IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHITMAN-WALKER CLINIC, INC., *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, *Defendants*.	Case No. 1:20-cv-01630 (JEB)

PLAINTIFFS' MOTION TO COMPEL DEFENDANTS TO PRODUCE THE ADMINISTRATIVE RECORD, TO HOLD IN ABEYANCE DEFENDANTS' PARTIAL MOTION TO DISMISS, AND TO SET A CONSOLIDATED SCHEDULE FOR FILING AND BRIEFING MOTIONS TO DISMISS AND/OR MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, through undersigned counsel, hereby move the Court for an order that (i) compels Defendants to produce the administrative record in accordance with Local Civil Rule 7(n); (ii) holds Defendants' September 29, 2020 partial motion to dismiss in abeyance or dismisses the motion without prejudice; and (iii) sets a consolidated schedule for filing and briefing motions to dismiss and/or cross-motions for summary judgment after Defendants complete production of the administrative record and Plaintiffs have an adequate opportunity to review. Alternatively, if the Court declines to hold Defendants' partial motion to dismiss in abeyance or to dismiss the motion without prejudice, Plaintiffs respectfully request that their response to Defendants' partial motion to dismiss be due 45 days from the date the Court decides this motion.

Defendants filed a partial motion to dismiss on September 29, 2020 that implicates and largely relies upon the agency's decision-making contained within the administrative record, yet

they failed to file a certified list of the contents of the administrative record, as required under Local Civil Rule 7(n), and have refused to produce the administrative record.

Pursuant to Local Civil Rule 7(m), prior to filing this motion, counsel for Plaintiffs conferred with Defendants' counsel in a good faith effort to resolve this issue without Court intervention. (*See* Declaration of Omar Gonzalez-Pagan ("Decl.") ¶¶ 16-19 & Ex. 4.) On October 2, 2020, counsel for Defendants confirmed that Defendants do not intend to produce the administrative record. (Decl. Ex. 4 at 1.)

INTRODUCTION

Plaintiffs have made repeated, good faith efforts to reach an agreement with Defendants on production of the administrative record since Plaintiffs filed their Complaint on June 22, 2020. The record should have been and usually is produced as a matter of course in Administrative Procedure Act ("APA") cases. Plaintiffs also have sought a joint briefing schedule that would allow for the orderly resolution of the issues in their Complaint. Defendants repeatedly have refused to agree to any schedule. And now, Defendants unilaterally have decided that they do not need to produce the administrative record, even though Plaintiffs have challenged the provisions in the Revised Rule as arbitrary and capricious under the APA and Defendants' motion to dismiss relies on the purported rationale and decision-making process of Defendant U.S. Department of Health and Human Services ("HHS") to defend the rulemaking.

Local Civil Rule 7(n) *requires* a defendant to file a certified list of the contents of the administrative record simultaneously with the filing of a dispositive motion unless the Court orders otherwise. Local Civil Rule 7(n) also contemplates the timely production of the administrative record so that the parties can rely on the record in support or opposition of any dispositive motion and submit relevant portions to the Court. Courts in this District have recognized the particular

importance of production of the administrative record in cases where, as here, a party challenges agency action as arbitrary and capricious. An agency cannot withhold the very record needed to make that determination.

Defendants should not be allowed to hide behind procedural maneuvers to avoid their basic obligation to produce the administrative record while moving to dismiss Plaintiffs' Complaint on grounds that implicate the administrative record. For instance, Defendants' ripeness arguments in their motion to dismiss rely on the preamble to the Revised Rule and HHS's decision-making process in eliminating the definition of "on the basis of sex" and other changes to the 2016 Final Rule. And Defendants repeatedly point to HHS's purported rationales and decision-making process underlying the Revised Rule in claiming that Plaintiffs have failed to state a claim under the APA that HHS acted arbitrarily and capriciously in promulgating the Revised Rule. Plaintiffs cannot counter these arguments and the Court cannot evaluate properly Plaintiffs' claims without the administrative record. The Court has the authority to compel production of the administrative record under Local Civil Rule 7(n). Plaintiffs respectfully request that it do so here in the interests of fairness and justice.

To promote judicial economy and efficiency, Plaintiffs also request that the Court hold Defendants' motion to dismiss in abeyance or dismiss it without prejudice and set a consolidated briefing schedule for motions that allows Plaintiffs sufficient time to review the administrative record. This will avoid piecemeal resolution of the issues and properly defer consideration of whether Defendants acted arbitrarily and capriciously until *both parties* – not only Defendants – have had an adequate opportunity to review the record that informed HHS's action.

Defendants will suffer no prejudice if they are required to turn over the record now and the parties proceed to brief cross-motions with the benefit of that record. First, Defendants concede

that several of Plaintiffs' claims will continue even after adjudication of Defendants' partial motion to dismiss. (*See* ECF No. 57-1 at 2.) Given that Defendants have not sought dismissal of the entire Complaint, they eventually will have to produce the record. Second, Defendants already have been ordered to produce the administrative record regarding the Revised Rule by October 16, 2020 in a different case. *See* Order Regulating Motion Practice and Record Procedures, *New York v. United States Dep't of Health & Human Servs.*, No. 1:20-cv-05583-AKH (S.D.N.Y. Sept. 22, 2020) (ECF No. 93), attached as Exhibit 6 to the Declaration of Omar Gonzalez-Pagan.

There is no reasonable explanation for Defendants' continued refusal to produce the administrative record in this case.

RELEVANT PROCEDURAL BACKGROUND

Plaintiffs briefly summarize those aspects of the procedural history of the challenged rulemaking and this litigation relevant to their attempts to obtain the administrative record without Court intervention and Plaintiffs' need for the record to support their claims.[1]

On June 19, 2020, HHS published a Rule in the Federal Register rolling back numerous anti-discrimination provisions in an Obama-era rule (the "2016 Final Rule") that implemented Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a). *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020) (to be codified at 42 C.F.R. pts. 438, 440, & 460 and 45 C.F.R. pts. 86, 92, 147, 155, & 156) (the "Revised Rule"). On June 22, 2020, Plaintiffs filed a Complaint alleging, among other things, that HHS had acted arbitrarily and capriciously in violation of the APA by repealing aspects of the 2016 Final Rule based on the government's failed litigation position in *Bostock v. Clayton*

[1] The procedural history of the challenged rulemaking and this litigation is set out in detail in the Court's Memorandum Opinion, dated September 2, 2020. (*See* ECF No. 56 at 9-14.)

County, 140 S. Ct. 1731 (2020), and incorporating Title IX's religious exemption into the Revised Rule when the statute has no such religious exemption and HHS had previously determined that Title IX's religious exemption was not appropriate in the health care context.

On July 7, 2020 – before moving for preliminary relief – Plaintiffs reached out to the government to inquire whether Defendants would agree to delay the effective date of the Revised Rule, produce the administrative record, and set an expedited schedule for filing cross-motions for summary judgment in lieu of Plaintiffs moving for a preliminary injunction. (*See* Decl. ¶ 5 & Ex. 1.) Defendants took the request under advisement.

Because the Revised Rule was to go into effect on August 18, 2020, Plaintiffs informed Defendants on July 8, 2020 that they would need to move forward with their motion so that it could be briefed fully prior to the effective date. Plaintiffs reiterated, however, that they would be willing to hold the motion in abeyance or convert the motion into a motion for summary judgment if HHS later agreed to their proposal. (Decl. Ex. 1 at 2-3.) After Plaintiffs filed their motion, they followed up again with Defendants about the possibility of postponing the effective date of the Revised Rule and an agreement on a consolidated briefing schedule in lieu of adjudication of the motion for preliminary injunction. (*Id.* at 2.) On July 17, 2020, Defendants informed Plaintiffs that HHS would not agree to stay the effective date of the Revised Rule. (*Id.* at 1.)

