UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; 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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Plaintiffs, the Catholic Benefits Association, on behalf of its members, The Sisters of St. Francis of the Immaculate Heart of Mary, St. Anne's Guest Home, and St. Gerard's Community of Care (collectively, either "Plaintiffs" or "CBA Plaintiffs"), through their attorneys respectfully move for summary judgment on its claim under the Religious Freedom Restoration Act, and state:

INTRODUCTION

This case is a follow-on suit to the Catholic Benefits Association's challenge to Defendants' interpretation of Section 1557 of the Affordable Care Act and Title VII to require CBA's members to cover and provide gender-transition services in *Religious Sisters of Mercy v. Azar* (*Religious Sisters I*), 513 F. Supp. 3d 1113 (D.N.D. 2021). In *Religious Sisters of Mercy v. Becerra* (*Religious Sisters II*), 55 F.4th 583 (8th Cir. 2022) the Eighth Circuit affirmed this Court's entry of declaratory and injunctive relief that the Defendants' respective interpretations of Section 1557 and Title VII, which CBA collectively calls the "Mandate," violated the Religious Freedom Restoration Act as applied to CBA and its religious beliefs. *Id.* at 588. The only issue left undecided by *Religious Sisters II* was whether CBA could adduce evidence of prong three of the associational standing test to challenge the Mandate on behalf of its members. *Id.* at 602. Defendants have conceded that four sworn declarations of nine CBA members have met this test. *See* Doc. 46, Am. Compl. ¶¶ 65-68; Am. Compl. Ex. E, Decl. of Chris Baechle; Ex. F, Decl. of Dr. Michael Sherman; Ex. 6, Decl. of Dr. Michelle Stanford; Ex. H, Decl. of Deacon Anthony Ternes.

After CBA re-filed this suit in October 2023, Defendants released a new rule interpreting Section 1557. Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) ("2024 Rule"). The 2024 Rule reinstates the 2016 Rule's interpretation of Section 1557 previously enjoined by this Court. It defines covered entities to include nearly all healthcare providers and insurers in the United States; requires them to cover and provide gender-affirming care,

abortion, and infertility treatments contrary to Catholic beliefs if the providers will offer similar services in other contexts; and it requires Catholic healthcare providers and employers to alter their speech to conform to the Government's preferred doctrine of sex and sexuality. The 2024 Rule, like the 2016 Rule, refuses to incorporate a categorical religious exemption (as required by Title IX and Title VII) or implement this Court's, the Northern District of Texas's, the Eighth Circuit's, or Fifth Circuit's injunctions under RFRA. For all the reasons this Court previously enjoined the Mandate, it should do so again and forthwith stop the only ploy available to Defendants: substantial delay, vexation, and resistance to the CBA's constitutional rights.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. CBA and its members are committed to Catholic teaching regarding sex, gender, sexuality, and abortion.

1.1. The CBA exists to amplify the voices of its members.

The CBA is a Catholic expressive association whose religious mission is to help Catholic organizations carry out their callings and operate their ministries and businesses in a way that is consistent with their Catholic convictions. Am. Compl. ¶ 45. CBA members include over 83 Catholic dioceses and archdioceses. Its members total over 1,350 Catholic employers plus 7,100 Catholic parishes. *Id.* ¶ 55. Together, they provide health care benefits to 137,000 employees and their families. CBA members also include hospitals, Catholic Charities, medical clinics, mental health service providers, counseling centers, nursing homes, senior residence facilities, schools, colleges, religious orders, and other Catholic ministries and Catholic-owned businesses. *Id.* ¶¶ 57–60. All CBA members are Catholic ministries or Catholic-owned businesses that believe and practice the teachings of the Catholic Church on the nature of the human person, the dignity of humankind,

the right to life, the right of conscience and religious freedom, including opposition to covering and providing gender-transition services, abortion, and immoral fertility treatments. *Id.* ¶¶ 51–54.

1.2. The Sisters of St. Francis, St. Anne's Guest Home, and St. Gerard's Community of Care are CBA members.

The Sisters of St. Francis are a congregation of religious women based in Hankinson, North Dakota. *Id.* ¶¶ 13, 17. Over the years, the Sisters of St. Francis have staffed Catholic schools, and founded and/or administered five rural Catholic hospitals, and two long term care facilities: St. Anne's Guest Home, and St. Gerard's Community of Care. *Id.* ¶ 16. Their work today, in addition to their common life of prayer and study, includes spiritual direction, operating a retreat center, and supporting St. Anne's and St. Gerard's. *Id.* In addition to the twelve sisters who are members of the Sisters of St. Francis, the Sisters of St. Francis have approximately 30 lay employees. They are thus an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b). *Id.* ¶ 20. Because of their commitment to Catholic teach in opposition to gender-transition services, the Mandate substantially burdens the Sisters' religious exercise. *Id.* ¶ 22.

St. Anne's Guest Home is a Catholic health care facility and senior residence located in Grand Forks, North Dakota. *Id.* ¶ 24. It began its work in the 1940s by helping homeless and other indigent people living on the streets. *Id.* St. Anne's provides senior residences for low-income individuals and for couples. *Id.* ¶¶ 25–26. It also provides senior residences for persons capable of living independently if supported with basic care. St. Anne's nurses assist residents with management of medications and other basic care. *Id.* St. Anne's mission is to "provide a safe, caring, and family-like home for our residents. Inspired by St. Francis, we strive to serve each person who comes to us as we would Christ." *Id.* ¶ 26. St. Anne's receives over 85% of its funding from Medicaid and employs approximately 30 employees. *Id.* ¶¶ 31–32. St. Anne's believe that the gender-transition

services mandate is both bad medicine and inconsistent with their Catholic faith and practice. *Id.* ¶¶ 33, 78, 80, 103. The Mandate substantially burden's St. Anne's religious exercise.

St. Gerard's Community of Care is a Catholic ministry in Hankinson, North Dakota that provides independent living and skilled nursing care for seniors. *Id.* ¶ 35. St. Gerard's vision is "to provide those we serve with loving and caring service based on Christ's mission of love and compassion." *Id.* ¶ 36. St. Gerard's receives Medicare and Medicaid funding and employs approximately 60 individuals. *Id.* ¶ 41, 42. They believe that the Mandate is both bad medicine and inconsistent with their Catholic faith, including service of the most vulnerable. *Id.* ¶ 43, 78, 80, 103. The Mandate substantially burdens St. Gerard's religious exercise.

1.3. Gender-transition services are contrary to Catholic teaching.

Catholics believe that "God created man in his own image . . . male and female he created them." *Id.* ¶ 83 (quoting Catechism of the Catholic Church ("CCC") 2331 (quoting *Genesis* 1:27)). Because all people are created in the image and likeness of God, the Catholic Church teaches that all people are imbued with human dignity. Am. Compl. ¶ 84 (citing CCC 1701). "By creating the human being man and woman, God gives personal dignity equally to the one and the other. Each of them, man and woman, should acknowledge and accept his sexual identity." CCC 2393. Pope Francis has reiterated this Catholic teaching, affirming that "'man too has a nature that he must respect and that he cannot manipulate at will.' . . . The acceptance of our bodies as God's gift is vital for welcoming and accepting the entire world as a gift from the Father. . . . Learning to accept our body, to care for it and to respect its fullest meaning, is an essential element of any genuine human ecology." Am. Compl. ¶ 85 (quoting Pope Francis, *Laudato Si*, No. 155 (2015) (quoting Pope Benedict XVI, Address from His Visit to the Bundestag (Sept. 22, 2011))).

Thus, while Catholics are compelled to care for those suffering from gender dysphoria, they cannot provide or cover in their health plans "gender-affirming care" that violates the God-given dignity of the person before them. Am. Compl. ¶¶ 80–82, 88–92. On March 20, 2023, the USCCB's Committee on Doctrine issued a "Doctrinal Note on the Moral Limits to Technological Manipulation of the Human Body" (the "Doctrinal Note"), which reiterates this teaching. *Id.* ¶ 88. The Doctrinal Note explains 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, "[i]n 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." *Id.* "First, they do not repair a defect in the body: there is no disorder in the body that needs to be addressed; the bodily organs are normal and healthy." "Second, the interventions do not sacrifice one part of the body for the good of the whole." *Id.*

1.3.1. Catholic institutions reasonably conclude that gender-transition services often cause harm.

Dr. Michelle Stanford is a practicing pediatrician and the owner of Centennial Pediatrics that is a CBA member. Am. Compl. ¶ 65(b), Decl. of Dr. Stanford ¶¶ 3, 18. She testifies that:

> Catholic beliefs . . . are consistent with scientific evidence that every person is either male or female and the fact that humans—like all mammals—are designed to produce gametes necessary for reproduction with males designed to produce sperm, and females to produce eggs. There is also a growing body of medical evidence concerning the uncertainties and risks associated with transgender medicine, especially when performed upon pediatric patients. That evidence demonstrates how transgender medicine leads to sterilization, impotence, loss of sexual satisfaction, and life-long medicalization. It also documents: the virtual impossibility of obtaining genuine informed consent from pediatric patients

> regarding these consequences; how frequently its effects are irreversible and linked with suicidal ideation and suicides; and the growing number of patients requesting "detransitioning" on the grounds of their dissatisfaction with the effects of such medical interventions. Several European countries and medical establishments are currently retrenching their support especially for the performance of transgender procedures upon pediatric patients, on the basis of this evidence. Catholic values thus align with the core Hippocratic value of "first do no harm."

