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VIA CM/ECF

August 12, 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:

Pursuant to Federal Appellate Rule 28(j), we write in response to the *Religious Sisters* plaintiffs' August 9, 2022 letter advising this Court of the recent oral argument in *Franciscan Alliance v. Becerra*, No. 21-11174 (5th Cir.).

The district court in *Franciscan Alliance* committed the same error as the district court in this case. Both courts issued injunctions that broadly prohibit the government from enforcing the relevant statutes based on positions that the government has not actually adopted. Contrary to plaintiffs' suggestion, the government did not make any "concessions relevant to this appeal" during the *Franciscan Alliance* oral argument.

First, the government has not argued that HHS's recent notice of proposed rulemaking (NPRM) renders this case moot. Rather, as we explained in our July 6, 2022 and August 11, 2022 filings, the NPRM only underscores that the district court's anticipatory injunctions were premature.

Second, the government cannot disavow enforcement against religious providers because it has not yet taken a position on how, if at all, the statutes should be enforced against objecting religious providers. Because the government has not to date concluded that plaintiffs' conduct violates the relevant statutes, this Court should reject plaintiffs' attempts to pretermit the agency's evaluation of the issues and obtain a preemptive judicial declaration that HHS may never bring an enforcement action against plaintiffs.

Third, plaintiffs are incorrect in suggesting that pre-enforcement RFRA injunctions are routine. As the Supreme Court explained in *Whole Women's Health v. Jackson*, the Supreme Court "has never recognized an unqualified right to pre-enforcement review." 142 S. Ct. 522, 537–38 (2021). The Court further explained that "the 'chilling effect' associated with a . . . law

being 'on the books' is insufficient to 'justify federal intervention' in a pre-enforcement suit. Instead, this Court has always required proof of a more concrete injury[.]" *Id.* at 538 (citation omitted). Moreover, the Supreme Court made clear in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* that RFRA requires "an inquiry more focused than [a] categorical approach" and requires a case-specific analysis. 546 U.S. 418, 431, (2006).

Respectfully submitted,

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