On July 29, 2020 – shortly before the hearing on Plaintiffs' motion – Plaintiffs again approached Defendants with a proposal to expedite production of the administrative record by aligning production in this case with the schedule for production of the record in other pending actions challenging the Revised Rule. (Decl. Ex. 2.) Plaintiffs discussed this proposal with Defendants by telephone on August 6, 2020. (Decl. ¶ 11.) Defendants said they would consider the proposal, but they never responded to Plaintiffs. (*Id.*)

After Plaintiffs' motion for preliminary injunction was fully briefed and heard by the Court, on August 21, 2020 – four days before Defendants' August 25, 2020 deadline to respond to the Complaint – Defendants approached Plaintiffs to request an extension of their response date to allow them to review the Court's forthcoming order on the Plaintiffs' motion before responding. (Decl. Ex. 3.) Plaintiffs responded by email and later reiterated during a call that any extension would need to be tied to an agreement to produce the administrative record within a reasonable time. (Decl. ¶ 12 & Ex. 3.) Plaintiffs proposed that Defendants produce the administrative record on September 18, 2020, the date it was due in the related action, *Washington v. United States Dep't of Health & Human Servs.*, No. 1:20-cv-01105 (W.D. Wash. July 16, 2020). (Decl. ¶ 13.) (*See also* Plaintiffs' Resp. to Defs.' Motion for Extension of Time (ECF No. 52) at 2.)

Defendants rejected Plaintiffs' proposal and on August 21, 2020, they filed a motion to extend their time to respond to the Complaint to twenty-one days after the Court decided the motion for preliminary relief. (ECF No. 51 at 1.) In seeking the extension, Defendants asserted that they "have been busy drafting briefs in this and related cases" and "have not had sufficient time to work on their response to plaintiffs' complaint." Defendants also explained their response may be affected by the Court's ruling on the pending motion for preliminary relief. (*Id.*)

Plaintiffs responded to Defendants' motion for an extension on August 25, 2020, explaining they opposed any extension that did not include a firm date for Defendants to produce the administrative record, as Local Civil Rule 7(n)(1) ties this obligation to the filing of a responsive pleading. (ECF No. 52. at 1.) Plaintiffs explained it was critical to begin review of the administrative record as soon as possible, particularly because the challenged Revised Rule became effective on August 18, 2020. (*See id.*)

On September 2, 2020, the Court granted Plaintiffs' pending motion for preliminary injunction in part and enjoined Defendants from enforcing their repeal of the 2016 Final Rule's definition of "on the basis of sex" as it pertained to "sex stereotyping" and the Revised Rule's incorporation of Title IX's religious exemption. (*See* ECF No. 55.) In a 101-page Memorandum Opinion, the Court explained that Plaintiffs are likely to succeed on their claims that HHS acted arbitrarily and capriciously in eliminating "sex stereotyping" from the 2016 Final Rule's definition of "on the basis of sex" (*see* ECF No. 56 at 51-61), and HHS acted arbitrarily and capriciously in incorporating Title IX's religious exemption into Section 1557's non-discrimination scheme (*id.* at 62-67). The Court thereafter entered a minute order extending Defendants' deadline to respond to the Complaint until September 29, 2020.

On September 29, 2020, Defendants filed a partial motion to dismiss. Defendants' motion challenges Plaintiffs' standing to assert certain claims and also raises new arguments about "ripeness." Defendants also contend Plaintiffs have failed to state a claim upon which relief may be granted because "HHS's reasoned explanation for the policy changes contained in the 2020 Rule within its authority more than adhered to the standards for reasoned decisionmaking required by the Administrative Procedure Act." (ECF No. 57-1 at 1.)

Because Defendants did not file a certified list of the contents of the administrative record simultaneously with the filing of their motion, as Local Civil Rule 7(n)(1) requires, and they did not move to be relieved from the requirements of the rule, on September 30, 2020, Plaintiffs reached out to Defendants to inquire when they expected to produce the administrative record and the certified list of its contents. (Decl. Ex. 4 at 2-3.) Defendants responded the same day, stating that the "government does not believe Local Rule 7(n)(1) requires it to produce and file a certified list of the contents of the administrative record at this time, before the government has filed an

answer or moved for summary judgment." (*Id.* at 2.) Defendants suggested their motion did not implicate the contents of the administrative record and, therefore, they did not need to produce it. (*Id.*)

Plaintiffs reached out again to Defendants on October 1, 2020, explaining why Defendants lacked a sufficient legal basis to withhold the record and informing them that Plaintiffs would move to compel if Defendants did not agree to produce the record. (*Id.* at 1.) On October 2, 2020, Defendants reiterated that "the government does not intend to produce the [administrative record] at this time." (*Id.*)

Defendants have not filed a motion for relief from Local Civil Rule 7(n).

ARGUMENT

I. DEFENDANTS SHOULD BE ORDERED TO PRODUCE THE ADMINISTRATIVE RECORD BECAUSE THEIR MOTION TO DISMISS CANNOT BE RESOLVED PROPERLY WITHOUT REFERENCE TO THE RECORD

Local Civil Rule 7(n) is explicit. In cases "involving the judicial review of administrative agency actions [under the Administrative Procedure Act ("APA")], ***unless otherwise ordered by the Court***, the agency must file a certified list of the contents of the administrative record with the Court ***within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion***." L. Civ. R. 7(n)(1) (emphasis added). Local Civil Rule 7(n)(1) further provides that "[t]hereafter, counsel shall provide the Court with an appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of ***or in opposition to any dispositive motion***." *Id*. (emphasis added). The rule thus contemplates that the agency will produce the administrative record in a timely fashion so that the opposing party may rely on it in opposing the motion, regardless of whether the agency relied on the record in its motion.

Defendants have flouted the clear mandate of Local Civil Rule 7(n). Defendants filed a motion to dismiss, which unquestionably is a dispositive motion. *See, e.g.*, *Dorsey v. Enter. Leasing*, 78 F. Supp. 3d 245, 246 (D.D.C. 2015) (a "motion to dismiss is a dispositive motion"). Yet, Defendants failed to file a certified list of the contents of the administrative record *simultaneously* with the filing of their motion, as required under Local Civil Rule 7(n)(1), and they refuse to produce the administrative record.

Local Civil Rule 7(n) requires a court order to be relieved from the obligations that it imposes. Indeed, in the principal case upon which Defendants rely in support of their refusal to produce the administrative record – *Connecticut v. United States Dep't of the Interior*, 344 F. Supp. 3d 279, 294 at n.11 (D.D.C. 2018) – the government moved to waive compliance with the Local Civil Rule. (*See* Decl. Ex. 4 at 2.) But Defendants did not file a motion. Instead, they determined unilaterally that they are not obligated to produce the administrative record to Plaintiffs.

Defendants suggest their position is consistent with the approach the government has taken in other cases in this District. (*See* Decl. Ex. 4 at 2.) In other cases before this Court, however, HHS has agreed to produce the administrative record prior to dispositive motion practice. *See, e.g.*, *Gresham v. Azar*, No. 18-cv-1900-JEB (D.D.C. Sept. 27, 2018) (ECF No. 23) (joint briefing schedule proposing deadlines for production of the administrative record and motions for summary judgment in lieu of an answer); *Stewart v. Azar*, No. 18-cv-152-JEB (D.D.C. Mar. 8, 2018) (ECF No. 27) (joint motion to set briefing schedule for motions for preliminary relief and motions to dismiss or for summary judgment, stating that the government "has acceded to Plaintiffs' request to expedite the certification of the administrative record" and has produced the record to plaintiffs).

Defendants also claim that the administrative record needs to be produced only when a motion to dismiss "implicates the contents of the administrative record." (Decl. Ex. 4 at 2.)

Defendants suggest, without stating directly, that their motion to dismiss does not implicate the contents of administrative record. (*Id.*) But the record demonstrates otherwise.