Compl. ¶ 65(c), Ex. G, Decl. of Dr. Stanford ¶ 11. She concludes that "healthcare . . .should aim to prevent or cure or at least alleviate a medical condition. It should not destroy or may dysfunctional a healthy bodily part or system." *Id.* ¶ 13. Dr. Michael Sherman, Executive Director of another CBA member, the Holy Family Catholic Clinic, concurs. Compl. ¶ 65(b), Ex. F, Decl. of Dr. Sherman ¶ 17; *see also* Am. Compl. ¶ 103 (and authorities cited there).

1.4. Abortion is contrary to Catholic teaching.

Abortion is contrary to Catholic belief. The Catechism of the Catholic Church teaches that life begins at conception and that "[h]uman life must be respected and protected absolutely from the moment of conception." *Id.* ¶ 93 (quoting CCC 2270). Thus, "[d]irect abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law." *Id.* (quoting CCC 2271). While "[a]bortion . . . is never permitted" for Catholic individuals and organizations, "[o]perations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable," are, "even if they will result in the death of the unborn child." Am. Compl. ¶ 94 (quoting United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 18–19, ¶¶ 45, 47 (6th ed. 2018) ("ERD").

1.5. Immoral fertility treatments like IVF are contrary to Catholic teaching.

The Catechism of the Catholic Church expresses that the sexual relationship between spouses is more than mere biology and that the conception of a child is the most serious role of spouses,

involving co-creation with God, and holding that each child is to be received as a gift from the Creator. Am. Compl. ¶ 95 (citing Pope John Paul II, *Familiaris Consortio*, Paragraph 11 (1981); CCC 2367, 2378**)**. The Catechism acknowledges the sorrow caused by infertility and supports the use of reproductive technologies that restore normal fertility to marital intercourse, preserving its unitive and procreative purposes. Am. Compl. ¶ 95 (citing CCC 2375 and ERD p. 17, ¶ 38). But methods that involve third parties (for example, medical technicians, donor gametes, or surrogate wombs), or separate fertilization from the conjugal act, are a violation of the dignity of the persons involved and are gravely immoral. *Id.* On the other hand, Catholic teaching permits infertility treatment "that does not separate the unitive and procreative ends of" a "marital act of sexual intercourse." *Id.* (citing ERD, p. 17, ¶ 38).

2. HHS's 2024 Rule reimposes the gender-transition-services Mandate governing insurers and medical providers that was previously enjoined by this Court.

2.1. Statutes prohibiting sex-based discrimination.

Section 1557 of the ACA, and Titles VII and IX of the Civil Rights Act are the primary fonts for the Mandate. 42 U.S.C. § 18116 (ACA); 20 U.S.C. § 1681(a)(3) (Title IX); 42 U.S.C. § 2000e(b) (Title VII); "Section 1557 of the ACA provides that a federally funded or administered health program or activity is prohibited from denying benefits to, or subjecting to discrimination, an individual 'on [a] ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).'" *Religious Sisters II*, 55 F.4th at 588 (quoting 42 U.S.C. § 18116(a)). "Section 1557 adopts the enforcement mechanisms available under the incorporated statutes, including Title IX." *Id.* Section 1557 vests the Secretary of HHS with discretion to promulgate implementing regulations. 42 U.S.C. § 18116(c).

Title IX states that "[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). "In short, the statute bars sex-based discrimination." *Religious Sisters II*, 55 F.4th at 588 (cleaned up) (quoting *Portz v. St. Cloud State Univ.*, 16 F.4th 577, 580 (8th Cir. 2021)). Title IX exempts from this prohibition "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). Title IX similarly requires neutrality regarding abortion: "Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. Title IX "authoriz[es] federal administrative enforcement by terminating the federal funding of any noncomplying recipient, or 'by any other means authorized by law.'" *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 n.5 (1999) (citing 20 U.S.C. § 1682(1)) (quoting 20 U.S.C. § 1682(2). The Supreme Court "has [also] recognized an implied private right of action." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009).

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against an applicant or employee "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Title VII applies to employers "with 15 or more employees." *Religious Sisters II*, 55 F.4th at 588 (cleaned up). An employer who violates Title VII faces an administrative enforcement action or private suit for compensatory damages, punitive damages, injunctive relief, attorney's fees, and other relief. *See* 42 U.S.C. §§ 1981a(b), 2000e-5(g). The EEOC "is empowered . . . to prevent any person from engaging in any unlawful employment practice" under Title VII. *Id.* § 2000e-5(a).

2.2. The 2016 Rule.

In May 2016, HHS issued a final rule interpreting Section 1557 to require coverage and performance of gender-transition services and abortion. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,376 (May 18, 2016) ["2016 Rule"]. The 2016 Rule defined "[c]overed entity" as "[a]n entity that operates a health program or activity, any part of which receives federal financial assistance." *Id.* at 31,466. It defined "[h]ealth program or activity" as "the provision or administration of health-related services, health-related insurance coverage, or other health-related coverage." *Id.* at 31,467. The 2016 Rule's impact was extraordinarily broad, affecting most of the healthcare industry. In it, HHS "concluded . . . that almost all practicing physicians in the United States are reached by Section 1557 because they accept some form of Federal remuneration or reimbursement apart from Medicare Part B." *Id.* at 31,446.

Pursuant to Title IX, the 2016 Rule prohibited discrimination "on the basis of . . . sex." *Id.* at 31,469. The 2016 Rule defined "[o]n the basis of sex" to "include . . . sex stereotyping and gender identity." *Id.* at 31,467. It also defined sex discrimination to include "termination of pregnancy."[1] *Id.* at 31,387. The 2016 Rule required covered entities to perform gender-transition services if they would do so in another context. *Id.* at 31,471.

"While the 2016 Rule provided that the statutory exceptions applicable for discrimination based on race, color, national origin, age, and disability applied, it omitted Title IX's religious exemption." *Religious Sisters II*, 55 F.4th at 590 (internal citation omitted). The 2016 Rule instead

[1] The 2016 Rule omitted a definition of "termination of pregnancy," which courts interpreted to encompass abortion. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 690–94 (N.D. Tex. 2016); *Religious Sisters I*, 513 F. Supp. 3d 1113, 1135 (D.N.D. 2021).

took a case-by-case approach to determining religious exemptions. HHS explained that "application of RFRA is the proper means to evaluate any religious concerns about the application of Section 1557 requirements." *Id.* at 31,380. "To obtain an exception, in other words, a provider objecting on religious grounds needed to convince HHS that the regulation circumstantially violated the RFRA." *Religious Sisters II*, 55 F.4th at 591 (quoting *Religious Sisters I*, 513 F. Supp. at 1125).

After the 2016 Rule was promulgated, it was challenged in the Northern District of Texas, where that court entered "a nationwide [preliminary] injunction," prohibiting HHS from "enforcing the [2016] Rule's prohibition against discrimination on the basis of gender identity." Am. Compl. ¶ 134, ECF No. 1 (quoting *Franciscan All., Inc. v. Burwell (Franciscan Alliance I)*, 227 F. Supp. 3d 660, 696) (N.D. Tex. 2016)). At the same time, two suits in this Court were filed challenging the Mandate. One case (16-cv-386) was filed by the Religious Sisters of Mercy, Sacred Heart Mercy Health Care Center, SMP Health System, and the University of Mary. *Religious Sisters II*, 513 F. Supp. 3d at 1131. The second case (16-cv-432) was filed by the Catholic Benefits Association, as well as three of its members: Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association. *Id.* at 1133. The cases were consolidated, and the Court stayed the Mandate while Defendants considered promulgating a new rule. *Id.* at 1127.

