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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)