

In the Supreme Court of the United States

SUSAN NEESE AND JAMES HURLY,
Petitioners,

v.

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

**APPLICATION TO EXTEND TIME
TO FILE A PETITION FOR WRIT OF CERTIORARI**

**Directed to the Honorable Samuel A. Alito Jr.,
Circuit Justice for the United States Court of Appeals for the Fifth Circuit**

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February 27, 2025

Counsel for Petitioner

To the Honorable Samuel A. Alito Jr., as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Petitioners Susan Neese and James Hurly respectfully request a 60-day extension of time to file their petition for writ of certiorari. This request, if granted, would extend the deadline from March 17, 2025, to May 16, 2025. The petitioner will be asking this Court to review a judgment of the U.S. Court of Appeals for the Fifth Circuit, issued on December 16, 2024, which vacated the district court’s judgment in favor of the petitioners and dismissed the petitioners’ claims for lack of Article III standing. *See App. A.* The petitioners did not seek panel rehearing or rehearing en banc, although Judge Ho sua sponte called for an en banc poll which failed by a 16-1 vote. *See App. B.* The Court’s jurisdiction to review the judgment rests on 28 U.S.C. § 1254.

The petitioners request this extension of time for the following reasons:

1. The petitioners are challenging the legality of a guidance document issued by the Biden Administration on May 10, 2021, which announces that the Department of Health and Human Services (HHS) will “interpret and enforce” section 1557 of the Affordable Care Act to prohibit “discrimination on the basis of sexual orientation” and “discrimination on the basis of gender identity.” The petitioners will be asking this Court to declare the case moot and vacate the Fifth Circuit’s judgment and opinion under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see also Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023). The Trump Administration and newly confirmed Secretary Kennedy are likely to take additional actions between

March 17, 2025, and May 16, 2025, to undo the Biden Administration’s policies on transgender-related anti-discrimination edicts, which will strengthen the case for mootness and vacatur under *Munsingwear*. It will therefore further judicial economy for this Court to extend the deadline for petitioning for certiorari so that the parties can brief the implications of any actions taken between March 17, 2025, and May 16, 2025.

2. Counsel for the petitioners is facing an unusually heavy workload during the months of February and March. He is representing the respondents in *Kennedy v. Braidwood Management Inc.*, No. 24-316, which is scheduled for oral argument before this Court on April 21, 2025, and he must devote his energies and attention to preparing the respondents’ brief on the merits, which is due on March 20, 2025—three days after the current deadline for the certiorari petition. Counsel for the petitioner works as a solo practitioner and is the sole attorney handling the respondents’ brief on the merits on *Braidwood* and the certiorari petition in this case.

For these reasons, the petitioners respectfully ask the Court to extend their time to file the petition for certiorari, up to and including May 16, 2025.

Respectfully submitted.

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I certify that a copy of this document has been has been sent by e-mail and Federal Express to:

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/s/ Jonathan F. Mitchell
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App. A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 16, 2024

Lyle W. Cayce
Clerk

No. 23-10078

SUSAN NEESE; JAMES HURLY,

Plaintiffs—Appellees,

versus

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

Defendants—Appellants.

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

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

PER CURIAM:

Dr. Susan Neese and Dr. James Hurly (“Plaintiffs”) brought a pre-enforcement challenge to the Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972 (“Notification”), which was issued by the Department of Health and Human Services (“HHS”) in May 2021. The district court granted summary judgment for Plaintiffs. Because Plaintiffs lack Article III standing, we VACATE the district court’s judgment and REMAND with instructions to dismiss Plaintiffs’ claims for lack of jurisdiction.

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

Both Plaintiffs are doctors in Amarillo, Texas. Dr. Neese practices general internal medicine for patients from age 16 to 105 years old. Dr. Hurly is a pathologist who diagnoses patients based on laboratory analyses. They both claim to be “unwilling to provide gender-affirming care, in at least some situations, to patients who assert a gender identity that departs from their biological sex.”³ For Dr. Neese, these situations include: (1) her categorical unwillingness to assist minors with transitioning or prescribe them puberty blockers or hormone therapy (which she explained is not within her medical specialty); and (2) her insistence that transgender patients or patients with gender dysphoria obtain preventive care consistent with their biological sex, such as a biological female who identifies as a man (but whose body remains female) undergoing a pelvic examination to check for cervical or ovarian cancer. For Dr. Hurly, these situations include informing a biological male who identifies as a woman of her prostate cancer diagnosis and need for

¹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

² See 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a).

³ The parties agree that Plaintiffs only assert an injury caused by the portion of the Notification that prohibits discrimination based on gender orientation.

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treatment. Put another way, the doctors want to be sure that the physical bodies of their patients are cared for properly.

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

We always have jurisdiction to determine jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Questions of standing are reviewed de novo. *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 236 (5th Cir. 2010). In order to have standing, a plaintiff must have suffered an injury that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation omitted). The right to pre-enforcement review is qualified and permitted only “under circumstances that render the threatened enforcement sufficiently imminent.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); see *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 49 (2021).

