on "providing equitable relief only to parties" because the fundamental role of a court was to "adjudicate the rights of 'individuals.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2427-28 (2018) (Thomas, J., concurring) (alteration omitted) (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

Other equitable principles reinforce this rule when government action is enjoined or stayed. As several Supreme Court Justices have recently recognized, overbroad injunctions create an inequitable "asymmetr[y]" whereby non-parties can claim the benefit of a favorable ruling but are not bound by a loss. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring in the grant of a stay). That means that "a single successful challenge is enough to stay [a] challenged [agency] rule across the country," and "the government's hope of implementing any new policy could face the long odds of a straight sweep." *Id.* Such injunctions also undermine the rule that non-parties cannot assert collateral estoppel as plaintiffs "against the government." *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *see Virginia Soc'y for Human Life Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001). *Mendoza*'s bar is meaningless if the first party granted a favorable ruling against the government can obtain an injunction that extends to non-parties who would otherwise be forced to relitigate the issue.

This Court has further noted the pernicious effects of overbroad relief when the same issues are pending in other jurisdictions. The Court has expressed "concern that a district judge issuing a nationwide injunction may in effect override contrary decisions

from co-equal and appellate courts, imposing its view of the law within the geographic jurisdiction of courts that have reached contrary conclusions." *New York*, 969 F.3d at 88. Thus, "[w]hen confronted with … a volatile litigation landscape," the Court has "encourage[d] district courts to consider crafting preliminary injunctions that anticipate the possibility of conflict with other courts," including through "the limitation of the injunction to the situation of particular plaintiffs or to similarly situated persons within the geographic jurisdiction of the court." *Id.*

Several other courts have also highlighted that overbroad relief harms the judicial system as a whole, even when other cases on the same issue are not yet pending. The Ninth Circuit, for example, has noted that geographically overbroad relief necessarily "deprive[s]" other parties of "the right to litigate in other forums," *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018), causing a "detrimental effect" on the law's development "by foreclosing adjudication by a number of different courts and judges," *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Yamasaki*, 442 U.S. at 702). By its sweeping nature, nationwide relief "stymie[s] . . . robust debate arising in different judicial districts," *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (quotation marks omitted), and thus "deprives the Supreme Court of the benefit it receives from permitting multiple courts of appeals to explore a difficult question before it grants certiorari," *Los Angeles Haven Hospice*, 638 F.3d at 664 (citing *Mendoza*, 464 U.S. at 160). The Fourth Circuit has concluded the same, explaining that overbroad relief "substantially thwart[s] the development of

important questions of law by freezing the first final decision rendered on a particular legal issue." *Virginia Soc'y for Human Life Inc.*, 263 F.3d at 393 (quoting *Mendoza*, 464 U.S. at 160)).

2. The district court's order is inconsistent with the foregoing constitutional and equitable principles. Plaintiffs are two individuals who live in New York City and have not alleged any imminent or concrete plans to obtain medical care elsewhere. The court provided no reason why the two individual plaintiffs in this case need relief extending beyond their city of residence—much less relief extending to all medical providers nationwide. Its decision to nonetheless award nationwide relief was an abuse of discretion.

The district court's error is especially pronounced in light of related litigation completed or pending in courts all across the country. After the district court's decision here, for example, the Western District of Washington denied a preliminary injunction because the plaintiff in that case failed to show that the new Rule would increase discrimination against transgender patients. *See Washington*, 2020 WL 5095467, at *1, *8-9. Yet because the district court here effectively awarded relief to the entire State of Washington, a co-equal district court's ruling is a nullity. The same issues are also pending in the D.C. Circuit and the District of Massachusetts, and litigation concerning HHS's 2016 regulations is pending in the Fifth Circuit and the District of North Dakota, where other plaintiffs seek to enjoin HHS from adopting the interpretation of Section 1557 that plaintiffs in this case desire. "When

confronted with such a volatile litigation landscape," this Court has made clear that district courts should avoid needlessly overbroad injunctions. *New York*, 969 F.3d at 88. The district court failed to apply that principle here.

CONCLUSION

For the foregoing reasons, the district court's preliminary injunctions and stays should be vacated, or at a minimum narrowed in scope.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,389 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos
Joshua Dos Santos

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Joshua Dos Santos
Joshua Dos Santos

ADDENDUM

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42 U.S.C. § 18116

§ 18116. Nondiscrimination

(a) In general

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

(b) Continued application of laws

Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of Title 29, or the Age Discrimination Act of 1975, or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

(c) Regulations

The Secretary may promulgate regulations to implement this section.

20 U.S.C. § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

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 that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal

appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

45 C.F.R. § 92.2

§ 92.2. Nondiscrimination requirements.

(a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.

(b) The grounds are the grounds prohibited under the following statutes:

(1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (race, color, national origin);

(2) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (sex);

(3) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) (age); or

(4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (disability).