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' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Table of Contents

INTRODUCTION

Defendants do not dispute that CBA members oppose abortion and gender-transition services. Nor do they dispute that CBA members include covered entities and employers under the Mandate. Defendants do not dispute that the Mandate requires covered entities to provide, and covered employers to cover in their health plans, gender-transition services and abortion. Defendants concede that they refused to incorporate Title IX's and Title VII's religious exemptions into the Mandate. And Defendants concede that *Religious Sisters of Mercy*, *Christian Employers Alliance*, and *Franciscan Alliance* previously enjoined identical interpretations of Section 1557 and Title VII.

Defendants instead argue that: pre-enforcement review is improper because *Defendants*, not this Court, are better situated to adjudicate CBA members' right to religious freedom in a non-binding, voluntary administrative "consultation" performed individually, thousands of times over for CBA's members; the CBA lacks associational standing because participation of its 8,400 individual members is required; and relief should not extend to CBA's present and future members. These arguments fail. This and other courts have repeatedly rejected them, including as recently as last month in *Catholic Benefits Association v. Burrows*, 2024 WL 4315021, at *10 (D.N.D. Sept. 23, 2024) (enjoining EEOC on a pre-enforcement basis from implementing the Pregnant Worker Fairness Act Final Rule and the EEOC Enforcement Guidance on Harassment against CBA's present and future members).[1] Notwithstanding the illegality of their actions, Defendants persist in

[1] *See also e.g.*, *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 606-07 (8th Cir. 2022) (affirming pre-enforcement challenge by Catholic Benefits Association, Diocese of Fargo, and Catholic Charities of North Dakota to EEOC interpretation of Title VII and HHS 2016 Rule); *Christian Emps. All. v. United States Equal Opportunity Comm'n*, 2022 WL 1573689, at *9 (D.N.D. May 16, 2022) (pre-enforcement preliminary injunction against EEOC and HHS for Christian membership organization); *Christian Emps. All. v. Azar*, 2019 WL 2130142, at *6 (D.N.D. May 15, 2019) (permanent injunction against HHS, DOL, and Treasury in favor of Christian membership organization

what this Court has called "a regulatory war on religion," *id.* at *1 n.2, which requires "[o]rganizations" like the CBA to "continually sue to keep the federal government from infringing on basic and well-settled rights to freedom of religion." *Id.* Because Defendants refuse to disavow enforcement of the Mandate against CBA members; participation of individual members is not required for associational standing to exist; and judicial efficiency weighs in favor of protecting future members, judgment in favor of CBA Plaintiffs should be entered forthwith.

ARGUMENT

1. This case is justiciable.

Defendants do not dispute the merits of CBA's RFRA claim. They instead argue that this Court lacks jurisdiction because CBA members have not suffered Article III injury. But there are two kinds of Article III injury suffered by CBA members—regulatory and constitutional—which provide two independent grounds for CBA Plaintiffs' standing in this case.

1.1. As regulated parties, CBA members have standing to challenge the Mandate.

First, CBA members have suffered regulatory harm. An "additional regulatory burden" "undeniably [creates] a live, concrete 'case or controversy.'" *Ass'n of Am. Railroads v. Dep't of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *see also Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (same). In *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 870 (8th Cir. 2013), for example, the Eighth Circuit ruled that Article III injury was present when EPA directive letters required changes to Iowa League of Cities members' policies and added compliance costs. "League members must either

---

on pre-enforcement basis); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016) (permanent injunction against HHS in favor of Christian Medical & Dental Society on pre-enforcement basis); *Catholic Benefits Association LCA v. Sebelius*, 24 F. Supp. 3d 1094, 1107 (W.D. Okla. 2014) (preliminary injunction against HHS, DOL, and Treasury in favor of CBA on pre-enforcement basis).

immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that . . . were viable before the publication of the letters but will be rejected when the letters are applied as written." *Id.* at 868.