Plaintiffs recognize that in some circumstances, a motion to dismiss may raise purely legal issues that can be resolved without reference to the administrative record. *See, e.g.*, *Vargus v. McHugh*, 87 F. Supp. 3d 298, 301 (D.D.C. 2015); *Zemeka v. Holder*, 963 F. Supp. 2d 22 (D.D.C. 2013). In such cases, judicial economy may favor permitting the agency to delay producing the administrative record, as a ruling in its favor would obviate the need to make such a production.

But this is not such a case. Defendants' motion to dismiss directly implicates the administrative record. First, despite stating that they are not seeking dismissal of Plaintiffs' challenge to HHS's decision to eliminate the definition of "on the basis of sex" (ECF No. 57-1 at 1-2), Defendants nevertheless argue Plaintiffs' challenge is not ripe because "the 2020 Rule merely replaces the 2016 Rule's explicit definition of 'on the basis of sex' by hewing to the text of Section 1557," and "in the preamble to the 2020 Rule, HHS recognized that, 'to the extent a Supreme Court decision is applicable in interpreting the meaning of a statutory term, the elimination of a regulatory definition of such term would not preclude application of the Court's construction.'" (*Id.* at 10 (quoting 85 Fed. Reg. at 37, 168).)

As the Court recognized in ruling on Plaintiffs' motion for preliminary injunction, Defendants' insistence that the Revised Rule merely "regurgitates the plain, unobjectionable text of Section 1557" is beside the point. (ECF No. 56 at 60.) Plaintiffs' challenge to Defendants' elimination of the definition of "on the basis of sex" is based on the agency's change in position and its decision to repeal a prior regulatory position. Under such circumstances, the agency is required to provide a reasoned analysis and a satisfactory explanation for the change. (*Id.* at 60-61.) The Court thus "must assess the reasonableness of the agency's explanation for why it made

the change" and is obligated to "'examin[e] the reasons' underlying HHS's action." (*Id.* at 61 (quoting *Judulang v. Holder*, 565 U.S. 42, 53 (2011).) To do so, both Plaintiffs and the Court need the administrative record.

Second, Defendants ask the Court to find, *as a matter of law*, that HHS did not act arbitrarily and capriciously. (*See, e.g.*, ECF No. 57-1 at 16-17, 21, 24.) For example, HHS argues that its decision to eliminate the prohibition on categorical coverage exclusions in the Revised Rule was not arbitrary and capricious. (*Id.* at 16-17.) HHS claims it "consulted scientific studies, government reviews, and comments from a host of medical professionals regarding treatment for gender dysphoria," and that it "reasonably determined that 'the medical community is divided on many issues related to gender identity, including the value of various gender-affirming treatments for gender dysphoria (especially for minors).'" (*Id.* at 17 (quoting *Whitman-Walker Clinic, Inc. v. United States Dep't of Health & Human Servs.*, No. 1:20-cv-01630-JEB, 2020 WL 5232076, at *29 (D.D.C. Sept. 2, 2020) (citing 85 Fed. Reg. at 37,187, 37,196-98)).) Likewise, with respect to the elimination of the notice requirements and access to language protections, HHS contends it "provided an array of reasons for its change in position," including its determination "that the costs and burdens imposed by the notice and tagline requirements were 'substantially larger than originally anticipated.'" (*Id.* (quoting *Whitman-Walker*, 2020 WL 5232076, at *32 (quoting 84 Fed. Reg. at 27, 587)).)

These are precisely the types of arguments that require the administrative record to resolve. It is well established that "when courts must determine whether the adjudicatory process was reasonable and whether the decision was consistent with Congressional intent[,] they must look to the administrative record." *Vargus*, 87 F. Supp. 3d at 301 (internal quotations and citation omitted). The "function of the district court [in such cases] is to determine whether or not as a

matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Zemeka*, 963 F. Supp. 2d at 24 (quoting *Cottage Health Sys. v. Sebelius*, 631 F. Supp 2d 80, 89-90 (D.D.C. 2009)). In so doing, the court "should have before it neither more nor less information than did the agency when it made its decision." *Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). "Without the administrative record, the court is unable to perform this function." *Swedish Am. Hosp. v. Sebelius*, 691 F. Supp. 2d 80, 88 (D.D.C. 2010). Courts in this District therefore regularly decline to address agencies' arguments that they complied with the APA without the benefit of the full administrative record. *See Zemeka*, 963 F. Supp. 2d at 26; *Swedish Am. Hosp.*, 691 F. Supp. 2d at 89; *Vargus*, 87 F. Supp. 3d at 302-03; *Verastegui v. McAleenan*, No. 18-cv-2358-TJK, 2019 WL 2550385, at *2 (D.D.C. June 20, 2019); *see also District Hosp. Partners, L.P. v. Sebelius*, 794 F. Supp. 2d 162, 171-73 (D.D.C. 2011) (denying motion to dismiss in part because agency had not yet produced the administrative record); *Banner Health v. Sebelius*, 797 F. Supp. 2d 97, 113-14 (D.D.C. 2011) (same).

Without the administrative record, the Court cannot adequately evaluate whether HHS complied with the APA's procedural mandates based solely on what HHS chose to cite in the preamble to the Revised Rule. And Plaintiffs are entitled to the full administrative record as well to develop their claims. Where "one party might be unaware of some parts of the record, failure to produce the Record in its entirety would produce 'asymmetry in information [that] undermines the reliability of a court's review upon those portions of the record cited by one party or the other.'" *Vargus*, 87 F. Supp. 3d at 302 (quoting *Boswell Meml. Hosp.*, 749 F.2d at 793). Among other things, to "review less than the full administrative record might allow a party to withhold evidence unfavorable to its case" *Id.* at 301 (internal citation and quotation marks omitted).

Experience also demonstrates that neither the public nor the courts can take *this* HHS at its word when it comes to its characterization of the administrative record or the justifications for its actions. Recent challenges to HHS's promulgation of a different rule purporting to interpret and provide for the implementation of statutory provisions regarding the rights of conscience-based objectors in the health care arena – the "denial-of-care" cases – demonstrate the importance of producing the full administrative record. In promulgating the rule, HHS cited "a significant increase" in complaints alleging violations of conscience provisions as demonstrating confusion and the need for agency action. *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 541 (S.D.N.Y. 2019) (quoting 84 Fed. Reg. at 23, 175). In the preamble to the rule, HHS specifically stated that there had been 34 such complaints between November 2016 and January 2018, and 343 such complaints during fiscal year 2018. *Id.* The administrative record, however, revealed that HHS's claim of a significant increase in such complaints was "demonstrably false." *Id.* Ultimately, HHS conceded that only approximately 20 complaints implicated any of the conscience provisions. *Id.* at 542. This conceded fact was "fatal to HHS's stated justifications for the Rule." *Id.* Defendants' representations concerning and justifications for the Revised Rule may be similarly flawed or misleading. However, neither Plaintiffs nor the Court can test Defendants' assertions in the preamble to the Revised Rule without the full administrative record.

Plaintiffs are entitled to the full administrative record, and the Court cannot resolve Defendants' motion to dismiss properly without it. Defendants should be ordered to produce promptly the full administrative record.

II. A CONSOLIDATED BRIEFING SCHEDULE FOR DISPOSITIVE MOTIONS IS WARRANTED

Because the administrative record is necessary to resolve Defendants' motion to dismiss, the Court should order production of the administrative record, hold Defendants' motion to dismiss in abeyance or deny it without prejudice, and set a consolidated briefing schedule for motions to dismiss and/or motions for summary judgment with appropriate citations to the record.

Summary judgment "is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Zemeka*, 963 F. Supp. 2d at 24, 26 (internal quotation marks omitted). As courts have recognized, wading "into the details" of an agency's decision-making process on a motion to dismiss only "invites error." *Banner Health*, 797 F. Supp. 2d. at 114.