2.3. The 2020 Rule and *Bostock*.

HHS then promulgated the 2020 Rule. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020) (the "2020 Rule"). The 2020 Rule adopted Title IX's religious exemption and "repeal[ed] the 2016 Rule's definition of 'on the basis of sex,' but decline[d] to replace it with a new regulatory definition. Instead, the [2020] [R]ule revert[ed] to, and relie[d] upon, the plain meaning of the term in [Title IX]." Id. at 37,178 (citation omitted). The 2020 Rule noted that that the Supreme Court's

forthcoming decision in what would later become *Bostock v. Clayton County*, 590 U.S. 644 (2020) was likely to affect enforcement of Section 1557 and Title VII. 85 Fed. Reg. at 37,168.

Bostock was decided soon after HHS finalized the 2020 Rule. The Court held that "[w]hen an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex" under Title VII. 590 U.S. at 665. The Court interpreted Title VII's prohibition on "sex discrimination" to include gender identity and sexual orientation. *Id.* at 651. Although the Court "proceed[ed] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female," *id.* at 655, it determined that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *id.* at 660. The Court emphasized, however, that it was not "prejudg[ing]" whether its "decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Id.* at 681.

The Court also expressed "deep[ ] concern[ ] with preserving the promise of the free exercise of religion enshrined in our Constitution." *Id.* at 681. "But," the Court noted, "worries about how Title VII may intersect with religious liberties are nothing new." *Id.* at 681–82. In fact, Congress went "a step further . . . in . . . RFRA" by "prohibit[ing] the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest." *Id.* at 682. "Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws," the Court explained, "it might supersede Title VII's commands in appropriate cases." *Id.*

Bostock triggered multiple lawsuits challenging the 2020 Rule. Two courts entered nationwide injunctions preventing much of the 2020 Rule from going into effect, effectively reinstating portions of the 2016 Rule (the [*Walker*] and *Whitman-Walker* opinions)." *Franciscan Alliance*, 47 F.4th at 372 (citing *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 60 (D.D.C. 2020); *Walker v. Azar*, 480 F. Supp. 3d 417, 420 (E.D.N.Y. 2020)).

2.4. The 2021 and 2022 Notices.

In January 2021, President Biden issued an executive order asserting that "laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021). On May 25, 2021, HHS published a document titled "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972." 86 Fed. Reg. 27,984 (May 25, 2021). The May 2021 notice said that "consistent with the Supreme Court's decision in *Bostock* and Title IX," HHS would "interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity." *Id.*

Shortly thereafter a group of physicians challenged the notification on the grounds that it would force them to treat youth suffering from gender dysphoria in a manner that violated their clinical judgment and conscience. *Neese v. Becerra*, 640 F. Supp. 3d 668, 668–70 (N.D. Tex. 2022). The U.S. District Court for the Northern District of Texas found the Notification to be "not in accordance with the law." *Id.* at 675. The Court entered a declaratory judgment declaring that "Section 1557 of the ACA does not prohibit discrimination on account of sexual orientation and gender identity, and the interpretation of 'sex' discrimination that the Supreme Court of the United States adopted in [*Bostock*] is inapplicable to the prohibitions on 'sex' discrimination in Title IX of the

Education Amendments of 1972 and in Section 1557 of the ACA." Final Judgment, *Neese*, 2:21-cv-163-Z (N.D. Tex. Nov. 22, 2022), ECF No. 71.

In March of 2022, HHS published a document titled "Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy," https://perma.cc/R76P-KJ2X ("2022 Notice"). The 2022 Notice asserted that HHS "unequivocally" takes the position that restricting gender-change interventions even "for minors . . . is dangerous." *Id.* HHS announced that its Office of Civil Rights would consider bringing enforcement actions against medical providers who comply with state laws that "restrict" the use of these interventions for minors. *Id.* HHS also claimed that refusal to provide these interventions could be discriminating on the basis of disability. *Id.* In *Texas v. Equal Employment Opportunity Commission*, the Northern District of Texas vacated the 2022 Notice. 633 F. Supp. 3d 824, 847 (N.D. Tex. 2022). Among other things, the Court held that the 2022 Notice misread *Bostock*, and did not adequately explain how, despite the specific exclusion of gender identity disorders from the definition of disability in the Rehabilitation Act (and hence in Section 1557, *see* 42 U.S.C. § 18116(a) (including "section 794 of title 29")), failure to provide cross-sex hormones or surgeries to these individuals could be discriminating on the basis of a disability. *Id.* at 836–38.

2.5. The 2024 Rule.

On May 6, 2024, HHS published a rule interpreting Section 1557, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) (the "2024 Rule"). The 2024 Rule repeals the 2020 Rule and in all material respects reinstates the commands of the 2016 Rule. *Id.*

2.5.1. Covered entities under the 2024 Rule.

The 2024 Rule defines "health program or activity" to cover virtually all healthcare providers and facilities, as well as health insurers, third-party administrators, pharmacy benefits managers, and other service providers in the United States. Health program or activity means: "(1) Any project, enterprise, venture, or undertaking to: (i) Provide or administer health-related services, health insurance coverage, or other health-related coverage; (ii) Provide assistance to persons in obtaining health-related services, health insurance coverage, or other health-related coverage; (iii) Provide clinical, pharmaceutical, or medical care; (iv) Engage in health or clinical research; or (v) Provide health education for health care professionals or others." 89 Fed. Reg. at 37,694, to be codified at 45 C.F.R. § 92.4; *see also* 89 Fed. Reg. at 37,538 ("OCR agrees with commenters' assessment that the Proposed Rule's approach to the inclusion of health insurance coverage and other health-related coverage in the definition of 'health program or activity' . . . .").

2.5.2. Prohibited discrimination under the 2024 Rule.

The 2024 Rule says that "[d]iscrimination on the basis of sex includes, but is not limited to, discrimination on the basis of: (i) Sex characteristics, including intersex traits; (ii) Pregnancy or related conditions; (iii) Sexual orientation; (iv) Gender identity; and (v) Sex stereotypes." 89 Fed. Reg. at 37,699, to be codified at 45 C.F.R. § 92.101(a)(2).

2.5.3. Gender-affirming care under the 2024 Rule.

Although the 2024 Rule does not provide a definition of these terms, HHS defined "gender identity" in the 2022 Notice of Proposed Rulemaking to encompass a plethora of sexual identities, including "transgender," "nonbinary," "gender nonconforming," "genderqueer," or "gender-fluid." Notice of Proposed Rulemaking, Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,867 (Aug. 4, 2022) ("2022 NPRM"). And the 2022 NPRM defines the

Rule's prohibition on "gender identity" discrimination to require coverage and performance of "gender affirming care." "'[G]ender-affirming care' refers to care for transgender individuals (including those who identify using other terms, for example, nonbinary or gender nonconforming) that may include, but is not necessarily limited to, counseling, hormone therapy, surgery, and other services designed to treat gender dysphoria or support gender affirmation or transition." 87 Fed. Reg. at 47,834 n.139. Guidance from HHS's Office of Population Affairs defines "gender affirming care" to include:

Affirming Care	**What is it?**	**When is it used?**	**Reversible or not**
Social Affirmation	Adopting gender-affirming hairstyles, clothing, name, gender pronouns, and restrooms and other facilities.	At any age or stage.	Reversible.
Puberty Blockers	Using certain types of hormones to pause pubertal development.	During puberty.	Reversible.
Hormone Therapy	Testosterone hormones for those who were assigned female at birth Estrogen hormones for those who were assigned male at birth.	Early adolescence onward.	Partially reversible.
Gender-Affirming Surgeries	"Top" surgery—to create male-typical chest shape or enhance breasts. "Bottom" surgery—surgery on genitals or reproductive organs Facial feminization or other procedures.	Typically used in adulthood or case by-case in adolescence.	Not reversible.

HHS Office of Population Affairs, Gender-Affirming Care and Young People, https://bit.ly/3SzfVq3 (last visited Aug. 1, 2024).

Notably, this definition of sex is contrary to law. The 2024 Rule presupposes that Title IX, and by extension Section 1557, prohibits any discrimination based on "gender identity." 89 Fed. Reg. at 37,699, *to be codified at* 45 C.F.R. § 92.101(a)(2). But that premise is inconsistent with persuasive

authority. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813–14 (11th Cir. 2022). In *Adams*, the Eleventh Circuit held that Title IX's prohibition on sex discrimination does not prohibit discrimination on the basis of gender identity. *Id.* at 811. The Eleventh Circuit began by explaining that "sex" in Title IX means "biological sex," and not "gender identity." *Id. at* 812–13. Further, *Adams* rejected the argument that *Bostock* required a different outcome, making it "pellucid" that unlike Title VII, Title IX doesn't protect "gender identity." *Id.* at 808. In *Florida v. HHS*, No. 24-cv-01080, ECF No. 41 (July 3, 2024 M.D. Fla.), the Court preliminarily enjoined the 2024 partly on the ground that Title IX does not prohibit "gender identity" discrimination. *Id.* at 20.