Here, it is undisputed that CBA's covered employer members are regulated by the Mandate. It is also undisputed that the Mandate imposes added compliance costs. For example, the 2024 Rule requires revisions to a covered employer's written policies, adding express affirmations that gender transition-related procedures would be provided, 89 Fed. Reg. at 37,697; 45 C.F.R. § 92.10(a)(1)(i). 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; 45 C.F.R. § 92.9. 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; 45 C.F.R. § 92.5(a), and, once approved, post notices regarding compliance with the Rule, 89 Fed. Reg. at 37,597–98; 45 C.F.R. § 92.10. CBA's members must either alter their behavior now or "play an expensive game of Russian roulette" that Defendants will enforce the Mandate against them.[2]

---

[2] The compliance costs for CBA members are written on the face of the 2024 Rule. 89 Fed. Reg. at 37,679 (**Training employees:** "The Department anticipates that some covered entities would incur costs to train or retrain employees under the final rule."); *id.* at 37,680 (**Revising policies and procedures:** "We monetize the time spent on revising policies and procedures by estimating a total cost per entity of $307.08 or $181.12, depending on the extent of the revisions."); *id.* at 37,680-81 (**Notices**: Estimating that the Mandate's "require[ment that] the 266,297 covered entities . . . provide a Notice of Nondiscrimination to participants, enrollees, and beneficiaries, hereafter referred to as beneficiaries of its health program or activity, and members of the public" will cost "between $28.6 million and $261.4 million").

Furthermore, the Mandate's purported requirement that 8,400 CBA members go through a case-by-case adjudication of their religious beliefs itself imposes an independent regulatory injury that makes this case justiciable. In *Catholic Benefits Association v. Burrows*, 2024 WL 4315021, at *4 (D.N.D. Sept. 23, 2024), this Court ruled that "[t]he burden of investigation and possible litigation" of a CBA member's religious defenses to a Title VII enforcement action is "added regulatory burden and compliance costs" and therefore Article III injury. *See also Christian Emps. All. v. EEOC*, 2022 WL 1573689, at *5 (D.N.D. May 16, 2022) (requiring religious organizations "to prove they are religious or evaluating whether their religious preferences can withstand a case-by-case analysis is a sufficient injury."). The Western District of Louisiana reached the same conclusion in *Louisiana v. EEOC*, 705 F. Supp. 3d 643, 664 (W.D. La. 2024). There, the United States Conference of Catholic Bishops, the Diocese of Lake Charles, and the Diocese of Lafayette challenged EEOC's rule implementing the Pregnant Workers' Fairness Act that purportedly "forc[ed] the Bishops Plaintiffs to address their religious exceptions on a case-by-case basis." *Id.* at 656. The court held that this constituted Article III injury. "[A]s a practical matter, [this case-by-case approach] would require [the plaintiffs] to wait until an EEOC investigation has opened and then retain attorneys to investigate the claim and assert individual defenses against the EEOC." *Id.* This "presents, at a minimum, a substantial likelihood of added regulatory burden and compliance costs." *Id.* Because the Mandate imposes a regulatory burden on CBA members, Article III injury is present.

1.2. Pre-enforcement review is proper.

Second, even if there was no regulatory injury, CBA members have suffered constitutional injury sufficient to give rise to standing. Article III standing exists if CBA Plaintiffs demonstrate: (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest,"

(2) "arguably proscribed by a statute," and (3) there "exists a credible threat of prosecution thereunder." *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 603 (8th Cir. 2022). Defendants concede that CBA's members intend to engage in a course of conduct affected with a constitutional interest. Defendants dispute the second and third requirements of the pre-enforcement-standing test.

1.2.1. CBA members' conduct is proscribed by the Mandate.

Pre-enforcement standing is present when the plaintiffs are "within the class whose conduct is arguably restricted" by government regulation. *Religious Sisters of Mercy*, 55 F.4th at 604 (cleaned up) (quoting *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020)). Defendants concede that the Mandate requires covered entities to cover and provide gender-transition services and alter their speech and policies accordingly. Doc. 57, p. 12-13. Defendants do not dispute that CBA's Members include covered entities under the 2024 Rule and Title VII, including those members who have submitted sworn statements in this case. *See* Doc. 51, p. 36-37. Therefore, the Mandate arguably proscribes CBA members' conduct.

