No. 21-1890

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE CATHOLIC BENEFITS ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of North Dakota

ANSWERING BRIEF OF APPELLEES THE CATHOLIC BENEFITS ASSOCIATION, DIOCESE OF FARGO, CATHOLIC CHARITIES NORTH DAKOTA, AND CATHOLIC MEDICAL ASSOCIATION

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INTRODUCTION AND STATEMENT OF THE ISSUE

Section 1557 of the Affordable Care Act prohibits federally funded health programs from discriminating on the basis of sex. *See* 42 U.S.C. § 18116(a). Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee "because of such individual's ... sex." *Id.* § 2000e-2(a)(1). These statutes are administered by the U.S. Department of Health and Human Services ("HHS") and the Equal Employment Opportunity Commission ("EEOC"), both defendants here. Through formal rulemaking, policy statements, and enforcement actions, HHS and the EEOC have interpreted Section 1557 and Title VII to mandate that plaintiffs—all Catholic organizations—perform and pay for gender-transition surgeries and related medical services. Plaintiffs, however, cannot comply with these mandates because facilitating gender transitions violates their sincerely held religious beliefs. They therefore sought relief under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). The district court agreed that plaintiffs were entitled to a RFRA-based exemption and entered declaratory and permanent injunctive relief.

The sole issue in this appeal is whether this case is justiciable, and it plainly is. Both HHS and the EEOC continue to interpret the relevant statutes to mandate that plaintiffs perform and cover gender-transition services. They have never backed off this view and have reconfirmed it since the district court's injunction entered. In a pre-enforcement challenge, questions of standing, ripeness, and justiciability essentially "boil down to the same question." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (quotation omitted). Plaintiffs must show "a credible threat of enforcement" because they "inten[d] to engage in a course of conduct arguably affected with a

constitutional interest, but proscribed by a statute." *Id.* at 159. As the district court correctly held, plaintiffs easily meet this standard.

STATEMENT OF THE CASE

"RFRA was designed to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). RFRA is a "super statute, displacing the normal operation of other federal laws" and "supersed[ing] [their] commands in appropriate cases." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). Where, as here, the sincerity of a religious belief is unquestioned, the court's "narrow function" is to "determine whether the government has placed substantial pressure, *i.e.*, a substantial burden, on the religious objector to engage in conduct that violates the religious belief." *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 938-39 (8th Cir. 2015) (quoting *Hobby Lobby*, 573 U.S. at 725) (internal quotation marks omitted), *vacated on other grounds*, 2016 WL 2842448 (U.S. May 16, 2016). If so, the government's action cannot stand unless it is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Plaintiffs/Appellees here are The Catholic Benefits Association, Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association. The Catholic Benefits Association ("CBA") is a membership organization that consists of Catholic hospitals and healthcare institutions as well as numerous Catholic employers, including dioceses and archdioceses, Catholic ministries, and Catholic-owned

businesses. A145-A146, ¶¶ 52-59.[1] The other named plaintiffs are all members of the CBA (together, "CBA Plaintiffs"). A138-A141, ¶¶ 12, 25, 32.[2]

All CBA members adhere to the teachings of the Catholic Church regarding sexuality, sexual identity, and the nature of the human person. A147. They sincerely believe that each human being is made in the image of God and that a person's biological sex—his or her identity as male or female—is a gift from God that cannot and should not be changed. A148-A149. CBA members also believe that every person must be treated with respect and dignity, regardless of gender identity or transgender status. A147-148, ¶¶ 72-73. But because of their devout Catholic faith, CBA members cannot perform, insure, or facilitate medical procedures and services as part of a gender transition. A152, ¶ 90. Thus, Catholic hospitals and healthcare institutions that are members of the CBA do not perform or provide sex-reassignment surgery, cross-sex hormone therapy, or psychotherapy and counseling as part of a gender transition. A146, ¶ 62-63; A152, ¶ 90. Nor do Catholic employers within the CBA cover these services in employee health plans. *Id.*; A139, ¶ 21.

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[1] Citations to the government's Appendix are abbreviated A__. Citations to Plaintiffs-Appellees' Supplemental Appendix are abbreviated SA__.

[2] The CBA Plaintiffs are plaintiffs in Case No. 16-cv-432 (D.N.D. filed Dec. 28, 2016), which was consolidated with Case No. 16-cv-386 (D.N.D. filed Nov. 7, 2016) brought by Plaintiffs/Appellees Religious Sisters of Mercy and others ("RSM Plaintiffs"). The RSM Plaintiffs sued only HHS, challenging its interpretation of Section 1557. The CBA Plaintiffs sued both HHS and the EEOC, challenging their interpretations of Section 1557 and Title VII. The district court entered declaratory and injunctive relief in favor of the RSM Plaintiffs against HHS, and similar relief in favor of the CBA Plaintiffs against both HHS and the EEOC. Both sets of plaintiffs hold essentially identical religious beliefs in relation to matters at issue in this case.

I. Section 1557, Title VII, and the 2016 Rule

Section 1557 of the Affordable Care Act ("ACA") prohibits discrimination on the basis of sex in federally funded health programs and activities. The statute doesn't do this directly, however. Rather, it coopts a different federal law, Title IX of the Education Amendments of 1972 ("Title IX"). Title IX bars discrimination "on the basis of sex" in federally funded educational programs, though it says it "shall not apply" to a religious organization if the "application of [Title IX] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a), (a)(3). Expressly incorporating Title IX, Section 1557 provides in relevant part, "[A]n individual shall not, on the ground prohibited under ... [T]itle IX ... , be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a).

Section 1557 also incorporates Title IX's enforcement mechanisms. *See id.* ("The enforcement mechanisms provided for and available under ... [T]itle IX ... shall apply for purposes of violations of this subsection."). Entities found to be in violation of Section 1557 face draconian sanctions including administrative enforcement actions, termination of federal funding, liability under the False Claims Act, civil lawsuits, and criminal penalties. *See* 20 U.S.C. § 1682.[3] HHS is the agency principally responsible for interpreting and enforcing Section 1557. *See* 42 U.S.C. § 18116(c).

[3] As the district court explained, an applicant for federal financial assistance from HHS must certify that it will comply with antidiscrimination laws like Section 1557 and Title IX. *See* 45 C.F.R. §§ 86.4, 92.4. Failure to comply with these laws may trigger the False Claims Act, exposing an entity to civil penalties and treble damages. 31 U.S.C. § 3729(a)(1). One who makes a materially false statement in connection with the delivery

Section 1557 and Title IX are not the only federal laws that ban sex discrimination. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against an applicant or employee "because of such individual's ... sex." *Id.* § 2000e-2(a)(1). Title VII generally applies to any employer with 15 or more employees, *see id.* § 2000e(b), and the U.S. Census Bureau estimates there are over 875,000 such employers in the United States, A155, ¶ 111. A violation of Title VII exposes an employer to administrative enforcement actions as well as private lawsuits for compensatory damages, punitive damages, injunctive relief, attorney's fees, and other relief. 42 U.S.C. §§ 1981a, 2000e-5. The EEOC is the agency principally responsible for interpreting and enforcing Title VII. *See id.* § 2000e-5(a); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

In 2016, HHS published a final rule interpreting Section 1557. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016) ("2016 Rule"). In relevant part, the 2016 Rule bars "covered entities" from discriminating on the basis of "gender identity" and "sex stereotyping." *Id.* at 31,467. HHS reasoned that "discrimination on the basis of sex includes discrimination on the basis of gender identity and sex stereotyping," *id.* at 31,389, and expressly relied on "case law interpreting ... Title VII" and EEOC decisions dating back to 2012 that reached the same conclusion, *id.* at 31,388, 31,385 & n.43, 31,409 & n.151.[4]

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of or payment for healthcare benefits or services is subject to criminal monetary penalties, up to five years' imprisonment, or both. 18 U.S.C. § 1035. Also, Section 1557 supports a private right of action for damages and attorney's fees. *Rumble v. Fairview Health Servs.*, 2015 WL 1197415, at *7 n.3 (D. Minn. Mar. 16, 2015).

[4] The 2016 Rule also prohibited discrimination "on the basis of ... termination of pregnancy," which raised the specter that covered entities may be required to perform

Under the 2016 Rule, a "covered entity" is an "entity that operates a health program or activity, any part of which receives Federal financial assistance." *Id.* at 31,466. HHS estimated that this broad definition—encompassing entities engaged in "the provision or administration of health-related services" as well as "health-related insurance coverage or other health-related coverage"—would apply to over 133,000 hospitals and healthcare facilities, "almost all practicing physicians in the United States," and some 180 health insurance companies that participate in federal and state-based marketplaces. *Id.* at 31,445. The rule defines "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth." *Id.* It defines "sex stereotypes" in part as "stereotypical notions of ... body characteristics" and "the expectation that individuals will consistently identify with only one gender [or] act in conformity with the gender-related expressions stereotypically associated with that gender." *Id.* at 31,468.