2.5.4. Abortion under the 2024 Rule.

The 2024 Rule defines "[p]regnancy or related conditions" to include "termination of pregnancy," *i.e.* abortion. 89 Fed. Reg. at 37,576.[2] The Fifth Circuit has previously explained that defining sex discrimination to include "termination of pregnancy" "require[s] that hospitals perform . . . abortions." *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374 (5th Cir. 2022).

This, too, is contrary to law. Title IX states that it "shall not apply" to religious organizations, 20 U.S.C. § 1681(a)(3), and "shall [not] be construed to require . . . any person . . . to provide or

[2] *See also id.* ("A covered entity that chooses to provide abortion care but refuses to provide an abortion for a particular individual on the basis of a protected ground—such as race—would violate section 1557."); *id.* at 37,556 ("We clarify that a Nondiscrimination Policy's prohibition of sex discrimination encompasses protections afforded for various types of sex discrimination such as pregnancy, including termination of pregnancy or related conditions . . . ."); *id.* at 37,576 ("OCR has concluded as a matter of statutory interpretation that section 1557 does not require the Department to incorporate the language of title IX's abortion neutrality provision."); *id.* at 37,577 ("We note also that, as commenters suggested, this provision protects patients from discrimination on the basis of actual or perceived prior abortions."); *id.* at 37,606 ("To the extent plans offer coverage for termination of pregnancies and related services, they must do so on a nondiscriminatory basis.").

pay for any benefit or service . . . related to an abortion," *id.* § 1688. For HHS to refuse to incorporate these religious and abortion exemptions into its 2024 Rule was contrary to law. As *Franciscan Alliance* explained, "failure to incorporate Title IX's religious and abortion exemptions nullifies Congress's specific direction to prohibit only the ground proscribed by Title IX. That is not permitted." 227 F. Supp. 3d at 690–91. "By not including these exemptions, HHS expanded the 'ground prohibited under' Title IX that Section 1557 explicitly incorporated." *Id.* (citing *Corley v. United States*, 556 U.S. 303, 314 (2009)).

2.5.5. Fertility care under the 2024 Rule.

The 2024 Rule also defines sex discrimination and sexual-orientation discrimination to require providing and covering "fertility care," including procedures like IVF, surrogacy, and gamete donation. 89 Fed. Reg. at 37,577 (defining "fertility care" to include "IVF"). The Rule also requires covered entities to provide infertility treatments to non-married couples. *Id.* (stating that "if a covered entity elects to provide or cover fertility services but categorically denies them to same-sex couples, it may violate section 1557's prohibition on sex discrimination."). In other words, a Catholic covered entity or employer must provide or cover IVF, surrogacy for all individuals, and must provide fertility treatments that are otherwise in line with Catholic belief for a non-married individual or a couple in a non-traditional relationship.

2.5.6. No religious exemption under the 2024 Rule.

Like the 2016 Rule, the 2024 Rule pays lip service to constitutional and statutory protections for religious institutions and individuals. The 2024 Rule states, for example, that "insofar as the application of any rule requirement would violate applicable Federal protections for religious freedom and conscience, such application shall not be required." 89 Fed. Reg. at 37,532; *see also id.* at 37,533 ("We are committed to affording full effect to Congress's protections of conscience and

religion, as detailed in §92.302 and the Department's issuance of its final rule, Safeguarding the Rights of Conscience as Protected by Federal Statutes."). But this hand waiving is not a religious exemption or a promise of non-enforcement against religious organizations. To the contrary, Defendants ignored what the law requires to protect religious freedom as previously stated in the decisions of this Court, the Northern District of Texas, and the Fifth and Eighth Circuits.

First, these statements are not a promise of non-enforcement and never have been. *See Religious Sisters II*, 55 F.4th at 606 ("Although the government maintains that it 'will comply' with RFRA, its promise is 'so vague that the scope of liability is both unknown by the government and unknowable to the plaintiffs,'" (cleaned up)). Defendants repeatedly emphasize it must evaluate any request for religious exemption on a case-by-case basis, taking into account "any harm an exemption could have on third parties." 89 Fed. Reg. at 37,656–57; *see also id.* at 37,532. Judge Traynor has aptly described Defendants' position of forcing religious organizations to "withstand a case-by-case analysis . . . of their religious preferences" as "[g]overnment harassment of religious organizations." *Christian Emps. All. v. U.S. Equal Opportunity Comm'n*, 2022 WL 1573689, at *5 (D.N.D. May 16, 2022).

Second, Defendants continue to refuse to adopt the categorical religious exemptions they are required to by law. As explained, Title IX requires a categorical religious exemption, yet the 2024 Rule doubles down on the 2016 Rule's approach and refuses to incorporate that exemption. *E.g.*, 89 Fed. Reg. at 37,533 (attempting to explain that the exemption has not been incorporated because it would "raise unique concerns.").

Indeed, in the 2016 Rule and the ensuing litigation, Defendants took the position that the best way to resolve religious exceptions is for *Defendants*, not a Court as authorized by RFRA, to grant

or deny religious exemptions—and that this provided religious objectors adequate protection. *See, e.g.*, Defs.' Opp'n to Pls.' Mot. Prelim. Inj. at 2–3, *Christian Emps. All. v. U.S. Equal Opportunity Comm'n*, No. 1:21-CV-195, 2022 WL 1573689 (D.N.D. May 16, 2022) (No. 18) (emphasis added) (asserting that "both agencies' affirmation that any future decisions about whether to file any enforcement actions will account for RFRA and other religious defenses"); *id.* at 13 ("Indeed, the agency materials that CEA challenges, such as the HHS Notification and EEOC Document, stress that any future enforcement action based on gender-identity discrimination will be fact-specific and account for all relevant religious-practice exemptions, as well as RFRA."); *id.* at 24 ("And it further stressed that HHS, in any future enforcement actions, would 'comply with [RFRA]' and all applicable court orders.").

Third, HHS trumpets a new religious exemption consultation provision that is supposed to address these concerns. 89 Fed. Reg. 37,655-56; 92,301-02 (to be codified at 29 C.F.R. § 92.302). Under this provision, a conscientiously objecting religious employer may "seek assurance" from HHS that it is exempt from one or more of the immoral mandates identified in this motion. There are numerous problems with this "solution." The decisionmaker is Office of Civil Rights, an office within HHS that has, by word and deed, minimized religious liberty protections—by rejecting the Title IX religious exemption, by opposing categorical religious exemption, and by refusing grant an exemption for the CBA members in this case and its prequel for over seven year and doing likewise in lawsuits brought by the Christian Medical and Dental Association and the Christian Employers Alliance. The applicant is required to provide evidence that it has never performed the objectionable procedure. 89 Fed. Reg. at 37,657. Thus, HHS would disqualify a Catholic hospital that performed a hysterectomy for a cancer patient but declined the same for a gender dysphoric patient.

Against explicit Supreme Court analysis directed against HHS itself, HHS insists that it will weigh the harm to a third party against the applicant's religious liberty interest. 89 Fed. Reg. at 37,656-57.; *contra Burwell v. Hobby Lobby*, 573 U.S. 682, n.37 (2014) ("Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals."). If HHS rejected such an application, it promises to commence an enforcement action against the applicant. 89 Fed. Reg. at 37,657. If HHS grants such an application, the religious exemption it recognizes shall have no legal effect outside of HHS administrative process. *Id.*at 37,703 (§ 93.302((d)). HHS has stated that, upon a receipt of a FOIA request, it will disclose the names and submissions of those who consulted with HHS about a religious exemption. It thus creates a "Hall of Shame" opportunity for activists ready to punish those seeking such protection. *Id.* at 37,555, 37,660.

In a hearing before Judge Traynor in *Christian Employers Alliance*, Defendants made clear just how skewed their understanding of religious freedom is. There, Defendants took the position that a religious organization's right to protection from the Mandate depended on where that organization was located. If, for example, an organization was based in a metropolitan area like the Twin Cities, it was likely entitled to a religious exemption. But, if the organization was based in a rural area like Bismarck, the organization would likely not be entitled to religious protections afforded by law according to Defendants. *See* ECF No. 41, *Christian Employers Alliance*, No. 21-cv-00195, 56:23–58:22 (May 17, 2022 D.N.D.). Had Defendants wanted to do anything other than add an additional step to their "legal Penrose staircase" to frustrate the rights of religious institutions like

CBA and its members, *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 373 (N.D. Tex. 2021), they would have simply incorporated Title IX's religious exemption.[3]

2.5.7. The unconstitutional burdens imposed by the 2024 Rule.

The upshot of the 2024 Rule's reinterpretation of Section 1557 to include "gender identity," abortion, and infertility, coupled with its expansive definition of a "covered entity," has four principal effects for purposes of this dispute.