Defendants object, arguing that the Mandate does not proscribe CBA members' conduct *if* CBA members are "protected by Federal protections for religious freedom and conscience." Doc. 57, p. 24. But Defendants' "if" spells doom for their argument. A "vague[] promise[] to not enforce the challenged [action] 'contrary to the First Amendment'" or to "comply with the Religious Freedom Restoration Act . . . and all other legal requirements" is not sufficient to defeat standing. *Religious Sisters of Mercy*, 55 F.4th at 604 (quoting *Speech First*, 979 F.3d at 338). This is because Defendants' "promise [i]s so vague that the scope of liability [i]s both 'unknown by the [defendants] and unknowable to those regulated by it." *Id.*

1.2.2. CBA members face a credible threat of injury.

The fact that CBA members' conduct is affected with a constitutional interest and the Mandate restricts CBA members' conduct on its face gives rise to a credible threat of injury where, as here, the Mandate was recently promulgated. Courts "assume a credible threat of prosecution" in a "pre-enforcement challenge[] to recently enacted (or, at least, non-moribund) [government actions] that facially restrict" First Amendment rights. *Speech First*, 979 F.3d at 335 (collecting cases from the 1st, 3rd, 4th, 5th, 7th, and 9th circuits). This is because "one should not have to risk prosecution to challenge a statute"—"especially . . . in First Amendment cases." *Arizona Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (quoting *Bland v. Fessler,* 88 F.3d 729, 736–37 (9th Cir.1996)). "Were it otherwise, [First Amendment rights]—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Id.* Thus, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Id.*

But even if a credible threat were not presumed, the undisputed evidence is that one exists. First, just as in *Religious Sisters of Mercy*, Defendants have "declined to adopt commenters' suggestion that it import Title IX's [and Title VII's] blanket religious exemption." 55 F.4th at 605. [3]

---

[3] Defendants imply that *Billard v. Charlotte Catholic High School*, 101 F.4th 316, 328 (4th Cir. 2024) holds that Title VII's religious exemption does not permit "religiously motivated sex discrimination." Doc. 57, p. 24. That description of *Billard* is misleading and demonstrates Defendants' warped understanding of religious-freedom and conscience protections. *Billard* expressly avoided deciding the question whether Title VII's religious exemption permitted "religiously motivated sex discrimination," noting that this reading of Title VII's exemption was not "easily dismissed, as demonstrated by separate writings from judges who would adopt it and its endorsement by our dissenting colleague today." *Id.* (collecting cases). The Fourth Circuit pivoted from the Title VII exemption, leaving it unresolved, and held that the ministerial exception barred the Catholic school teachers sex discrimination claim after he announced his plan to marry his same sex partner. *Id.* In

This refusal to include a religious exemption reveals Defendants' intention to enforce the Mandate against CBA members. *Id.*

Second, Defendants have not promised to comply with closely related precedents that apply RFRA, the First Amendment, or related conscience protections. This Court, the Eighth Circuit, the Northern District of Texas, and the Fifth Circuit showed what proper respect for religious freedom requires: an exemption for the CBA and its members. Yet Defendants state that they "disagree[]" with these precedents. 87 Fed. Reg. at 47,858, 47,879. Defendants have never "disavowed any intent to enforce" the Mandate and thus a credible threat of enforcement exists.

Defendants argue that 45 C.F.R. § 92.3(c) is the promise of non-enforcement required by *Religious Sisters of Mercy*. Doc. 57, p. 21. Not so. Section 92.3(c) states, "*[i]nsofar* as the application of any requirement . . . would violate applicable Federal protections for religious freedom and conscience, such application shall not be required." (Emphasis added). Section 92.3(c) is not new. Section 92.2 of the 2016 Rule contained a materially identical provision: "Insofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required." 45 C.F.R. § 92.2 (2016). Section 92.3(c) merely means that a Catholic employer may rely upon its personal belief that it is exempt, but it must do so at its own risk.

