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August 1, 2022

VIA CM/ECF

Lyle W. Cayce, Clerk of Court
United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130

Re: *Franciscan Alliance, Inc. v. Becerra* (No. 21-11174)
Response to Rule 28(j) Notice of Supplemental Authority:

HHS, Notice of Proposed Rulemaking (NPRM),
Nondiscrimination in Health Programs and Activities (July 25, 2022)

Dear Mr. Cayce:

ACLU (but not HHS) cites HHS's week-old NPRM, claiming it helps their appeal. Not so.

The Supreme Court and this Court have repeatedly held that issuance of a proposed rule doesn't affect justiciability of a lawsuit challenging agency action—even if the proposed rule would completely "rescind" the challenged action. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617, 627 n.5 (2018); *West Virginia v. EPA*, 142 S.Ct. 2587, 2607 (2022); *El Paso Elec. Co. v. FERC*, 667 F.2d 462, 467 (5th Cir. 1982) (agencies shouldn't be "permit[ted] … to escape review … solely by the instigation of new rulemaking proceedings"). So the NPRM has no bearing on this appeal.

Indeed, HHS effectively admitted as much when the Eighth Circuit ordered supplemental briefing on this very issue. *See* Letter, *Religious Sisters of Mercy v. Becerra*, No. 21-1890 (July 6, 2022), attached as Exhibit A; Appellees' Joint Response, *id.*, attached as Exhibit B.

Regardless, the NPRM's content only underscores this controversy's continuing vitality. The NPRM proposes to "reinstate" "the same approach" "identical to the 2016 Rule," requiring covered entities to perform transitions and abortions. *See* NPRM 14, 57-58, 108-12, 132-33, 144, 150, 172. Contra ACLU (n.1), it likewise prohibits "a categorical [insurance] coverage exclusion." NPRM 150. And it again refuses to incorporate Title IX's religious exemption—or any categorical religious or abortion exemption (NPRM 47-54, 172-73)—though the district court here invalidated the 2016 Rule for such refusal. The NPRM simply "disagree[s] with" the district court's decision, saying it "does not bind this new rulemaking," NPRM 172-73—illustrating exactly why Plaintiffs need (and received) the injunction at issue.

Nor does the religious notification "process" (ACLU 1) change anything. The NPRM says HHS needn't respond to a religious objector if HHS lacks "a sufficiently concrete factual basis for making a determination"—which simply codifies its position throughout this litigation. *Id.* at 193, 306. So the proposed rule would keep Plaintiffs in precisely the position they've occupied since 2016: mandated to perform and insure gender transitions, with no exemption, subject to massive financial penalties.

The Court should affirm.

Word Count: 347

Sincerely,

/s/ *Joseph C. Davis*

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Exhibit A

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VIA CM/ECF

July 6, 2022

Mr. Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
Room 24.329
St. Louis, MO 63102

RE: *Religious Sisters of Mercy v. Becerra*, No. 21-1890 (8th Cir.)

Dear Mr. Gans:

Defendants write in response to the Court's June 21, 2022 order directing the parties to "submit responses on what, if any, effect HHS's submission of the proposed rule has on the current appeal." Order, at 2. The forthcoming notice of proposed rulemaking (NPRM) underscores that the district court's anticipatory injunctions were premature. This Court should proceed to a decision and vacate the judgment of the district court.

As the Court noted, the Department of Health and Human Services (HHS) intends to issue an NPRM proposing to revise its regulations implementing Section 1557 of the Affordable Care Act. The draft NPRM has been submitted to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), but HHS has not yet issued the NPRM.

The submission of the draft NPRM to OIRA highlights why the district court's injunctions are at odds with core Article III and equitable principles: those injunctions broadly prohibit the government from enforcing the relevant statutes based on positions that the government has not actually adopted. As we explained in our opening brief, this Court "must assess standing in view only of the facts that existed at the time" of the operative complaints. *See Conners v. Gusano's Chi. Style Pizzeria*, 779 F.3d 835, 840 (8th Cir. 2015); Gov't Br. at 19. For the reasons set forth in our brief, plaintiffs did not have standing when they filed their amended complaints in November 2020, following publication of HHS's 2020 Rule. *See* Gov't Br. at 22-30; 36-44. And even now, long after the filing of the operative complaints, HHS has not even *proposed* a rule addressing the relevant issues—whether Section 1557 requires entities with religious objections to provide or cover gender-transition procedures, and how RFRA and other exemptions might apply to such religious entities—much less promulgated a *final* rule that could be subject to challenge. The district court fundamentally erred in preemptively enjoining a coordinate branch of government from taking certain positions and bringing future enforcement actions based on those hypothetical positions before the relevant Executive Branch agencies even

had an opportunity to finish considering the complicated, interconnecting issues at hand. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.").

This Court need only hold that, in this unique context, the district court's injunctions were premature. Reversal on that narrow ground would not preclude the district court from considering whether to stay proceedings pending this rulemaking or allow amendment of the complaint, if necessary, after HHS adopts a new final rule. Nor would it prevent plaintiffs from seeking relief in the future if they ever were to face non-speculative imminent injury from agency action.

Respectfully submitted,

s/ Ashley A. Cheung
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cc: Counsel (via CM/ECF)

Exhibit B

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.

* * *

The Court should affirm.

Respectfully submitted,

/s/ Luke W. Goodrich

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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.

/s/ Luke W. Goodrich
Luke W. Goodrich