Performance and coverage. *First*, the 2024 Rule, like the 2016 Rule, requires healthcare providers to perform, cover, or refer for, and covered insurers, pharmacy benefits managers ("PBM"), and TPAs to cover gender transition procedures and abortion if they offer analogous services in other contexts. *See* 89 Fed. Reg. at 37,700–01, to be codified at 45 C.F.R. § 92.206; 89 Fed. Reg. at 37,576. For example, if a provider specializing in reconstructive surgery would perform a mastectomy for a woman suffering from breast cancer, the 2024 Rule requires that provider to perform a mastectomy for a minor who identifies as a transgender man. *See* 87 Fed. Reg. at 47,867 ("[A] gynecological surgeon may be in violation of the rule if they accept a referral for a hysterectomy but later refuse to perform the surgery upon learning the patient is a transgender man."). *See also* Am. Compl. ¶¶ 189-91 (listing the procedures required to be covered under Defendants' definition of "gender-affirming care"). Similarly, covered entities must provide abortions if they will

[3] They would have also incorporated Title VII's religious exemption in § 702(a) of the Civil Rights Act of 1964. 42 U.S.C. § 2000e–1(a). "Section 702(a) permits a religious employer to require the staff to abide by religious rules" and to discriminate on the basis of sex in employment-related decisions if such discrimination is "related to religious doctrine." *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook J., concurring). Here, it is undisputed that the CBA members cannot cover gender-transition services or immoral infertility treatment for their members because of their Catholic beliefs.

provide analogous services in other contexts: "A covered provider that generally offered abortion care could violate that prohibition if, for example, it refused to provide an abortion to a particular patient because of that patient's race or disability." 89 Fed. Reg. at 37,576; *see also Religious Sisters of Mercy,* 513 F. Supp. 3d at 1124 ("The same concept theoretically applied for abortions. So if an obstetrician performed dilation and curettage procedures for miscarriages, then the 2016 Rule barred a later refusal to perform those procedures for abortions.").

Anti-ERDs. *Second*, the 2024 Rule prohibits Catholic organizations from adopting policies, such as the Ethical and Religious Directives or Doctrinal Note, that would prohibit the organizations' constituents or agents from providing abortions, gender-affirming care, or immoral artificial reproductive procedures. The 2024 Rule "prohibits covered entities from . . . limiting a health care professional's ability to provide health services on the basis of a patient's . . . gender identity." 89 Fed. Reg. at 37,591; *see also id.* at 37,700 (same), to be codified at 45 C.F.R. § 92.206(b)(1).

Speech. *Third,* covered entities are required to alter their speech or remain silent regarding their considered medical views. For example, the Rule mandates revisions to healthcare program and activity's written policies, requiring express affirmations that gender transition-related procedures would be provided, 89 Fed. Reg. at 37,697, to be codified at 45 C.F.R. § 92.10(a)(1)(i), even if such revisions do not reflect the entity's medical judgment, values, or beliefs. The 2024 Rule similarly requires covered entities to train their employees regarding the "non-discrimination" requirements in the Rule related to gender-affirming care, abortion, and artificial reproductive technology. 89 Fed. Reg. at 37,697, to be codified at 45 C.F.R. § 92.9. Under the 2024 Rule, covered entities must state that males can become pregnant, give birth, and breastfeed. As HHS explains in the 2022 NPRM, healthcare providers are responsible for "'discrimination, stigma, and

erasure'" if they speak or act in way that treats "pregnancy and childbirth . . . as something exclusively experienced by . . . women." 87 Fed. Reg. at 47,865. The 2024 Rule also requires that covered entities applying for federal financial assistance affirm up front that they will comply with the Rule, 89 Fed. Reg. at 37,596, to be codified at 45 C.F.R. 92.5(a), and, once approved, post notices regarding compliance with the Rule, 89 Fed. Reg. at 37,597–98, to be codified at 45 C.F.R. 92.10.

Single-sex spaces. *Fourth*, sex-specific healthcare facilities and programs, including shower facilities and hospital wards, must be opened to individuals based on gender identity. The 2024 Rule states, "A covered entity must not deny a nonbinary individual access to a health program or facility on the basis that the program or facility separates patients based on sex or offers separate male and female programs or facilities." 89 Fed. Reg. at 37,593. "For example, a hospital that assigns patients to dual-occupancy rooms based on sex would be prohibited from requiring a transgender woman to share a room with a cisgender man, regardless of how [that person's] sex is recorded in [their] insurance or medical records." 87 Fed. Reg. at 47,866–67. With regard to other health programs, HHS stated that sex-specific health programs or activities are permissible only when they do not cause more than *de minimis* harm. 89 Fed. Reg. at 37,594–95; *see also id.* at 37,700–01, to be codified at 45 C.F.R. 92.206(b)(3) ("[A] covered entity must not adopt or apply any policy or practice of treating individuals differently or separating them on the basis of sex in a manner that subjects any individual to more than de minimis harm, including by adopting a policy or engaging in a practice that prevents an individual from participating in a health program or activity consistent with the individual's gender identity.").

3. The EEOC Coverage Mandate governs employer health plans.

To address the fact that TPAs and non-covered-entity health plans "are generally not responsible for the benefit design of the self-insured plans they administer," the 2016 Rule said HHS

would refer complaints regarding health plans to EEOC. 81 Fed. Reg. at 31,432. "Where, for example, [HHS] lacks jurisdiction over an employer responsible for benefit design, [HHS] typically will refer or transfer the matter to the EEOC and allow that agency to address the matter." *Id.*

The 2024 Rule reiterates this referral relationship. The 2024 Rule declares that although HHS lacks jurisdiction over "employment practices," 89 Fed. Reg. at 37,552, it will "transfer matters to the EEOC or DOJ where OCR lacks jurisdiction over an employer," *id.* at 37,624, 37,627; *see also* 87 Fed. Reg. at 47,877 ("For example, OCR will transfer matters to the EEOC where OCR lacks jurisdiction over an employer responsible for the benefit design of an employer-sponsored group health plan."). HHS has decided that, for non-healthcare entities, Title VII is better suited to "address claims that an employer has discriminated in the provision of benefits, including health benefits, to its employees." 81 Fed. Reg. at 31,437

This referral mechanism is based on EEOC's interpretation of Title VII to require coverage of gender-transition services in covered-employer health plans. In 2016, the "EEOC interpret[ed] and enforce[d] Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation." Am. Compl. Ex. J at 1. Examples of LGBT-related claims that EEOC saw as unlawful sex discrimination included: "[f]ailing to hire an applicant because she is a transgender woman" and "discriminating against or harassing an employee because of his or her . . . gender identity, . . . for example, on the basis of transgender status." *Id.* at 2. The EEOC has found "intentional discrimination against a transgender individual because that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII." *Id.* at 3 (citing *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012)). The EEOC continues to follow this interpretation of Title VII. *See, e.g.*, EEOC, *Fact*

Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination, https://perma.cc/Y9FW-MA5T (last visited June 24, 2024). In *Lange v. Houston Cnty.* No. 22-13626 (11th Cir. 2023), for example, the United States filed an *amicus* brief in support of the plaintiff in that case, who alleged discrimination under Title VII by her employer for its categorical exclusion of "gender-affirming care" from the employer's health plan. Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance on the Issues Addressed Herein, *Lange v. Houston Cnty., Georgia*, No. 22-13626, (Mar. 17, 2023), attached to Amended Complaint as Exhibit N. In that brief, the United States argued that an employer-sponsored health insurance plan violates Title VII if it excludes coverage for medical treatments only when they are needed to provide gender-affirming care." *Id.* at 10. The United States filed this brief because of its "substantial interest . . . [in] the proper application of the prohibition on sex discrimination in Title VII . . . to an employer's denial of health insurance benefits to a transgender worker" in light of EEOC's and DOJ's "enforcement authority under Title VII." *Id.* at 1-2.

3.1. EEOC has previously attempted to enforce the Mandate against a CBA Member.

The EEOC has attempted to enforce the Mandate against a CBA member. While the appeal in *Religious Sisters II* was pending before the Eighth Circuit, in October 2022, the CBA was notified by one of its members, a Catholic ministry with "Catholic" in its name, that the EEOC had begun an enforcement action for its refusal to provide gender-transition coverage. The EEOC demanded reams of information from this CBA member (hereafter "Catholic Ministry"), including "all contracts" with insurers and third party administrators, "all benefits and/or health plans," "all hard copy and/or electronic communications and/or notes" regarding health plans, "all medically necessary reason(s) for which [Catholic Ministry] has covered hysterectomy procedures," and "the software and/or additional data systems" used by Catholic Ministry to manage health benefits. *See*

Am. Compl., Ex. I. The only thing that prevented further imposition on Catholic Ministry was this Court's then-in-effect injunction against EEOC.