Substantial overlap exists between the legal issues to be decided on a motion to dismiss and a motion for summary judgment in APA cases such as this one. As Defendants informed the district court in a separate challenge to the Revised Rule, the Court should permit consolidated briefing on any motions to dismiss and motions for summary judgment "to reduce the duplicative briefing that would substantially overlap in those two separate sets of briefing." (*See* Decl. Ex. 5 at 7.) It is typical for courts to set forth a consolidated briefing schedule for dispositive motions *after* production of the administrative record. *See*, *e.g.*, *Gresham v. Azar*, No. 18-cv-1900-JEB (D.D.C. Sept. 27, 2018); *Stewart v. Azar*, No. 18-cv-152-JEB (D.D.C. Mar. 8, 2018); *New York v. United States Dep't of Health & Human Servs.*, No. 20-cv-5583-AKH (S.D.N.Y. Sept. 22, 2020).

Although Defendants also challenge Plaintiffs' standing to pursue a subset of their claims, judicial economy favors addressing Defendants' challenges to standing at the same time that it addresses Defendants' ripeness challenges and the merits of HHS's administrative action. As the Court's ruling on Plaintiffs' motion for preliminary relief indicates, these issues are substantially

intertwined and would benefit from joint adjudication rather than piecemeal rulings. *See Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 87-88 (2d Cir. 2006) (observing that district courts have discretion to determine the appropriate means to resolve standing challenges and may defer ruling until the merits stage); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 29 n.18 (D.D.C. 2009) (declining to resolve the merits of Plaintiffs' claims in the context of standing, noting that where jurisdictional issues are inextricably intertwined with merits of the case, a court usually should defer until the merits are heard). In addition, even if Defendants were to prevail on their challenges to standing, a number of claims would survive for briefing on summary judgment. Addressing the standing issues first thus would not result in any appreciable gains in judicial efficiency.

III. IF THE COURT DENIES THIS MOTION, PLAINTIFFS REQUEST THAT THEIR RESPONSE TO DEFENDANTS' PARTIAL MOTION TO DISMISS BE DUE 45 DAYS FROM THE DATE THE COURT DECIDES THE MOTION

If the Court declines to hold Defendants' partial motion to dismiss in abeyance or to dismiss the motion without prejudice, Plaintiffs respectfully request that their response to Defendants' partial motion to dismiss be due 45 days from the date the Court decides this motion. As the Court is aware, the Revised Rule is complex and multi-faceted, and Plaintiffs represent a broad coalition of LGBTQ health care providers, organizations, and service providers, all of whom are spending a significant amount of their resources to combat the COVID-19 pandemic while simultaneously fighting Defendants' efforts to diminish access to health care through the Revised Rule.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court compel Defendants to produce the administrative record, hold Defendants' partial motion to dismiss in abeyance or dismiss the motion without prejudice, and order a consolidated briefing schedule for dispositive motions. Alternatively, if the Court declines to hold Defendants' partial motion to dismiss in

abeyance or to dismiss the motion without prejudice, Plaintiffs respectfully request that their response to Defendants' partial motion to dismiss be due 45 days from the date the Court decides this motion.

Dated: October 6, 2020

Respectfully submitted,

LAMBDA LEGAL DEFENSE
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By: /s/ *Omar Gonzalez-Pagan*

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** *Application for admission to U.S. District Court for the District of Columbia forthcoming.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHITMAN-WALKER CLINIC, INC., *et al.*, *Plaintiffs,* v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, *Defendants*.	Case No. 1:20-cv-01630 (JEB)

DECLARATION OF OMAR GONZALEZ-PAGAN

I, Omar Gonzalez-Pagan, declare as follows:

1. I am a Senior Attorney at Lambda Legal Defense and Education Fund, Inc. and counsel of record for the Plaintiffs in this action.

2. I am a member of the bar of the Commonwealth of Massachusetts and State of New York, and have been admitted *pro hac vice* to this court.

3. I submit this declaration, based on my personal knowledge, in support of Plaintiffs' Motion to Compel Defendants to Produce the Administrative Record, to Hold in Abeyance Defendants' Partial Motion to Dismiss, and to Set a Consolidated Schedule for Filing and Briefing Motions to Dismiss and/or Motions for Summary Judgment.

4. On June 22, 2020, Plaintiffs filed a Complaint, alleging, among other things, that HHS had acted arbitrarily and capriciously when it promulgated its rule, entitled "Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority," 85 Fed. Reg. 37,160 (June 19, 2020) (to be codified at 42 C.F.R. pts. 438, 440, & 460 and 45 C.F.R. pts. 86, 92, 147, 155, & 156) (the "Revised Rule").

5. On July 7, 2020, after service of Plaintiffs' Complaint was completed and prior to moving for preliminary relief, counsel for Plaintiffs, including the undersigned, spoke by telephone with counsel for Defendants to inquire whether Defendants would agree to delay the effective date of the Revised Rule, produce the administrative record, and set an expedited schedule for filing cross-motions for summary judgment in lieu of Plaintiffs moving for a preliminary injunction.

6. Because the Revised Rule was set to go into effect on August 18, 2020, counsel for Plaintiffs informed Defendants on July 8, 2020 that they would need to move forward with their motion so that it could be briefed fully prior to the effective date. Counsel for Plaintiffs reiterated, however, that they would be willing to hold the motion in abeyance or convert the motion into a motion for summary judgment if HHS later agreed to their proposal.

7. After Plaintiffs filed their motion for a preliminary injunction, counsel for Plaintiffs followed up again with Defendants about the possibility of postponing the effective date of the Revised Rule and an agreement on a consolidated briefing schedule in lieu of adjudication of the motion for preliminary injunction.

8. On July 17, 2020, Defendants informed Plaintiffs that HHS would not agree to stay the effective date of the Revised Rule.

9. A true and accurate copy of an email exchange documenting these efforts is enclosed as **Exhibit 1**.

10. On July 29, 2020, shortly before the hearing on Plaintiffs' motion for preliminary relief, counsel for Plaintiffs again approached Defendants with a proposal to expedite production of the administrative record by aligning production in this case with the schedule for production of the record in other pending actions challenging the Revised Rule. A true and accurate copy of this request is enclosed as **Exhibit 2**.

11. Counsel for Plaintiffs, including the undersigned, discussed this proposal with counsel for Defendants by telephone on August 6, 2020. Defendants said they would consider the proposal, but they never responded to Plaintiffs.

12. After Plaintiffs' motion for preliminary injunction was fully briefed and heard by the Court, on August 21, 2020 – four days before Defendants' August 25, 2020 deadline to respond to the Complaint – Defendants approached Plaintiffs to request an extension of their response date to allow them to review the Court's forthcoming order on the Plaintiffs' motion before responding. Plaintiffs responded by email and later reiterated during a call that any extension would need to be tied to an agreement to produce the administrative record within a reasonable time. A true and accurate copy of this email exchange is attached as **Exhibit 3**.

13. Plaintiffs proposed that Defendants produce the administrative record on September 18, 2020, the date it was due in the related action, *Washington v. United States Dep't of Health & Human Servs.*, No. 2:20-cv-01105-JLR (W.D. Wash.).

14. Defendants rejected Plaintiffs' proposal and on August 21, 2020, they filed a motion to extend their time to respond to the Complaint to twenty-one days after the Court decided the motion for preliminary relief.

15. Plaintiffs responded to Defendants' motion for an extension on August 25, 2020, explaining they opposed any extension that did not include a firm date for Defendants to produce the administrative record, as Local Civil Rule 7(n)(1) ties this obligation to the filing of a responsive pleading. In their response, Plaintiffs explained it was critical to begin review of the administrative record as soon as possible, particularly because the challenged Revised Rule became effective on August 18, 2020.

16. Following the filing of Defendants' partial motion to dismiss on September 29, 2020, counsel for Plaintiffs reached out to Defendants to inquire when they expected to produce the administrative record and the certified list of its contents.

17. Defendants responded the same day, stating that the "government does not believe Local Civil Rule 7(n)(1) requires it to produce and file a certified list of the contents of the administrative record at this time, before the government has filed an answer or moved for summary judgment." Defendants suggested their motion did not implicate the contents of the administrative record, and therefore, they did not need to produce it.