These expansive definitions transformed Section 1557 into a national mandate for transgender health services, including surgical treatments, hormone therapy, and psychotherapy to facilitate gender transitions. *See id.* at 31,435-36 (acknowledging that these services would have to be provided "over the lifetime of the individual"). The 2016 Rule had two major impacts. First, HHS explained that healthcare providers and professionals must provide gender-transition services if they offer comparable services

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and cover surgical abortions. The district court found that HHS successfully repealed this aspect of the rule and that "[a]s interpreted today, Section 1557 does not proscribe refusal to perform or insure abortions." A779. The CBA Plaintiffs do not challenge this ruling, so the termination-of-pregnancy provisions are not at issue in this appeal.

in other contexts. For example, "[a] provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." *Id.* at 31,455. Indeed, according to HHS, the rule mandates gender-transition procedures even when they are not "strictly identified as medically necessary or appropriate." *Id.* at 31,435.

Second, the 2016 Rule requires employers that are covered entities to cover gender-transition services in their health plans. HHS explained that a "categorical (or automatic) exclusion or limitation of coverage for all health services related to gender transition is unlawful on its face." *Id.* at 31,429. Further, if an employer's health plan covers a service for a purpose "not related to gender transition," it also must cover the service "as part of transition-related care." *Id.* So, for example, covering a hysterectomy to treat uterine cancer also requires covering a hysterectomy to "treat gender dysphoria." *Id.* Throughout this brief, we refer to this particular aspect of the 2016 Rule as the "coverage mandate."

By its terms, Section 1557 bars sex discrimination only in the context of health programs and activities that receive federal funds. But when it issued the 2016 Rule, HHS worked to expand the coverage mandate to all employers, even those that are not "covered entities." HHS achieved this result in two ways. First, it defined health insurers and third party administrators ("TPAs") to be covered entities, thus prohibiting them from providing or administering health coverage that excludes gender-transition services—even if the employer sponsoring the coverage is not itself a covered entity under the rule. *See id.* at 31,342. This seriously restricted CBA members' ability to obtain

morally-compliant health coverage. Second, HHS coordinated with the EEOC to ensure the coverage mandate applied to all Title VII employers:

> As part of its enforcement authority, [HHS] may refer matters to other Federal agencies with jurisdiction over the entity. Where, for example, [HHS] lacks jurisdiction over an employer responsible for benefit design, [HHS] typically will refer or transfer the matter to the EEOC and allow that agency to address the matter. The EEOC has informed [HHS] that, provided the filing meets the requirements for an EEOC charge, the date a complaint was filed with [HHS] will be deemed the date it was filed with the EEOC ....

Id.

The EEOC's pledge of cooperation in the 2016 Rule was not a surprise because the EEOC already had begun enforcing the same coverage mandate under its Title VII authority. When the 2016 Rule was published, official EEOC guidance interpreted Title VII's ban on sex discrimination to prohibit discrimination based on "transgender status." A169, ¶ 156; A262-268. And between 2016 and today, the EEOC has repeatedly enforced this interpretation to require employers to pay for gender-transition services as part of employee health coverage:

- The EEOC sued an employer and later entered into a three-year consent decree which provided that, "as of January 1, 2016, [employer's] national health benefits plan will not include any partial or categorical exclusion for otherwise medically necessary care based on transgender status." EEOC, Deluxe Financial to Settle Sex Discrimination Suit on Behalf of Transgender Employee, 2016 WL 246967 (Jan. 21, 2016).

- In 2016, the EEOC submitted amicus briefs in *Josef Robinson v. Dignity Health*, No. 4:16-cv-03035 (N.D. Cal. 2016), arguing that a hospital's exclusion of coverage for gender-transition services in its employee health plan violated Title VII. See A169-A170, ¶ 158.

- The EEOC has taken enforcement action against other employers on the same grounds. *See* A170; Soc'y for Human Res. Mgmt., Wal-Mart Loses Perfect LGBTQ Rating Because of Transgender Harassment, Nov. 30, 2017, https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wal-mart-lgbtq-rating.aspx (EEOC enforcement against Wal-Mart for "categorical exclusion" from its health plans of "services related to transgender treatment/sex therapy").

- "On March 13, 2018, the EEOC found that [the State of Alaska's] 'categorical exclusion of gender reassignment treatment and services from its health plan results in adverse treatment of [its] employees based on sex (including gender identity), in violation of Title VII.'" *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1028 (D. Alaska 2020) (quoting EEOC determination letter).

The EEOC maintains this interpretation of Title VII today. It has never altered its view that Title VII requires employers—healthcare and non-healthcare employers alike—to cover gender-transition services in their health plans. A170 ¶¶ 160-161; *see also* EEOC, Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination, https://www.eeoc.gov/fact-sheet-recent-eeoc-litigation-regarding-title-vii-lgbt-related-discrimination.

The 2016 Rule contains no religious exemption. HHS knew that its rule would burden religious exercise, but rather than accommodate religious objections, it simply said that the rule would not "displace th[e] protections" provided by RFRA and other federal laws protecting conscience. 81 Fed. Reg. at 31,379-80. HHS declined to "import Title IX's blanket religious exemption into Section 1557," and instead singled out RFRA as "the proper means to evaluate any religious concerns about the application of Section 1557 requirements"—essentially forcing plaintiffs to seek judicial relief. *Id.* at 31,380.

As a direct result of Section 1557 and the 2016 Rule, some CBA members' health plans were involuntarily changed. Two members received notices from their insurers

that, in order to comply with the 2016 Rule, their health plans would begin covering gender-transition services. A163-64, ¶¶ 136-140. Another CBA member, Plaintiff Diocese of Fargo, was required to enter an indemnification agreement with its TPA, Blue Cross Blue Shield of North Dakota ("BCBS"). Although the Diocese is not a covered entity and maintains a self-insured plan, its agreement with BCBS recites that "Section 1557 applies to [BCBS's] operations as a third-party administrator." Because the Diocese has excluded gender-transition coverage from its plan, the agreement requires the Diocese to accept "any and all liability," and to absolve BCBS, for "any plan design or administration that may be determined to violate Section 1557." A139-40, ¶¶ 21-22. This agreement remains in place today.

II. Litigation challenging the 2016 Rule

Litigation followed the issuance of the 2016 Rule. The first case filed was *Franciscan Alliance v. Burwell*, where the district court preliminarily enjoined HHS from enforcing the 2016 Rule's prohibition of discrimination "on the basis of gender identity." *See* 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016).[5] The court found that the 2016 Rule impermissibly expanded Title IX to encompass gender identity and omitted Title IX's religious exemption, both violations of the Administrative Procedure Act ("APA"), and substantially burdened the plaintiffs' religious exercise without satisfying strict scrutiny, a violation of RFRA. *Id.* at 689, 691-93.

In the meantime, the two cases giving rise to this appeal were filed and then consolidated. The CBA Plaintiffs sought declaratory and injunctive relief, pursuant to

[5] The court also enjoined the rule's termination-of-pregnancy provisions.

RFRA, against HHS's and the EEOC's interpretation and enforcement of the relevant statutes to the extent they required CBA members to "provide, perform, pay for, cover, or facilitate access to health services for gender transition." *See* A211. Given the nationwide injunction in *Franciscan Alliance*, the district court stayed enforcement of the 2016 Rule insofar as it prohibited discrimination on the basis of gender identity. With both an injunction and a stay in place, HHS promised that it would "assess the reasonableness, necessity, and efficacy" of the 2016 Rule and "address certain issues identified by" the *Franciscan Alliance* court. A764.

Then, several years passed. Between 2017 and 2020, HHS submitted multiple status reports to the district court regarding its efforts to supposedly revise the 2016 Rule. The EEOC, however, was silent. In thirteen status reports over this three-year period, the EEOC said not a word to the district court about Title VII. *See* SA301-SA325, SA530-SA550. Yet all the while, it was actively enforcing its coverage mandate around the country. *See* Soc'y for Human Res. Mgmt., *supra* (enforcement in 2017); *Fletcher*, 443 F. Supp. 3d at 1028 (enforcement in 2018). The EEOC also had taken the lead in *EEOC v. Harris Funeral Homes, Inc.*—one of three cases that became *Bostock v. Clayton County* at the Supreme Court—where it argued not only that Title VII prohibits "the full range of gender discrimination," including what it called "transitioning discrimination," but also that Title VII's prohibition specifically overrode an employer's religiously-based employment practices. *See* Op. Br. of EEOC, *EEOC v. Harris Funeral Homes, Inc.*, No. 16-2424, ECF No. 22, at 24, 33, 50-61 (6th Cir. Feb. 10, 2017). The Sixth Circuit ultimately agreed with the EEOC. 884 F.3d 560, 600 (6th Cir. 2018).