4. Procedural history

In addition to this Court's injunction upheld by the Eighth Circuit in *Religious Sisters II*, the Mandate has been enjoined in *Christian Employers Alliance* and *Franciscan Alliance*. More recently, the 2024 Rule (but not the EEOC Coverage Mandate) was enjoined nationwide by the Southern District of Mississippi insofar as the Rule requires coverage and performance of gender-transition services. The court's ruling was based on the 2024 Rule's violation of the Administrative Procedure Act. *Tennessee v. Becerra*, 2024 WL 3283887 (S.D. Miss. July 3, 2024). The 2021 and 2022 Notices were enjoined in *Neese v. Becerra* in favor of a class of all healthcare providers subject to Section 1557. 342 F.R.D. at 405. The 2024 Rule (but not the EEOC Coverage Mandate) was also enjoined in the State of Florida on APA grounds. Slip Op., *Florida v. HHS*, No. 24-cv-01080 (M.D. Fla. July 3, 2024), attached here as Exhibit A.

The parties filed a joint motion to stay all but the CBA's claim under RFRA, Doc. 48, which the Court granted, Doc.49. The CBA Plaintiffs now move for summary judgment on that claim.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue is 'genuine' if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party." *Schilf v. Eli Lilly & Co.*, 687 F.3d 947, 948 (8th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

ARGUMENT

As Magistrate Judge Senchal has previously noted, the 2024 Rule does not materially alter the Mandate. Doc. 39 at 7–8, 10 (noting that the 2022 NPRM is substantively similar to the 2016 Rule, including in its definition of sex discrimination and failure to incorporate a religious exemption). Accordingly, judgment should be entered in favor of the CBA for all the reasons previously stated by the Court and affirmed by the Eighth Circuit in *Religious Sisters of Mercy*.[4]

1. The Mandate continues to burden the CBA's members' religious beliefs without satisfying strict scrutiny.

The Government has never contested the merits of the CBA's members' RFRA claim, resting its defense of the Mandate entirely on justiciability arguments. This Court's holding that the Government's Mandate violates the CBA and its named member plaintiffs in the *Religious Sisters of Mercy* litigation is, like its other rulings, dispositive here.

Congress enacted RFRA "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA forbids government to "substantially burden a person's exercise of religion" unless the burden (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling interest." 42 U.S.C. § 2000bb-1(b). "A person whose religious practices are burdened in violation of RFRA 'may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424 (2006)

[4] CBA has not filed a motion for preliminary injunction against the 2024 Rule pursuant to the Government's promise of non-enforcement of the Mandate against CBA members during this litigation. *See* Doc. 39 at 9; Doc. 45 at 3–4. It reserves the right to do so should circumstances change.

(quoting 42 U.S.C. § 2000bb-1(c)). If a substantial burden exists, then the government must meet the "exceptionally demanding" strict scrutiny standard. *Hobby Lobby*, 573 U.S. at 728.

1.1. Substantial burden.

"RFRA initially queries whether the challenged implementations of Section 1557 and Title VII impose a substantial burden on the [CBA Plaintiffs'] exercise of religion." *Religious Sisters I*, 513 F. Supp. 3d at 1147. "First, would non-compliance have substantial adverse practical consequences?" *Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657, 692 (2020) (Alito, J., concurring). "Second, would compliance cause the objecting party to violate its religious beliefs, as it sincerely understands them?" *Id.* (emphasis omitted).

This Court's findings regarding gender-transition services and substantial burden are on all fours with the allegations in CBA's amended complaint:

> In this instance, adverse practical consequences abound. Under the prevailing interpretations of Section 1557 and Title VII, refusal to perform or cover gender-transition procedures would result in the [CBA] Plaintiffs losing millions of dollars in federal healthcare funding and incurring civil and criminal liability. An "imposition of significant monetary penalties" indisputably qualifies as a substantial burden.
>
> Just as clearly, compliance with the challenged laws would violate the [CBA] Plaintiffs' religious beliefs as they sincerely understand them. The RFRA broadly defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." "[T]he 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts.'" In meticulous detail, the [CBA] Plaintiffs have explained that their religious beliefs regarding human sexuality and procreation prevent them from facilitating gender transitions through either medical services or insurance coverage. See [Doc. 46 ¶¶ 78–96].[5] The Defendants in no way dispute the sincerity of those beliefs. Nor is it this Court's domain to question them. Because the interpretations of Section 1557 and Title VII threaten to penalize the [CBA] Plaintiffs for adhering to their beliefs, a substantial burden weighs on the exercise of religion.

[5] Pertinent record evidence in this suit appears at ¶¶ 78–96 of the CBA's amended complaint.

Religious Sisters I, 513 F. Supp. 3d at 1147–48 (citations omitted). The Court's reasoning equally applies to the 2024 Rule's extension to abortion and immoral infertility treatments. As explained in the CBA's verified complaint as well as the declarations attached thereto, Catholics oppose direct abortion and certain immoral infertility treatments. The 2024 Rule extends the "adverse practical consequences" of the 2016 Rule to all covered entities who refuse to provide or cover abortions or immoral infertility treatments.

1.2. Compelling interest.

"With a substantial burden present, the government must demonstrate that the challenged implementations of federal law advance "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (citations and internal quotation marks omitted). The Defendants cannot do so here. As the Court has previously explained, Defendants, in the 2020 Rule, conceded to lacking a "compelling interest in forcing the provision, or coverage, of these medically controversial [gender-transition] services by covered entities." 85 Fed. Reg. at 37,188. *Religious Sisters I*, 513 F. Supp. 3d at 1148.

The interests proffered in the 2024 Rule meet this requirement. The 2024 Rule, like the 2016 Rule, 81 Fed. Reg. at 31,380, says Defendants have a compelling interest in ensuring nondiscriminatory access to healthcare, 89 Fed. Reg. at 37,656, 87 Fed. Reg. at 47,825. The EEOC similarly has stated that applying Title VII to transgender individuals is a "top Commission enforcement priority." EEOC, *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, https://perma.cc/Y9FW-MA5T (last visited June 24, 2024). But as this Court has previously explained, "the Supreme Court has instructed to look 'beyond broadly formulated interests.'" *Religious Sisters I*, 513 F. Supp. 3d at 1148 (quoting *O Centro*, 546 U.S. at 431). "Rather, courts must 'scrutinize the asserted harm of granting specific exemptions to particular religious

claimants and to look to the marginal interest in enforcing the challenged government action in that particular context.'" *Id.* (quoting *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (cleaned up)). "Neither HHS nor the EEOC has articulated how granting specific exemptions for the [CBA] Plaintiffs will harm the asserted interests in preventing discrimination." *Id.*

Furthermore:

> "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." A mandate for entities subject to Section 1557 and Title VII to perform and cover gender-transition procedures still leaves gaps, including in the government's own healthcare programs. In short, the Court harbors serious doubts that a compelling interest exists. This issue need not be resolved, however, because the Defendants fail to meet the rigors of the least-restrictive-means test.

Religious Sisters I, 513 F. Supp. 3d at 1148 (citations omitted).

1.3. Least-restrictive means.

To satisfy the least-restrictive-means test, the government must "come forward with evidence" to show that its policies "are the only feasible means . . . to achieve its compelling interest." *Sharpe Holdings*, 801 F.3d at 943. "If a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt*, 574 U.S. at 365 (cleaned up). In the RFRA context, "a regulation may constitute the least restrictive means of furthering the government's compelling interests if 'no alternative forms of regulation' would accomplish those interests without infringing on a claimant's religious-exercise rights." *Sharpe Holdings*, 801 F.3d at 943 (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)). This Court's holding regarding less-restrictive means is also dispositive here:

> Here, the Defendants possess many less restrictive alternatives beyond forcing the [CBA] Plaintiffs to perform and cover gender-transition procedures in violation of their religious beliefs. If the aim is to expand financial support, then "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing" gender-transition procedures for those "unable to obtain them under

> their health-insurance policies due to their employers' religious objections." Other options include providing 'subsidies, reimbursements, tax credits, or tax deductions to employees' or paying for services "at community health centers, public clinics, and hospitals with income-based support." ACA exchanges offer yet another viable alternative, whereby "the government could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage at all." And if broadening access to gender-transition procedures themselves is the goal, then "[t]he government could . . . assist transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and specialize in those services."[6]
>
> In response, the Defendants have "not shown that these alternatives are infeasible." They therefore fail to demonstrate that their policies use the least restrictive means to burden the [CBA] Plaintiffs' exercise of religion. As applied, the challenged interpretations of Section 1557 and Title VII violate the RFRA.