18. Plaintiffs reached out again to Defendants on October 1, 2020, explaining why Defendants lacked a sufficient legal basis to withhold the record and informing them that Plaintiffs would move to compel if Defendants did not agree to produce the record. On October 2, 2020, Defendants reiterated that "the government does not intend to produce the [administrative record] at this time."

19. A true and accurate copy of an email exchange documenting these efforts is attached as **Exhibit 4**.

20. Attached as **Exhibit 5** to this declaration is a true and correct copy of the Memorandum in Support of Their Motion to Stay Briefing on Plaintiffs' Premature Motion For Summary Judgment or, in the Alternative, to Consolidate Briefing and Set a Briefing Schedule filed by Defendants in *New York v. United States Dep't of Health & Human Servs.*, No. 1:20-cv-05583-AKH (S.D.N.Y. Sept. 18, 2020) (ECF No. 89).

21. Attached as **Exhibit 6** to this declaration is a true and correct copy of the Order Regulating Motion Practice and Record Procedures issued by the court in *New York v. United*

States Dep't of Health & Human Servs., No. 1:20-cv-5583-AKH (S.D.N.Y. Sept. 22, 2020) (ECF No. 93).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 6th day of October, 2020.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan

EXHIBIT 1

Omar Gonzalez-Pagan

From: Lane, William (CIV) <William.Lane2@usdoj.gov>
Sent: Friday, July 17, 2020 5:27 PM
To: Omar Gonzalez-Pagan
Cc: Edelstein, Laurie; Dennehy, Johanna; Von Bokern, Jordan L. (CIV)
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Omar,

Thank you for reaching out. I just touched base with the agency—HHS will not agree to a delay of the effective date, so we will have to proceed in a preliminary injunction posture. Please let me know if you have any questions. Have a good weekend.

Thanks,
Bill

William Lane
Counsel to the Assistant Attorney General
U.S. Department of Justice, Civil Division
(202) 305-7920

From: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Sent: Friday, July 17, 2020 12:32 PM
To: Lane, William (CIV) <wlane@CIV.USDOJ.GOV>; Von Bokern, Jordan L. (CIV) <jvonboke@CIV.USDOJ.GOV>
Cc: Edelstein, Laurie <ledelstein@steptoe.com>; Dennehy, Johanna <jdennehy@Steptoe.com>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

[Adding Jordan Von Bokern and Johanna Dennehy, and removing Karen Loewy.]

Bill and Jordan,

We are writing to check in on our request for HHS to stipulate to the postponement of the effective date of the revised rule, currently set for August 18, 2020, in lieu of adjudication of motions for preliminary injunctions. As you are aware, aside from our pending motion for a preliminary injunction, an additional two motions for preliminary injunctions have been filed this week in *Walker v. Azar*, No. 20-cv-2834 (E.D.N.Y.), and *Washington v. HHS*, No. 20-cv-1105 (W.D. Wash.). And per their complaint, the plaintiffs in *BAGLY v. HHS*, No. 20-cv-11297 (D. Mass.), may also seek preliminary relief.

Please let us know if you'd like to meet and confer about this.

Omar

Omar Gonzalez-Pagan
Senior Attorney
Pronouns: He/Him/His

Work Phone: 212-809-8585, ext. 211 | Mobile Phone: (617) 686-3464 | Email: ogonzalez-pagan@lambdalegal.org

From: Lane, William (CIV) <William.Lane2@usdoj.gov>
Sent: Friday, July 10, 2020 1:51 PM
To: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Cc: Edelstein, Laurie <ledelstein@steptoe.com>; Karen Loewy <KLoewy@lambdalegal.org>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Omar,

Thanks for this. It will probably come up on our call today, but I wanted to update you that HHS is still considering whether it would be open to proceeding in an expedited summary judgment posture. They have told me that they expect to make a decision soon.

In the meantime, we would like to take you up on your offer for an extension of time for our opposition, which I'm sure we will discuss on the call.

Thanks,
Bill

William Lane
Counsel to the Assistant Attorney General
U.S. Department of Justice, Civil Division
(202) 305-7920

From: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Sent: Thursday, July 9, 2020 5:45 PM
To: Lane, William (CIV) <wlane@CIV.USDOJ.GOV>
Cc: Edelstein, Laurie <ledelstein@steptoe.com>; Karen Loewy <KLoewy@lambdalegal.org>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Bill,

As noted below, we filed our motion for a preliminary injunction earlier today. As a courtesy, please find enclosed copies of today's filings. In addition, in order to facilitate consideration of our request to postpone the effective date of the rule, enclosed is the stipulated request that was filed in *New York v. HHS* with regards to the conscience rule last year.

Omar

Omar Gonzalez-Pagan
Senior Attorney
Pronouns: He/Him/His

Work Phone: 212-809-8585, ext. 211 | Mobile Phone: (617) 686-3464 | Email: ogonzalez-pagan@lambdalegal.org

Lambda Legal: Making the case for equality

From: Karen Loewy <KLoewy@lambdalegal.org>
Sent: Wednesday, July 8, 2020 5:20 PM
To: Lane, William (CIV) <William.Lane2@usdoj.gov>

Cc: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>; Edelstein, Laurie <ledelstein@steptoe.com>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Bill,

Thanks very much for getting back to us. We appreciate your moving the conversation forward with the agency. As we discussed, in light of the pending effective date, we will need to move forward with the motion for a preliminary injunction tomorrow, though we remain willing to hold that in abeyance or convert to an MSJ posture if HHS publishes the delay of the effective date in the Federal Register. We are also willing to consider a slight extension for you to respond to the PI, but we must move forward with significant haste given the pending effective date.

Just as an administrative matter, as the case moves forward, please consider Omar and Laurie to be your primary points of contact.

Sincerely,
Karen

Karen L. Loewy
Senior Counsel
Pronouns: She/her/hers
Lambda Legal
120 Wall Street, 19th Floor
New York, NY 10005-3919
Tel 212-809-8585 ext. 210
Fax 212-809-0055
kloewy@lambdalegal.org
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From: Lane, William (CIV) <William.Lane2@usdoj.gov>
Sent: Wednesday, July 8, 2020 5:00 PM
To: Karen Loewy <KLoewy@lambdalegal.org>
Cc: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>; Edelstein, Laurie <ledelstein@steptoe.com>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Karen,

I just wanted to give you a quick update, as promised yesterday. We were able to speak to individuals at HHS today and relayed your preference that the case proceed in an expedited summary judgment posture (rather than PI), contingent

on HHS agreeing to delay enforcement of the rule. The agency is now discussing that option internally, and we hope to have a decision from them in the coming days.

Thanks,
Bill

From: Karen Loewy <KLoewy@lambdalegal.org>
Sent: Monday, July 6, 2020 4:24 PM
To: Lane, William (CIV) <wlane@CIV.USDOJ.GOV>
Cc: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>; Edelstein, Laurie <ledelstein@steptoe.com>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Great. An invitation will be forthcoming.

From: Lane, William (CIV) <William.Lane2@usdoj.gov>
Sent: Monday, July 6, 2020 4:13 PM
To: Karen Loewy <KLoewy@lambdalegal.org>
Cc: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>; Edelstein, Laurie <ledelstein@steptoe.com>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Karen,

3 pm works for me. Talk to you then.

Thanks,
Bill

From: Karen Loewy <KLoewy@lambdalegal.org>
Sent: Monday, July 6, 2020 3:09 PM
To: Lane, William (CIV) <wlane@CIV.USDOJ.GOV>
Cc: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>; Edelstein, Laurie <ledelstein@steptoe.com>
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Hello, Bill,

Thanks so much for reaching out. Please extend my thanks to Steve for making the connection.

I'm cc'ing my colleagues Omar Gonzalez-Pagan, also from Lambda Legal, and Laurie Edelstein, from Steptoe. We'd like to take you up on your offer for a call. Would 3 pm ET work for you tomorrow? We can send an invitation with call-in information if it would.

