IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE RELIGIOUS SISTERS OF MERCY, ET AL., *Plaintiffs-Appellees*, v. XAVIER BECERRA, ET AL., *Defendants-Appellants.*	No. 21-1890

APPELLEES' JOINT RESPONSE TO ORDER REGARDING HHS'S SUBMISSION OF PROPOSED RULE

This Court asked the parties to address what effect, "if any," a new proposed rule implementing Section 1557 could have on this appeal. The answer is: none.

The Supreme Court has repeatedly held that issuance of a proposed rule doesn't affect the justiciability of a case challenging a final rule—even when the proposed rule would completely "rescind" the challenged rule. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617, 628 n.5 (2018). This is because a proposed rule is just that—a proposal—that may never be finalized at all. Those cases are controlling here.

The stays in *Walker* and *Whitman-Walker* only underscore this conclusion. HHS obtained those stays on the premise that its forthcoming rule would satisfy the *Walker* and *Whitman-Walker* plaintiffs—who have

specifically argued that the requirement to perform and insure gender transitions must extend to "religiously affiliated hospitals" like Plaintiffs, without "religious exemptions." Compl. at ¶¶119-30, *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-1630 (D.D.C. June 22, 2020), ECF No. 1. So even if speculation about the proposed rule were relevant—and it isn't—that would only confirm the need for relief here. That may be why, despite an appeal based entirely on supposed justiciability issues, HHS has never once suggested its new rule would have any effect on this appeal.

Six years, three administrations, and three agency rulemakings is long enough for Plaintiffs to remain under the Government's sword of Damocles. The Court should proceed to a decision and affirm.

1. The Supreme Court has repeatedly considered whether a new proposed rule affects the justiciability of an ongoing lawsuit—and repeatedly concluded it does not.

In *National Association of Manufacturers v. Department of Defense*, the plaintiffs challenged the EPA's Waters of the United States Rule. While the case was pending in the Supreme Court, the EPA issued a proposed rule that, "once implemented, would rescind" the challenged rule. 138 S.Ct. at 628 n.5. Yet the Supreme Court rejected any notion that this development rendered the case nonjusticiable or otherwise affected the appeal. The Court explained that because the current "Rule remains on the books for now, the parties retain 'a concrete interest' in the outcome of this litigation, and it is not 'impossible for a court to grant any effectual

relief … to the prevailing party.'" *Id.* (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

Likewise, in *West Virginia v. EPA*—decided just last week—parties challenged the "Clean Power Plan rule" promulgated by the Obama Administration. On appeal, the Biden Administration represented it had "no intention of enforcing" this rule and instead intended "to promulgate a new Section 111(d) rule"—and then claimed the case was no longer justiciable. ___ S.Ct. ___, No. 20-1530, 2022 WL 2347278, at *11 (June 30, 2022). But the Supreme Court disagreed. The agency had a "heavy" burden to make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"—yet the "Government 'nowhere suggests that if this litigation is resolved in its favor it will not' reimpose" a new rule adopting the same "approach" as the previous one. *Id.*

These precedents are dispositive here; indeed, this is an even easier case. First, as in *National Association*, here, too, the 2016 and 2020 Rules "remain on the books[]," notwithstanding HHS's new draft. 138 S.Ct. at 628 n.5. But here, Plaintiffs sought (and obtained) an injunction protecting them not only against HHS's enforcement of the *2016 and 2020 Rules*, but also against its enforcement of *Section 1557 itself* to require them to perform and insure gender transitions. A809-10. No HHS rule, of course, could "rescind" the statute, so that injunction would constitute "effectual relief" no matter what the draft rule does with the 2016 and 2020 Rules. 138 S.Ct. at 628 n.5; *see* Sisters of Mercy Br.35-37; CBA Br.22, 27-29.

Ditto the EEOC, which hasn't promised future agency guidance at all and right now interprets Title VII to require gender-transition coverage in violation of Plaintiffs' RFRA rights.

Similarly, like the EPA in *West Virginia*, the Government has made no showing that a new rule won't take the same "approach" challenged here, 2022 WL 2347278, at *11—*i.e.*, requiring Plaintiffs to perform and insure gender transitions or else incur liability. In *West Virginia*, however, the agency had at least represented it "ha[d] no intention of enforcing" the current rule in the interim, *id.*; here, neither agency has done any such thing—to the contrary, they have repeatedly promised robust enforcement, and repeatedly declined express invitations to disavow enforcement against religious objectors like Plaintiffs. Sisters of Mercy Br.40-41; *see also* CBA Br.29-30, 32. Under *National Association* and *West Virginia*, then, this is an *a fortiori* case.*

* In addition to demonstrating that the draft proposed rule doesn't change the justiciability analysis here, *West Virginia* also confirms the district court's justiciability analysis is correct. In *West Virginia*, although the Trump Administration attempted to repeal the Obama-era rule that injured the petitioner states, the Supreme Court determined the case remained justiciable because the lower court had "vacated … [this] repeal, and accordingly purport[ed] to bring the Clean Power Plan back into legal effect." 2022 WL 2347278, at *9-11. The same is true here: although "HHS tried to repeal the 2016 Rule's explicit prohibition on gender-identity discrimination," "that repeal never took effect," since the *Walker* and *Whitman-Walker* courts "entered partially overlapping preliminary injunctions that collectively reinstate" the relevant provisions of the 2016 Rule. *Sisters of Mercy v. Azar,* 513 F. Supp.