In June 2019, HHS issued a Notice of Proposed Rulemaking that sought to revise portions of the 2016 Rule. *See* Nondiscrimination in Health and Heath Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019) ("NPRM"). HHS pointed out, however, that the Supreme Court had just granted petitions for certiorari in *Bostock* to determine, in relevant part, whether Title VII's ban on sex discrimination applied to gender identity. *Id.* at 27,855. "Because Title IX adopts the substantive and legal standards of Title VII," HHS reasoned that *Bostock* would "likely have ramifications for the [interpretation] of Title IX." *Id.* HHS thus proposed to repeal the 2016 Rule's definition of the term "on the basis of sex" but not replace it with a new definition. *Id.* at 27,857. Rather, HHS would "ultimately allow the Federal courts," and particularly *Bostock*, "to resolve any dispute about the proper legal interpretation" of that term. *Id.* at 27,873; *see also id.* at 27,875.

Four months later, the district court in *Franciscan Alliance* entered summary judgment for the religious plaintiffs on their APA and RFRA claims and vacated the gender-identity and termination-of-pregnancy provisions of the 2016 Rule. 414 F. Supp. 3d 928, 944-45 (N.D. Tex. 2019). At the time, however, the court declined to issue a permanent injunction. *Id.* at 946.

III. The 2020 Rule and *Bostock*

With *Bostock* still looming, HHS finalized its new rule interpreting Section 1557 on June 12, 2020, with publication in the Federal Register a week later. *See* Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160 (June 19, 2020) ("2020 Rule"). As promised in the NPRM, HHS repealed the 2016 Rule's definition of "on the basis of sex" but "decline[d] to replace it with a new

regulatory definition." *Id.* at 37,178. Instead, HHS explained that the 2020 Rule "relies on the plain meaning of the term under Title IX" to allow "application of the Court's construction" in *Bostock*. *Id.* at 37,168; *see also id.* (2020 Rule "reverts to … plain meaning" because *Bostock* "will have ramifications" for interpretation); *id.* at 37,178 (2020 Rule "relies on … plain meaning" because "the executive and judicial branches can recognize the meaning of the term 'sex'").

As with the 2016 Rule, HHS still refused to include a religious exemption. *Id.* at 37,207 ("This final rule does not craft a religious exemption to Section 1557."). Rather, HHS again pointed to other federal statutes, "including RFRA, healthcare conscience statutes, and the religious organization exception in Title IX," and only said the 2020 Rule would "be implemented consistent with those statutes." *Id.*; *see also id.* at 32,204-05 (stating that the 2020 Rule would not apply "insofar as" it "would violate, depart from, or contradict" RFRA and other laws). This was the same gameplan HHS had adopted in 2016. Both times, when faced with an opportunity to efficiently accommodate religious objections through rulemaking, HHS punted, forcing religious plaintiffs into costly and time-consuming litigation to obtain judicial relief.

Three days after HHS finalized the 2020 Rule, the Supreme Court decided *Bostock*, holding in relevant part that an employer violates Title VII's ban on sex discrimination if it fires someone "simply for being ... transgender." 140 S. Ct. at 1753. Although the Court "assum[ed]" that the term "sex" refers "only to biological distinctions between male and female," *id.* at 1739, it reasoned that it was "impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex," *id.* at 1741. The Court nonetheless cautioned against

"prejudg[ing]" how its decision would apply to "other federal … laws that prohibit sex discrimination." *Id.* at 1753. It also emphasized its "dee[p] concer[n] with preserving the promise of the free exercise of religion" and pointed in particular to RFRA: "Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." *Id.* The Court observed that "other employers in other cases may raise free exercise arguments that merit careful consideration." *Id.* In dissent, Justice Alito singled out Section 1557 and predicted that gender-transition procedures would "emerge as an intense battleground" because requiring "employers and healthcare providers" to "pay for or to perform" such procedures "will have a severe impact on their ability to honor their deeply held religious beliefs." *Id.* at 1781-82 & n.57.

Unlike with the 2016 Rule, the EEOC did not participate in the NPRM or the 2020 Rule. During this time, however, it was pushing federal courts to interpret Title VII to cover gender-identity discrimination. *See, e.g.*, Op. Br. of EEOC, *Harris Funeral Homes*, *supra*. This is the very interpretation that *Bostock* affirmed, and that HHS admitted would "have ramifications" for how it implemented the 2020 Rule.

IV. Post-*Bostock* litigation and reinstatement of the 2016 Rule

After *Bostock*, more litigation ensued. Various coalitions of states and private plaintiffs brought challenges the 2020 Rule under *Bostock* and asked that it be enjoined. HHS explained to these courts that its new rule allowed Section 1557 to be interpreted and applied consistent with the *Bostock* Court's construction. Indeed, HHS argued that construing Section 1557 to "cover discrimination based on gender identity" was "*more likely* to bear fruit under the 2020 Rule than under the 2016 Rule." Mem. in Supp. of

Mot. to Dismiss, *BAGLY v. HHS*, No. 1:20-cv-11297-PS, ECF No. 22, at 14 (D. Mass. Oct. 14, 2020) (emphasis added). Still, two district courts enjoined the 2020 Rule and reinstated the religiously-burdensome provisions of the 2016 Rule.

First, the court in *Walker v. Azar* found that the 2020 Rule was "contrary to *Bostock*" and entered a preliminary injunction "to preclude the rul[e] from becoming operative." 480 F. Supp. 3d 417, 420, 430 (E.D.N.Y. 2020). Acknowledging that portions of the 2016 Rule had been vacated in *Franciscan Alliance*, the court "agree[d] that it has no power to revive a rule vacated by another district court." *Id.* at 427. Yet it "stay[ed] the repeal of the 2016 definition of discrimination on the basis of sex" and ordered that this definition, along with the 2016 definitions of both "gender identity" and "sex stereotyping," "shall remain in effect." *Id.* at 430. The court also barred HHS "from enforcing the repeal." *Id.*

A second federal district court issued a nationwide preliminary injunction against key portions of the 2020 Rule. *See Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, 10, 63 (D.D.C. 2020). This court also acknowledged that it had "no authority ... to disregard the final order [in *Franciscan Alliance*] vacating part of a regulation." *Id.* at 26. But it purported to distinguish between what it called the "'gender identity' portion" of the 2016 Rule, which had been vacated, and that rule's "prohibition on discrimination based on sex stereotyping," which supposedly had not been vacated. *Id.* at 25-26. The court enjoined the 2020 Rule to the extent that it "eliminated 'sex stereotyping' from the [2016] Rule's definition of 'discrimination on the basis of sex.'" *Id.* at 10, 64. Further, even though the 2020 Rule refused to create a religious exemption, the court read the rule as "explicitly incorporat[ing] Title IX's

religious exemption into Section 1557's nondiscrimination scheme," *id.* at 43, and found fault with this, reasoning that "a blanket religious exemption" might "allow for discrimination on the bases prohibited by Section 1557," *id.* at 44 (cleaned up). The court thus "enjoined [HHS] from enforcing its incorporation of the religious exemption contained in Title IX." *Id.* at 64.

The upshot of these overlapping injunctions is clear: they revive the morally-objectionable provisions of the 2016 Rule and reimpose on religious plaintiffs the same RFRA-violating burdens they faced in 2016. The *Walker* court "stay[ed] the repeal" effected by the 2020 Rule and fully reinstated the 2016 definition of "on the basis of sex." *See* 480 F. Supp. 3d at 430. The *Whitman-Walker Clinic* court purported to keep alive only the sex-stereotyping "portion" of that definition, but admitted that sex stereotyping could not be "meaningfully separated" from gender-identity discrimination "because the belief that an individual should identify with only their birth-assigned sex *is* such a sex-based stereotype." 485 F. Supp. 3d at 38 (emphasis added). *Whitman-Walker Clinic* also eliminated any regulation-based religious exemption that the 2020 Rule may have created. *See id.* at 43, 64. In short, these two injunctions reinstated those aspects of the 2016 Rule that triggered the CBA Plaintiffs' RFRA challenge. And the injunctions remain in place today.

After these two injunctions were entered, the district court in this case lifted the stay, and the CBA Plaintiffs amended their complaint to seek relief, pursuant to RFRA, against the "requirements imposed" by the 2016 Rule. A135, ¶ 3; A210-A212. They requested a declaration that "neither the Affordable Care Act, Title IX, nor Title VII, nor any regulations or other executive actions promulgated thereunder, shall infringe

on the CBA's and its members' right" to provide health plans that exclude gender-transition coverage. A210-211, ¶ 'A'. They also requested a permanent injunction against both HHS and the EEOC to protect CBA members' right to refuse to "pay for, provide, or directly or indirectly facilitate access to … gender transition services." A212, ¶ 'G'.

