UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION; SISTERS OF ST. FRANCIS OF THE IMMACULATE HEART OF MARY; ST. ANNE'S GUEST HOME; and ST. GERARD'S COMMUNITY OF CARE,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 3:23-cv-203-PDW-ARS

CBA PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

In this follow-on suit to the *Religious Sisters of Mercy* litigation, there is a single issue left undecided by the 2021 and 2022 decisions of this Court and the Eighth Circuit: the first prong of the associational-standing test, whether CBA has provided sworn evidence from a member who would have standing to sue in its own right. The Government opposed CBA's request to reopen the record in *Religious Sisters of Mercy* to present that evidence, forcing CBA to expend substantial resources by filing a brand-new suit and seeking a preliminary injunction. Now having seen the sworn testimony of not one, *but twelve*, such members, the Government does not dispute that CBA has

satisfied the first prong of the associational-standing test. That concession should resolve this case in CBA's favor.

The Government instead makes three arguments in opposition to CBA's request for injunctive relief: (1) that associational standing is inappropriate in religious-freedom cases, (2) that CBA is not entitled to injunctive relief protecting future members, and (3) that the Mandate does not substantially burden CBA members' religious beliefs. Regarding the first two arguments, the Government is estopped from re-raising them here; the Government has already litigated and lost these arguments against the CBA in previous litigation in the Western District of Oklahoma. Regarding the third argument, the Court has already held that the Mandate substantially burdens CBA members' religious beliefs.

In seven years of litigation, the Government has never disavowed its intent to force the CBA's member employers and healthcare providers to cover and provide gender-transition services in violation of their Catholic faith. This is despite orders from this Court, the Northern District of Texas, and the Fifth and Eighth Circuits, holding that the Mandate is illegal and dangerous, forcing Catholics into an existential choice between their faith and ruinous Government sanctions. The Government has instead attempted to construct "a legal Penrose staircase" to thwart the CBA's rights with revolving arguments regarding justiciability. *See Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 373 (N.D. Tex. 2021). Because its justiciability arguments fail for all of the reasons this and other courts have previously determined, the Court should reject the Government's Mandate once and for all, and enter an injunction protecting the CBA's present and future members.

ARGUMENT

1. "Where an organizational plaintiff seeks only declaratory and prospective relief, the participation of individual members is not required."

The Government does not dispute that the sworn testimony of CBA's members submitted with the CBA's complaint at paragraphs 14-45 and exhibits E-H thereto satisfies the first prong of the associational-standing test that, for an association to have standing to seek relief on behalf its members, the association must "submit affidavits showing, through specific facts that one or more of its members would be directly affected by the allegedly illegal activity." *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 601-02 (8th Cir. 2022) (cleaned up). The Government also concedes that the second prong of the associational-standing test is present here, that "[t]he CBA's purpose of supporting Catholic employers that wish to provide employee benefits consistent with their religious beliefs is certainly germane to a lawsuit that challenges regulations affecting members' health plans." *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1137 (D.N.D. 2021). Citing *Harris v. McRae,* 448 U.S. 297, 321 (1980), the Government instead argues that CBA cannot satisfy the third prong of the associational-standing test because associational standing is inappropriate in Free Exercise and RFRA cases. Resp. at 13-15. This argument is incorrect for three reasons.

1.1. The Government is collaterally estopped from arguing that the CBA cannot assert a RFRA claim on behalf of its members.

First, the Government is collaterally estopped from re-raising this argument, having litigated and lost it previously in a case brought by the CBA, *Catholic Benefits Association v. Sebelius*, 24 F. Supp. 3d 1094, 1100–01 (W.D. Okla. 2014). The court's holding in *Catholic Benefits Association v. Sebelius* is worth quoting at length because it dispatches in detail the identical argument made by the Government here:

> Concerning the third prong of the [associational-standing] test, Defendants [the Government] rely heavily on *Harris v. McRae,* 448 U.S. 297, 321 (1980), in arguing that a RFRA claim requires individual participation. Similarly, Defendants contend that "the availability of preliminary injunctive relief on any claim turns on questions of irreparable harm, the balance of equities, and the public interest, all of which may very well vary from employer to employer and circumstance to circumstance."
>
> Notwithstanding Defendants' arguments, the Court finds that the CBA possesses associational standing to pursue its members' claims. To begin with, Defendants' argument that *Harris* dictates that all RFRA claims require individual participation is unpersuasive. In *Harris,* the organization seeking to establish associational standing conceded to the Supreme Court that its membership held a diversity of religious views concerning what was at stake in the case. And this diversity of views no doubt impacted the Supreme Court's determination that the participation of the individual members of the organization was required in order to properly resolve their diverging free exercise claims.
>
> It follows that the basis for associational standing was much more tenuous in *Harris* than the basis for it in this case. Here, it is abundantly clear that all of the CBA's members abide by Catholic conviction that contraceptives violate their conscience, and Defendants do not contend otherwise. Because the CBA's members are so uniform in their beliefs—particularly their beliefs that contraceptives are objectionable—the Court finds that the CBA can properly present its members' claims in this case such that the participation of the individual members of the CBA is not required.
>
> Additionally, Defendants' argument that the preliminary injunction factors prohibit associational standing is unavailing, as it contradicts Supreme Court precedent. The CBA is seeking an injunction on its members' behalf, and this is the type of relief where "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth,* 422 U.S. at 515. This means that the type of relief requested does not require the participation of individual members. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 546 (1996) ("Relying on *Warth* . . ., *Hunt* held that 'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members . . .."). Therefore, the Court finds that the CBA possesses associational standing to sue in this case.

