



U.S. Department of Justice
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VIA CM/ECF

September 2, 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 Rule 28(j), we write in response to the *Religious Sisters* plaintiffs' August 29 letter advising this Court of a decision affirming a permanent injunction in *Franciscan Alliance v. Becerra*, No. 21-11174 (5th Cir.).

Franciscan Alliance was an unusual case with a lengthy procedural history quite different from this case. It involved a challenge to HHS's 2016 Rule under the APA and RFRA. The district court granted summary judgment for the plaintiffs and vacated the challenged provisions of the 2016 Rule. Op. 3. The plaintiffs appealed the denial of permanent injunctive relief. *Id.* Shortly thereafter, HHS issued the 2020 Rule, and the Supreme Court decided *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Op. 4. In the first appeal, the Fifth Circuit remanded the case because "the legal landscape ha[d] shifted significantly." Op. 5. On remand, the district court granted the plaintiffs' motion for a permanent injunction, and the Fifth Circuit affirmed. Op. 6, 18.

Plaintiffs here argue that *Franciscan Alliance* "rejected the same justiciability arguments HHS makes here." That is not accurate. In *Franciscan Alliance*, the Fifth Circuit principally addressed pre-enforcement standing concepts in the course of analyzing whether the government established that the plaintiffs' claims were moot in light of the case's lengthy factual and procedural history. Op. 7-13. Although the court cited several pre-enforcement standing cases, it did so in its mootness analysis. Op. 11-13. Here, the government has made no argument that plaintiffs' claims are moot.

Franciscan Alliance only briefly addressed standing. Op. 16-17. The Fifth Circuit failed to perform the necessary analysis of pre-enforcement standing that this Court recently conducted in *School of the Ozarks, Inc. v. Biden* to find that a religious school lacked standing to challenge HUD's possible enforcement of the Fair Housing Act where the challenged memorandum did

not “require that HUD reach the specific enforcement decision that the school’s current housing policies violate federal law.” 41 F.4th 992, 998 (8th Cir. 2022). Nor did the Fifth Circuit say anything about ripeness in *Franciscan Alliance*. For these reasons, *Franciscan Alliance* does not support plaintiffs’ standing and ripeness arguments here.

Respectfully submitted,

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