



U.S. Department of Justice
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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 U.S. Department of Health and Human Services' (HHS) notice of proposed rulemaking (NPRM).

The NPRM was issued on July 25, 2022 and proposes to revise HHS's regulations implementing Section 1557 of the Affordable Care Act. As the government explained in its July 6, 2022 filing, the NPRM only underscores that the district court's anticipatory injunctions were premature. 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. 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 promulgated a final rule taking the hypothetical position that plaintiffs challenge. *See Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992 (8th Cir. 2022) (holding that plaintiffs did not have standing to challenge a Department of Housing and Urban Development memorandum that did not "require that HUD reach the specific enforcement decision that the College's current housing policies violate federal law").

Moreover, the NPRM makes clear that HHS is fully committed to respecting conscience and religious freedom laws and will consider them in the context of enforcement decisions. The NPRM proposes a process by which entities can notify HHS of their view that application of a provision of the regulation would violate religious freedom laws, such as RFRA. 87 Fed. Reg. 47,824, 47,885-86, 47,918-19 (Aug. 4, 2022). Under this proposed provision, HHS "shall promptly consider those views in responding to any complaints or otherwise determining whether to proceed with any investigation or enforcement activity" and can "determine at any time whether a recipient is wholly exempt from" a certain provision. *Id.* at 47,885-6. The

NPRM underscores that plaintiffs have not demonstrated a credible threat of enforcement sufficient to demonstrate standing.

Respectfully submitted,

s/ Ashley A. Cheung

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cc: Counsel (via CM/ECF)