Defendants have expressly rejected two of the "Federal protections" referenced in Section 92.3 out of hand—the Title VII and Title IX religious exemptions. 87 Fed. Reg. at 47,840. Further, HHS states that it will weigh any claim of religious exemption against whether the proposed

---

any event, Defendants' argument, if true, would mean that Title VII's religious exemption would require the Catholic Church to ordain women priests.

exemption causes third-party harm, 89 Fed. Reg. at 37,656, 37,657 n.8[4], and EEOC states it will evaluate whether religious exemption might constitute an establishment of religion, 89 Fed. Reg. at 29,151.[5]

The Fifth and Eighth Circuits have already decided what RFRA and the First Amendment require. Section 92.3(c) is not that. It is instead the same vague and contingent "promise" to comply with RFRA and the First Amendment rejected by the Eighth Circuit. *Religious Sisters*, 55 F.4th 583, 605; *see also Cath. Benefits Ass'n v. Burrows*, 2024 WL 4315021, at *4 (D.N.D. Sept. 23, 2024) ("A religious defense is not the same as a religious exemption."). If anything, the 2024 Rule is actually worse than the 2016 Rule. In the 2024 Rule, Defendants expressly promise to "seek forward-looking relief" against CBA members if, in Defendants' view, the member "does not satisfy the legal requirements for a[religious] exception." 89 Fed. Reg. at 37,567. That is a plain threat of enforcement. Defendants' "reliance on its case-by-case standard constitutes 'a concession that it may' seek enforcement." *Cath. Benefits Assn.*, 2024 WL 4315021, at *4.

Defendants have argued *ad nauseum* since 2015 that their "promise" to "comply with RFRA" defeats every pre-enforcement challenge to the Mandate. In the Fifth Circuit in 2016, for example, Defendants argued just as they do here:

> [T]he Rule does not override federal statutory protections for religious freedom and conscience—including the Church, Weldon, and Coats amendments, and the

---

[4] HHS cites Justice Kennedy's concurrence in *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 739 (2014) in support of a possible third-party harm exception to religious protections. 89 Fed. Reg. at 37,657 n.387. But *Hobby Lobby* held that RFRA required a religious exemption from the government's contraceptive coverage mandate. Furthermore, there is almost always theoretical third-party harm when one is relieved of a burden that others must carry. For example, granting conscientious exemption from the draft means others must serve.

[5] To the contrary, religious exemption never constitutes an establishment. *See, e.g., Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 678-80 (1970).

> Religious Freedom Restoration Act—and it does not displace state laws concerning abortion. Quite the opposite, the Rule recognizes them…. Thus, only if the Court were to ignore the very protections that the Rule recognizes and the procedures the Rule provides could the Court credit Plaintiffs' allegations of irreparable harm.

Defs.' Opp'n Pl. Mots. Prelim. Inj. at 1-2, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 50) (emphasis added); *see also id.* at 8 (same); 10 (same); 20 n.10 (same); and 25-26 (same). Defendants made the same argument—unsuccessfully—in *Religious Sisters of Mercy*, *Christian Employers Alliance*, and *Catholic Benefits Association v. Burrows*.[6] Like all of Defendants' arguments made in this case, this one too has been repeatedly rejected by courts.

Third, "the government cannot identify a long history of nonenforcement against the plaintiffs and others like them." *Religious Sisters of Mercy*, 55 F.4th at 606. As to the 2024 Rule, it was only recently promulgated so the Government cannot identify a long history of non-enforcement. As to Title VII, the CBA has been protected from enforcement actions by a stay of the EEOC's interpretation followed by an injunction in *Religious Sisters of Mercy* between 2016 and October 2023, From October 2023 to the present, CBA has been protected by a promise of non-enforcement by the Government consistent with this Court's injunction.[7] This Court's injunction in *Religious Sisters of Mercy* was the only barrier to an intrusive, substantially burdensome EEOC investigation of one of CBA's members. Doc. 51, p. 33-34. And in any event, the Mandate is a "top . . . enforcement priority" for Defendants; Defendants are actively pushing the Mandate in litigation; and the

---

[6] A complete listing since 2015 of the Defendants' vague promise that they will "comply with RFRA" identical to those made in this case is attached as Appendix A to this brief.