The district court granted the CBA Plaintiffs' motion for summary judgment and entered the requested relief. The government's sole basis for opposing summary judgment was justiciability, but the court rejected the government's arguments. With respect to HHS, the court found that "HHS's interpretation of Section 1557—as influenced by *Bostock* and the two nationwide preliminary injunctions against the 2020 Rule—provokes a credible threat of enforcement for refusal to provide or insure gender-transition procedures." A778. With respect to the EEOC, the court observed that CBA members faced a "credible threat of enforcement" because "[t]he EEOC has never disavowed an intent to enforce Title VII's prohibition on gender-transition exclusions in health plans against the CBA or its members," "the EEOC has enforced that very interpretation against other employers," and "CBA members' course of action is within the plain text of Title VII." A790 (cleaned up). The court thus enjoined HHS "from interpreting or enforcing Section 1557 ... or any implementing regulations thereto" against the CBA and its members "in a manner that would require them to perform or provide insurance coverage for gender-transition procedures." A809. The court enjoined the EEOC "from interpreting or enforcing Title VII ... or any implementing regulations thereto against the CBA and its members in a manner that

would require them to provide insurance coverage for gender-transition procedures." A810. The court also entered congruent declaratory relief. A809-A810.

V. Post-injunction developments

Even if the *Walker* and *Whitman-Walker Clinic* courts had not revived key aspects of the 2016 Rule, the 2020 Rule itself continues to substantially burden plaintiffs' religious practices. In the 2020 Rule, HHS let its regulatory definition track the "plain meaning" of the term "on the basis of sex," envisioning that *Bostock*, and "the executive and judicial branches" more generally, would inject that term with meaning. 85 Fed. Reg. at 37,178. That is exactly what happened. Pre-*Bostock*, federal courts had already held that Section 1557 requires the provision and coverage of gender-transition services, and these decisions were based not on any HHS rule, but on the "plain language" of Section 1557. *See Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018) ("plain language" of Section 1557 "encompasses gender-identity discrimination"); *see also Kadel v. Folwell*, 446 F. Supp. 3d 1, 14 (M.D.N.C. 2020); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098-1100 (S.D. Cal. 2017). Post-*Bostock*, courts continue to draw the same conclusion. *Hammons v. Univ. of Md. Med. Sys. Corp.*, 2021 WL 3190492, at *17 (D. Md. 2021) (relying on *Bostock* and holding that Catholic hospital's refusal to perform gender-transition procedure violated Section 1557); *Pritchard v. Blue Cross Blue Shield of Ill.*, 2021 WL 1758896 (W.D. Wash. 2021) (relying on *Bostock* and holding that Catholic employer's health plan exclusion for gender-transition services violated Section 1557).

The same pattern holds for Title VII. Both before and after *Bostock*, courts have held that health-plan exclusions for gender-transition coverage are illegal under Title

VII. *See Lange v. Houston Cnty., Ga.*, 499 F. Supp. 3d 1258, 1274 (M.D. Ga. 2020); *Fletcher*, 443 F. Supp. 3d at 1030 ("[D]efendant's policy of excluding coverage for medically necessary surgery such as vaginoplasty and mammoplasty for employees, such a plaintiff, whose natal sex is male while providing coverage for such medically necessary surgery for employees whose natal sex is female is discriminatory on its face….").

President Biden came into office on a campaign promise to expand the ACA's protections for gender identity and to reverse religious exemptions for medical providers. A746, A738. On Inauguration Day, January 20, 2021, his administration made it official federal policy that, "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX …—prohibit discrimination on the basis of gender identity," and ordered federal agencies to "consider" and "promulgate new agency actions" to "fully implement" this policy. *See* Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021). Several weeks later, the Department of Justice instructed federal agencies to apply *Bostock*'s definition of sex discrimination to Title IX. Pamela S. Karlan, Memo re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, Mar. 26, 2021, *available at* https://www.justice.gov/crt/page/file/1383026/download.

Effective May 10, 2021, HHS issued a "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972," 86 Fed. Reg. 27,984 (May 25, 2021) ("2021 Interpretation"). HHS stated that "[c]onsistent with the Supreme Court's decision in *Bostock* and Title IX, beginning today, [HHS] will interpret and enforce Section 1557's prohibition on

discrimination on the basis of sex to include … discrimination on the basis of gender identity," and this interpretation would "guide [HHS] in processing complaints and conducting investigations." *Id.* at 27,985. HHS also said it "will comply with any applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance* … , *Whitman-Walker Clinic* … , *Walker* … , and *Religious Sisters of Mercy*." *Id.* HHS did not explain how it could possibly comply, simultaneously, with a decision vacating a regulatory provision (*Franciscan Alliance*) and with decisions reinstating it (*Walker* and *Whitman-Walker Clinic*). Finally, as with the 2016 and 2020 Rules, although HHS professed that it would "comply with the Religious Freedom Restoration Act and all other legal requirements," it said this interpretation "does not itself determine the outcome in any particular case or set of facts." *Id.* (citation and footnote omitted).

In *Hammons*, the district court expressly referenced the 2021 Interpretation as "persuasive support" for the plaintiff's claim that a Catholic hospital violated Section 1557 when it "refus[ed] to perform [plaintiff's] hysterectomy in aid of [a] sex reassignment." 2021 WL 3190492, at *16. The court observed, however, that "*Bostock* already made clear that the position stated in HHS's interpretation was *already* binding law." *Id.* at *17 (emphasis added). So the court rested its decision, not on any HHS interpretation, but on Section 1557 itself. *See id.* at *18.

Through all this, the EEOC's interpretation of Title VII never changed. Before *Bostock*, the EEOC interpreted Title VII to cover gender-identity discrimination and "transitioning discrimination," and specifically enforced this interpretation to require both healthcare and non-healthcare employers to include gender-transition coverage in

their health plans. Since *Bostock*, the EEOC has not changed course. In a press release in June 2021, the EEOC announced a set of agency resources on gender-identity discrimination that, "[c]onsistent with *Bostock*, *reiterat[e]* the EEOC's *established* positions on basic Title VII concepts, rights, and responsibilities as they pertain to discrimination based on … gender identity." EEOC, Press Release, June 15, 2021, https://www.eeoc.gov/newsroom/eeoc-announces-new-resources-about-sexual-orientation-and-gender-identity-workplace-rights (emphases added).

A final development bears mention. The plaintiffs in *Franciscan Alliance* appealed that court's refusal to enter a permanent injunction. On remand from the Fifth Circuit, the court entered permanent injunctive relief in favor of the plaintiffs. Like the district court here, the *Franciscan Alliance* court rejected the government's justiciability arguments and found that "the current Section 1557 regulatory scheme credibly threatens the same RFRA-violating religious burden that the application of the 2016 Rule threatened." *Franciscan Alliance v. Becerra*, 2021 WL 3492338, at *9 (N.D. Tex. Aug. 9, 2021). Calling the present legal landscape "unworkable" and "Kafkaesque," the court observed that "[t]he 2021 Interpretation effectuates a legal Penrose staircase to enforce Section 1557 in the near identical way as, if not an enhanced version of, how the 2016 Rule dictated." *Id.* at *7 & n.10.

SUMMARY OF ARGUMENT

The government's sole argument on appeal is that this case is not justiciable. The government is wrong, and clearly so. The regulatory and judicial background here may be complicated, but the issue this Court must resolve is not. This case is easily justiciable. In a pre-enforcement challenge such as this, the relevant legal standard is set

forth in the Supreme Court's decision in *Susan B. Anthony List* (*SBA List*), which requires plaintiffs to satisfy a three-prong test. They must show (1) they "inten[d] to engage in a course of conduct arguably affected with a constitutional interest," 573 U.S. at 161, (2) their "intended future conduct is arguably proscribed by the statute they wish to challenge," *id.* at 162 (cleaned up), and (3) "the threat of future enforcement of the … statute is substantial," *id.* at 163. Given the present legal landscape, CBA members meet each prong of this test because, absent injunctive relief, they face the same RFRA-violating burden today that they faced in 2016. This is true under both Section 1557 and Title VII.

Under Section 1557, the burden arises in three ways. First, the provisions of the 2016 Rule that triggered the present RFRA challenge "remain in effect." *See Walker*, 480 F. Supp. 3d at 430; *Whitman-Walker Clinic*, 485 F. Supp. 3d at 10, 63. Second, under the 2020 Rule, HHS interprets Section 1557 based on *Bostock*'s construction of its "plain language," and courts have held this interpretation to require performance and coverage of gender-transition services. Third, the 2021 Interpretation indicates that HHS will "interpret and enforce" Section 1557 *itself*—regardless of what Rule is on the books—"[c]onsistent with … *Bostock*" to prohibit gender-identity discrimination, and will "comply with" *Walker* and *Whitman-Walker Clinic*, the decisions that reinstate the 2016 Rule. Given these commitments, the district court correctly found that CBA members face a "credible threat" that they will be forced to perform and cover gender-transition services in violation of RFRA. *SBA List*, 573 U.S. at 161.

