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July 25, 2022

VIA CM/ECF

Mr. Lyle W. Cayce, Clerk of Court
United States Court of Appeals for the Fifth Circuit
21400 U.S. Courthouse
600 S. Maestri Place Suite 115
New Orleans, LA 70130-3408

RE: *Franciscan Alliance, Inc. v. Becerra*, No. 21-11174
(oral argument scheduled for August 4, 2022)

Dear Mr. Cayce:

The federal defendants respectfully respond to plaintiffs' July 21, 2022 letter citing the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), as supplemental authority under Federal Rule of Appellate Procedure 28(j).

As an initial matter, plaintiffs are incorrect to assert (Letter 1) that the facts in *West Virginia* "precisely mirror this case." In *West Virginia*, the Supreme Court determined that litigants seeking to challenge the Clean Power Plan were still injured by the Plan given that the court of appeals had vacated its repeal and replacement, thus bringing the Plan "back into legal effect." 142 S. Ct. at 2605-06. Here, by contrast, the provisions of HHS's 2016 Rule that were vacated by the district court in this case have not been—and, indeed, could not be—revived by the subsequent decisions of other district courts. *See* Gov't Opening Br. 42-43; Gov't Reply Br. 3-4. Accordingly, plaintiffs cannot demonstrate any injury from the 2016 Rule.

Moreover, in *West Virginia* the Supreme Court held that the case remained justiciable based on the "voluntary cessation" exception to mootness. 142 S. Ct. at 2607. Plaintiffs have insisted, however, that the voluntary-cessation exception is not the "relevant [mootness] principle" in this case. Pls. Br. 53. As such, in their brief before this Court, plaintiffs did not dispute the government's argument that the voluntary-cessation exception is inapplicable here. *See* Gov't Opening Br. 28-30; Gov't Reply Br. 8-9.

The Supreme Court’s application of the voluntary-cessation exception in *West Virginia*—in the particular factual context at issue there—has no bearing on this case.

Sincerely,

/s/ McKaye L. Neumeister

McKaye L. Neumeister

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cc: Counsel of Record (via CM/ECF)