Id. (2nd, 3rd, and 4th citations omitted). This Court has similarly decided that participation of individual CBA members is not required in *Religious Sisters of Mercy*: "injunctive relief should extend to the [CBA's] present and future members to avoid continuous litigation and a waste of judicial resources." 513 F. Supp. 3d at 1137 (cleaned up).

The doctrine of "mutual defensive collateral estoppel is applicable against the government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984). Accordingly, because this "issue of . . . law"—whether the CBA may assert a RFRA claim on behalf of its members—"[wa]s actually litigated and determined by a valid and final judgment, and the determination [wa]s essential to the judgment, the determination is conclusive in [this] subsequent action between the parties." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quoting Restatement (Second) of Judgments § 27, p. 250 (1980)).

1.2. The Government has lost this argument in other cases challenging the Mandate.

Second, even if the Government were not collaterally estopped from asserting this argument, the Western District of Oklahoma's decision is highly persuasive authority, as are decisions from the Northern District of Texas and this Court in similar cases. In *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 680 (N.D. Tex. 2016), a case which challenged the Mandate, the Government argued that the Christian Medical and Dental Association "lack[ed] associational standing as to the asserted RFRA claim because it would require the participation of individual members." *Id.* Notably, the Government's briefing on this issue in *Franciscan Alliance* was identical to its argument here. Among other things, the Government cited the same authority, namely *McRae*. *See* ECF No. 50 at p. 28, Def.'s Resp. Br., *Franciscan Alliance, Inc. v. Burwell*, 16-cv-00108 (Nov. 23, 2016). The *Franciscan Alliance* court rejected the Government's argument, explaining that an association "is not required to detail the specific religious views of each member" to have associational standing to assert a RFRA claim. 227 F. Supp. 3d at 680. Similarly, in *Christian Employers Alliance v. EEOC*, 2022 WL 1573689, at *8 (D.N.D. May 16, 2022), this Court rejected the Government's argument that a RFRA claim challenging the Mandate cannot be asserted on an

associational basis. *Id.* Contrary to the Government's arguments, the Court held that the compelling-interest and least-restrictive-means prongs of a RFRA claim could be resolved on an association-wide basis. *Id.*

1.3. *McRae* is distinguishable.

Third, the Government's argument is wrong on the merits, because the decisions it relies on are distinguishable. *McRae* held that the association who brought that case could not assert a free-exercise claim on behalf of its members, because the association "concede[d]" that there was a "diversity of view[s] within [its] membership" concerning the religious belief at issue—namely, the permissibility of abortion. *McRae*, 448 U.S. at 321. The association in *McRae* further conceded that it had no association-wide stance on the permissibility of abortion because it is a "determination which must be ultimately and absolutely entrusted to the conscience of the individual before God." *Id.* Accordingly, the Court held "that the participation of individual members . . . is essential to a proper understanding and resolution of their free exercise claims." *Id.* Similarly, *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) required a factual analysis regarding coercion that required individualized facts and thus precluded associational standing. And in *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1288 (5th Cir. 1992), "nothing in th[e] record support[ed] the notion that Society members share [the individual plaintiff's] views regarding the" religious belief at issue.

By contrast, the Government has never contested that all CBA members share the same belief that providing and insuring gender-transition services violates their Catholic faith. *See* ECF No. 1 at ¶¶ 78-95. As stated in the CBA's complaint, "[t]o be a member of the CBA, an organization must meet these criteria, among others: (1) it shall be a Catholic employer, and (2) with regard to the benefits it provides to its employees, independent contractors, or students, or with regard to

the health care services it provides to its patients, the employer shall, as part of its religious witness and exercise, be committed to providing no benefits or services inconsistent with Catholic values." *Id.* at ¶ 52. Every new member must sign a statement to that effect:

> The organization hereby represents, for itself and its related employers, that it and its related employers are Catholic employers committed to providing health care benefits consistent with Catholic teaching, and support efforts to preserve the right of Catholic organizations to provide such benefits.

ECF No. 1-3 at p.1, CBA Nonprofit Employer App. for Membership; *see also* ECF No. 1-1, CBA Articles, art. VI, Members; ECF No. 1-2 at p. 1, CBA Bylaws, art. 3.1.2; ECF No. 1-4, CBA For-Profit Employer App. for Membership. Those Catholic values include the belief that "the use of surgical or chemical techniques that aim to exchange the sex characteristics of a patient's body for those of the opposite sex or for simulations thereof" and, "in the case of children, the exchange of sex characteristics prepared by the administration of chemical puberty blockers, which arrest the natural course of puberty and prevent the development of some sex characteristics in the first place to treat" "gender dysphoria" and "gender incongruence" are not "morally justified either as attempts to repair a defect in the body or as attempts to sacrifice a part of the body for the sake of the whole." ECF No. 1 at ¶ 87 (quoting Comm. on Doctrine, U.S. Conf. of Cath. Bishops, *Doctrinal Note on the Moral Limits to Technological Manipulation of the Human Body* ¶¶ 14-15 (Mar. 20, 2023)).