The burden on CBA members is also clear under Title VII. Since 2012, the EEOC has consistently interpreted Title VII to cover gender-identity discrimination,

and has specifically enforced this interpretation to require employer coverage of gender-transition services. The EEOC has never disavowed this interpretation nor ever suggested that Title VII might apply differently to religious employers like the CBA's members. The EEOC had ample opportunity in this lawsuit—years, in fact—to suggest a different or qualified reading. Yet it kept mum in this case even as it enforced a coverage mandate throughout the country. It now says that *Bostock* only "reiterates [its] established positions" on gender-identity discrimination. *See* EEOC Press Release, *supra*. The district court was thus correct in finding that CBA members face a "credible threat" from the EEOC that they will be forced to cover gender-transition services in violation of RFRA. *SBA List*, 573 U.S. at 161.

The government's arguments against justiciability are without merit. Tellingly, the government barely mentions *SBA List* in its brief, and when it does, it is largely for one-off propositions and scattered quotes, not for its controlling legal standard. Instead, the government points to *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998), as the "most apposite" Supreme Court authority for its argument. Br. at 4-5. But *Ohio Forestry* concerned a pre-implementation Forest Service logging plan—a form of agency action that the Court specifically *contrasted* to agency rules for which pre-enforcement review is appropriate. 523 U.S. at 734, 737. The government also misconstrues or ignores this Court's own precedents on pre-enforcement justiciability, cases which amply demonstrate that the CBA Plaintiffs have standing and that their RFRA challenge is ripe. Further, while not necessary to the conclusion that this case is justiciable, Diocese of Fargo's experience with its own health plan in the wake of the 2016 Rule is

a concrete manifestation of the injury to CBA members and why they need relief from both Section 1557 and Title VII.

The district court was right to find this case justiciable and to grant declaratory and permanent injunctive relief in favor of the CBA and its members. This Court should affirm.

ARGUMENT

I. Under *SBA List*, the CBA Plaintiffs have shown a credible threat of enforcement sufficient for Article III standing.

The logic of pre-enforcement review is that a plaintiff within the lexical crosshairs of a law should not have to wait till the government pulls the trigger. To bring a legal challenge, a plaintiff need not "in fact violate th[e] law," *SBA List*, 573 U.S. at 163, nor be the subject of an "actual … enforcement action," *id.* at 158. Rather, "a plaintiff satisfies the injury-in-fact requirement" if he "inten[ds] to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and thereby faces a "credible threat of enforcement." *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) (internal quotation marks omitted). Threatened administrative action is sufficient to justify pre-enforcement review, particularly when backed by the prospect of other civil and criminal penalties. *See id.* at 165-66. As the contraceptive-mandate cases make clear, a pre-enforcement challenge under RFRA is appropriate when agency rules substantially burden religious practices. *See Hobby Lobby*, 573 U.S. 682; *Sharpe Holdings*, 801 F.3d 927.

In *SBA List*, drawing on its prior decision in *Babbitt*, the Supreme Court greenlighted the plaintiffs' First Amendment challenge to a statute criminalizing false

statements about electoral candidates. The Court found that (1) the plaintiffs had alleged "specific statements they intend[ed] to make in future election cycles," *id.* at 161; (2) the false-statement law "swe[pt] broadly" and "cover[ed] the subject matter of [their] intended speech," *id.* at 162; and (3) the "threat of future enforcement" was "substantial" based on the government's "past enforcement against the same conduct" and its refusal to "disavo[w] enforcement if petitioners make similar statements in the future," *id.* at 164-65.

En route to this conclusion, the Court pointed to its decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), as "illustrat[ive]" of "the circumstances under which plaintiffs may bring a preenforcement challenge consistent with Article III." 573 U.S. at 159. In that case, plaintiffs challenged a law that criminalized the provision of material support to foreign terrorist groups. The Court held the challenge justiciable because the plaintiffs claimed they had provided support to such groups before the law was enacted and would do so again in the future; the government had "charged about 150 persons"—persons *other* than the plaintiffs—with violations of the law; and the government would not say that "plaintiffs will not be prosecuted if they do what they say they wish to do." *Humanitarian Law Project*, 561 U.S. at 15-16. "Based on these considerations," the Court said, "plaintiffs' claims are suitable for judicial review." *Id.* at 16.

CBA members, represented by the CBA Plaintiffs in this action, satisfy Article III's requirements for their RFRA challenge. The CBA's membership includes hospitals and other healthcare providers that are recipients of federal financial assistance and are thus subject to Section 1557. A145, ¶ 55. Named plaintiff and CBA member Catholic

Medical Association is itself a membership organization consisting of licensed physicians devoted to Catholic teaching, who are likewise subject to Section 1557. *See* A141-A142, ¶¶ 30, 35, 37; 85 Fed. Reg. at 37,227 (agreeing with the 2016 Rule that Section 1557 applies to "almost all licensed physicians"). The CBA's membership also includes non-healthcare employers that are subject to Title VII. A146, ¶ 59. Finally, some CBA members, though not directly subject to Section 1557, are nevertheless burdened by it because they contract with health insurers and TPAs for the provision and administration of health coverage. This includes Plaintiff Diocese of Fargo, which as a direct consequence of the 2016 Rule was forced to assume additional liability in its health plan for excluding gender-transition coverage. *See* A139-40, ¶¶ 21-22.[6]

[6] In a single paragraph in its brief, the government purports to challenge the CBA's associational standing to represent its members in its action. Br. at 29-30. Yet the CBA's members *indisputably* include entities that are subject to Section 1557 and to Title VII and that are burdened by HHS's and the EEOC's interpretations of these statutes. In its Second Amended Verified Complaint (and in its prior two complaints, both also verified), the CBA made specific allegations about its members, including the other CBA Plaintiffs, and articulated the specific factual bases of their standing to challenge both agencies' interpretations of these statutes. The government disputed *none* of these allegations, and they are now conclusively established for purposes of this case. The district court thus correctly found that the CBA has standing to represent its members in this action. *See* A781-A782. Further, the government's brief misrepresents *Summers v. Earth Island Institute*. There, the Supreme Court rejected a theory of associational standing based on the "statistical probability" that members were affected by a law, and faulted the organizational plaintiff for failing to "submit affidavits showing, through specific facts that one or more of its members would be directly affected by the allegedly illegal activity." 555 U.S. 488, 498-99 (2009) (cleaned up). The CBA indisputably met this requirement here.

Based on HHS's past and present interpretation of Section 1557 and the EEOC's past and present interpretation of Title VII, CBA members face a credible threat of enforcement under both statutes.

A. CBA members' refusal to perform and cover gender-transition services is religious exercise "affected with a constitutional interest."

First, CBA members do not simply "*inten[d]* to engage in a course of conduct arguably affected with a constitutional interest." *SBA List*, 573 U.S. at 159. They actually *do* engage in such conduct because they refuse to perform and cover gender-transition services, and they will continue to do so in the future, based on their Catholic beliefs. Because this conduct is religious exercise, "it is certainly affected with a constitutional interest." *Id.* at 162 (cleaned up). The government does not dispute the sincerity of CBA members' religious beliefs, nor does it contest the merits of their RFRA claims.

B. CBA members' religious exercise is arguably, if not actually, proscribed by Section 1557 and Title VII, and by HHS's and the EEOC's consistent interpretations of these statutes.

Second, CBA members' religious practices are "arguably proscribed" by Section 1557 and Title VII. *Id.* at 163. In *SBA List*, the agency had previously found that a statement by one plaintiff "probabl[y]" violated the statute, and based on the statute's plain language—what the Court called its "broa[d]" "swee[p]"—there was "every reason to think that similar speech in the future will result in similar proceedings." *Id.* The Court thus "ha[d] no difficulty concluding that petitioners' intended speech is 'arguably proscribed' by the law." *Id.*

The same conclusion is warranted here. In 2016, HHS interpreted Section 1557 to proscribe the refusal to provide gender-transition services, and both HHS and the EEOC interpreted Section 1557 and Title VII to proscribe the refusal to cover these services in health plans. Legal developments since then have done nothing to suggest a change of course: the requirements of the 2016 Rule remain in effect; the *Bostock*-inflected 2020 Rule imposes the same requirements; the 2021 Interpretation confirms that HHS will enforce Section 1557 accordingly; and the EEOC has never altered, indeed has only reiterated, its longstanding interpretation of Title VII. There is, then, "every reason to think" these statutes will be construed "in the future" to make CBA members' religious exercise illegal. *Id.*[7]

Moreover, even apart from how these statutes are interpreted by the responsible agencies, based on their plain language alone, they at least *arguably*, if not actually, proscribe CBA members' conduct. Justice Alito called it "virtually certain" that *Bostock*'s interpretation of Title VII would have "far-reaching consequences," 140 S. Ct. at 1778 (Alito, J., dissenting), including for "employers and healthcare providers" that refuse to "pay for or to perform [gender-transition] procedures," *id.* at 1781-82. And courts have held that such refusals do actually violate both Section 1557 and Title VII. *See Hammons*, 2021 WL 3190492, at *17; *Pritchard*, 2021 WL 1758896, at *4; *Tovar*, 342 F. Supp. 3d at

[7] The government's brief repeatedly ventures that the 2016 Rule is "defunct," "rescinded," "replaced," etc. Br. at 1, 32. But the *Walker* and *Whitman-Walker Clinic* rulings, with which HHS has promised to comply, foreclose this argument. In any event, justiciability depends not on the *actual* legal status of the 2016 Rule but on whether it is "credible" to think its requirements will be imposed on CBA members. In light of the 2016 Rule itself, the 2020 Rule, *Bostock*, the 2021 Interpretation, and judicial decisions before and after *Bostock*, this possibility is more than credible.