Thanks again,
Karen

Karen L. Loewy
Senior Counsel
Pronouns: She/her/hers

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From: Lane, William (CIV) <William.Lane2@usdoj.gov>
Sent: Monday, July 6, 2020 2:34 PM
To: Karen Loewy <KLoewy@lambdalegal.org>
Subject: Whitman-Walker Health v. U.S. Department of Health and Human Services

Karen,

I hope that you had a great Fourth of July. I understand that you reached out to Steve Pezzi about the *Whitman-Walker* case in DDC. I'll be serving as counsel of record. Please let me know if there's anything you'd like to discuss. If you'd prefer, we can set up a call. Other than from 11:30 to 12:30, my schedule tomorrow is flexible—just let me know when works best for you.

Thanks,
Bill

William Lane
Counsel to the Assistant Attorney General
U.S. Department of Justice, Civil Division
(202) 305-7920

EXHIBIT 2

Omar Gonzalez-Pagan

From: Omar Gonzalez-Pagan
Sent: Wednesday, July 29, 2020 11:08 PM
To: Lane, William (CIV); Jordan.L.Von.Bokern2@usdoj.gov
Cc: Edelstein, Laurie; Dennehy, Johanna; Banker, Michelle; Datla, Kirti; Chien, Marsha (ATG); brian.sutherland@atg.wa.gov; neal.luna@atg.wa.gov; Neli Palma; Kathleen Boergers; Lily Weaver; Ashley.Harrison@doj.ca.gov; Martine DAgostino; Wardenski, Joseph; Goldstein, Elena; Kaye, Fiona; England, Travis; Hainsworth, Amanda (AGO); Parr, Kimberly (AGO); Jason Starr; Jacobs, Edward J.; Quicker, Katrina; Zunno-Freaney, Kathryn
Subject: Request to meet and confer re production of administrative record

Counsel,

I am writing on behalf of plaintiffs' counsel in the *Whitman-Walker Clinic*, *BAGLY*, *Walker*, *Washington*, and *New York et al.* cases, all of which challenge the revised rule promulgated by HHS under Section 1557 of the ACA. We would like to jointly discuss and coordinate the expedited production of the administrative record in these cases. Please let us know if you are amenable to meet and confer about this matter in the next few days.

Regards,

Omar Gonzalez-Pagan
Senior Attorney*
Pronouns: He/Him/His
Lambda Legal
120 Wall Street, 19th Floor
New York, New York 10005-3919
Work Phone: 212-809-8585, ext. 211 | Mobile Phone: (617) 686-3464
Email: ogonzalez-pagan@lambdalegal.org | Fax: (212) 809-0055
http://www.lambdalegal.org
* *Admitted in Massachusetts and New York.*

EXHIBIT 3

Omar Gonzalez-Pagan

From: Omar Gonzalez-Pagan
Sent: Friday, August 21, 2020 2:00 PM
To: 'Lane, William (CIV)'
Cc: Edelstein, Laurie; Dennehy, Johanna; Von Bokern, Jordan L. (CIV)
Subject: RE: Whitman-Walker Health v. U.S. Department of Health and Human Services

Bill,

Thank you for your email. We think any extension has to be tied to the production of the Administrative Record and would not agree to an open-ended extension. That said, keeping in mind the forthcoming deadline, we are happy to discuss alternatives. Would you be available to discuss after 3:00pm ET today?

Omar

Omar Gonzalez-Pagan
Pronouns: He/Him/His
Lambda Legal

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From: Lane, William (CIV) <William.Lane2@usdoj.gov>
Sent: Friday, August 21, 2020 12:31 PM
To: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Cc: Edelstein, Laurie <ledelstein@steptoe.com>; Dennehy, Johanna <jdennehy@Steptoe.com>; Von Bokern, Jordan L. (CIV) <Jordan.L.Von.Bokern2@usdoj.gov>
Subject: Whitman-Walker Health v. U.S. Department of Health and Human Services

Omar,

We hope that you are doing well. Defendants would like to secure an extension that would allow them to review the court's forthcoming order before responding to the complaint. A draft motion and proposed order are attached. Please let us know what plaintiffs' position on this motion would be at your earliest convenience.

Thanks,
Bill

WILLIAM LANE
COUNSEL TO THE ASSISTANT ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION
(202) 305-7920

EXHIBIT 4

Omar Gonzalez-Pagan

From: Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>
Sent: Friday, October 2, 2020 11:16 AM
To: Omar Gonzalez-Pagan; Lane, William (CIV)
Cc: Edelstein, Laurie; Dennehy, Johanna
Subject: RE: Whitman-Walker Clinic v. HHS - Administrative Record

Good Morning Omar,

Consistent with our prior email, the government does not intend to produce the AR at this time.

Best,
Liam

From: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Sent: Thursday, October 1, 2020 6:45 PM
To: Holland, Liam C. (CIV) <lholland@CIV.USDOJ.GOV>; Lane, William (CIV) <wlane@CIV.USDOJ.GOV>
Cc: Edelstein, Laurie <ledelstein@Steptoe.com>; Dennehy, Johanna <jdennehy@Steptoe.com>
Subject: RE: Whitman-Walker Clinic v. HHS - Administrative Record

Counsel,

Thank you for your response. We disagree on whether defendants must produce the administrative record; they must. Not only does LR 7(n)(1) unambiguously state that defendants must file a certified list of the contents of the administrative record simultaneously with any dispositive motion, case law does not support defendants' failure to do so here. Here, plaintiffs have alleged that each of the provisions of the revised rule are arbitrary and capricious. Yet, in their motion, defendants rely on the agency's rationales and "decisionmaking" to justify the revised rule. "[In] order to allow for meaningful judicial review," however, "[an] agency must produce an administrative record that delineates the path by which it reached its decision." Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 339 (D.C. Cir. 1989). The court here will not be able to "properly evaluate the plaintiff's claims that the defendants acted arbitrarily and capriciously" without the administrative record. Farrell v. Tillerson, 315 F. Supp. 3d 47, 69 (D.D.C. 2018).

Accordingly, we request that you respond by no later than 5:00pm ET tomorrow indicating whether defendants will comply with their obligation to produce the administrative record. Should defendants refuse or fail to respond by 5:00pm ET tomorrow, plaintiffs will file a motion to compel production of the administrative record.

Omar

Omar Gonzalez-Pagan
Pronouns: He/Him/His
Lambda Legal

Lambda Legal: Making the case for equality

From: Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>
Sent: Wednesday, September 30, 2020 1:17 PM
To: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>; Lane, William (CIV) <William.Lane2@usdoj.gov>

Cc: Edelstein, Laurie <ledelstein@Steptoe.com>; Dennehy, Johanna <jdennehy@Steptoe.com>
Subject: RE: Whitman-Walker Clinic v. HHS - Administrative Record

Good Afternoon Counsel,

The government does not believe Local Rule 7(n)(1) requires it to produce and file a certified list of the contents of the administrative record at this time, before the government has filed an answer or moved for summary judgment. In practice, DDC courts do not require defendants to do so when they file a motion to dismiss because the logic of Local Rule 7(n)(1) presupposes that the motion implicates the contents of the administrative record. *See Connecticut v. United States Dep't of the Interior*, 344 F. Supp. 3d 279, 294 (D.D.C. 2018) (waiving rule 7(n) "follow[ing] the practice of other courts in this jurisdiction when 'the administrative record is not necessary for [the court's] decision' regarding a motion to dismiss") (quoting *Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F.Supp.3d 116, 123 n.12 (D.D.C. 2017)); *Carroll v. Office of Fed. Contract Compliance Programs, U.S. Dep't of Labor*, 235 F. Supp. 3d 79, 81 n.1 (D.D.C. 2017); *PETA v. U.S. Fish & Wildlife Serv.*, 59 F.Supp.3d 91, 94 n.2 (D.D.C. 2014)). Indeed, in directing counsel to file an appendix of administrative record material in addition to the certified list, the rule specifically instructs counsel not to "burden the appendix with excess material from the administrative record that does not relate to the issues raised in the motion or opposition." *Id.*; *see also* L. Civ. R. 7(n) cmt. 1 ("This rule is intended to assist the Court in cases involving a voluminous record . . . by providing the Court with copies of *relevant portions of the record relied upon in any dispositive motion*." (emphasis added)).