The Government contends that its interest in forcing the CBA's member healthcare providers and employers to perform and insure gender-transition services cannot be determined on an association-wide basis. Resp. at 15. But as this Court has already ruled, the Government lacks evidence of compelling interest as to *any* member of the CBA, because the Mandate "still leaves gaps, including in the government's own healthcare programs," and therefore cannot "be regarded as protecting an interest of the highest order." *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1148; *see*

also Franciscan Alliance, 227 F. Supp. 3d at 693 ("[T]he government's own health insurance programs, Medicare and Medicaid, do not mandate coverage for transition surgeries; the military's health insurance program, TRICARE, specifically excludes coverage for transition surgeries . . .."); *Christian Emps.*, 2022 WL 1573689, at *8 (rejecting the Government's argument).

Worse, the Government's argument turns religious freedom on its head. The compelling-interest requirement is part of the *Government's burden* to show why a substantial burden upon religious practice is justified. But the Government's argument here reverses that constitutional logic, turning an element of strict scrutiny (which the Government must satisfy) into a precondition for asserting a RFRA claim at all. Nothing in RFRA or case law supports that move. The Government instead argues that it can promulgate policies that, in a single stroke, equally burden the religious practices of thousands of like-minded institutions across the country, but those institutions cannot associate to challenge them. What purpose would forbidding religious associations to assert claims common to the association's members serve other than a strategic effort by the Government to "divide and conquer" religious claimants and wear them down through incessant rulemaking, rule changes, litigation, and ever-evolving justiciability arguments? This is precisely the kind of step in the "legal Penrose staircase" Judge O'Connor decried in *Franciscan Alliance*.

Yet even if the Government had some compelling interest here, the Government does not dispute that the Mandate is not the least-restrictive means of achieving any interest it may have. There are "many less restrictive alternatives beyond forcing the [CBA] to perform and cover gender-transition procedures in violation of their religious beliefs" available to Defendants, including "assum[ing] the cost of providing gender-transition procedures for those unable to obtain them under

their health-insurance policies due to their employers' religious objections." *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1148-49 (cleaned up).

McRae did not announce a categorical prohibition on associations asserting claims of religious freedom. Numerous decisions since *McRae* have ruled religious-freedom claims can be asserted by an association, and that *McRae* is distinguishable because of the diversity of religious views at play in that case.[1] If it were otherwise, believers' First Amendment right of association would be destroyed. "Religious groups are the archetype of associations formed for expressive purposes." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 200 (2012) (Alito and Kagan, J., concurring). "Throughout our Nation's history, religious bodies have been the

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[1] *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Lab.,* 471 U.S. 290, 303 n.26 (1985) ("Petitioner Larry La Roche is an associate and a former vice-president of the Foundation. The Foundation also has standing to raise the free exercise claims of the associates, who are members of the religious organization as well as employees under the Act."); *Arizona Yage Assembly v. Garland*, 2023 WL 3246927, at *4 (D. Ariz. May 4, 2023) (holding church had associational standing to assert RFRA claim on behalf of its members in challenge to Controlled Substances Act); *Christian Emps. All.*, 2022 WL 1573689, at *8 (holding that Christian association could challenge Mandate under RFRA on behalf of its members); *Word Seed Church v. Vill. of Hazel Crest*, 533 F. Supp. 3d 637, 649 (N.D. Ill. 2021)(holding association of churches had associational standing to assert RLUIPA and free exercise claims); *Fields v. Speaker of the Pennsylvania House of Representatives*, 251 F. Supp. 3d 772, 783 (M.D. Pa. 2017) (holding association could assert free-exercise claim on associational basis); *Franciscan All.*, 227 F. Supp. 3d at 680(holding that the Christian Medical and Dental association could assert RFRA challenge to the Mandate, and rejecting the Government's invocation of *McRae*); *Cath. Benefits Association*, 24 F. Supp. 3d at 1100–01 (holding that the CBA could assert a RFRA claim on behalf its members); *Big Hart Ministries Assoc., Inc. v. City of Dallas*, 2013 WL 12304552, at *9-10 (N.D. Tex. Mar. 25, 2013) (distinguishing *McRae* and *Cornerstone* and holding that religious organization had associational standing); *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1205–06 (D. Nev. 2009) (holding that group of Indian tribes could assert religious-freedom claims on behalf of their members and rejecting the Government's invocation of *McRae*), *aff'd in part, rev'd in part on other grounds*, *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009); *C.L.U.B. v. City of Chicago*, 1996 WL 89241, at *15 (N.D. Ill. Feb. 27, 1996) (rejecting Defendant's invocation of *McRae* and holding association could assert free-exercise claim on behalf of its members).

preeminent example of private associations that have acted as critical buffers between the individual and the power of the State." *Id.* at 199 (cleaned up). Thus, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" for religious associations as much as secular ones. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

2. The Court should protect present and future members.

From the outset of this dispute seven years ago, CBA has sought injunctive and declaratory relief that protects all of its members. The CBA seeks this relief because protecting Catholic healthcare providers and employers from the Mandate is at the heart of its mission. The CBA was established "[t]o work and advocate for religious freedom of Catholic and other religious employers" and "[t]o support Catholic employers" who, "as part of their religious witness and exercise," wish to provide employee benefits "in a manner that is consistent with Catholic values." ECF No. 1 at ¶ 46. The Mandate hurts the CBA itself, as a ministry seeking to serve organizations. Given these uncontested facts, restricting relief to the CBA's present members would cripple the CBA by preventing it from fulfilling its mission and preventing it from growing. The CBA would be forced to bring *ad nauseum* litigation to protect its members and its religious mission.