Plaintiffs have not met their burden to establish standing in this case because they have not shown how their conduct constitutes gender-identity discrimination under any plausible reading of the Notification. Plaintiffs themselves do not view their conduct as gender-identity discrimination, nor do they offer any evidence that HHS will view it as such. They have valid, non-discriminatory reasons for their medical practices, including that acting

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otherwise would be malpractice or would require them to provide services outside of their specialty areas. Lastly, their current practices have not been chilled or otherwise affected, and there is no evidence that an enforcement proceeding is imminent. *Cf. Braidwood Mgmt. Inc. v. EEOC*, 70 F.4th 914, 929 & n.27 (5th Cir. 2023) (holding plaintiffs had standing to bring pre-enforcement challenge where the EEOC previously brought an enforcement action under similar circumstances).

Plaintiffs have thus failed to show that they are actually violating the Notification, much less that they face a credible threat of enforcement. They therefore do not have standing.⁴ Accordingly, we VACATE the district court's judgment and REMAND with instructions to dismiss Plaintiffs' claims for lack of jurisdiction.

⁴ Among other things, the Government challenged the district court's conclusion that the Notification was a final agency action and that *Bostock*, 140 S. Ct. at 1754, where the Supreme Court held that Title VII's ban on discrimination "because of . . . sex" prohibits an employer from firing an employee because that employee is homosexual or transgender, does not apply to Title IX or § 1557 of the Affordable Care Act. Because we conclude Plaintiffs lack standing, we do not reach the other issues raised in this appeal.

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Edith Hollan Jones, concurring:

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

Specifically, HHS judicially admits and confirmed at oral argument that "[P]laintiffs do not explain how a medical provider's care based on a transgender patient's physiological sex characteristics could be considered gender-identity discrimination, and HHS has never taken the position that such conduct constitutes gender-identity discrimination." HHS further acknowledges that the proposed rule interpreting section 1557 [the rule was stayed before it took effect] would not "'prohibit a covered entity from treating an individual for conditions that may be specific to their sex characteristics,' such as treating a transgender man with a pregnancy test." [citing 87 Fed. Reg. at 47,866]. HHS also reaffirmed at oral argument that "nothing in Section 1557 has ever been taken to mean that a physician must provide services outside their [sic] area of specialty." In sum, nothing in the briefing or argument by HHS implies that the plaintiffs faced a credible threat of investigation or losing federal funds based on their described medical practices.

United States Court of Appeals

FIFTH CIRCUIT
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CLERK

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December 16, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-10078 Neese v. Becerra
USDC No. 2:21-CV-163

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 39, 40, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Appellees pay to Appellants the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

A rectangular box containing a handwritten signature in black ink that reads "Melissa Mattingly".

By: _____
Melissa V. Mattingly, Deputy Clerk

Enclosure(s)

Ms. Alexandra Z. Brodsky
Mr. John J. Bursch
Ms. Kara Dansky
Mr. Charles William Fillmore
Mr. Gene Patrick Hamilton
Mrs. Ashley Cheung Honold
Mr. Christopher Lee Jensen
Mr. Jonathan F. Mitchell
Mr. Jeremy Samuel Bloch Newman
Mr. Joseph R. Palmore
Mr. David Peters
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App. B

United States Court of Appeals
for the Fifth Circuit

No. 23-10078

United States Court of Appeals
Fifth Circuit

FILED

January 31, 2025

SUSAN NEESE; JAMES HURLY,

Lyle W. Cayce
Clerk

Plaintiffs—Appellees,

versus

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

Defendants—Appellants.

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

ORDER ON REHEARING EN BANC

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

PER CURIAM:

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

In the en banc poll, one judge voted in favor of rehearing (JUDGE HO), and sixteen judges voted against rehearing (CHIEF JUDGE ELROD, and JUDGES JONES, SMITH, STEWART, RICHMAN, SOUTHWICK,

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HAYNES, GRAVES, HIGGINSON, WILLETT, DUNCAN, ENGELHARDT, OLDHAM, WILSON, DOUGLAS, and RAMIREZ).

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

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

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

But let’s suppose, as our dissenting colleague argues, that there was some way to make a case for Dr. Neese’s standing. *Post* at 3–6. Even so, en banc would have been pointless. That is for the simple reason that the challenged guidance has been superseded, not once but twice.

Over six months ago, the Biden Administration codified the guidance in a Final Rule, effective July 5, 2024. *See* HHS, *Final Rule: Nondiscrimination in Health Programs and Activities*, 89 FED. REG. 37522 (May 6, 2024). That new rule is now under challenge in at least three district

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

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courts, two in this circuit. *See Texas v. Becerra*, 2024 WL 3297147 (E.D. Tex. July 3, 2024); *Tennessee v. Becerra*, 2024 WL 3283887 (S.D. Miss. July 3, 2024); *Florida v. Dep't of Health & Human Servs.*, 8:24-CV-0108 (M.D. Fla. July 3, 2024). Those courts can address the issues posed here, but on a full administrative record and without the standing pitfalls presented by this case.

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

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

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

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

I concur in the denial of en banc rehearing.