Sincerely,
Liam

Liam Holland
Trial Attorney | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-4964

From: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Sent: Wednesday, September 30, 2020 12:09 PM
To: Holland, Liam C. (CIV) <lholland@CIV.USDOJ.GOV>; Lane, William (CIV) <wlane@CIV.USDOJ.GOV>
Cc: Edelstein, Laurie <ledelstein@Steptoe.com>; Dennehy, Johanna <jdennehy@Steptoe.com>
Subject: Whitman-Walker Clinic v. HHS - Administrative Record

Counsel,

I am writing with regards to the motion to dismiss filed last night in this case. To date and notwithstanding repeated requests to do so, defendants have failed to produce the administrative record in this case. The motion also failed to include a certified list of the contents of the administrative record. Local Rule 7(n)(1) states that "the agency must file a certified list of the contents of the administrative record with the Court … simultaneously with the filing of a dispositive motion." In addition, LR 7(n) requires the parties work together to prepare an appendix of the relevant portions of the administrative record for the court to consider. Please advise by close of business today when defendants will produce

the administrative record as well as the certified list of its contents. We are available to discuss this matter should you wish to do so.

Regards,

Omar Gonzalez-Pagan
Senior Attorney*
Pronouns: He/Him/His
Lambda Legal
120 Wall Street, 19th Floor
New York, New York 10005-3919
Work Phone: 212-809-8585, ext. 211 | Mobile Phone: (617) 686-3464
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* *Admitted in Massachusetts and New York.*

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EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

State of New York, *et al.*,

Plaintiffs,

v.

U.S. Department of Health and Human Services, *et al.*,

Defendants.

Case No. 1:20-cv-05583-AKH
Hon. Alvin K. Hellerstein

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STAY BRIEFING ON PLAINTIFFS' PREMATURE MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO CONSOLIDATE BRIEFING AND SET A BRIEFING SCHEDULE

Defendants respectfully move for a stay of Defendants' deadline to respond to Plaintiffs' premature motion for summary judgment until after this Court resolves Defendants' anticipated motion to dismiss, for which Defendants request a 30-day extension from September 21 to October 21, 2020. In the alternative, Defendants request that this Court extend the deadline to answer or respond to the complaint from September 21 until November 6, and the deadline to respond to Plaintiffs' motion for summary judgment from October 13 until November 6, so that Defendants can address the overlapping issues without duplicative briefing and with the benefit of the administrative record, which they anticipate producing by October 16. Plaintiffs oppose the relief requested. If the Court denies those requests, Defendants respectfully request that the Court enter an order extending their deadline to respond to Plaintiffs' Complaint and their deadline to respond to Plaintiffs' motion for summary judgment each until fourteen days after the denial order, so long

as that extension of Defendants' response deadline to the motion for summary judgment would not make the response due before the current October 13 deadline

BACKGROUND

In this case, Plaintiffs—twenty-two states and the District of Columbia—challenge numerous provisions of a final rule ("2020 Rule") issued by the Department of Health and Human Services. *See* Nondiscrimination in Health & Health Educ. Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020). The 2020 Rule relates to Section 1557 of the Affordable Care Act, the law's antidiscrimination provision, codified at 42 U.S.C. § 18116. The 2020 Rule replaces a previous version of the rule issued in 2016. The 2020 Rule addresses a range of regulatory provisions that relate to sex discrimination, other forms of discrimination, the entities covered by the statute, the exemptions from that statute, the notices that covered entities must supply, the policies that covered entities must have in place, and myriad other issues.

Plaintiffs' Complaint challenges the 2020 Rule as substantively unlawful under the Administrative Procedure Act (APA) and contrary to the Due Process Clause. Defendants' answer or other response to Plaintiffs' 92-page Complaint is due on Monday, September 21. On September 10, Plaintiffs filed a 65-page motion for partial summary judgment, with 109 exhibits, to which Defendants' response is currently due on Tuesday, October 13. That motion for summary judgment likewise contends that the 2020 Rule is contrary to law and arbitrary and capricious in violation of the APA. Defendants have not yet responded to Plaintiffs' Complaint. Nor have Defendants produced the administrative record.

ARGUMENT

I. The Court Should Stay the Briefing on Plaintiffs' Motion for Summary Judgment

The Court should stay briefing on the Plaintiffs' motion for summary judgment pending resolution of Defendants' forthcoming motion to dismiss. This Court has the inherent authority to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). That broad discretion includes the "inherent power to control the sequence in which it hears matters on its calendar." *United States v. W. Elec. Co.*, 46 F.3d 1198, 1207 n.7 (D.C. Cir. 1995). In particular, when two parties present separate motions, the Court may first consider a motion that "addresses a specific and narrow issue" rather than a motion that "encompass[es] issues far broader." *United States v. W. Elec. Co.*, 158 F.R.D. 211, 220 (D.D.C. 1994), *aff'd*, 46 F.3d at 1207 n.7 ("[T]he [district] court's explanation amply supports its exercise of discretion."). In this case, the existence of serious jurisdictional questions and the interests of efficiency and judicial economy make it appropriate for the Court to resolve Defendants' forthcoming motion to dismiss before the litigation proceeds to summary judgment.

The "first and fundamental" question for any court is that of jurisdiction: "[t]he requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception," and therefore "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (internal quotation marks omitted). Defendants' forthcoming motion to dismiss will raise, *inter alia*, the threshold issue of whether the Plaintiffs have standing to bring suit, including whether Plaintiffs have suffered any injury from the challenged provisions. Until this Court rules on that jurisdictional issue, Defendants "should not be put to the trouble and expense of any further proceedings, and the time of the court should not be occupied with any further proceeding." *United Transp. Serv. Employees of Am., CIO, ex rel.*

Wash. v. Nat'l Mediation Bd., 179 F.2d 446, 454 (D.C. Cir. 1949). Neither the Court's nor the parties' time is well served by extensively debating the merits of the Rule and this suit when a dispositive jurisdictional motion is forthcoming. Indeed, in a lawsuit against the 2020 Rule brought by another state (Washington), the federal district court wholly denied preliminary relief due to a lack of standing, after which the state voluntarily dismissed its case. *Washington v. HHS*, No. 20-cv-1105, 2020 WL 5095467, at *12 (W.D. Wash. Aug. 28, 2020). In another challenge to the 2020 Rule, a district court found that plaintiffs lacked standing to challenge certain provisions. *Whitman-Walker Clinic, Inc. v. HHS*, No. 1:20-cv-1630-JEB, 2020 WL 5232076 (D.D.C. Sept. 2, 2020).

Because Defendants' motion to dismiss, if granted, would put an end to this litigation or at least substantially shrink the number of provisions being challenged, to require the parties or the Court to address the substance of Plaintiffs' summary judgment motion at this time would be an inefficient use of resources. Nothing in Rule 56 justifies such waste. In fact, the Advisory Committee notes for Rule 56 encourage courts to issue orders that will prevent the premature briefing of summary judgment motions filed at the commencement of a case: "Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case." Fed. R. Civ. P. 56 advisory committee's note (2010 amendments). Indeed, Rule 12(b) "promotes the early and simultaneous presentation and determination of preliminary defenses." 5B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1349 (3d ed. 2004). Adjudicating motions under Rule 12(b) thus helps to "produce an overall savings in time and resources as well as avoid delay in the disposition of cases, thereby benefiting both the parties and the courts." Wright & Miller, § 1349. Plaintiffs should not be

permitted to preempt Defendants' rights under Rule 12 and waste the parties' and the Court's resources by seeking to advance this litigation straight to summary judgment.