This is exactly what happened in *Catholic Benefits Association v. Sebelius*, 24 F. Supp. 3d 1094 (W.D. Okla. 2014). In 2014, CBA filed suit on behalf of its members, seeking an injunction against Defendants' contraceptive, abortifacient, sterilization, and counseling mandate (the "CASC Mandate") promulgated under the Affordable Care Act. *See id.* The court initially sided with the Government and refused to issue relief that extended to the CBA's future members. *See id.* at 1106-07. Not unlike the Government's opposition to CBA resolving its associational standing on remand in *Religious Sisters of Mercy*, the Government's opposition to protection of CBA's future members

resulted in the CBA having to file a second lawsuit to seek the same relief for its newest members: *Catholic Benefits Association v. Burwell*, 5:14-cv-685 (W.D. Okla.). Eventually, after numerous motions to amend the Court's preliminary injunction to protect new CBA members as they joined, the Court agreed with the CBA and found that it was judicially efficient to issue a permanent injunction that protects the CBA's future members. *See* ECF No. 184 at p.2, *Catholic Benefits Association v. Hargan*, 14-cv-240 (W.D. Okla. Mar. 7, 2018).[2]

Like its argument regarding associational standing, the Government has already litigated and lost this issue against the CBA in the Western District of Oklahoma and is estopped from re-raising here. Undeterred, the Government again argues against extending injunctive relief to the CBA's future members. Resp. at 12. But there is nothing unusual about CBA's request. In a 2019 case, for example, this Court entered an injunction protecting future members of a religious association against the Government's CASC Mandate because "a limitation [to present members only] would result in continuous litigation and be a waste of judicial resources as well as the time and resources of the litigants." *Christian Emps. All. v. Azar*, 2019 WL 2130142, at *5 (D.N.D. May 15, 2019). In 2021 and 2022, this Court similarly entered injunctions against the Mandate that respectively protect future members of religious associations. *See Christian Emps. All.*, 2022 WL 1573689, at *9 (entering an injunction inuring to the benefit of "present or future members"); *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1153 ("Finally, injunctive relief should extend to the Catholic Plaintiffs' present and future members to avoid continuous litigation and a waste of judicial resources." (cleaned up)). And other courts have similarly entered injunctions protecting future members of

[2] A copy of the court's injunction protecting CBA's future members is attached as Exhibit A.

religious associations. *E.g.*, ECF No. 82 at p. 2-3, *Little Sisters of the Poor Home for the Aged v. Azar*, 13-cv-02611 (D. Colo. May 29, 2018) (enjoining HHS from enforcing its contraceptive mandate "all current and future participating employers in the Christian Brothers Employee Benefit Trust Plan"); ECF No. 95, *Reaching Souls Int'l Inc. v. Azar*, 13-cv-1092 (W.D. Okla. March 15, 2018) (extending Mandate-related injunction to "all current and future participating employers in the Guidestone plan").[3]

2.1. The Government will not agree to the terms of this Court's January 19, 2021 injunction.

Finally, the Government says that it offered to comply with the terms of this Court's January 19, 2021 injunction in the *Religious Sisters of Mercy* case and thus preliminary injunctive relief is unnecessary. Resp. at 12-13. That is incorrect. As explained, the January 2021 injunction protected present and future members. *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1153. The Government will not agree to this condition, and so a preliminary injunction is necessary.

Just *yesterday*, three new organizations joined the CBA. Exhibit D, Declaration of Martin Nussbaum ¶ 2. These new members are not protected by the Government's offer, and thus the CBA would have to file a new motion for preliminary injunction for these members, re-raising the identical arguments here. The CBA has averaged adding 12 new regular employer members plus 61 new parish employer members every month since March 2014. Nussbaum Decl. ¶ 4. Certainly, more organizations will join in the coming weeks, repeating this judicially inefficient process.

[3] Copies of the injunctions in *Little Sisters of the Poor* and *Reaching Souls International* are attached as Exhibits B and C.

The Government's argument regarding the CBA's future members is fatally undermined by the guardrails the Western District of Oklahoma put on its injunction in favor of the CBA and its present and future members. Specifically, the Western District of Oklahoma ruled that, to be entitled to protections of its injunction, a future CBA member must meet four criteria:

1. The employer is not yet protected from the [CASC] Mandate;
2. The CBA's Membership Director or CEO has determined that these Catholic employers meet the CBA's strict membership criteria;
3. The CBA's membership criteria have not changed since the CBA filed its complaint . . .;
4. The new CBA members have not had an adverse ruling on the merits issued against them in another case involving the [CASC] Mandate.

Exh. A, ECF No. 184 at p.2, *Catholic Benefits Association v. Hargan*, 14-cv-240 (W.D. Okla. Mar. 7, 2018). The Court can adopt similar criteria here, alleviating any concern raised by the Government.

