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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 / The Catholic Benefits Ass'n v. Becerra*, No. 21-1890

Rule 28(j) Notice of Supplemental Authority:
Franciscan Alliance v. Becerra, --- F.4th ---, No. 21-11174, 2022 WL 3700044 (5th Cir. Aug. 26, 2022)

Dear Mr. Gans:

On behalf of the CBA Plaintiffs, we write regarding the *Franciscan* decision. As recounted in the Sisters' Rule 28(j) letter, *Franciscan* rejects the same justiciability arguments that HHS and EEOC make here. The Government's efforts to distinguish *Franciscan* don't hold up.

Franciscan's procedural history doesn't distinguish it. After the Fifth Circuit's initial remand, the *Franciscan* plaintiffs and the Plaintiffs here faced the same legal landscape: the 2016 and 2020 Rules, the *Walker* and *Whitman-Walker* injunctions, and the 2021 Interpretation. The *Franciscan* district court cited Chief Judge Welte's opinion below for good reason—it was directly on point. And as in *Franciscan*, Plaintiffs here challenge not just agency interpretations but the statutes themselves.

Franciscan's standing analysis is directly on point. In *Franciscan*, the Government disputed and extensively briefed standing, arguing that plaintiffs' conduct wasn't arguably proscribed, HHS.Br.35-46—just like this case. The Fifth Circuit disagreed because the Government "repeatedly refused to disavow enforcement" and "plaintiffs have standing in the face of [such] prosecutorial indecision." Op.12. Whatever "the subtle distinctions between mootness and standing," they are immaterial to both cases because "if there is an ongoing dispute giving a plaintiff standing, the case is not moot." Op.12 n.40. Ditto for ripeness since, in the pre-enforcement context, standing and ripeness "boil down the same question." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014).

Finally, *Franciscan* agreed that the new Section 1557 proposed rule—the "2022 NPRM"—doesn't affect justiciability. "No party argues that the 2022 NPRM affects the mootness inquiry.

Nor can we see any reason why it should." Op.11 n.39. The NPRM, "if adopted, would reinstate much the same approach as the 2016 Rule." Op.7. As Plaintiffs here previously explained, the NPRM "simply confirm[s] that Plaintiffs' conduct is still proscribed" and they "still face a credible threat of enforcement." Aplees.' Joint Resp.10.

With HHS "committed" to "robust enforcement" of Section 1557, 87 Fed.Reg. 47,824, 47,831 (Aug. 4, 2022), and EEOC steadfast in its views on Title VII, this case is justiciable. This Court should follow *Franciscan* and affirm.

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Sincerely,

s/Ian Speir

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