953; *Lange*, 499 F. Supp. 3d at 1274; *Fletcher*, 443 F. Supp. 3d at 1030. Whether or not these decisions are correct is not the point. *Cf. Bostock*, 140 S. Ct. at 1753 (maj. op.) ("[W]e do not prejudge any such question today[.]"). Rather, it is enough that CBA members' religious exercise is "arguably" within the statutes' proscriptive sweep.

C. In light of past and present interpretations of Section 1557 and Title VII, prior enforcement actions, multiple enforcement tools, and the agencies' refusal to disavow enforcement, CBA members face a substantial threat of enforcement.

Finally, the threat of enforcement here is substantial. *SBA List*, 573 U.S. at 164. In 2016 HHS promised "robust enforcement of Section 1557" through "compliance reviews and complaint investigations," termination of federal funding, "referral to the Department of Justice," and referral to the EEOC, among other mechanisms. 81 Fed. Reg. at 31,440, 31,439, 31,432. In 2020 it recommitted to "robust enforcement of the nondiscrimination grounds applicable under Section 1557." 85 Fed. Reg. at 37,166. Contrary to the government's suggestion, Br. at 20-21, these are not the sort of "general threats" of enforcement that have been found insufficient for standing. *Cf. Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010). Rather, HHS made these official commitments through formal rulemaking, promising specific actions based on a specific interpretation of a specific statutory phrase. This is more than sufficient for pre-enforcement judicial review, and it is not necessary for HHS to have particularized its threat to CBA members. *See United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988) (under *Babbitt*, "courts have found standing to challenge [a] statute, even absent a specific threat of enforcement"); *Lopez*, 630 F.3d at

786-87 ("[T]he plaintiffs themselves need not be the direct target of government enforcement.").

The enforcement threat from the EEOC is substantial, too. "[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." *SBA List*, 573 U.S. at 164 (quotation omitted). In *Humanitarian Law Project*, the challenged statute had not been enforced against the plaintiffs specifically, but the Court nevertheless found a "credible threat" sufficient for standing because the government had "charged about 150 persons with violating [the statute], and … several of those prosecutions involved the enforcement of the statutory terms at issue here." 561 U.S. at 16. As the Ninth Circuit observed in *Lopez*, "[a] history of past enforcement against parties similarly situated to the plaintiffs cuts in favor of a conclusion that a threat is specific and credible." 630 F.3d at 786-87. In 2016, the EEOC pledged to cooperate with HHS to enforce a coverage mandate for gender-transition services. *See* 81 Fed. Reg. at 31,432. Since then, the EEOC has done just that, requiring employers across the country to cover these services in their health plans. These enforcement efforts involved the same conduct at issue here: exclusion of gender-transition coverage from health plans.

The government suggests the CBA Plaintiffs seek to ground standing in events that post-date their most recent complaint. Br. at 23-24. Not so. The CBA and its members face a credible threat of enforcement based on the 2016 Rule, its revival by *Walker* and *Whitman-Walker Clinic*, the interface between the 2020 Rule and *Bostock*, and the EEOC's unchanged interpretation and enforcement of Title VII—all events that *pre*date the operative complaint. Since the complaint, HHS has issued the 2021

Interpretation, but that "was already binding law" under *Bostock*. *Hammons*, 2021 WL 3190492, at *16. Likewise, the EEOC's 2021 press release simply "*reiterates* [its] *established* positions" on gender-identity discrimination. EEOC Press Release, *supra* (emphases added). Both statements confirm that the agencies' interpretation and enforcement of the underlying statutes have been consistent since 2016 and that CBA members face the same RFRA-violating burden today as they did back then.[8]

The existential threat to CBA members seeking to practice their faith is bolstered by the multiple enforcement mechanisms available under Section 1557 and Title VII. These include administrative investigations and enforcement actions, termination of federal funding, False Claims Act liability, compensatory damages, punitive damages, injunctive relief, attorney's fees, and potential criminal penalties. *See* 42 U.S.C. § 18116(a), 20 U.S.C. § 1682 (Section 1557); 42 U.S.C. §§ 1981a, 2000e-5 (Title VII); *see also* 81 Fed. Reg. at 31,440, 31,439, 31,432; 85 Fed. Reg. at 37,166. Together with the agencies' burdensome interpretations, these additional enforcement tools "provid[e] substantial additional support for the conclusion that appellees' challenge is justiciable" *SBA List*, 573 U.S. at 166 (cleaned up).

Moreover, authority to initiate enforcement "is not limited to" HHS or the EEOC. *SBA List*, 573 U.S. at 164. Both Section 1557 and Title VII permit private civil actions to enforce their terms, and lawsuits are common. Mere months after *Bostock*, at least three district courts have held that these statutes require provision and coverage

[8] HHS cannot avoid judicial review based on its suggestion in the 2021 Interpretation that it would "*beginning today*" interpret Section 1557 to cover gender-identity discrimination. 86 Fed. Reg. at 27,985 (emphasis added). Its currently-in-effect 2016 Rule and its *Bostock*-inflected 2020 Rule *already* interpret Section 1557 that way.

of gender-transition services; two of these cases involved religious institutions. *Hammons*, 2021 WL 3190492; *Pritchard*, 2021 WL 1758896; *Lange*, 499 F. Supp. 3d 1258.

Finally, at no point during the four-plus-year saga of this litigation has HHS or the EEOC ever disavowed plans to enforce the statues as promised. Nor have they disavowed enforcement against CBA members in particular. *See SBA List*, 573 U.S. at 165 (failing to disavow enforcement reinforces credibility of threat); *Humanitarian Law Project*, 561 U.S. at 16 (same); *United Food*, 857 F.2d at 425 (government "specifically did not disavow an intention to enforce the law").

In fact, the agencies have effectively admitted that the threat of enforcement here is real. In the summary judgment briefing below, the government claimed it could not comply with an injunction against enforcement "without knowing the identities of [the CBA's] members." SA655 n.4. But a risk of noncompliance can arise only if there is a risk of actual enforcement. Prior to the entry of judgment, both agencies asked the district to modify its injunctive order, *see* SA717-SA726, and the final Order for Entry of Judgment provides: "[I]f either agency, unaware of an entity's status as a CBA member, … *takes any of the above-described [enforcement] actions*," the entity must notify the agency of its CBA-membership status and the agency shall then "promptly comply with this order." A820 (emphasis added). If the possibility of enforcement actions was substantial enough to warrant modifying the court's order, then CBA members face a threat of enforcement that is "far from imaginary or wholly speculative" and is, at the very least, "credible." *SBA List*, 573 U.S. at 165, 167 (cleaned up).

II. This Court's precedents confirm that this case is justiciable.

This Court's precedents on pre-enforcement review confirm that this case is justiciable. In *281 Care Committee*, the plaintiffs challenged on First Amendment grounds a false-statement statute much like the one in *SBA List*. *See* 638 F.3d at 625. This Court rejected the government's argument that the case was not justiciable. *Id.* at 627. The Court found that the plaintiffs' intended conduct "could reasonably be interpreted" as violating the statute, *id.* at 628, and plaintiffs had a "reasonably worry that state officials and other complainants—including their political opponents who are free to file complaints under the statute—will interpret these actions as violating the statute," *id.* at 630. That the statute had not been specifically enforced against the plaintiffs did not matter because, in a First Amendment pre-enforcement challenge, "[it] is only evidence ... that authorities actually reject a statute," either by "official policy or a long history of disuse," that undermines standing. *Id.* at 628. Because the government had "neither established a long history of disuse nor produced a clear statement … that they do not intend to enforce the statute," the case was justiciable. *Id.*

281 Care Committee built upon this Court's decision in *United Food*. There, unions brought pre-enforcement challenges to Nebraska picketing statutes. 857 F.2d at 424. The government argued the case was not justiciable and submitted affidavits from three high-ranking law enforcement officials, including the Attorney General, stating that they had no "present plan" to enforce the statutes. *Id.* at 429. This Court rejected the government's argument. Applying *Babbitt*, it observed that "[w]here plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge

the statute, even absent a specific threat of enforcement." *Id.* at 428. The government's "voluntary cessation of [the] challenged practice" did not eliminate standing because "present intentions may not be carried out," and "it is not certain that changes in leadership or philosophy might not result in reinstitution of the challenged policy." *Id.* at 429-30 (cleaned up).