3. The Mandate imposes a substantial burden on members' religious beliefs.

In arguing that the Mandate is not a substantial burden on CBA members' religious beliefs, Resp. at 16-17, the Government conflates two distinct inquiries. First, under the heading "substantial burden," the Government argues that the CBA may not seek pre-enforcement review of the Mandate because it has not suffered an injury in fact. *Id.* at 16-17. But the Government does not dispute that the Eighth Circuit has already ruled that the CBA meets the injury-in-fact requirement, because the conduct of the CBA's members—refusing to cover and perform gender transition services—is (1) "arguably affected with a constitutional interest," (2) "arguably proscribed by" Section 1557 and Title VII, and (3) "a credible threat of prosecution" exists. *Religious Sisters of Mercy*, 55 F.4th at 603 (cleaned up). The Government continues to refuse to "disavow enforcement," and rather has promised "robust enforcement" of Section 1557 and Title VII. *Id.* at 605, 607. The Eighth Circuit's affirmance of this Court's ruling as to the CBA's injury is dispositive.

Second, the Government argues that the Mandate does not impose a substantial burden on CBA because CBA's members will not comply with the Mandate. Resp. at 16-17. But that argument ignores the doctrine of pre-enforcement review: "An individual need not be subject to a threat, an actual arrest, prosecution, or other enforcement action to challenge the law." *Religious Sisters of Mercy*, 55 F.4th at 602 (cleaned up). It also ignores what constitutes a substantial burden and that this Court has already ruled the Mandate imposes a substantial burden on CBA members, because (1) "[u]nder the prevailing interpretations of Section 1557 and Title VII, refusal to perform or cover gender-transition procedures would result in the Catholic Plaintiffs losing millions of dollars in federal healthcare funding and incurring civil and criminal liability"; and (2) "[j]ust as clearly, compliance with the challenged laws would violate the Catholic Plaintiffs' religious beliefs as they sincerely understand them." *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1147.

Finally, the Government argues that its attempts to enforce the Mandate against one of CBA's members ("Catholic Ministry") in 2021[4] does not suggest a credible threat of enforcement because "once EEOC was informed that the employer was a CBA member, EEOC did not take any further action." Resp. at 17. But EEOC "did not take any further action" *only because of this Court's injunction*, which expressly prohibited EEOC "from 'pursuing, charging, or assessing any penalties, fines, assessments, *investigations*, or other enforcement actions.'" ECF No. 1-9 at p. 1 (emphasis added) (quoting *Catholic Benefits Ass'n v. Cochran*, 16-cv-00386, ECF No. 133 (D.N.D. Feb. 19, 2021)). That the Government ceased its enforcement of the Mandate against Catholic Ministry after receiving this notice is exactly why the Court's 2021 injunction should be reentered.

[4] *See* ECF No. 1 ¶ 158; ECF No. 1-9.

4. The Government is not "committed to complying with RFRA."

Throughout its response, the Government coos it is "committed to complying with RFRA" and other religious freedom protections. *E.g.*, Resp. at 11. But if that were so, this suit would not have been necessary. What RFRA requires here has been determined at great length by the Eighth Circuit (*Religious Sisters of Mercy*), the Fifth Circuit (*Franciscan Alliance*), this Court (*Religious Sisters of Mercy* and *Christian Employers Alliance II*), and the Northern District of Texas (*Franciscan Alliance*). The Government has similarly refused to incorporate the religious exemptions provided by Title IX and Title VII, notwithstanding the statutory requirement in Section 1557 it must do so. *See Religious Sisters of Mercy*, 513 F. Supp. 3d at 1125. If the Government were committed to "Federal conscience and religious freedom protections," Resp. at 11, it would adhere to the court orders about what these protections require.

5. CBA is under threat of irreparable harm, and the balance of the equities and the public interest favor an injunction.

The Government argues that irreparable harm is not present, and that the public interest and the balance of the equities disfavor injunctive relief. Resp. at 12, 19. The Government's arguments are incorrect. First, the Court has already determined that the public interest and the equities favor the CBA's requested injunction, and that the CBA is under threat of irreparable harm. *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1153. Second, because the CBA has established "a likely violation of" its right to religious freedom, "the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012). Third, "intrusion upon the [CBA members'] exercise of religion is sufficient to show irreparable harm." *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1153 (citing *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1.*, 690 F.3d 996,

1000 (8th Cir. 2012)). Fourth, the public interest and the equities favor an injunction "because the protection of constitutional rights is "always in the public interest." *Id.* (quoting *Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020)).

Conclusion

After seven years of litigation, enduring the Government's thirteen requests for stay, a new rulemaking, a trip to the Eighth Circuit, and incurring over $1 million in legal fees, the Government forced the CBA into this second suit on the stated premise that CBA had failed to prove the third prong of the associational standing test in *Religious Sisters of Mercy*. Its immediate concession of that point reveals its real goal is to exhaust conscientious Catholic organizations through a series of revolving arguments about justiciability and the technicalities of injunctive relief. But at this stage—after having lost all of its arguments in previous suits against the CBA and similar religious associations—it is the Government's arguments that are tired, and barred by the doctrine of collateral estoppel. The core facts have never changed that the Government intends to force CBA members to violate their consciences by insuring and providing procedures the Catholic Church teaches are incompatible with biblical faith and human flourishing. This Court should preliminarily and/or permanently enjoin Defendants from doing so.

