

February 4, 2021

VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
United States Court of Appeals for the Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408



RE: Response to Notice of Supplemental Authority, *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021)

Dear Mr. Cayce:

Plaintiffs' reliance on *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021), is misplaced or at least three reasons.

First, unlike the plaintiffs in *Religious Sisters*, the plaintiffs in this case have already obtained a declaratory judgment that RFRA prohibits HHS from applying the 2016 Rules against them, and that judgment is binding on the government in future litigation between the parties. Whether or not "a credible threat of enforcement endures" that the 2016 Rules could be applied against other entities, *id.* at *15, the 2016 Rule cannot be applied against the plaintiffs in this case with or without an injunction. Intervenors' Br. 27.

Second, even if a "credible threat" from the 2016 Rules continued to exist, Plaintiffs confuse the test for standing with the test for a permanent injunction. The same cases holding that voluntary cessation of enforcement does not moot a case *also* recognize that voluntary cessation weighs in favor of granting only declaratory relief and not a permanent injunction. *See* Intervenors' Br. 32 (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 192–93 (2000), and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)).

Third, Plaintiffs continue to confuse a court's power to enjoin enforcement of "present regulations" (Pls.' Letter 1) with the court's power to enjoin hypothetical "future" regulations before they can be enacted. Appellants' Br. 38. In light of the government's complete failure to defend the 2016 Rules, the court in *Religious Sisters* held "that HHS's interpretation of Section 1557 that requires the Catholic Plaintiffs to perform and provide insurance coverage for gender-transition procedures violates their sincerely held religious beliefs without satisfying strict scrutiny under the RFRA." 2021 WL 191009, at *27. But to the

extent that the *Religious Sisters* injunction could be construed to preemptively enjoin hypothetical future *new* interpretations based on *new* regulations and *new* administrative records, the court exceeded both Article III and its equitable powers. Intervenors' Br. 28-32.

Respectfully submitted,

/s/ Joshua A. Block

Joshua A. Block

Counsel for Intervenors-Appellees

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