These cases amply demonstrate the CBA Plaintiffs' standing to maintain their RFRA challenge. Pre-enforcement review here is particularly appropriate because RFRA is meant to provide "even broader protection for religious liberty than" the First Amendment. *Hobby Lobby*, 573 U.S. at 695 n.3. Given HHS's prior and present interpretation of Section 1557 and the EEOC's prior and present interpretation of Title VII, CBA members have at least a "reasonable worry" that their actions—refusing to perform and cover gender-transition services—"could reasonably be interpreted" to violate these statutes. *281 Care Comm.*, 638 F.3d at 630, 628. That CBA members have not yet been the target of specific enforcement efforts does not eliminate standing. To the contrary: rather than a "clear statement" that they "actually reject" these statutes, HHS and the EEOC have only confirmed through formal rulemaking, policy statements, and actual enforcement that they fully intend to impose the definitions and requirements set forth in the 2016 Rule—definitions and requirements that are currently in effect anyway thanks to *Walker* and *Whitman-Walker Clinic*. *See* 86 Fed. Reg. at 27,985. And even if HHS's and the EEOC's recent actions amounted to "voluntary cessation" (and they do not), their prior actions, coupled with *Bostock*, strongly suggest there will be "reinstitution of the challenged policy." *United Workers*, 857 F.2d at 430 (cleaned up).

In every pre-enforcement case, the government can always come into court asserting that it might change its mind or might not enforce the statute as written or as previously interpreted. That is not enough to preclude standing. *See Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019) (state's in-court assurances that it would "never enforce its anti-loitering law against 'polite' and 'courteous' beggars … do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future"). Where as here a plaintiff's conduct is prohibited by a statute's plain language, by judicial constructions of that plain language, and by an agency's own interpretation and enforcement of the same, the case is justiciable. The CBA Plaintiffs, on behalf of CBA members, "are not simply attempting to obtain an advisory opinion or to enlist the court in a general effort to purge" the U.S. Code or Federal Register "of unconstitutional [laws]." *United Workers*, 857 F.2d at 430. Rather, "their interests [are] sufficiently adverse to the defendants with respect to both [statutes] to present a case or controversy within the court's jurisdiction." *Id.*

III. The government's ripeness arguments are without merit.

The government casts its justiciability arguments in terms of both standing and ripeness. In the pre-enforcement context, these often "boil down to the same question." *SBA List*, 573 U.S. at 157 n.5 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)) (internal quotation marks omitted). Whether framed as "imminent injury in fact" (standing) or as "hardship to the parties in withholding court consideration until there is enforcement action" (ripeness), *MedImmune*, 549 U.S. at 128 n.8 (cleaned up), the key question is whether the CBA Plaintiffs have shown a credible

threat of enforcement, *SBA List*, 573 U.S. at 159. As explained, they easily meet this standard.

The government's ripeness arguments are without merit. First, the government contested none of the allegations of the CBA Plaintiffs' Second Amended Verified Complaint. Those allegations conclusively establish that Section 1557 and Title VII burden CBA members' religious practices without satisfying strict scrutiny, and the RFRA claims here "requir[e] no further factual development." *281 Care Comm.*, 638 F.3d at 631. Second, withholding judicial review would only magnify the hardship to CBA members. Members already have been injured by agency interpretations of the statutes (*see, e.g.*, *infra*, Part IV), and they will be continued to be injured because the "very existence" of these statutes, after *Bostock*, "chills the exercise of First Amendment rights." *Id.* (quotation omitted). Every time a CBA member accepts HHS funds or adopts or renews a health plan excluding gender-transition coverage, it is in violation of these statutes. Indeed, the government effectively admits this. HHS and the EEOC requested modification of the injunction here so as not to be held in contempt as they "carry out their *statutory obligations* … to enforce Section 1557 and/or Title VII on the basis of the failure to perform or provide insurance coverage for gender-transition procedures." SA722 (emphasis added).

In its brief, the government contests ripeness under Section 1557 by trying to portray itself as agnostic about a particular application of the statute, claiming "HHS has not yet interpreted how Section 1557 applies to [objecting] religious entities," Br. at 33, and that to "properly evaluate" RFRA claims, a "specific factual context" is needed, *id.* at 34. The government is wrong in three ways. First, to state the obvious, that's what

this case is: a specific factual context for RFRA-based objections to HHS's and the EEOC's mandates, and neither agency has ever contested the factual bases or the legal merits of these objections. Second, to reiterate the legal standard the government's brief continuously ignores, the question is not whether HHS has specifically applied the statute to a particular subset of entities, but whether CBA members' conduct is "arguably proscribed" by the statutes, and it is.

Finally, HHS *has* in fact determined how Section 1557 applies to objecting religious entities. Three times now, HHS has issued a Section 1557 rule. Each time, it gestured toward RFRA but expressly declined to fashion a religious exemption. *See* 81 Fed. Reg. at 31,379-80 (RFRA must be evaluated on "a case-by-case basis" and refusing to include a "blanket religious exemption"); 85 Fed. Reg. at 37,207 ("This final rule does not craft a religious exemption…."); 86 Fed. Reg. at 27,984 (HHS "will comply" with RFRA but this "does not itself determine the outcome in any particular case or set of facts"). HHS knows how to create a real religious exemption through rulemaking: it did so for the ACA's contraceptive mandate. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377 (2020). Its repeated refusal to do so here only underscores why this case is ripe.

The government also contests ripeness under Title VII. It admits that "health plans that categorically exclude gender-transition procedures violate Title VII" if the employer is "*non*-religious," but suggests the "EEOC has [n]ever taken such a position with respect to religious employers." Br. at 44. This is so much smoke. According to the EEOC, religious employers enjoy no categorical exemption from Title VII, and the statute's prohibition on sex discrimination fully proscribes CBA members' conduct,

particularly in light of *Bostock*. This has been the EEOC's position *for decades*. It has repeatedly taken the position that while Title VII's religious exemption (known as § 702) allows an employer to prefer coreligionists, it does not allow an employer to discriminate based on sex. This is exactly what the EEOC argued in *Harris Funeral Homes*, one of the *Bostock* cases. The EEOC told the Sixth Circuit that Title VII does not protect discrimination based on sex or gender identity "*even [by a] religious organization*," Op. Br. of EEOC, *supra*, at 35 (emphasis added), and pointed to its 35-year old precedent in *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1366 (9th Cir. 1986) ("[R]eligious employers are not immune from liability under Title VII for discrimination based on sex."). Over the years, the EEOC has never deviated from this position, and multiple federal courts have accepted it. *E.g.*, *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985). To drive the point home:

(1) In its agency guidance, enforcement actions, and litigating positions, the EEOC has consistently and without exception asserted that:

   (a) religious employers must comply with Title VII's prohibition on sex discrimination,

   (b) sex discrimination includes gender-identity discrimination, and

   (c) illegal gender-identity discrimination includes health-plan exclusions for gender-transition services; and

(2) In no administrative or judicial context has the EEOC ever hinted that religious employers might be exempt from any of these requirements.

The EEOC could have suggested the contours of such an exemption in *Harris Funeral Homes*. Instead, it doubled down, arguing that the § 702 exemption did not apply

and that Title VII's prohibition on "transitioning discrimination" specifically overrode a religious employer's rights under RFRA. Op. Br. of EEOC, *supra*, 33-35, 40-61. To credit the EEOC's suggestion now that it has "[n]ever taken … a position" on this issue, Br. at 44, blinks reality. And it is not "imaginary or speculative," *SBA List*, 573 U.S. at 166, to draw the obvious, logical conclusion from the EEOC's prior agency actions—particularly when, in this very case, the EEOC had years' worth of opportunities to "tak[e] … a position with respect to religious employers," Br. at 44, and instead chose the administrative equivalent of pleading the Fifth.

At bottom, the government would have this Court accept the notion that an agency can promulgate RFRA-burdening interpretations of statutes, decline to create (or keep mum about) any exemption for religious entities, but then avoid judicial review on the ground that the agency *might* "exercis[e] its discretion" to "evaluat[e]" how these statutes "*might* apply to such religious entities" in the future. *See* Br. at 44, 2 (emphasis added). This, however, is not the law. "[A]n agency *always* retains the power to revise a final rule through additional rulemaking. If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *Am. Petrol. Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). Ripeness doctrine does not "require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013). Under *SBA List*, the CBA Plaintiffs need only show a credible threat of enforcement, and they have.

Finally, the government makes a cursory "irreparable harm" argument, but this only duplicates its erroneous justiciability arguments. *See* Br. at 50-51. In the absence of

an injunction, Section 1557 and Title VII, and the agencies' unchanged interpretations of these statutes, will force CBA members to choose between adhering to their sincere religious beliefs or "incur[ring] severe monetary penalties." *Sharpe Holdings*, 801 F.3d at 945. The deprivation of a First Amendment right, "standing alone," constitutes irreparable harm. *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000 (8th Cir. 2012); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quotation omitted)). And RFRA "provide[s] greater protection for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). The district court correctly found the irreparable harm factor satisfied here. *See* A808.