DATED: December 20, 2023.

Respectfully submitted,

/s/ Andrew Nussbaum

L. Martin Nussbaum
Andrew Nussbaum
Nussbaum Gleason PLLC
2 N. Cascade Ave., Suite 1430
Colorado Springs, CO 80903
(719) 428-4937
martin@nussbaumgleason.com
andrew@nussbaumgleason.com
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CATHOLIC BENEFITS ASSOCIATION LCA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case Nos. CIV-14-240-R**
	)	**CIV-14-685-R**
HARGAN, *et al.*,	)	
Defendants.	)	

ORDER

Before the Court is Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment, *CBA I* (CIV-14-240-R) Doc. 161 and *CBA II* (CIV-14-685-R) Doc. 57. This case began with the Affordable Care Act's contraceptive mandate ("the Mandate," defined below) and has continued for several years through changes in implementing regulations, the Government's position on the Mandate's legality and accommodation process, and nationwide litigation over the application of the Religious Freedom and Restoration Act ("RFRA") to religious employers' provision of healthcare consistent with their faith. Defendants no longer defend the Mandate or its accommodation process to Plaintiffs' RFRA claim, and they concede that the issue is not moot. Having considered the parties' briefs and all relevant legal authority, the Motion is GRANTED AS SET FORTH HEREIN.

The Court ORDERS that this Court's previous preliminary injunctions in *CBA I* (CIV-14-240-R, Doc. 68, at 21, as modified by Docs. 84, 107, 116, 128, 138, and 146) and in *CBA II* (CIV-14-685-R, Doc. 40, at 15) are hereby replaced in their entirety by the following:

EXHIBIT A

The Court restricts relief to Plaintiffs and future Group II Members (non-exempt nonprofits) and Group III Members (for-profit employers) of the Catholic Benefit Association ("CBA") that meet the following criteria:[1]

1) The employer is not yet protected from the Mandate;
2) The CBA's Membership Director or CEO has determined that the employer meets the CBA's strict membership criteria;
3) The CBA's Membership criteria have not changed since the CBA filed its complaint on March 12, 2014; and
4) The employer has not had an adverse ruling on the merits issued against it in another case involving the Mandate.

The Court hereby DECLARES that Defendants—the United States Departments of Health and Human Services, Treasury, and Labor, along with their respective Secretaries—violated RFRA, 42 U.S.C. § 2000bb-1 *et seq.*, by promulgating and enforcing regulations pursuant to 42 U.S.C. § 300gg-13 that require Plaintiffs to take actions that facilitate the provision, through or in connection with their health plans, of Food and Drug Administration-approved contraceptive methods, abortifacients, sterilization procedures, and related patient education and counseling ("the Mandate").

The Court also finds that Plaintiffs have met the standards necessary for injunctive relief: (1) Plaintiffs have demonstrated, and Defendants now concede, that enforcement of the Mandate against Plaintiffs would violate their rights under RFRA; (2) Plaintiffs will suffer irreparable harm to their ability to practice their Catholic beliefs—harm that is the direct result of Defendants' conduct—unless Defendants are enjoined from further interfering with Plaintiffs' religious practice; (3) The threatened injury to Plaintiffs outweighs any injury to Defendants

[1] The Court adopts its prior Group II and III definitions. *See* Preliminary Injunction, Doc. 68, at 19. This order does not modify the Court's prior denial of relief for CIC and CBA Group I Members. *See id.* at 10–11, 14–15.

resulting from this injunction; and (4) The public interest in the vindication of religious freedom favors the entry of an injunction.

The Court therefore PERMANENTLY ENJOINS AND RESTRAINS Defendants, their agents, officers, and employees, and all others in active concert or participation with them, including their successors in office, from enforcing 42 U.S.C. § 300gg-13(a)(4) and regulations passed in relation to this statute—or from enforcing any penalties, files, assessments, or other adverse consequences, including any penalties under 26 U.S.C. §§ 4980D and 4980H, as a result of noncompliance with any law or regulation requiring the provision of religiously-objectionable contraceptive methods, abortifacients, sterilization procedures, and related patient education and counseling ("medical care") since August 1, 2011—against CBA members, their health plans, their health insurance issuers, or third-party administrators in connection with their health plans, to the extent that these laws and related regulations require CBA members to contract, arrange, pay, or refer for religiously-objectionable medical care.

For the reasons set forth herein, Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment, *CBA I* (CIV-14-240-R) Doc. 161 and *CBA II* (CIV-14-685-R) Doc. 57, is GRANTED. The Court further orders that any petition by Plaintiffs for attorney's fees or costs shall be submitted within 45 days from the date of this order. The Court shall retain jurisdiction as necessary to enforce this order.

IT IS SO ORDERED this 7th day of March, 2018.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 13-cv-2611-WJM

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation,
LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated, along with CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs,

v.