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

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

In *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Supreme Court held that transgender discrimination constitutes sex discrimination under Title VII of the Civil Rights Act of 1964. *Bostock* has been heralded by some as a landmark decision—and derided by others as an act of judicial “legislation.” *Id.* at 683 (Alito, J., dissenting). *Cf. Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 333 (5th Cir. 2019) (Ho, J., concurring). Of course, we are duty-bound to faithfully apply *Bostock* as an inferior court, regardless of one’s views on the matter. *See, e.g., Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595 (5th Cir. 2021) (applying *Bostock*). But we are not required to extend it. To the contrary, “we should decide every case faithful to the text to the maximum extent permitted by a faithful reading of binding precedent.” *Hamilton v. Dallas County*, 79 F.4th 494, 506 (5th Cir. 2023) (Ho, J., concurring).

I agree with the district court that nothing in federal law (or *Bostock*) requires physicians to help enable minors to transition from their biological sex to the opposite sex. A panel of our court vacated that judgment, however, for lack of Article III standing. I disagree and accordingly dissent from the denial of rehearing en banc in this obviously important case.⁴

⁴ A brief response to my concurring colleagues: The fact that Executive Branch officials have dutifully done their job doesn’t mean that we needn’t do ours. Nor is our job obviated by the fact that Plaintiffs calculated (correctly, as it turns out) that a rehearing petition would not be an efficient use of their resources. Our rules plainly authorize us to rehear cases en banc on our own motion, precisely to alleviate litigants of unnecessary litigation burdens. *See* FED. R. APP. PROC. I.O.P. 40 (“Requesting A Poll On Court’s Own Motion”). The only question is whether a particular case warrants en banc.

By denying rehearing en banc, our court today leaves on the books a published, precedential ruling that overturns the district court’s dutiful efforts and validates administrative overreach in an area of profound sensitivity. I’ve previously expressed my concerns about allowing government officials to engage in procedural stratagems to avoid

I.

Section 1557 of the Affordable Care Act incorporates and applies Title IX of the Educational Amendments of 1972 to any health program or activity that receives federal financial assistance. *See* 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a).

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

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

And the same logic applies here. “[T]he fact that only transgender individuals experience gender dysphoria does not mean the exclusions discriminate based on transgender status, any more than the fact that ‘only women can become pregnant’ made the exclusion in *Geduldig* facially discriminatory.” *Kadel v. Folwell*, 100 F.4th 122, 174 (4th Cir. 2024) (Richardson, J., dissenting). *See also id.* (“As in *Geduldig*, the challenged exclusions do not deny coverage to anyone because of their sex or transgender status. Instead, they merely decline coverage for a particular

judicial review. *See U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677 (5th Cir. 2023) (Ho, J., dissenting) (citing *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring)). Our decision today continues the pattern.

risk: gender dysphoria. And *Geduldig* held that a health plan that declines to cover a risk that only members of a protected class face does not facially classify people based on their membership in that class.”) (cleaned up); Oral Arg. Tr. 21, *United States v. Skrmetti*, No. 23-477 (2024) (“The Court has addressed . . . how an equal protection claim should be analyzed when the law in question treats a medical condition or procedure differently based on a characteristic that is associated with just one sex. And that was *Geduldig* in 1974, reaffirmed in *Dobbs* in 2022.”) (quoting Justice Alito).

II.

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

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

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

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

Her concern is well taken. In 2021, HHS issued a formal notification that it would construe section 1557 consistent with the Supreme Court’s interpretation of Title VII of the Civil Rights Act of 1964 in *Bostock*. 86 Fed. Reg. 27984 (2021). And there is little doubt what that means. During the course of this litigation, HHS has not denied that it reads *Bostock* in the

manner that Dr. Neese fears. To the contrary, it has been the official position of the United States that physicians who are able but unwilling to enable minors to transition to the opposite sex are guilty of sex discrimination.

Last year, HHS promulgated a rule indicating that doctors receiving federal funds “must not” “[d]eny or limit health services sought for purpose of gender transition or other gender-affirming care that the covered entity would provide to an individual for other purposes if the denial or limitation is based on an individual’s sex assigned at birth, gender identity, or gender otherwise recorded.” 45 C.F.R. § 92.206(b)(4).

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

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

III.

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

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

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

To be sure, her declaration also says that providing these services to 16- and 17-year olds is “not my area of specialty.” But Dr. Neese explains what she means by that. She says that she is “not comfortable . . . due to the complexity of the medical and emotional issues.” After all, “I do not believe the brains of minors are fully mature or that they fully understand the ramifications of their actions. Most of the other transgender patients who have come to me have already transitioned and I maintain their care.”

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

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

IV.

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

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

* * *

I respectfully dissent from the denial of rehearing en banc.

United States Court of Appeals

FIFTH CIRCUIT
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January 31, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-10078 Neese v. Becerra
USDC No. 2:21-CV-163

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

Ms. Alexandra Z. Brodsky
Mr. John J. Bursch
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Mr. Charles William Fillmore
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Mrs. Ashley Cheung Honold
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