IV. Diocese of Fargo's experience confirms the injury to CBA members arising from both Section 1557 and Title VII.

After the 2016 Rule, Plaintiff Diocese of Fargo is able to maintain its health-plan exclusion for gender-transition coverage only because it has absolved its third party administrator, BCBS, of liability for "any plan design or administration that may be determined to violate Section 1557." A139-40, ¶¶ 21-22. BCBS imposed this requirement on the ground that "Section 1557 applies to [its] operations as a third-party administrator." *Id.* Being forced to assume this additional contingent liability is a concrete injury to the Diocese sufficient for standing. *See Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006) ("[P]laintiffs have standing to challenge the constitutionality of a law that has a direct negative effect on their borrowing power, financial strength, and fiscal planning." (quotation omitted)).

The district court rejected this as a basis for standing. It reasoned that while the 2016 Rule applied to a TPA's administration of health benefits even for non-covered entities like the Diocese, the 2020 Rule "no longer does that," A780, and the 2020 Rule's more narrow application to insurers and TPAs "remains operative" even after the *Walker* and *Whitman-Walker Clinic* injunctions. *See* A780, 778. The court thus found that "the prevailing interpretation of Section 1557 does not require insurers or TPAs to cover gender-transition procedures," that the harms to Diocese of Fargo "emanate from since-repealed regulations, not existing HHS policy," and that "[p]ast injuries alone cannot confer standing to pursue declaratory and injunctive relief." A780-A781.

On this point, the district court erred. Although justiciability does not hinge on this issue—the district court correctly found the case justiciable on other grounds—Diocese of Fargo's experience offers a concrete and illustrative demonstration of why the CBA Plaintiffs' RFRA challenge is appropriate for judicial resolution.

It is true, as the district court suggested, that the 2020 Rule tried to refine how Section 1557 applies to the operations of insurers and TPAs that provide or administer health coverage for non-covered entities. *See* 85 Fed. Reg. at 37,173. And HHS clarified that a self-insured health plan that does not receive federal financial assistance is not itself a covered entity under the rule. *Id.*

But the 2020 Rule does not categorically exempt insurers and TPAs from Section 1557's requirements. Instead, the rule says that "an entity principally or otherwise engaged in the business of providing health insurance shall not, by virtue of such provision, be considered to be principally engaged in the business of providing healthcare," *id.* at 37,244-45 (45 C.F.R. § 92.3(c)), and HHS explained that "this final

rule does not extend the Department's enforcement authority to a covered entity that is not principally engaged in the business of providing healthcare to the extent of its operations that do not receive financial assistance from the Department," *id.* at 37,173. If this sounds confusing, that's because it is. The CBA is aware of no HHS guidance (and the government cites none) clarifying how Section 1557 applies to a health insurer (like BCBS) administering health coverage for a non-covered entity (like Diocese of Fargo). BCBS, at least, takes the view that "Section 1557 applies" to its services in connection with the diocesan plan, even though neither the plan nor the Diocese is itself subject to Section 1557. A139, ¶ 22. And *Bostock* has only sown further confusion. For example, in *Pritchard v. Blue Cross Blue Shield of Illinois*, the district court found that plaintiffs had adequately alleged that "BCBS is a healthcare provider that receives federal financial assistance" and that under *Bostock*, BCBS could be held liable as a TPA for "den[ying] coverage" of gender-transition services under a Catholic employer's health plan. 2021 WL 1758896, at *4-5.

Ordinarily, a plaintiff lacks standing to challenge a statute if his harm is "the result of the independent action of some third party not before the court." *Balogh v. Lombardi*, 816 F.3d 536, 543 (8th Cir. 2016) (cleaned up). But a plaintiff *does* have standing if a third party inflicts the injury to avoid its *own* liability under the challenged statute. "While it does not suffice if the injury complained of is the result of the *independent* action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Wieland v. U.S. Dep't of Health & Hum. Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) (cleaned up). Thus, in *SBA List*, the Supreme Court found standing in part because a private billboard

owner "refused to display [the plaintiff's] message after receiving a letter" from the plaintiff's opponent threatening legal action. 573 U.S. at 154, 165. And in *Wieland*, this Court found standing to challenge HHS's contraceptive mandate because the plaintiffs' employer had eliminated contraceptive-free coverage and transferred the plaintiffs into a plan that covered contraceptives in order "to avoid violating the Mandate and putting its assets at risk." 793 F.3d at 955 (cleaned up). *See also Cedar Park Assembly of God of Kirkland, Wash. v. Kreidler*, --- F. App'x ----, 2021 WL 3087873, at *1 (9th Cir. 2021) (plaintiff had standing to challenge statute mandating abortion coverage because, "due to the enactment of [the statute], its health insurer (Kaiser Permanente) stopped offering a plan with abortion coverage restrictions and [plaintiff] could not procure comparable replacement coverage"). Here, Diocese of Fargo was forced to take on additional liability because its TPA reasonably fears its own liability under Section 1557. This is cognizable Article III injury to the Diocese, fairly traceable to a statute that HHS has "authority to enforce." *Balogh*, 816 F.3d at 543; *see Wieland*, 794 F.3d at 955 ("The Mandate … requires group health plans and health insurance issuers to include coverage for contraceptives in all healthcare plans, and it is the Mandate that caused the [employer] to eliminate contraceptive-free healthcare plans, to place the [plaintiffs] in a healthcare plan that included this coverage, and thus to cause injury to the [plaintiffs].").

Further, this injury is redressable through declaratory and injunctive relief. Indeed, it concretely demonstrates why CBA members like the Diocese need relief from both Section 1557 and Title VII. In 2016, HHS and the EEOC worked together to implement a coverage mandate against entities like Diocese of Fargo. They accomplished this both through Section 1557, by prohibiting TPAs from administering

gender-transition exclusions, and through Title VII, by prohibiting employers from maintaining such exclusions in their health plans. As explained, the *Bostock*-inflected 2020 Rule does not alleviate these burdens, nor has the EEOC changed its views on Title VII. The injury wrought by these agencies in 2016 continues to harm Diocese of Fargo today—as evidenced by the fact that its agreement with BCBS remains in place—and *Bostock* and its progeny have only exacerbated the legal uncertainty for religious employers and their insurers and TPAs.

Declaratory and injunctive relief would redress this injury—in fact, they *do* address this injury. The district court's order properly enjoins HHS and the EEOC from enforcing their interpretations against CBA members, their health plans, and "any insurers or TPAs in connection with such health plans." A810. Although this does not automatically remove third-party harms like the BCBS indemnification agreement, it is a necessary legal predicate. Armed with the injunction, Diocese of Fargo can now explain to BCBS that federal law neither requires *the Diocese* to cover gender-transition services, nor requires *BCBS* to administer such coverage in connection with the plan. *See Wieland*, 793 F.3d at 957 ("With the benefit of the requested injunction …, [the employer] would be assured that it could safely proceed … to provide the [plaintiffs] with an opportunity to opt out of coverage for contraceptives."). The injunction also positions other CBA members, in similar situations, to do the same thing. Thus, while the district court's favorable decision does not alleviate CBA members' "every injury," it does redress a "discrete portion" of their injury. *281 Care Comm.*, 638 F.3d at 631 (quotation omitted). Even an incremental step that makes redressability more likely is enough for standing. *See Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007). Because

"the risk [of harm] would be reduced *to some extent* if [CBA members] received the relief they seek," they have standing. *Id.* at 526 (emphasis added).

To be clear, as the district court correctly held, this case is justiciable quite apart from Diocese of Fargo's experience with its TPA in connection with Section 1557, for all the reasons set forth in Parts I-III above. But this particular situation is a concrete demonstration of both the harm to CBA members as a result of the government's action and the necessity of RFRA-based relief to redress it. The Diocese's experience is an additional, independent reason to affirm the district court's ruling that this case is justiciable.

CONCLUSION

The government's brief ignores or misapplies the legal standard applicable to this RFRA challenge. The district court correctly found that the CBA Plaintiffs, on behalf of the CBA's members, have established a credible threat of enforcement under Section 1557 and Title VII; that they have standing to seek a RFRA-based exemption to these statutes (and agency interpretations of the same) that would require them to perform and cover gender-transition services in violation of their sincerely held religious beliefs; and that this case is ripe for judicial review. The government does not otherwise challenge the merits of the RFRA claims or the propriety of declaratory and injunctive relief for the CBA's members. This Court should affirm the judgment of the district court.

Respectfully submitted September 3, 2021,

s/ *Ian Speir*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,943 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Garamond 14-point font, a proportionally spaced typeface.

Pursuant to 8th Cir. R. 28A(h)(2), I further certify that this brief has been scanned for viruses and the brief is virus-free.

s/ Ian Speir
Ian Speir

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Ian Speir
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