IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, *et al*. *Plaintiffs*, v. XAVIER BECERRA, *et al.* *Defendants*.	)	No. 3:cv-00203-PDW-ARS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

This case does not warrant a temporary restraining order or preliminary injunction, as there is no emergency requiring the Court's intervention. In light of the Eighth Circuit's decision in *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022), Defendants offered in negotiations with Plaintiffs to apply the terms of this Court's permanent injunction in that case to all current members of the Catholic Benefits Association ("CBA"), and against their respective insurers and third-party administrators for coverage pertaining to current CBA members, pending this Court's resolution of Plaintiffs' Religious Freedom Restoration Act ("RFRA") claims on summary judgment. *See Religious Sisters of Mercy v. Azar*, 3:16-cv-00386 (D.N.D.), ECF No. 170. Defendants reaffirm that commitment in this filing. Thus, for any current member of CBA—including the other three plaintiffs in this action, the Franciscan Sisters of Dillingen, St. Anne's Guest House, and St. Gerard's Community of Care—there is no imminent threat of irreparable injury that could warrant a temporary restraining order or preliminary injunctive relief. Plaintiffs may contend that Defendants' commitment is insufficient because it does not protect *future* CBA members; however, Plaintiffs cannot show imminent injury to unknown entities that have not even joined CBA and whose interests Plaintiffs lack standing to assert.

Plaintiffs' motion also fails because they are unlikely to succeed on the merits. First, CBA has failed to show that it has associational standing to assert claims on behalf of its members. CBA's RFRA claims "require[] the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). RFRA requires individualized, fact-specific analysis of the religious beliefs and practices of the claimant, whether the claimant's religious exercise has been substantially burdened, and whether, given the claimant's specific circumstances, the government can "demonstrate that the compelling interest test is satisfied

through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (citation omitted). This individualized analysis cannot be performed on a blanket basis across all the members of an organization with "over 1,350 Catholic employer[]" members, Compl. ¶ 56.

Plaintiffs also have not shown that their—or any of the CBA members'—religious exercise has been substantially burdened. CBA does not contend that any member is currently engaged in activities in violation of its religious beliefs because of the alleged "Mandates." Nor does CBA contend or provide evidence that either EEOC or HHS have imposed any penalty on any CBA member for acting in accordance with its religious beliefs, or even threatened to do so. Rather, CBA speculates that EEOC or HHS may burden its members' religious exercise at some unspecified time in the future. But that is insufficient to make the required showing that a person's "religious exercise has been burdened in violation of [RFRA]." 42 U.S.C. § 2000bb-1(c).

Finally, the public interest and the balance of the equities tip in Defendants' favor. There is no threat of injury to Plaintiffs, given Defendants' agreement to apply the terms of this Court's injunction in *Religious Sisters of Mercy* to all current CBA members. The public interest in advancing the goals of Section 1557 and Title VII, and the agencies' ability to consider religious defenses raised in the context of specific investigations, as is contemplated under RFRA, also outweighs any speculative future harm to entities that have not joined—and may never join—CBA.

BACKGROUND

I. Title VII's Prohibition on Sex Discrimination and EEOC

Title VII prohibits employment discrimination "because of . . . sex." 42 U.S.C. § 2000e-

2(a)(1). EEOC is tasked with enforcing laws prohibiting unlawful employment discrimination, including sex discrimination, under Title VII. *See generally* 42 U.S.C. § 2000e-5. Employees or job applicants who allege that they have been subject to an unlawful employment practice by an employer subject to Title VII may file a charge with EEOC. *Id.* § 2000e-5(b). EEOC will then investigate the claim. An employer can raise relevant defenses to a charge, including possible religious defenses, at any time during the investigation. If, after completing its investigation, EEOC determines that "there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the [employer] of its action." *Id.* The notice to the employee or applicant is typically referred to as a "notice of right to sue" because the employee or applicant can file suit only after they receive the notice. *Id.* § 2000e-5(f)(1). If, however, EEOC concludes that there is reasonable cause to believe that an employer violated Title VII, it initiates conciliation, a process by which the agency attempts to facilitate a settlement agreement among the charging party, EEOC, and the employer. *Id.* A finding by the EEOC of reasonable cause does not result in any penalty for the employer. If conciliation fails, EEOC "may" bring its own enforcement action against a private employer or issue a right to sue notice allowing the claimant to sue. *Id.* In either event, the ensuing judicial review is *de novo*. *See Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 325 (1980). Thus, the only way that an employer could face litigation by the EEOC is after the EEOC completed its investigation process, found reasonable cause, and conciliation failed. And even then, the employer would be entitled to its defenses being reviewed *de novo* by a court. Thus, any finding of liability, award of damages, or equitable remedy imposed on an employer would only occur if a court disagreed with the employer's defenses.