A stay of summary judgment briefing is also appropriate so that summary judgment motions, if ultimately necessary, can be properly resolved on the administrative record. Plaintiffs' claims for substantive violations of the APA must be determined based on the administrative record, which the agency is charged with compiling. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record[.]"); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." (internal citation omitted)). Here, Plaintiffs moved for summary judgment without permitting Defendants the opportunity to compile the administrative record. In the absence of an administrative record, Plaintiffs seek to support their motion with various exhibits. This unofficial, Plaintiff-selected compilation of documents, however, does not and cannot substitute for the administrative record against which the agency's actions must be evaluated. Plaintiffs should not be permitted to unilaterally redefine the traditional method for judicial review of agency action, and Defendants should not be forced to brief, nor the Court to decide, summary judgment without the benefit of the administrative record. To respond to Plaintiffs' motion would require Defendants to first spend significant time and resources compiling an administrative record to enable review of the merits of Plaintiffs' substantive APA claims, all of which would become wasted effort if the Court grants Defendants' motion to dismiss.

Finally, deferring summary judgment briefing would not prejudice Plaintiffs. If the Court ultimately denies the motion to dismiss, the parties may then turn to the merits of the arguments

raised in Plaintiffs' summary judgment motion and any cross-motion for summary judgment that Defendants would file.

In sum, Defendants respectfully submit that the more efficient path forward in this case is for the Court to resolve the anticipated motion to dismiss, which has the potential to shrink the scope of the disputed issues and resolve whether this Court even has jurisdiction to hear this case. Defendants believe that a stay of briefing on summary judgment until after resolution of that motion to dismiss will minimize the parties' unnecessary or duplicative briefing and will preserve the parties' and the Court's resources and efficiency. Briefing summary judgment at this point—before any motion to dismiss has been resolved, the complaint answered, or the administrative record produced—would be premature. Defendants therefore propose that this Court stay briefing on summary judgment until after resolution of the anticipated motion to dismiss.

To enable Defendants to adequately respond to Plaintiffs' 92-page Complaint, Defendants further request that the deadline to respond to Plaintiffs' complaint be extended thirty days to October 21. Counsel for Defendants face numerous pressing matters limiting their ability to respond to Plaintiffs' lengthy Complaint—for example, counsel for Defendants have undertaken several rounds of preliminary injunction briefing and arguments relating to the 2020 Rule since Plaintiffs filed this lawsuit,[1] and several other challenges to Rule 1557 have a deadline approaching for the answer or response to the complaint in those cases. *See* Minute Order, *Whitman-Walker Clinic, Inc. v. HHS*, No. 1:20-cv-1630-JEB (D.D.C. Sept. 8, 2020) (setting the answer deadline for September 29); Electronic Order, *Boston Alliance of Gay, Lesbian, Bisexual and Transgender Youth (BAGLY) v. HHS*, No. 1:20-cv-11297, ECF No. 17 (D. Mass. Sept. 11, 2020) (setting the

[1] *See Washington v. HHS*, No. 20-cv-1105, 2020 WL 5095467 (W.D. Wash. Aug. 28, 2020); *Whitman-Walker Clinic, Inc. v. HHS*, No. 1:20-cv-1630-JEB, 2020 WL 5232076 (D.D.C. Sept. 2, 2020); *Walker v. Azar*, No. 20-cv-2834, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020).

answer deadline for October 14); Electronic Order, *Walker v. Azar*, No. 20-cv-2834 (E.D.N.Y. Sept. 15, 2020) (setting the answer deadline for October 30, 2020). Additional time for Defendants' response is necessary to ensure that Defendants are able to adequately respond to Plaintiffs' extensive Complaint.

II. In the Alternative, the Court Should Extend the Deadline to Answer or Respond to the Complaint and the Deadline to Respond to Plaintiffs' Motion for Summary Judgment

As discussed above, the proper path forward in this case is for the Court to assure itself of jurisdiction and address the anticipated motion to dismiss before requiring the parties to address the merits of Plaintiffs' motion for summary judgment. It should accordingly stay Defendants' response to Plaintiffs' motion for summary judgment until after the Court decides Defendants' forthcoming motion to dismiss. In the alternative, however, the Court should at least provide Defendants an opportunity to compile an administrative record on which to defend the agency action at issue here. Likewise, the Court should permit Defendants to file their anticipated motion to dismiss and the summary judgment briefing together, to reduce the duplicative briefing that would substantially overlap in those two separate sets of briefing. Defendants expect to produce the administrative record by October 16, 2020. Defendants therefore request that the Court extend their deadlines to respond to the Complaint and to respond to Plaintiffs' motion for summary judgment until November 6, 2020, and to permit Defendants to file a consolidated motion to dismiss, motion for summary judgment, and opposition to plaintiffs' partial motion for summary judgment at that time.

III. If This Court Denies This Motion, Defendants Request That Their Deadlines to Respond to the Complaint and Respond to Summary Judgment Be Set for Fourteen Days After That Denial

If this Court believes that staying summary judgment briefing or consolidating the issues for consideration after production of the administrative record is inappropriate, Defendants

respectfully request that this Court permit Defendants to file their answer or motion to dismiss and their response to the summary judgment motion fourteen days after this Court enters its order denying those requests.

CONCLUSION

For the foregoing reasons, the Court should stay Defendants' response to Plaintiffs' motion for summary judgment pending resolution of Defendants' forthcoming motion to dismiss, and should grant Defendants a thirty-day extension to file that motion to dismiss. Alternatively, if the Court denies that request, Defendants respectfully request that the Court extend the deadlines for Defendants to answer or respond to the Complaint and to respond to Plaintiffs' motion until November 6. Lastly, if the Court decides that neither form of relief is appropriate, Defendants respectfully request an extension of fourteen days from entry of that denial order for Defendants to answer or respond to the complaint and to respond to Plaintiffs' motion for summary judgment.

Dated: September 18, 2020

Respectfully submitted,

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Attorneys for Defendants

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*,	:	
Plaintiffs,	:	**ORDER REGULATING MOTION PRACTICE AND RECORD PROCEDURES**
-against-	:	
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,	:	20 Civ. 5583 (AKH)
Defendants.	:	

ALVIN K. HELLERSTEIN, U.S.D.J.:

On September 10, 2020, Plaintiffs filed a motion for partial summary judgment with respect to Plaintiffs' three claims for relief under the Administrative Procedure Act, 5 U.S.C. § 706, *et seq.* ("APA"), but not with respect to Plaintiffs' due process claim. *See* ECF No. 62. On September 18, 2020, Defendants filed a motion to stay briefing on the motion for partial summary judgment, or in the alternative, to consolidate briefing and set a briefing schedule. *See* ECF No. 88. Plaintiffs oppose Defendants' motion. *See* ECF No. 91.

Having considered the parties' submissions, the Court hereby orders as follows:

1. As the administrative record in this case has yet to be compiled, Plaintiffs' motion for partial summary judgment, *see* ECF No. 62, is premature. Accordingly, the motion for partial summary judgment is dismissed without prejudice.
2. On or before October 16, 2020, Defendants' shall file with the Court and opposing counsel the relevant administrative record pertaining to Plaintiffs' claims under the APA. *See* ECF No 1. Thereafter, Plaintiffs shall have until

October 26, 2020 to comment or otherwise object as to the adequacy, accuracy, or comprehensiveness of the administrative record.

3. The parties shall appear for a telephonic status conference on October 29, 2020, at 11:00 a.m. to regulate further motion practice and address objections, modifications, or other applications regarding the adequacy, accuracy, and comprehensiveness of the administrative record produced by Defendants.
4. Defendants' time to answer or respond to the Complaint, *see* ECF No. 1, is hereby extended to a time to be determined by the Court during the October 29, 2020 status conference.
5. Defendants' motion to stay briefing with respect to Plaintiffs' motion for partial summary judgment, *see* ECF No. 88, is denied as moot.
6. The Clerk is directed to close the open motions at ECF Nos. 62 and 88.

SO ORDERED.

Dated: September 22, 2020
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge