

August 9, 2022

VIA CM/ECF

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
Rule 28(j) Notice of Supplemental Authority:

Oral Argument in *Franciscan Alliance v. Becerra*,
No. 21-11174 (5th Cir.) (oral argument held Aug. 4, 2022), available at
https://www.ca5.uscourts.gov/OralArgRecordings/21/21-11174_8-4-2022.mp3

Dear Mr. Gans:

On August 4, 2022, the Fifth Circuit held oral argument in *Franciscan Alliance v. Becerra*. See Resp.Br.14-27 (discussing *Franciscan*); A800-02 (same). There, HHS's counsel made several concessions relevant to this appeal.

First, HHS confirmed that the NPRM doesn't moot a case like this one, as Plaintiffs previously explained. Oral Arg. at 6:39-6:43; Supp.Br.1-6.

Second, HHS again confirmed that it will not disavow enforcing Section 1557 against religious providers like Plaintiffs. Judge Willett asked: "The last time we heard argument in this case, ... we asked if you, the Government, could promise that Plaintiffs would not face prosecution or an enforcement action for refusing to offer gender reassignment surgeries ... and the Government's response was, 'No.' And has that answer changed?" HHS responded, "It hasn't, your honor." Oral Arg. at 7:16-7:44. This is another straightforward admission that Plaintiffs face a credible threat of enforcement. Resp.Br.26.

Third, HHS confirmed its blanket opposition to *any* pre-enforcement RFRA adjudication. Asked by Judge Elrod what factual context would be "concrete enough" for a court or agency to address a RFRA objection, HHS's counsel stated that "you would have to have a scenario where a provider is asked to perform a particular service, the



provider says, ‘no,’ that individual then goes to the agency and files a complaint, and then the agency has to go through the process of determining whether there was a violation of the statute.” Judge Elrod then noted (with apparent skepticism) that this would mean religious objectors would “have to make ... a split-second decision and be on the defense” and could never bring a pre-enforcement challenge to “the whole regulation.” Oral Arg. at 8:23-9:20.

But courts across the country have resolved numerous pre-enforcement RFRA challenges resulting in numerous injunctions indistinguishable from the injunction at issue here. Resp.Br.44-45. Those cases, like the decision below, rest on a foundational principle of Article III standing: Plaintiffs need not “operate beneath the sword of Damocles” or “wait for an actual prosecution or enforcement action before challenging a law’s constitutionality.” Resp.Br.31, 52-53 (quoting cases).

The Court should affirm.

Word Count: 342

Sincerely,

/s/ Luke W. Goodrich

LUKE W. GOODRICH

MARK L. RIENZI

JOSEPH DAVIS

DANIEL L. CHEN

The Becket Fund for Religious Liberty

1919 Pennsylvania Ave. NW, Ste. 400

Washington, DC 20036

(202) 955-0095

lgoodrich@becketlaw.org

Counsel for Plaintiffs-Appellees