In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court held that Title

VII's prohibition on sex discrimination extends to discrimination based on gender identity, explaining that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *id.* at 1741. While the EEOC has brought cases regarding discrimination based on gender identity, it has not brought any litigation regarding the denial of coverage for gender transition services, much less over the religious objections of an employer. EEOC has issued a compliance manual stating that the "applicability and scope of . . . defenses based on Title VII's interaction with the First Amendment or . . . RFRA[] is an evolving area of the law." EEOC's Compliance Manual on Religious Discrimination, Directive 915.063, § 12-1-C (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination ("EEOC Compliance Manual"). The EEOC Compliance Manual counsels EEOC investigators to "take great care" in situations involving RFRA, directs EEOC personnel to "seek the advice of the EEOC Legal Counsel in such a situation," and notes that "on occasion, the [EEOC] Legal Counsel may consult as needed with the U.S. Department of Justice." *Id.*

II. Section 1557 and HHS

Section 1557 of the Affordable Care Act states that no individual shall be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a covered federally funded health program or activity on the grounds in several long-standing civil rights laws. 42 U.S.C. § 18116(a) (citing, *e.g.*, 20 U.S.C. § 1681). Among other prohibitions, Section 1557 thus provides that "an individual shall not [on the basis of sex] be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in covered federally funded health programs or activities. 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a)

Section 1557 also incorporates the "enforcement mechanisms provided for and available

under" the civil rights laws it cites. 42 U.S.C. § 18116(a); *see also* 45 C.F.R. § 92.5(a). These enforcement mechanisms permit an enforcing agency—here, HHS and its Office for Civil Rights ("OCR")—to terminate, or refuse to grant, federal funds to entities that discriminate on the basis of sex. *See, e.g.*, 20 U.S.C. § 1682; *see also* 45 C.F.R. § 80.6–80.8. But the enforcing agency must take several steps before withholding federal funds. First, it must "advise[] the appropriate person or persons of the failure to comply with the requirement" not to discriminate because of sex and "determine[] that compliance cannot be secured by voluntary means." 20 U.S.C. § 1682. If the party does not voluntarily comply, HHS may withhold funding only after "there has been an express finding on the record, after opportunity for hearing, of a failure to comply." *Id.* The agency then must inform the appropriate Congressional committees of the grounds for its action, and any withholding of funding does not take effect until thirty days after the agency provides such notice. *Id.* A party aggrieved by this administrative process may obtain "judicial review as may otherwise be provided by law." *Id.* § 1683; *see id.* § 1682 (further providing for enforcement "by any other means authorized by law[,]" including referral to the Department of Justice with a recommendation for proceedings under 45 C.F.R. § 80.8); *id.* § 1234g(a) (providing judicial review of funding decision in the court of appeals where recipient located).

III. HHS's Prior Rulemaking Under Section 1557

A. The 2016 Rule and Related Litigation

In 2016, HHS promulgated a rule prohibiting discrimination on the basis of sex in covered health programs or activities. *See Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376 (May 18, 2016) ("2016 Rule"). The rule defined sex discrimination to include, as relevant here, gender-identity discrimination. *Id.* at 31,467. It explained, for example, that a covered provider could not refuse to offer medical services for gender transitions if the provider

offered comparable services to those not seeking gender transition. *Id.* at 31,471. Thus, 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.

The rule did not permit enforcement that "would violate applicable Federal statutory protections for religious freedom and conscience," *id.* at 31,466, and it further explained that RFRA "is the proper means to evaluate any religious concerns about the application of Section 1557 requirements," *id.* at 31,380. The 2016 Rule stated that HHS would evaluate "individualized and fact specific" RFRA claims "on a case-by-case basis[.]" *Id.* The 2016 Rule's prohibition on gender-identity discrimination was preliminarily enjoined on a nationwide basis later in 2016. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 (N.D. Tex. 2016). That Court also granted summary judgment to the plaintiffs and vacated, as relevant here, the 2016 Rule's prohibition on gender-identity discrimination. *See Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

B. The 2020 Rule and Related Litigation

In 2019, while the 2016 Rule remained preliminarily enjoined, HHS issued a Notice of Proposed Rulemaking indicating that it intended to revise the 2016 Rule. *See Nondiscrimination in Health and Health Education Programs or Activities*, 84 Fed. Reg. 27,846 (proposed June 14, 2019) ("2019 NPRM"). The 2019 NPRM indicated that HHS intended to repeal the 2016 Rule's definition of discrimination "on the basis of sex" altogether. But the notice also observed that the Supreme Court had granted several petitions for certiorari to determine whether Title VII's bar on sex discrimination included gender identity and sexual orientation discrimination. *Id.* at 27,855.

HHS acknowledged the likely consequence of the Supreme Court's decision to its own interpretation of Title IX because "Title IX adopts the substantive and legal standards of Title VII[.]" *Id.* Rather than propose a new definition of discrimination "on the basis of sex," HHS indicated it would permit the federal courts to supply the term's "proper legal interpretation." *Id.* at 27,873.

Shortly before the Supreme Court's decision in *Bostock*, HHS released its new rule. *See Nondiscrimination in Health and Health Education Programs or Activities*, 85 Fed. Reg. 37,160 (June 19, 2020) ("2020 Rule"); *see also Fact Sheet: HHS Finalizes ACA Section 1557 Rule* (June 12, 2020), https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf. Consistent with the 2019 NPRM, the 2020 Rule rescinded the 2016 Rule's definition of "on the basis of sex." *Id.* at 37,167. The 2020 Rule gave no definition for that term beyond Title IX's statutory text. It explained that HHS did not believe either Section 1557 or Title IX prohibited gender-identity discrimination. *Id.* at 37,168. The 2020 Rule also expressly incorporated Title IX's existing statutory exemption for educational institutions controlled by religious organizations, in addition to acknowledging that RFRA and any similar laws would apply under Section 1557. *Id.* at 37,204.

The Supreme Court issued its decision in *Bostock* three days after HHS published the 2020 Rule, holding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. Shortly thereafter, several courts concluded that the 2020 Rule likely violated the Administrative Procedure Act because it did not appropriately consider *Bostock* prior to issuance. As relevant here, one district court enjoined the repeal of the 2016 Rule's definition of sex discrimination, but stated that it could not overturn the earlier vacatur of the gender identity language by the *Franciscan Alliance* district court. *See Walker v. Azar*, 480 F. Supp. 3d 417, 427

(E.D.N.Y. 2020). A second district court issued a preliminary injunction enjoining the repeal of "sex stereotyping" language in the 2016 definition of sex discrimination, and further enjoining the 2020 Rule's incorporation of Title IX's statutory religious exemption. *See Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 64–65 (D.D.C. Sept. 2, 2020). Both district courts acknowledged that their orders did not disturb the *Franciscan Alliance* district court's 2019 vacatur of the 2016 Rule's definition of sex discrimination that incorporated gender-identity discrimination. *See Whitman-Walker*, 485 F. Supp. 3d 1, 14 (acknowledging *Franciscan Alliance* vacatur); *Walker*, 480 F. Supp. 3d 417, 427 (same). The 2020 Rule remains in effect subject to these two preliminary injunctions.[1]

C. The *Religious Sisters of Mercy* Proceedings

On January 19, 2021, in *Religious Sisters of Mercy v. Azar*, this Court granted the plaintiffs' motions for partial summary judgment and injunctive relief as to their RFRA claims. *See* 513 F. Supp. 3d 1113, 1153 (D.N.D. 2021). The Court concluded that the CBA—which was also a plaintiff in that case—and the other named plaintiffs lacked standing to sue HHS because none of the plaintiffs received federal funding, and thus they are not regulated entities under Section 1557. *Id*. at 1136–37 ("Section 1557 does not apply directly to the named [CBA] Plaintiffs. . . . None of the [CBA] Plaintiffs aver that their own health plans receive federal funding. . . . Those Plaintiffs thus lack standing to challenge Section 1557 in their own capacities."). However, the Court concluded that the CBA had associational standing to sue both HHS and the EEOC on behalf of its unnamed members who receive federal funding. *Id.* at 1137, 1141. On the merits, the Court concluded that, "[u]nder the prevailing interpretations of Section 1557 and Title VII," the plaintiffs

[1] HHS appealed each of the two preliminary injunctions on the 2020 rule but has since stipulated to dismissal in both appeals. *See Walker v. Becerra*, No. 20-3580 (2d Cir. filed Oct. 16, 2020); *Whitman-Walker Clinic v. HHS*, No. 20-5331 (D.C. Cir. filed Nov. 9, 2020).

were entitled to judgment on their RFRA claim. *Id. at* 1147–49. Following the Court's order, the parties in that case jointly moved for entry of final judgment, which the Court entered on February 19, 2021. *Religious Sisters of Mercy v. Azar*, No. 3:16-cv-00386 (D.N.D.), ECF No. 169.

On review, the Eighth Circuit reversed the Court's conclusion that the CBA has associational standing to sue on behalf of its unnamed members. *See Religious Sisters of Mercy*, 55 F.4th at 609. The Eighth Circuit explained that the Supreme Court has instructed that "[a] court cannot 'accept[] the organizations' self-descriptions of their membership' because 'the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.'" *Id.* at 602 (second alteration in original) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). Thus, "the [Supreme] Court 'require[s] plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm.'" *Id*. (second alteration in original) (quoting *Summers*, 555 U.S. at 499). The Eighth Circuit concluded that the CBA "failed to identify members who have suffered the requisite harm." *Id*. It thus held that "the CBA lacks associational standing to sue on behalf of unnamed members" as to both Section 1557 and Title VII. *Id*. As to only the named plaintiffs, and not CBA's members, the Eighth Circuit found standing and concluded that their claims were justiciable and otherwise affirmed the Court's decision. *See id*. at 602–07.

On September 15, 2023, after considering additional briefing from the parties, this Court dismissed the CBA's claims without prejudice. *See Religious Sisters of Mercy v. Azar*, No. 3:16-cv-00386 (D.N.D.), ECF No. 169. The Court issued an amended judgment that did not include relief for the CBA's members on October 11, 2023. *See Religious Sisters of Mercy v. Azar*, No. 3:16-cv-00386 (D.N.D.), ECF No. 170.

D. The 2022 NPRM

On August 4, 2022, HHS and OCR promulgated a Notice of Proposed Rulemaking proposing a rule to implement Section 1557, which would supersede the 2020 Rule and any aspects of the 2016 Rule deemed to remain in effect. *See Nondiscrimination in Health Programs and Activities*, 87 Fed. Reg. 47,824 (Aug. 4, 2022) ("2022 NPRM"). That rulemaking is ongoing.

The proposed rule in the 2022 NPRM states that "[d]iscrimination on the basis of sex includes," among other things, "discrimination on the basis of . . . gender identity." *Id.* at 47,916 (proposed 45 C.F.R. § 92.101(a)(2)). The proposed rule also states that it does not "require[] the provision of any health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting that service." 87 Fed. Reg. at 47,918 (proposed 45 C.F.R. § 92.206(c)). The preamble states that under the proposed rule, health care providers may decline "to perform services outside of their normal specialty area" because "a provider that declines to provide services outside its specialty area would have a legitimate, nondiscriminatory reason for its action." 87 Fed. Reg. at 47,867.

The NPRM also proposes instituting a procedure in which a covered entity could assert claims that it is entitled to an exemption from the rule due to the application of federal conscience or religious freedom laws, and OCR would hold any investigation or enforcement activity regarding the covered entity in abeyance until it made a determination on the entity's entitlement to a religious exemption. *Id.* at 47,918–19 (proposed 45 C.F.R. § 92.302). HHS and OCR explained this proposed provision as follows:

> OCR maintains an important civil rights interest in the proper application of Federal conscience and religious freedom protections. In enforcing Section 1557, OCR is thus committed to complying with RFRA and all other legal requirements. The Department believes that the proposed approach in this section will assist the Department in fulfilling that commitment by providing the opportunity for recipients to raise concerns with the Department, such that the Department can determine whether an exemption or modification of the application of certain provisions is appropriate under the corresponding Federal conscience or religious freedom law. As noted above, the Department also maintains a strong interest in taking a case-by-case approach to such determinations, which will allow it to account for any harm an exemption could have on third parties and, in the context of RFRA, to consider whether the application of any substantial burden on a person's exercise of religion is in furtherance of a compelling interest and is the least restrictive means of advancing that compelling interest.

Id. at 47,886 (footnotes omitted).

IV. This Litigation

Plaintiffs filed this action on October 13, 2023. The Complaint asserts claims under the Administrative Procedure Act, the First Amendment, the Fifth Amendment, RFRA, and Title VII of the Civil Rights Act of 1964. On November 22, 2023, Plaintiffs moved for a temporary restraining order and preliminary injunction based on their RFRA claims. ECF No. 3.

STANDARD OF REVIEW

A temporary restraining order and a preliminary injunction are both "extraordinary remed[ies] and the burden of establishing the propriety of an injunction is on the movant." *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 705 (8th Cir. 2011); *see also Tumey v. Mycroft AI, Inc.*, 27 F.4th 657, 665 (8th Cir. 2022)In determining whether to grant Plaintiffs' request for injunctive relief, the Court "should consider four factors": the "threat of irreparable harm" to Plaintiffs, the "probability" that Plaintiffs "will succeed on the merits," the balance between the threat of irreparable harm that Plaintiffs allege "and the injury that granting the injunction will inflict on other parties," and "the public interest." *Id.* (citing *Dataphase Sys., Inc. v. C L Sys.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

ARGUMENT

I. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE INJURY.

Plaintiffs cannot establish a credible threat of irreparable harm because, in light of the Eighth Circuit's decision in *Religious Sisters of Mercy*, Defendants have committed to apply the terms of this Court's permanent injunction in that case to current CBA members pending this Court's resolution of Plaintiffs' RFRA claims on summary judgment. While Plaintiffs discuss the parties' negotiations in their motion, they do not acknowledge Defendants' willingness to apply the terms of the *Religious Sisters of Mercy* injunction to current members, and they do not explain how there is any credible threat of injury in light of it.

Presumably Plaintiffs contend that they will suffer irreparable injury because Defendants have not agreed to extend their commitment to cover all *future* members of the CBA. However, even if CBA could meet the three-part requirement for associational standing to represent its members—which it cannot for the reasons discussed below—CBA cannot establish standing, much less show a threat of harm, to unknown third parties that may (or may not) join CBA in the future. *See Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) ("In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." (citing *Packard Elevator v. Interstate Commerce Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986)); *see also infra*, Part IV. Defendants' commitment to apply the same terms of this Court's injunction in *Religious Sisters of Mercy* to current CBA members, and their respective insurers and third-party administrators, means that no party before the Court will be harmed pending resolution of this case on the merits, and therefore Plaintiffs cannot establish irreparable injury. *See Dataphase*, 640 F.2d at 113 (requiring courts to

consider whether there will be irreparable harm "*to the movant*" (emphasis added).[2]

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

A. CBA Lacks Associational Standing.

To establish associational standing, an organization must show: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. As discussed below, CBA fails to show that it satisfies the third requirement.

In *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court held that an organization lacked associational standing to bring a First Amendment free exercise claim against HHS's predecessor because the participation of individual members was required. The Court explained that "[s]ince 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,' . . . the claim asserted here is one that ordinarily requires individual participation." *Id.* at 321 (internal citation and footnote omitted). Other courts have similarly rejected associational standing in free exercise claims based on the necessity of individual participation. *See Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) ("*Harris* precludes Cornerstone's standing to bring the free exercise claim in this case. The involvement of parents and students . . . is essential to the resolution of the individualized element of coercion within this free exercise

[2] Plaintiffs are incorrect that Defendants "initially expressed agreement" to a stay of enforcement "pursuant to the terms of this Court's February 19, 2021 injunction" in *Religious Sisters of Mercy*. Pls.' Mem. at 20. It is true that the parties were in discussions about Defendants applying the Court's injunction in *Religious Sisters of Mercy*—and, indeed, Defendants offered to do so as to *current* CBA members on September 26, 2023. *See* Declaration of Bradley Humphreys, Ex. A. However, Plaintiffs' statement that Defendants "initially agreed" to the relief Plaintiffs seek in their motion is inaccurate. Pls.' Mem. at 20.

claim."); *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1288 (5th Cir. 1992) ("[I]t appears likely that the Society's claim would require the participation of individual members. It is often difficult for religious organizations to assert free exercise claims on behalf of their members[.]" (citing *Harris*, 448 U.S. at 320).

The same reasoning applies to RFRA claims. As the Supreme Court has explained, Congress enacted RFRA to codify the standard that governed free exercise claims before the Court's decision in *Employment Division v. Smith. See City of Boerne v. Flores*, 521 U.S. 507, 512–16 (1997). RFRA provides that the "Government shall not substantially burden a person's exercise of religion," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA requires individual consideration of the claimant's religious beliefs, whether the application of a law to the claimant substantially burdens the claimant's exercise of religion, and whether, given the claimant's specific circumstances, the government can "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. The "to the person" analysis required by RFRA is incompatible with blanket application of RFRA to the entire membership of an organization without the individual members' participation.

CBA asserts that individual member participation is not required because, according to Plaintiffs, all CBA members adhere to the same religious teachings. *See, e.g.*, Pls.' Mem in Support of Mot. for TRO & PI, ECF No. 4-1 ("Pls.' Mem."), at 16, 14. However, even if the Court accepted CBA's assertion that its members have identical religious beliefs on gender transition services, the Court would still need to consider whether each member acts on those religious beliefs in such a

way that a purported requirement to provide insurance coverage for or perform gender transition services would "substantially burden" each member's "exercise of religion." 42 U.S.C. § 2000bb-1(a).

Moreover, even if each member had established a substantial burden on religious exercise, the Court would still need to consider whether, given each member's individual circumstances, imposing such a burden was "the least restrictive means of furthering" a "compelling governmental interest." *Id.* § 2000bb-1(b). That test demands a fact-specific "application of the challenged law 'to the person[,]'" *O Centro*, 546 U.S. at 430, which is impossible without the presence of the unnamed members. *Cf. Ramirez v. Collier*, 595 U.S. 411, 433 (2022) (holding that the Religious Land Use and Institutionalized Persons Act, which applies RFRA's test in the prison setting, "requires that courts take cases one at a time, considering only the particular claimant whose sincere exercise of religion is being substantially burdened" (quotation omitted).

Defendants recognize the Court's conclusion in *Religious Sisters of Mercy* that CBA satisfies the third requirement for associational standing, that neither the claim asserted nor the relief requested requires the participation of individual members. *See* 513 F. Supp. 3d at 1137 (citing *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 533 (8th Cir. 2005)). Yet, in *Religious Sisters of Mercy*, Defendants raised arguments only with respect to the first prong of the associational standing test. *See Religious Sisters of Mercy v. Azar*, No. 3:16-cv-00386 (D.N.D.), ECF No. 113. The Court did not have the opportunity to consider Defendants' argument raised here that—unlike the claims in *Heartland Academy*, which addressed Fourth Amendment claims, *see* 427 F.3d at 528–29, 533—individual participation is required under RFRA.[3]

[3] Plaintiffs' hurdles regard are even greater for future, unnamed entities that have not even joined CBA and for whose interests Plaintiffs lack standing to represent. *See infra,* Part IV.

B. CBA Has Not Shown That Its Members' Religious Exercise Has Been Substantially Burdened.

CBA is unlikely to prevail on the merits of its RFRA claims because it has not shown that its current members' religious exercise has been "substantially burden[ed]." 42 U.S.C. § 2000bb-1(a). "Substantially burdening one's free exercise of religion means that the regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008).

CBA does not contend or provide evidence that any of its members, because of the alleged EEOC and HHS "Mandate," currently are violating their religious convictions by offering insurance coverage for gender transition services or by performing gender transition services. Nor does CBA provide any evidence that EEOC or HHS has taken any action against any of CBA's members to impose any adverse consequences on them (or, for that matter, any other religious employer or healthcare provider) for action in violation to the supposed "Mandate." In fact, EEOC has never filed an enforcement action in court against any employer, much less an employer asserting religious objections, for not offering health care coverage for gender transition services.

Plaintiffs point to one instance in which the EEOC requested information from an entity that—unknown to the EEOC at the time—was a CBA member. *See* Pls.' Mem. at 17. Compl. ¶ 158. Plaintiffs' description of the events as an "enforcement action" is inaccurate. Pls.' Mem. at 17. When an individual files a charge of discrimination against an employer, Title VII requires EEOC to notify the employer of the charge and to initiate an investigation. *See* 42 U.S.C. § 20003-5(b) ("Whenever a charge is filed …[EEOC] *shall* serve a notice of the charge …on such employer

[]…within ten days, and shall make an investigation thereof." (emphasis added)).[4] Accordingly, Plaintiffs' allegations show only that EEOC complied with its statutory obligations concerning the administrative process. EEOC engaging in is statutorily required administrative process is very different from EEOC deciding to exercise its enforcement discretion to pursue an enforcement action in court against an employer. EEOC's administrative process is not an enforcement action at all, as EEOC does not "adjudicate the claim and has no authority to impose penalties on employers itself." *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846–47 (2019) (alterations omitted); *see also Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 363 (1977); 42 U.S.C. § 2000e-5(f)(1). Moreover, CBA has acknowledged that once EEOC was informed that the employer was a CBA member, EEOC did not take any further action. And even if no injunction had been in place, an employer can always respond to a charge of discrimination by invoking a RFRA defense. If EEOC were to conclude that the employer raised a valid RFRA defense, EEOC would not take any further action against the employer and would not file an enforcement action. *See Newsome v. EEOC*, 301 F.3d 227, 229–30 (5th Cir. 2002).