ALEX AZAR, Secretary of the United States Department of Health and Human Services,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
R. ALEXANDER ACOSTA, Secretary of the United States of Department of Labor,
UNITED STATES DEPARTMENT OF LABOR,
STEVEN MNUCHIN, Secretary of the United States Department of the Treasury, and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

ORDER REOPENING CASE AND GRANTING PERMANENT INJUNCTION

Upon consideration of Plaintiffs' Unopposed Motion to Reopen Proceedings and for Entry of Permanent Injunction and Declaration (ECF No. 80), Defendants' response thereto (ECF No. 81), and the existing case record, the Court finds that reopening this case and granting a permanent injunction under Rule 65(d) and declaratory relief under 28 U.S.C. § 2201 is warranted, and states the following findings and conclusions:

A. Plaintiffs have demonstrated, and Defendants concede, that the promulgation and enforcement of the mandate against Plaintiffs, either through the accommodation or other regulatory means that require Plaintiffs to facilitate the

provision of coverage for contraceptive and sterilization services and related education and counseling, to which they hold sincere religious objections, violated and would violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

B. Plaintiffs will suffer irreparable harm as a direct result of Defendants' conduct unless Defendants are enjoined from further interfering with Plaintiffs' practice of their religious beliefs.

C. The threatened injury to Plaintiffs outweighs any injury to Defendants resulting from this injunction.

D. The public interest in the vindication of religious freedom favors the entry of an injunction.

The Court therefore ORDERS as follows:

1. Plaintiffs' Unopposed Motion to Reopen Proceedings and for Entry of Permanent Injunction and Declaration (ECF No. 80) is GRANTED.

2. This case is REOPENED pursuant to D.C.COLO.LCivR 41.2.

3. The Court issues the following PERMANENT INJUNCTION:

> Defendants, their agents, officers, employees, and all successors in office are enjoined and restrained from any effort to apply or enforce the substantive requirements of 42 U.S.C. § 300gg-13(a)(4) and any implementing regulations as those requirements relate to the provision of sterilization or contraceptive drugs, devices, or procedures and related education and counseling to which Plaintiffs have sincerely-held religious objections, and are enjoined and restrained from pursuing, charging, or assessing penalties, fines, assessments, or other enforcement actions for noncompliance related thereto, including those in 26 U.S.C. §§ 4980D and 4980H, and 29 U.S.C. §§ 1132 and 1185d, and including, but not limited to, penalties for failure to offer or facilitate access to religiously-objectionable sterilization or contraceptive drugs, devices, or procedures, and related education and counseling, against Plaintiffs, all current and

future participating employers in the Christian Brothers Employee Benefit Trust Plan, and any-third party administrators acting on behalf of these entities with respect to the Christian Brothers Employee Benefit Trust Plan, including Christian Brothers Services. Defendants remain free to enforce 26 U.S.C. § 4980H for any purpose other than to require Plaintiffs, other employers participating in the Christian Brother Employee Benefit Trust Plan, and third-party administrators acting on their behalf, to provide or facilitate the provision of sterilization or contraceptive drugs, devices, or procedures, and related education and counseling, or to punish them for failing to do so.

4. The Clerk shall enter judgment in favor of Plaintiffs and against Defendants, and shall terminate this case. Plaintiffs shall have their costs upon compliance with D.C.COLO.LCivR 54.1.

Dated this 29th day of May, 2018.

BY THE COURT:

William J. Martínez
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-13-1092-D
ALEX M. AZAR, II, Secretary of the United States Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

ORDER GRANTING PERMANENT INJUNCTION AND DECLARATORY RELIEF

Upon consideration of Plaintiffs' Motion for Permanent Injunction and Declaratory Relief [Doc. No. 91], and Defendants' response thereto, the Court finds that the Motion should be granted, as set forth herein.

Plaintiffs Reaching Souls International, Inc. and Truett-McConnell College, Inc. are nonprofit religious organizations that provide employee health benefits through a group plan sponsored by Plaintiff GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). The GuideStone Plan is a "church plan" as defined by 29 U.S.C. § 1002(33), and is available to organizations controlled by or associated with the Southern Baptist Convention, which share sincere religious views regarding abortion and contraception and rely on GuideStone to provide insurance coverage consistent with those views. By the Complaint, a prior motion for a preliminary injunction, and the instant Motion, Plaintiffs seek relief pursuant to Fed. R. Civ. P. 65 from federal regulations

implementing the Affordable Care Act ("ACA")[1] that require compliance with ACA's mandate to include contraceptive services in group health plan coverage as a preventive care service for women, and provide a means of compliance for nonexempt organizations that have religious objections to some contraceptive methods. *See* 42 U.S.C. § 300gg-13. This mechanism, known as the accommodation, was codified in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2590.715-2713A, and 45 C.F.R. § 147.131.[2] Defendants are federal agencies and officials responsible for implementing these regulations and other recently proposed amendments.[3]

On December 20, 2013, the Court granted preliminary injunctive relief and enjoined the enforcement of the accommodation and the contraceptive mandate as a violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), under *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2103), *aff'd sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014). *See* Mem. Decision & Order [Doc.

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[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] These regulations have been recently reserved and amended by interim final rules. *See* 82 Fed. Reg. 47792, 47838 (Oct. 13, 2017). But federal courts have enjoined enforcement of the interim rules so their effectiveness remains in doubt.