Religious Sisters I, 513 F. Supp. 3d at 1146–49 (citations omitted). The record before the Court in the instant suit is identical to the *Religious Sisters of Mercy* litigation. The Government Defendants' mandate thus violates the CBA Plaintiffs' rights under RFRA.

2. The CBA has standing and this case is ripe.

"To establish Article III standing, a party invoking federal jurisdiction must show (1) that the plaintiff suffered an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury." *Religious Sisters II*, 55 F.4th at 602. Each element is present here.

2.1. The CBA's members faces a credible threat of injury.

In a pre-enforcement challenge, like this one, an injury in fact exists if "the threatened enforcement [is] sufficiently imminent." *Id.* at 603 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S.

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[6] "A true and accurate copy of a similar listing of clinics that specialize in transgender is attached as Exhibit A, the declaration of Andrew Nussbaum in support of CBA's motion for preliminary injunction, *see* Doc. 4-1.

149, 156 (2014)). "Specifically, the Supreme Court has held that a plaintiff satisfies the injury-in-fact requirement where he alleges '(1) an intention to engage in a course of conduct arguably affected with a constitutional interest, but (2) arguably proscribed by a statute, and there (3) exists a credible threat of prosecution thereunder." *Id.* (cleaned up).

2.1.1. CBA members engage in conduct affected with constitutional interests.

First, CBA members do not simply "inten[d] to engage in a course of conduct arguably affected with a constitutional interest," *Susan B. Anthony List*, 573 U.S. at 159, they actually do engage in such conduct because they refuse to perform and cover gender-transition services, abortion, and immoral infertility treatments, and they will continue to do so in the future, based on their Catholic beliefs. Because this conduct is religious exercise, "it is certainly affected with a constitutional interest." *Id.* at 162 (cleaned up).

2.1.2. CBA members' conduct is arguably proscribed by the Mandate.

Second, CBA members' religious practices are "arguably proscribed" by Section 1557 and Title VII. *Id.* at 163. In *Susan B. Anthony List*, the agency had previously found that a statement by one plaintiff "probabl[y]" violated the statute, and based on the statute's plain language—what the Court called its "broa[d]" "swee[p]"—there was "every reason to think that similar speech in the future will result in similar proceedings." *Id.* The Court thus "ha[d] no difficulty concluding that petitioners' intended speech is 'arguably proscribed' by the law." *Id* at 162. Similarly, in *Religious Sisters II*, the Eighth Circuit held that even though the Government contended that the 2020 Rule allegedly "rescinded" the 2016 Rule, the combination of official statements and injunctions stopping the 2020 Rule from going into effect "combined to threaten the plaintiffs in the same way that the challenged portions of the 2016 Rule did." 55 F.4th at 605.

The same conclusion is warranted here. The 2024 Rule interprets Section 1557 to proscribe the refusal to provide gender-transition services, abortion, and immoral infertility treatments, and both HHS and the EEOC interpreted Section 1557 and Title VII to proscribe the refusal to cover these services in health plans. This has been the status of Defendants' position since at least 2015, when it issued its notice of proposed rulemaking regarding the 2015 Rule. There is, then, "every reason to think" these statutes will be construed "in the future" to make CBA members' religious exercise illegal. *Susan B. Anthony List*, 573 U.S. at 163.

2.1.3. There is a credible threat of enforcement.

In *Susan B. Anthony List*, the Supreme Court found a credible threat of enforcement based on (1) the fact that the plaintiff there had been subject to a complaint under the challenged provision, (2) the fact private parties, in addition to the government, could prosecute the arguably proscribed conduct, and (3) the fact that enforcement proceedings are a common occurrence. 573 U.S. at 164–65. In *Religious Sisters II*, the Eighth Circuit found a credible threat of enforcement because (1) Defendants had recently issued the 2022 Notice, warning "covered entities . . . that refusing to offer gender-reassignment surgeries violates Section 1557"; (2) Defendants refused to disavow enforcement of the mandate; and (3) Defendants had failed to identify "a long history of nonenforcement against the plaintiffs and others like them." 55F.4th at 603–06.

If anything, the evidence of a credible threat of enforcement against CBA Members is stronger now than it was even in *Religious Sisters of Mercy*. While the appeal was pending in *Religious Sisters of Mercy* was pending, Defendants began an enforcement action against one of CBA members in an attempt to enforce the Mandate. *See* § 3.1, *supra*. What stopped that action was this Court's previously-in-effect injunction. *Id.* The Government has since then doubled down on the Mandate. It filed an amicus brief in the Eleventh Circuit arguing that Title VII requires coverage of gender-

affirming care, *see* § 3, *supra*, and has issued the 2024 Rule. The EEOC has recently stated that applying Title VII to transgender individuals is a "top Commission enforcement priority." *See* § 3, *supra*. Indeed, the Government recently conceded that "there have been complaints that have likely gone through the conciliation process" concerning the Mandate. *Christian Emps. All. v. U.S. Equal Opportunity Comm'n*, 2022 WL 1573689, at *5 (D.N.D. May 16, 2022). And like *Susan B. Anthony List*, the threat of private enforcement exists alongside Government enforcement. *E.g.*, *Hammons v. Univ. of Maryland Med. Sys. Corp.*, 551 F. Supp. 3d 567, 572 (D. Md. 2021) (denying motion to dismiss in 1557 suit against Catholic hospital). There continues to be a credible threat of enforcement.

2.2. CBA members' injury is traceable to the government, and a favorable ruling from this Court will redress their harm.

Although the Government conceded as much in the *Religious Sisters of Mercy* litigation, redressability and causation are present here:

> HHS's responsibility to enforce Section 1557 supplies a sufficient causal relationship to the asserted injuries, which declaratory and injunctive relief will likely redress. For a pre-enforcement constitutional challenge to a statute, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision. HHS and Secretary [Becerra] fit that bill for Section 1557. Redressability is likewise plain because a favorable decision will relieve a discrete injury of threatened enforcement.

Religious Sisters I, 513 F. Supp. 3d at 1139; *see also* Am. Compl. ¶¶ 73, 75, 76, 151, 157, 160–72.

2.3. CBA has associational standing to sue on behalf of its members.

In *Religious Sisters I*, this Court ruled that the CBA had associational standing to challenge the Government Defendants' interpretation of Section 1557 to require coverage and performance of gender-transition services because CBA satisfied the three-part test for associational standing from *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 986 (8th Cir. 2011): (1) "the CBA's

verified second amended complaint confirms that its membership includes Catholic hospitals and other healthcare entities 'that receive Medicaid and Medicare payments and participate in HHS-funded programs'"; (2) "[t]he CBA's purpose of supporting Catholic employers that wish to provide employee benefits consistent with their religious beliefs is certainly germane to" the suit; and (3) "[a]nd where an organizational plaintiff 'seeks only declaratory and prospective injunctive relief, the participation of individual members is not required.'" *Id.* at 1137 (cleaned up).

This Court also ruled that the CBA had associational standing to challenge the EEOC's interpretation of Title VII to cover gender-transition services in their health plans: (1) "the CBA's organizational purpose is relevant to religious freedom claims pertaining to members' health plans"; (2) "[t]he participation of individual members remains unnecessary to obtain declaratory and injunctive relief"; and (3) "individual CBA members like [named plaintiffs in *Religious Sisters of Mercy*] the Diocese [of Fargo] and Catholic Charities [of North Dakota] have standing to sue in their own right." *Id.* at 1141.

On appeal, the Eighth Circuit affirmed the Court's injunction nearly in full, except as to the third prong of the associational-standing test. Relying on *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009), the Eighth Circuit explained that, to have associational standing, the CBA "must identify particular members and their injuries." *Religious Sisters I*, 55 F.4th at 601. To do that, the CBA must submit sworn evidence "showing, through specific facts that one or more of its members would be directly affected by the allegedly illegal activity." *Id.* at 602 (cleaned up) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992)). Thus, because the CBA only offered a "self-description of the activities of its [un-named] members," in the form of the testimony of the Chairman of the CBA's Board of Directors, the CBA lacked associational standing to

challenge the Government Defendants' gender-transition-services mandate. *Id.* at 601 (quoting *Summers*, 555 U.S. at 498–99).

On remand, the CBA requested the opportunity to reopen the record and submit affidavits of individual members. ECF No. 151, *Religious Sisters of Mercy v. Becerra*, 16-cv-386 (D.N.D. Jul. 21, 2023). The Court denied the CBA's request on September 15, 2023, explaining in relevant part:

> Because standing is jurisdictional, and the Eighth Circuit decided the CBA lacked associational standing to sue on behalf of its unnamed members, on remand, the claims by the CBA on behalf of its unnamed members must be dismissed for lack of subject matter jurisdiction. **Importantly, the dismissal is without prejudice, and nothing prevents the CBA from filing a new action, where associational standing is properly established.**

ECF 169 at 3, *Religious Sisters of Mercy*, 16-cv-386 (D.N.D. Sept. 15, 2023) (emphasis added). The Court then entered an amended judgment, removing protection for CBA's members on October 11, 2023. ECF No. 170, *Religious Sisters of Mercy*, 16-cv-386 (D.N.D. Oct. 11, 2023). The CBA filed this suit on October 13 pursuant to the Court's order allowing CBA to refile its suit.