Indeed, both EEOC and HHS have made clear that they operate in compliance with RFRA when enforcing Title VII and Section 1557, respectively. EEOC's Compliance Manual directs EEOC investigators to "take great care" in situations involving RFRA, directs EEOC personnel to "seek the advice of the EEOC Legal Counsel in such a situation," and notes that "on occasion, the [EEOC] Legal Counsel may consult as needed with the U.S. Department of Justice." EEOC

[4] EEOC cannot respond to Plaintiffs' allegations in further detail, as Title VII's confidentiality provision precludes EEOC from providing information regarding any charge. *See* 42 U.S.C. § 2000e-8(e) (making it unlawful "to make public in any manner whatever any information obtained by [EEOC] pursuant to its authority under this section prior to the institution of any proceeding"); 29 C.F.R. § 1601.22 ("Neither a charge, nor information obtained during the investigation of a charge of employment discrimination under title VII . . . shall be made matters of public information by [EEOC] prior to the institution of any proceeding under title VII[.]").

Compliance Manual § 12-1-C. HHS, for its part, has repeatedly reaffirmed across three presidential administrations (including the current administration) that it complies with RFRA when enforcing Section 1557. *See supra*, pp. 5–8, 10–11.

Absent any plausible argument that EEOC or HHS are either preventing the named Plaintiffs or CBA's current members from exercising their religion or penalizing them for doing so, Plaintiffs essentially argue that they, and CBA's current members, face a substantial burden at some unspecified time in the future. Such speculation of future burden, however, is insufficient to show that any of the named plaintiffs or CBA's members' "religious exercise has been burdened in violation of" RFRA, 42 U.S.C. § 2000bb-1(c), as necessary to support relief under the statute. To the extent Plaintiffs' claim is that they face a substantial burden because of the threat of future enforcement, that argument is also unavailing. CBA cannot show that HHS or EEOC have filed actions in court regarding health care coverage and gender transition services, much less over religious objections. And any claim regarding the allegedly substantial burden on the religious exercise of *future* CBA members is even more speculative, given that CBA does not know who those hypothetical employers are or what may substantially burden their religious exercise.

Because Plaintiffs fail to show a substantial burden, it is unnecessary for the Court to address whether the imposition of a substantial burden would be the least restrictive means of furthering compelling government interests. The Supreme Court has made clear that application of the least restrictive means test requires a "to the person" fact-specific analysis. *O'Centro*, 546 U.S. at 430. Therefore, this test cannot be applied on a blanket basis to the numerous members of an organization, or to unknown future members of an organization. The government, moreover, has a compelling interest in protecting the right of transgender patients to access crucial healthcare and in protecting workers from sex discrimination. If a current member showed that EEOC's

application of Title VII or HHS's application of Section 1557 would substantially burden that member's religious exercise, EEOC or HHS would consider the specific factual circumstances to assess whether applying those statutes to that member was the least restrictive means of furthering the government's compelling interests, as RFRA demands. CBA's inability to demonstrate a violation of RFRA is underscored by the fact that both agencies have demonstrated a commitment to applying RFRA's test, and there are no examples of either agency ever requiring anyone to perform or provide insurance coverage for gender transition services in violation of RFRA.

III. THE EQUITIES AND THE PUBLIC INTEREST FAVOR DENIAL.

At most, Plaintiffs' interest in injunctive relief is the difference between Defendants applying the *Religious Sisters of Mercy* injunction to current CBA members and a broader injunction that would cover *future* CBA members. Plaintiffs have not demonstrated that the alleged injury to unknown possible future members outweighs the harm that an injunction would cause Defendants and unrepresented third parties.

Against Plaintiffs' non-showing weighs the significant public interest in achieving Title VII's and Section 1557's goals. Courts presume that violations of civil rights statutes constitute irreparable harm. *See Silver Sage Partners, Ltd. v. Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001); *Roberts v. Colo. Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993). There is "inherent harm to an agency" in enjoining statutes and regulations that "Congress found it in the public interest to direct that [it] . . . develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008).

IV. THE COURT SHOULD LIMIT ANY RELIEF TO CURRENT CBA MEMBERS.

Although the Court should not issue an injunction for the reasons explained above, to the extent the Court grants any relief, it should limit such relief to CBA's current members. The Supreme Court has "recognized that an association has standing to bring suit *on behalf of its members*" when the three-part test for associational standing is satisfied. *Hunt*, 432 U.S. at 343

(emphasis added). But the Supreme Court has never recognized an association's standing to bring suit on behalf of someone who *is not a member* of the organization, based on the circumstance that the person or entity may become a member in the future. Thus, even if the Court were to determine that CBA has met the three-part test for associational standing as to current members, the Court should not extend Article III standing beyond what has been recognized by the Supreme Court.

Traditional equitable principles further counsel against extending relief to future members. "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford,* 138 S. Ct. 1916, 1934 (2018), and "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994). Plaintiffs are CBA and three of its members. Granting relief to entities that are not CBA members is unnecessary to provide complete relief.

At a minimum, even if the Court were to extend relief to future members, it should not apply relief to any person or entity who is not a member of CBA at the time of the alleged violation of Title VII or Section 1557. A rule that allowed an entity to join CBA and later take advantage of any relief awarded in this case (such as during the investigation, during litigation, or on the eve of trial) would be open to manipulation.[5]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Dated: December 6, 2023 Respectfully submitted,

[5] Such an entity could, of course, raise its own defenses under RFRA, independent of this litigation.