Nor are *National Association* and *West Virginia* alone. This Court has likewise held that "the possibility" that an agency "could promulgate a new [administrative rule] before implementation does not prohibit [a plaintiff] from challenging it." *City of Kennett v. EPA*, 887 F.3d 424, 432 (8th Cir. 2018). In *City of Kennett*, a city challenged a regulation as unlawful for too stringently regulating the city's pollutants. The district court dismissed the case based on standing and ripeness because the agency had stated its "intention" to review the pollutant criterion before implementing the regulation. But this Court reversed on both grounds. The Court concluded that the agency's "intention" was insufficient to defeat standing, *id*. at 431-32, and that the case was ripe for review because the regulation "ha[d] not changed," and "the chance of a change … d[id] not warrant delay." *Id*. at 433-34.

Courts around the country have long reached the same conclusion: agencies shouldn't be "permit[ted] … to escape review … solely by the instigation of new rulemaking proceedings which may or may not" obviate the plaintiff's claims. *El Paso Elec. Co. v. FERC*, 667 F.2d 462, 467 (5th Cir. 1982); *see also, e.g.*, *Vanscoter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990) ("The protracted nature of agency proceedings and the

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3d 1113, 1138 (D.N.D. 2021). Indeed, this case is even easier than *West Virginia* on this score, too, since here, "Plaintiffs face potential consequences … even without the injunctions" in *Walker* and *Whitman-Walker*, because their conduct is *also* arguably proscribed by the 2020 Rule and Section 1557 themselves. *Id.* at 1138-39; *see also id.* at 1141 (same analysis for Title VII).

uncertainty as to whether and when the proposed regulation may be adopted preclude a finding of mootness."); *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1044 (7th Cir. 1987) ("Not only have the proposed regulations not been adopted, but they have never been tested in practice.… That the defendants have reconsidered the regulations about which the plaintiffs complain does not mean [they] have eliminated the alleged deficiencies.").

And unsurprisingly so. For one thing, a proposed rule is, after all, "simply a proposal" that may never be finalized at all. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007). Moreover, even when a proposed rule *is* finalized, it often takes significant time—all while Plaintiffs must implement policies and plan insurance coverage. In this very case, for example, it took *over two years* from the time HHS's 2020 Rule was submitted to OIRA, *see* SA310 (draft proposed rule submitted April 13, 2018), to the time it was finalized, *see* 85 Fed. Reg. 37,160 (June 19, 2020). Thus, deferring to proposed rules would leave Plaintiffs "beneath the sword of Damocles" indefinitely—which is just what a pre-enforcement challenge is designed to prevent. *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013).

Under settled law, HHS's draft proposed rule has no effect on this appeal. This Court should affirm.

2. The stays in *Walker* and *Whitman-Walker* don't change this result; if anything, they support it. First, *Walker* and *Whitman-Walker* involve

different claims in a different posture from this case. Specifically, they involve Administrative Procedure Act challenges to the 2020 Rule, alleging that Rule is inconsistent with Section 1557—challenges that may well be obviated if that Rule is superseded by a new one. *See Sisters of Mercy*, 513 F. Supp. 3d at 1143-45. This appeal, by contrast, involves a RFRA challenge seeking an exemption not from any particular agency rule, but from application of *Section 1557 and Title VII themselves* to require Plaintiffs to perform or insure gender transitions—an exemption that would still have work to do even if the 2016 and 2020 Rules were superseded in their entirety (indeed, even if they had never existed at all). Thus, the stays in *Walker* and *Whitman-Walker* are inapposite here.

But to the extent they are relevant at all, they only support injunctive relief. Indeed, the *Walker* and *Whitman-Walker* courts have maintained stays precisely because HHS apparently intends the new rule to address the *Walker* and *Whitman-Walker* plaintiffs' concerns—*i.e.*, requiring covered entities to provide "affirming health care," and eliminating so-called "discrimination at the hands of religiously affiliated providers" like Plaintiffs here. *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 20-22 (D.D.C. 2020); *see also Walker v. Azar*, 480 F. Supp. 3d 417, 424-25 (E.D.N.Y. 2020) ("discrimination" includes refusing to facilitate "gender confirmation surgery" or to prescribe cross-sex hormones). The stays thus only reinforce what the district court found and what has been true since Plaintiffs filed their complaints: if Plaintiffs adhere to their religious

exercise of declining to perform and insure gender transitions, they face a credible threat of punishment.