[7] Defendants argue that there have been "no reports of a serious agency action against CBA" since October 2023. Doc. 57, p. 18. But that is only because the *Government* has agreed to not enforce the Mandate against CBA's members.

Government concedes that "'there have been complaints that have likely gone through the conciliation process' concerning the Mandate." Doc. 51, p. 33-34.

Defendants go so far as to say they've "never" enforced the Mandate against an "employer asserting religious objections." Doc. 57, p. 35. That is inaccurate. Apart from the recent enforcement action against a CBA member described above and their admission on the record in *Christian Employers Alliance* that they've enforced the Mandate against religious employers, Doc. 51, p. 34, *Herx v. Diocese of Fort Wayne-South Bend*, 48 F.Supp.3d 1168 (N.D. Ind. 2014), involved a CBA member who terminated an employee for causing scandal related to her publicly pursuing infertility "treatments" that violated of Catholic teaching. "EEOC" investigated the charge and "issued its Determination concluding that the Diocese had terminated Mrs. Herx's employment in violation of Title VII." *Id.* at 1173.[8] And in *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018), EEOC sued a Christian funeral home for refusing to allow a biologically female employee to dress like a man.

1.3. Defendants' non-binding voluntary consultation provision targets CBA members' rights.

As expected, Doc. 51, p. 17-21, HHS argues that its religious "notification" or "consultation" provision deprives this Court of jurisdiction by "add[ing] to an already attenuated chain of events that must occur before any CBA member might be injured." Doc. 57, p. 23; *id.*, p. 21-25; *see also*

[8] Catholic employers (and CBA members) are regularly sued for policies related to Catholic teaching—with the imprimatur of Defendants—on **IVF**, *Herx*, 48 F.Supp.3d 1168; **gender identity**, *C. P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, 2022 WL 17788148 (W.D. Wash. Dec. 19, 2022); **same-sex marriage**, *Doe v. Cath. Relief Servs.*, 618 F. Supp. 3d 244 (D. Md. 2022) (subsequent history omitted); *Starkey v. Archdiocese of Indianapolis,* 41 F.4th 931 (7th Cir. 2022); and **abortion**, *Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130 (3d Cir. 2006).

45 C.F.R. § 92.302 and commentary at 89 Fed. Reg. at 37,655-661. EEOC similarly points to its "enhanced procedures" for religious exemptions as depriving this Court of jurisdiction. *Id.*, p. 27, *see also* 89 Fed. Reg. at 29,147 n.245 (stating EEOC's enhanced procedures "will apply to charges filed under any of the statutes that the EEOC enforces"). But neither the "consultation" provision nor the "enhanced" procedures defeat this Court's jurisdiction.[9]

Start first with the fact that these provisions do not allow CBA members to assert their rights on an associational basis. Instead, CBA members must engage in these processes, case-by-case, thousands of times over. This case-by-case, member-by-member process injures CBA members in two ways. First, "[g]overnment harassment of religious organizations requiring them to prove they are religious or evaluating whether their religious preferences can withstand a case-by-case analysis is [itself] a sufficient injury" to give rise to Article III standing. *Christian Emps. All.*, 2022 WL 1573689, at *5. And Defendants' "reliance on [their] case-by-case standard constitutes 'a concession that it may' seek enforcement" against CBA members. *Cath. Benefits Ass'n*, 2024 WL 4315021, at *4.

Second, the fact that consultation cannot occur on an associational basis harms the CBA itself and violates CBA members' right of association guaranteed by the First Amendment. That right, among other things, allows individuals and institutions to associate to amplify their voices and collectively vindicate their rights. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon

[9] As explained in section 1.4, *infra*, the government concedes that, under *Religious Sisters of Mercy*, Plaintiffs have standing to challenge the EEOC's Title VII interpretation.