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

MICHELLE BENNETT
Assistant Director, Federal Programs Branch

/s/ Bradley P. Humphreys
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Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that, on December 6, 2023, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's CM/ECF system. Parties may access this filing through the CM/ECF system.

/s Bradley P. Humphreys
BRADLEY P. HUMPHREYS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, *et al.* *Plaintiffs*, v. XAVIER BECERRA, *et al.* *Defendants*.	)	No. 3:cv-00203-PDW-ARS

DECLARATION OF BRADLEY P. HUMPHREYS

I, Bradley P. Humphreys, make the following Declaration pursuant to 28 U.S.C. § 1746, and state under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am a Senior Trial Counsel with the Federal Programs Branch of the Civil Division of the United States Department of Justice and counsel for Defendants in this matter.

2. Attached as Exhibit A is a true and correct copy of an email from me to counsel for Plaintiffs, Andrew Nussbaum and L. Martin Nussbaum, dated September 26, 2023.

Executed this 6th day of December, 2023.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS

EXHIBIT A

Humphreys, Bradley (CIV)

From: Humphreys, Bradley (CIV)
Sent: Tuesday, September 26, 2023 6:56 PM
To: Andrew Nussbaum
Cc: L. Martin Nussbaum
Subject: RE: URGENT MATTER--Amended Judgment in CBA v. Becerra Case No. 16-cv-432 (D. ND.) and FRCP 65(a)(1) Notice of Preliminary Injunction in New CBA v. Becerra Case

Andrew and Martin,

Thanks for your patience while my clients considered your proposals. Defendants are willing to agree in principle not to enforce against current CBA members who meet the criteria set out in the *CBA I* order while the court considers the parties' cross motions for summary judgment, provided the complaint includes the additional named members as required by the Eighth Circuit, and provided the parties can agree on a briefing schedule. From our perspective, we think it makes sense for you to go ahead and file your complaint with that understanding.

Regarding the stipulations you proposed, defendants do not agree. This is an entirely new case, and defendants are not willing to prejudge issues in advance of briefing on the merits. With that said, we do think it makes sense, as the parties did in *CBA I*, to limit initial summary judgment briefing to the RFRA claim in order to conserve the parties' and the court's resources.

Can we schedule a call for tomorrow am to discuss logistics?

Thanks,
Brad

From: Andrew Nussbaum <andrew@nussbaumgleason.com>
Sent: Monday, September 25, 2023 7:47 PM
To: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Cc: L. Martin Nussbaum <martin@nussbaumgleason.com>
Subject: [EXTERNAL] RE: URGENT MATTER--Amended Judgment in CBA v. Becerra Case No. 16-cv-432 (D. ND.) and FRCP 65(a)(1) Notice of Preliminary Injunction in New CBA v. Becerra Case

Brad,

Thanks for letting us know.

We wanted to follow up regarding potential stipulations the CBA and our other plaintiffs might reach with DOJ. As we explained during our conference call on September 22, Judge Welte's January 19, 2021 order granting the CBA's motion for summary judgment and the Eighth Circuit's affirmance of the same resolve nearly all the issues between the parties, except associational standing. To avoid re-litigation of these already-decided issues—and the attendant drain on the Court's time and the parties' resources—we suggest stipulating to the following:

- CBA's members face a credible threat of enforcement by HHS and EEOC of their interpretations of Section 1557 and Title VII to require CBA's members to cover and provide gender-transition services;
- CBA's challenge to HHS's and EEOC's interpretations of Section 1557 and Title VII to require CBA's members to cover and provide gender-transition services are ripe and not moot;
- The CBA's members' Catholic beliefs prohibit them from covering and providing gender-transition services;

- HHS's and EEOC's interpretations of Section 1557 and Title VII to require CBA's members to cover and provide gender-transition services, and the enforcement mechanisms available to HHS and EEOC under those statutes, impose a substantial burden on the religious beliefs of CBA members;
- HHS and EEOC have not identified a compelling interest in enforcing their interpretations of Section 1557 and Title VII to require CBA's members to cover and provide gender-transition services; and
- There exist less-restrictive means available to HHS and EEOC to achieve any attendant interests in their interpretations of Section 1557 and Title VII.

These conclusions are established by the Eighth Circuit's opinion and Judge Welte's January 19, 2021 order. Please let us know if the DOJ will stipulate to them in full or in part and, if not, the basis therefore.

We also look forward to hearing from you tomorrow whether your clients will agree to a stay of enforcement against the CBA while we brief summary judgment.

Best regards,

Andrew

From: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Sent: Monday, September 25, 2023 1:13 PM
To: Andrew Nussbaum <andrew@nussbaumgleason.com>
Cc: L. Martin Nussbaum <martin@nussbaumgleason.com>
Subject: RE: URGENT MATTER--Amended Judgment in CBA v. Becerra Case No. 16-cv-432 (D. ND.) and FRCP 65(a)(1) Notice of Preliminary Injunction in New CBA v. Becerra Case

Andrew and Martin,

We're making progress here, but the religious observance today has people out who need to weigh in. I'm told we should be able to get you the two agencies' positions tomorrow. Apologies for overpromising on the timing. I had forgotten about Yom Kippur.

On the service question, we can't waive service, but obviously we're in contact and can continue to discuss the new case in the meantime.