In fact, the *Whitman-Walker* court was explicit on this score, saying the litigation could remain paused since "Defendants … have given [the *Whitman-Walker*] Plaintiffs reason to believe that they will soon act to address their concerns," and HHS's "actions" under the current Administration "demonstrate that HHS shares many of [those] concerns." *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-1630, 2021 WL 4033072, at *3 (D.D.C. Sept. 3, 2021). And the *Whitman-Walker* court was amply justified in concluding as much, as the current Administration has made clear that it understands Section 1557 to impose the same mandate as the 2016 Rule, and has refused to recognize any religious exemption. *See* Sisters of Mercy Br.36-37, 40; CBA Br.19-20.

As Plaintiffs have explained, President Biden campaigned on enforcing Section 1557 on behalf of "the LGBTQ+ community" and "revers[ing]" "religious exemptions" for "medical providers." A738. On Inauguration Day, President Biden issued an Executive Order declaring that "discrimination on the basis of gender identity" in "healthcare" is prohibited. 86 Fed. Reg. 7023 (Jan. 20, 2021). In May 2021, HHS issued a Notification of Interpretation and Enforcement stating it "interpret[s] and enforce[s] Section 1557[]" to prohibit "discrimination on the basis of gender identity," regardless of any implementing rule. 86 Fed. Reg. 27,984, 27,985 (May 25, 2021). In June 2021, the EEOC affirmed that *Bostock*

"reiterat[es] [its] established positions" on gender-identity discrimination under Title VII. CBA Br.21. And the same month, the Government filed a brief explaining the Administration's view that gender-identity discrimination includes conduct just like Plaintiffs' here—permitting medical treatments for non-transition purposes while prohibiting them for transition purposes. Sisters of Mercy Br.36.

Most recently, HHS issued a "Guidance" document on "Gender Affirming Care," *see* https://perma.cc/LX26-59QR (Mar. 2, 2022), calling "attempts to restrict" these procedures "dangerous" and inviting "[p]arents or caregivers who believe their child has been denied … gender affirming care … on the basis of that child's gender identity" to file a Section 1557 complaint. *Christian Emps. All. v. EEOC*, No. 21-195, 2022 WL 1573689, at *4 (D.N.D. May 16, 2022) (finding RFRA claims justiciable and entering injunction against HHS and the EEOC). And HHS has "admitted there have been complaints that have likely gone through the conciliation process" already. *Id.* at *5. Moreover, courts around the country have concluded that categorically refusing to perform or insure gender transitions—as Plaintiffs do—violates Section 1557 and Title VII, regardless of any administrative rule, and even when the refusal is religiously based. *Hammons v. Univ. of Md. Sys. Corp.*, 551 F. Supp. 3d 567, 591 (D. Md. 2021) (Catholic hospital and CBA member violated Section 1557 by refusing gender-transition procedure); Sisters of Mercy Br.35-36; *see also* Pls.' Rule 28(j) Not. (May 3, 2022); Appellees' Br. at 22-24 & n.1,

Franciscan All., Inc. v. Becerra, No. 21-11174 (5th Cir. June 10, 2022) (collecting cases).

These developments simply confirm that Plaintiffs' conduct is still proscribed *now* and Plaintiffs still face a credible threat of enforcement *today*, as they have at least since the 2016 Rule—rendering this case fully justiciable. Sisters of Mercy Br.30-50; CBA Br.24-37. And HHS and the EEOC have given no indication that the new proposed rule will reverse the interpretations of Section 1557 and Title VII articulated repeatedly by the 2016 Rule, by federal courts, and by the current Administration, including just months ago.

Indeed, perhaps the clearest indication that the new proposed rule won't change the burden on Plaintiffs' religious exercise is that, despite vigorously litigating this appeal on Article III grounds, the agencies have never suggested that the new Section 1557 rule would undermine this case's justiciability. HHS announced to the *Whitman-Walker* court more than a year ago—in May 2021—that "it intends to initiate a rulemaking proceeding on Section 1557," which "will provide for the reconsideration of" the provisions challenged in the 2020 Rule. Joint Status Report at 2, *Whitman-Walker*, No. 20-1630 (D.D.C. May 14, 2021), ECF No. 71. By July 2021, HHS told the *Walker* court it was "working diligently and making substantial progress in efforts to promulgate a new Section 1557 rule," and that it "anticipates issuing a Notice of Proposed Rulemaking

in early 2022." Letter Br. at 3, *Walker*, No. 20-2834 (E.D.N.Y. July 16, 2021), ECF No. 39.

Yet at no point in this appeal—not in the opening brief (filed June 2021), nor the reply (October), nor at oral argument (December), nor in any post-argument filing (like the agencies' two 28(j) letters in May 2022)—has the Government even mentioned the anticipated new rule, much less offered any argument that it bolsters the justiciability arguments it has urged in this appeal. That silence—from the only party before the Court who actually knows what the new rule says, and could inform the Court of its content at any time—speaks volumes.

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The Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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