Paragraphs 13–44 and 65 and Exhibits E–H (ECF nos. 46–5 to 46–8) of the CBA's verified amended complaint in the instant action establish its associational standing to challenge Defendants Mandate. Exhibit F to the CBA's verified complaint is a declaration of a group of Catholic health clinics, Holy Family Catholic Clinic, that receive Medicare and Medicaid funding (federal financial assistance requisite to trigger Section 1557) and employ nineteen individuals (greater than Title VII's fifteen-employee threshold). Am. Compl. ¶ 65.b; ECF No. 1–6, Ex. F ¶¶ 4, 9. Exhibit G to the CBA's verified complaint is a declaration of a Catholic-owned pediatric clinic, Centennial Pediatrics, that employs eighteen individuals (Title VII standing) and receives Medicaid funding (Section 1557 standing). Am. Compl. ¶ 65.c; ECF No. 1–7, Ex. G ¶¶ 4–5. And exhibit E to the CBA's verified complaint is a declaration of a Catholic ministry, Cardinal Ritter Senior Services,

that provides care for senior services, employs 382 individuals (Title VII standing) and receives Medicare and Medicaid funding (Section 1557 standing). Am. Compl. ¶ 65.a, ECF No. 1–5, Ex. E ¶¶ 7, 9. And the CBA's complaint is verified by Plaintiff-members Sisters of Dillingen, St. Anne's Guest Home, and St. Gerard's Community of Care, each of whom have standing to sue in their own right. *See* Am. Compl. ¶¶ 13–44.

Each of these entities is a member of the CBA, Am. Compl. ¶¶ 24, 35, 45; Ex. E ¶ 19; Ex. F ¶ 16; Ex. G ¶ 15. Each of these CBA members provides health plans to its employees because, "Catholic social teaching holds that access to health care, including health insurance, is a basic and universal human right and a demand of the common good," which "honors the dignity of every person." *E.g.*, Ex. E ¶ 14, Ex. F ¶ 5. Five of these CBA members receive HHS funds and thus are "covered entities" under the 2024 Rule. According to Holy Family Catholic Clinic, "[t]here are a growing number of, including our patients, who seek medical intervention because they do not identify with their biological sex." Am. Compl. Ex. F ¶ 11. Yet consistent with their Catholic views regarding the dignity of all persons and the Church's teachings regarding the gift of biological sex, these members cannot perform or cover gender-transition services:

> Catholics oppose transgender medicine because it contradicts God's creative sovereignty and confounds human beings' understanding of their own dignity as well as their development as body-soul entities. Catholics believe that as sovereign Creator, God does not place any human being in the "wrong body." We also believe that God makes every human being; we do not make ourselves. Catholicism further teaches that God creates every human being as inseparable unity of body and soul. Consequently, a human being's failure to accept his or her bodily sex would impede self-understanding and development at the biological, physiological, emotional, mental and spiritual levels, all of which are interrelated.

Compl. Ex. F ¶ 14. "Any governmental regulation or policy requiring [these members] to cover abortion or gender transition services and cross-sex hormones in its employee health plans or to perform such services or prescribe such drugs when it was competent to do so violates [their]

deeply-held Catholic values and beliefs." *Id.* ¶ 17. These CBA members similarly oppose providing or covering abortion or immoral infertility treatments. *See* Doc. 46-5 ¶¶ 19-20; Doc. 46-6 ¶¶ 15-16; Doc. 46-7 ¶¶ 12, 16. Through this testimony of specific members, the CBA has "properly established" its associational standing under the law of the Eighth Circuit. The CBA has "submit[ted]" sworn evidence showing that "one or more of its members would be directly affected" by the Mandate. *Religious Sisters II*, 55 F.4th at 602.

In addition, the remaining two prongs of the associational-standing test remain unchanged from when the Court first determined the CBA had associational standing. "The CBA's purpose of supporting Catholic employers that wish to provide employee benefits consistent with their religious beliefs is certainly germane to" the suit. *Religious Sisters I*, 513 F. Supp. 3d at 1137; Am. Compl. ¶¶ 45–61 (paragraphs of complaint regarding CBA's purpose and mission). "And where an organizational plaintiff 'seeks only declaratory and prospective injunctive relief, the participation of individual members is not required.'" *Religious Sisters I* at 1137 (cleaned up); Am. Compl. at 97-100 (seeking only declaratory and prospective injunctive relief).

2.4. CBA's claims are ripe.

Article III standing and ripeness often "boil down to the same question." *Susan B. Anthony List*, 573 U.S. at 157, n. 5 (citation omitted). As in *Religious Sisters*, this case is apt for judicial resolution because no additional factual development is needed to issue an injunction at this stage. 513 F. Supp. 3d at 1145–46. CBA has set forth the necessary facts under oath in its complaint and in motion, and this case "present[s] purely legal questions." *Id.* (citation omitted). Denying judicial review would inflict "significant practical harm" on CBA members by forcing them to either follow their religious beliefs or face serious and harsh penalties under the statutes. *Id.*

3. The remaining factors weigh in favor of entering a temporary restraining order and preliminary injunction.

3.1. Irreparable harm is presumed in RFRA cases.

The Eighth Circuit's holding that the CBA and its named-plaintiff members in the *Religious Sisters of Mercy* case will suffer irreparable harm absent an injunction is also binding here:

> In [*Franciscan Alliance v. Becerra*], 47 F.4th 368, 380, the Fifth Circuit rejected the argument that "the district court erred in granting the permanent injunction because Franciscan Alliance did not satisfy the irreparable harm standard." 47 F.4th at 380. It held "that the loss of freedoms guaranteed by . . . RFRA . . . constitute[s] per se irreparable harm." *Id.* (citing *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 294 (5th Cir. 2012)).
>
> Other circuits are in agreement that "establishing a likely RFRA violation satisfies the irreparable harm factor." . . .
>
> We agree with these courts and therefore conclude that the district court correctly held that "intrusion upon the Catholic Plaintiffs' exercise of religion is sufficient to show irreparable harm." *Religious Sisters I*, 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) ("CEF can demonstrate that it has a high likelihood of success on the merits of its First Amendment claim, which is likely enough, standing alone, to establish irreparable harm.")).

Religious Sisters II, 55 F.4th 583, 608–09 (8th Cir. 2022) (footnotes omitted). Because the Mandate violates RFRA, irreparable harm is established in this case.

3.2. The balance of the equities favor the CBA Plaintiffs.

Since the Mandate violates RFRA, the Government Defendants must "present powerful evidence of harms to [their] interests" to prevent CBA Plaintiffs from meeting the balancing requirement. *Opulent Life Church v. City of Holly Spring, Miss.*, 697 F.3d 279, 297 (5th Cir. 2012). Here, the harms faced by CBA Plaintiffs are severe, while the harms to Defendants are minimal. HHS has acknowledged that its goals need not be achieved immediately or uniformly, a fact made plain by its decision to wait *six years* after enactment of the ACA to promulgate the 2016 Rule—and to

exempt its own insurance programs from its effect. HHS has claimed that the Rule "would not displace the protections afforded by provider conscience laws, the Religious Freedom Restoration Act (RFRA), provisions in the ACA related to abortion services, or regulations issued under the ACA related to preventive health services." 81 Fed. Reg. at 31,378–79. Those are the very protections invoked here. "[W]here the regulation [is underinclusive and] fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being 'compelling' . . . enough to justify abridging core constitutional rights." *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014) (second alteration in original).

3.3. The public interest favors the CBA Plaintiffs.

"This factor overlaps considerably with the previous one, and most of the same analysis applies." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015). "[I]njunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). Moreover, stripping CBA Plaintiffs of Medicare and Medicaid funding hurts the vulnerable people that depend on CBA Plaintiffs' health services—both the poor and elderly, and those in rural areas that depend on Plaintiffs' critical access to hospitals. Given the gravity of the Mandate, the medical debate on the propriety of these procedures, the widespread impact on private and public entities, the harm to citizens who rely upon CBA Plaintiffs for medical treatment, the public interest favors an injunction.

CONCLUSION

For the foregoing reasons, CBA respectfully requests the Court enter judgment in its favor on behalf of its members on CBA's RFRA claim.

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Respectfully submitted,

/s/ Andrew Nussbaum

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