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VIA CM/ECF

May 5, 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' May 3, 2022 letter advising this Court of a recent order denying the defendant's motion to dismiss in *Scott v. St. Louis Univ. Hosp.*, No. 21-1270, 2022 WL 1211092 (E.D. Mo. Apr. 25, 2022). That unpublished, interlocutory district court ruling has no bearing on this appeal.

Scott involved a private lawsuit in which the plaintiff-employee brought a discrimination claim against the defendant-employer under Section 1557 of the Affordable Care Act challenging the exclusion of health benefits to cover treatment costs for gender dysphoria from the employer's health benefits plan. As relevant here, the defendant moved to dismiss, arguing that the plaintiff was not within the intended class of beneficiaries who may bring suit under Section 1557. Pls.' Ex. 1 at 11. The court rejected this argument and denied the defendant's motion to dismiss.

Plaintiffs contend that *Scott* supports their standing to seek a broad injunction prohibiting the Department of Health and Human Services (HHS) from taking any future enforcement action under Section 1557 that would require plaintiffs to perform or provide insurance coverage for gender-transition procedures. It does not. As explained in the government's briefs in this appeal, plaintiffs have not demonstrated a credible threat of enforcement sufficient to support standing because HHS has not initiated or threatened any Section 1557 enforcement action against plaintiffs or any entity with religious objections to performing or providing coverage for gender-transition procedures. Nothing in *Scott* affects that argument. The court's ruling in *Scott*—a private lawsuit under Section 1557—has no bearing on whether *defendant* HHS will bring enforcement actions against plaintiffs for declining to provide or cover gender-transition services. And to the extent plaintiffs are alleging injury from future private lawsuits, such alleged injury is not traceable to HHS or redressable by the injunction against HHS, which has

no effect on private litigants. *See Balogh v. Lombardi*, 816 F.3d 536, 544 (8th Cir. 2016) (plaintiff did not have standing despite the threat of private lawsuits because the “injury is ‘fairly traceable’ only to the private civil litigants”).

Respectfully submitted,

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