Thanks,
Brad

From: Andrew Nussbaum <andrew@nussbaumgleason.com>
Sent: Friday, September 22, 2023 7:12 PM
To: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Cc: L. Martin Nussbaum <martin@nussbaumgleason.com>
Subject: [EXTERNAL] RE: URGENT MATTER--Amended Judgment in CBA v. Becerra Case No. 16-cv-432 (D. ND.) and FRCP 65(a)(1) Notice of Preliminary Injunction in New CBA v. Becerra Case

Brad,

One more thing. On (2) below, our member-plaintiffs in the new case receive substantial HHS funds and meet the Title VII employee requirement.

Best regards,

Andrew

From: Andrew Nussbaum
Sent: Friday, September 22, 2023 5:09 PM
To: 'Humphreys, Bradley (CIV)' <Bradley.Humphreys@usdoj.gov>
Cc: L. Martin Nussbaum <martin@nussbaumgleason.com>
Subject: RE: URGENT MATTER--Amended Judgment in CBA v. Becerra Case No. 16-cv-432 (D. ND.) and FRCP 65(a)(1) Notice of Preliminary Injunction in New CBA v. Becerra Case

Brad,

We don't have a final complaint we can share with you yet. But I can tell you that the complaint is materially identical to our Verified Second Amended Complaint filed in case number 16-cv-432, except that (1) it attaches affidavits of non-named plaintiff members who receive HHS funds and/or meet the Title VII employee threshold to meet the Eighth Circuit's associational-standing test; (2) replaces Plaintiffs Diocese of Fargo, Catholic Charities of North Dakota, and Catholic Medical Association with new CBA-member plaintiffs that are located in the District of North Dakota; and (3) updates the allegations in the complaint with recent events (*e.g.*, the Committee on Doctrine of the USCCB's March 20, 2023, Doctrinal Note on Technological Manipulation of the Human Body.)

We look forward to your response on Monday.

Best regards,

Andrew

From: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Sent: Friday, September 22, 2023 1:52 PM
To: Andrew Nussbaum <andrew@nussbaumgleason.com>
Cc: L. Martin Nussbaum <martin@nussbaumgleason.com>
Subject: RE: URGENT MATTER--Amended Judgment in CBA v. Becerra Case No. 16-cv-432 (D. ND.) and FRCP 65(a)(1) Notice of Preliminary Injunction in New CBA v. Becerra Case

Hi again, Andrew and Martin,

Thanks for the call today. As I mentioned, we're actively working on getting you an answer on your proposals. Unfortunately, I'm not going to be able to give you the agencies' position today, but I will have an answer for you on Monday.

One thing that would help is if you have a draft of the complaint in the new case that you'd be willing to share with us. Please let me know if that's something you can provide.

Thanks,
Brad

From: Andrew Nussbaum <andrew@nussbaumgleason.com>
Sent: Thursday, September 21, 2023 11:35 AM
To: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Cc: L. Martin Nussbaum <martin@nussbaumgleason.com>
Subject: [EXTERNAL] URGENT MATTER--Amended Judgment in CBA v. Becerra Case No. 16-cv-432 (D. ND.) and FRCP

65(a)(1) Notice of Preliminary Injunction in New CBA v. Becerra Case
Importance: High

Brad,

I hope this message finds you well.

I am writing with regards to two matters.

First, pursuant to the Court's order of September 15, 2023 in the above-referenced matter, I am attaching here a proposed amended final judgment in Case No. 16-cv-432. It amends the judgment to the extent the judgment recognized associational standing of the CBA as required by the Court September 15 order. Please let me know if these changes are acceptable to your clients. This is due to the Court by email tomorrow.

Second, we are prepared to immediately refile suit in the Eastern Division of the District of North Dakota on behalf the CBA and one or more of its members. Our complaint is materially identical to the second amended complaint we filed in the above-referenced action, except that it satisfies the Eighth Circuit's requirement for associational standing that the CBA identify a non-named-plaintiff member who meets the employee threshold under Title VII and receives federal financial assistance under Section 1557. In light of Judge Welte's order of January 21, 2021, as well as the Eighth Circuit's affirmance of the same, we see no basis for HHS or EEOC to defend the CBA's renewed lawsuit. We thus request that the parties resolve the suit by agreement to the terms of Judge Welte's injunction of February 19, 2021. You have seen the additional declarations of our CBA members that satisfy the Eighth Circuit's associational-standing test, which we filed with the Court on July 21, 2023. Please let us know if you will resolve this second suit by agreement.

Absent such agreement, we will file our complaint and seek emergency relief. Our preference in that regard would be to agree to a temporary restraining order/preliminary injunction identical to Judge Welte's February 19, 2021 injunction and set a briefing schedule on cross-motions for summary judgment as we agreed to do in December 2020. If you will not resolve our second suit by agreement, please let us know if you will agree to a stipulated temporary injunction and a briefing schedule. Such an agreement would protect CBA members from any enforcement actions while the District Court evaluated the CBA's evidence related to standing and our respective arguments.

Please also let us know if you will waive service of the our complaint.

We would like to confer about these issues by Zoom teleconference. Given the Court's deadline, might we confer today, September 21 or Friday, September 22? If we are unable to confer on Thursday or Friday of this week, we will send the Court our proposed amended judgment on Friday, and file a complaint and a combined motion for preliminary injunction and temporary restraining order early next week, noting our attempts to confer.

Best regards,

Andrew

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