[3] By operation of Fed. R. Civ. P. 25(d), the current defendants are: Alex Azar, Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; R. Alexander Acosta, Secretary of the United States Department of Labor; United States Department of Labor; Steven T. Mnuchin, Secretary of the United States Department of the Treasury; and United States Department of the Treasury.

No. 67] (available at 2013 WL 6804259).[4] At Plaintiffs' request, and without objection by Defendants, the injunction was made broad enough to protect a putative class of similarly situated employers, as defined in the Complaint. *See id*. at 16; Compl. [Doc. No. 1], ¶ 18. Defendants appealed, and this case was stayed by agreement of the parties. *See* 3/26/14 Order [Doc. No. 79]. After an appellate ruling in consolidated appeals, *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), a grant of certiorari by the Supreme Court that resulted in an order vacating the decision and remanding the case for further proceedings, *Zubick v. Burwell*, 136 S. Ct. 1557 (2016), and a change of administrations, the Tenth Circuit on October 23, 2017, granted Defendants' motion for voluntarily dismissal of the appeal. The case is once again pending in this Court.[5]

Upon consideration of Plaintiff's current Motion in light of the existing case record, the Court finds that a permanent injunction under Rule 65(d) and declaratory relief under 28 U.S.C. § 2201 are warranted, and states the following findings and conclusions:

1) Plaintiffs have demonstrated, and Defendants concede, that the promulgation and enforcement of the contraceptive mandate against Plaintiffs, either through the accommodation or other regulatory means that require Plaintiffs to facilitate the provision

[4] Plaintiffs also sought injunctive relief based on constitutional claims that the Court declined to reach. *See id*. at 16 n.9; *see also* 3/10/14 Order [Doc. No. 77]. In addition, the Complaint asserts a claim under the Administrative Procedures Act, 5 U.S.C. § 706. *See* Compl., ¶ 333. These claims have not been resolved, and currently remain pending.

[5] Given the marked change in circumstances, one might question what remains to be accomplished in this action. Plaintiffs' counsel assures the Court that an actual controversy still exists even though Defendants offer little resistance, and the Court accepts the representations of counsel, which Defendants do not dispute.

of coverage for contraceptive services to which they hold sincere religious objections, violated and would violate RFRA.

2) Plaintiffs will suffer irreparable harm as a direct result of Defendants' conduct unless Defendants are enjoined from further interfering with Plaintiffs' practice of their religious beliefs.

3) The threatened injury to Plaintiffs outweighs any injury to Defendants resulting from this injunction.

4) The public interest in the vindication of religious freedom favors the entry of an injunction.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Permanent Injunction and Declaratory Relief [Doc. No. 91] is GRANTED.

IT IS FURTHER ORDERED that the Court issues the following PERMANENT INJUNCTION:

Defendants, their agents, officers, employees, and all successors in office are enjoined and restrained from any effort to apply or enforce the substantive requirements of 42 U.S.C. § 300gg-13(a)(4) and any implementing regulations as those requirements relate to the provision of contraceptive drugs, devices, or procedures and related education and counseling to which Plaintiffs have sincerely-held religious objections, and are enjoined and restrained from pursuing, charging, or assessing penalties, fines, assessments, or other enforcement actions for noncompliance related thereto, including those in 26 U.S.C. §§ 4980D and 4980H, and 29 U.S.C. §§ 1132 and 1185d, and including, but not limited to,

penalties for failure to offer or facilitate access to religiously-objectionable contraceptive drugs, devices, or procedures, and related education and counseling, against Reaching Souls International, Inc., Truett-McConnell College, Inc., GuideStone Financial Resources of the Southern Baptist Convention, all current and future participating employers in the GuideStone Plan, and any-third party administrators acting on behalf of these entities with respect to the GuideStone Plan. Defendants remain free to enforce 26 U.S.C. § 4980H for any purpose other than to require Plaintiffs, other employers participating in the GuideStone Plan, and third-party administrators acting on their behalf, to provide or facilitate the provision of contraceptive coverage, or to punish them for failing to do so.

IT IS SO ORDERED this 15th day of March, 2018.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION; SISTERS OF ST. FRANCIS OF THE IMMACULATE HEART OF MARY; ST. ANNE'S GUEST HOME; and ST. GERARD'S COMMUNITY OF CARE,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 3:23-cv-PDW-ARS

DECLARATION OF L. MARTIN NUSSBAUM

1. My name is Martin Nussbaum. I am over the age of 21 and am capable of making this declaration pursuant to 28 U.S.C. §1746. I have not been convicted of a felony or crime involving dishonesty. The facts contained herein are within my personal knowledge. If I were called upon to testify to these facts, I could and would competently do so.

2. I have served as General Counsel for the Catholic Benefits Association ("CBA") it was formed in 2013.

3. The CBA's first member joined on March 21, 2014. Since then, Catholic employers of all types have steadily become members. When the CBA filed the complaint in this action, it had over

EXHIBIT D

1,350 employers as members plus 7,100 Catholic parish employers. The number of CBA employer members has grown by 20 employers since then. Today, three additional employers joined the CBA.

4. Thus, the CBA has averaged adding 12 new regular employer members plus 61 new parish employer members every month since March 2014.

5. This declaration is being submitted in support of the motion for temporary restraining order and preliminary injunction filed by the CBA and the other named plaintiffs in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 19, 2023.

/s/ L. Martin Nussbaum