the close nexus between the freedoms of speech and assembly."); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201 (2023) (permitting association to vindicate equal protection rights of their members in civil suit). In this "precarious time for people of religious faith in America" marked by "the repeated illegal and unconstitutional administrative actions against one of the founding principles of our country, the free exercise of religion," *Cath. Benefits Ass'n*, 2024 WL 4315021, at *1; *see also id.* *1 n.2, the CBA's members came together "so that . . . they might find solutions permitting them to focus on the work of their ministries and their Catholic-owned businesses in a manner that is consistent with their Catholic values." Declaration of Archbishop William Lori of Baltimore, attached here as Exhibit 1, at ¶ 5 ("Lori Decl.")[10]; *see also* Doc. 46, ¶ 45. This "regulatory war on religion" of recent years is not capable of redress by individual members. *Cath. Benefits Ass'n*, 2024 WL 4315021, at *1 n.2. "Few if any of the attorneys regularly serving CBA members have expertise in the complex procedural, substantive, statutory, regulatory, and constitutional law implicated by the regulations addressed by the CBA for its members." Lori Decl., ¶ 13. Nor could CBA members afford the cost of individual case-by-case litigation. *Id.* The effect of Defendants' case-by-case requirement is to chill CBA members' exercise of their First Amendment rights. *Id.*, ¶¶ 17-18.

Third, HHS's consultation provision can only be accessed by "recipients." § 92.302(b). "Recipients" are "health programs or activities, any part of which" receives federal financial aid "directly or indirectly." 89 Fed. Reg. at 37,526; 45 C.F.R. § 92.2. Only CBA members that are medical

[10] Archbishop Lori is both the chairman of CBA's board and a representative of CBA's member, the Archdiocese of Baltimore. His declaration is submitted in both his capacity as a representative of CBA and as a CBA member.

providers receive federal financial assistance. Thus, most CBA members, who are nevertheless subject to the Mandate by way of their TPAs or insurers, cannot even access this option.

Fourth, Defendants' religious consultation procedures are not anonymous. For example, Defendants promise that, upon receipt of a FOIA request, they will disclose the names and submissions of those who consulted with HHS about a religious exemption, creating a "Hall of Shame" opportunity for activists ready to punish those seeking such protection. *Id.* at 37,555, 37,660. This is contrary to "longstanding Supreme Court authority supporting standing for organizations whose injured members are not named." *Speech First, Inc. v. Shrum*, 92 F.4th 947, 950-51 (10th Cir. 2024) (citing *NAACP v. Alabama*, 357 U.S. 449, 458–59 (1958); and *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 53 (2006), both cases involve anonymous membership organizations). To sustain its attempt to compel disclosure of CBA member's identities, Defendants would have to establish "a substantial relation between the disclosure requirement and a sufficiently important governmental interest and that the disclosure requirement be narrowly tailored to the interest it promotes," which it has made no attempt to do. *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021). "Given our cancel culture and given that such applications would be subject to discovery by third parties upon receipt of FOIA requests as occurred with the Title IX religious exemption applicants, case-by-case consideration would have a profound chilling effect on Catholic employers' willingness to seek legal protection of their religious exercise." Lori Decl., ¶ 16.

Viewed in this light, it becomes clear that the purpose of Defendants' consultation procedure is to eliminate CBA's ability to vindicate its members rights. By not allowing CBA members to assert their rights collectively in Court, Defendants' religious consultation processes themselves injure CBA members' constitutional rights. This Court has already concluded as much: "In this

regulatory environment, agencies seem to be enacting illegal regulations but drafting them in such a way as to make a legal challenge difficult because of standing." *Cath. Benefits Ass'n*, 2024 WL 4315021, at *3 n.4. This maneuver is simply another step in Defendants' "legal Penrose staircase" that forces covered employers to a "Kafkaesque burden . . . in even deciding whether the [Mandate] applies to [them]—much less how and to what extent it applies." *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 373 n.10 (N.D. Tex. 2021) (subsequent history omitted). "The executive branch should not be permitted to prevent judicial review of agency actions that clearly violate the civil liberties of American citizens." *Cath. Benefits Ass'n*, 2024 WL 4315021, at *3 n.4.

Defendants argue that their consultation provision renders any injury to CBA members speculative and posit a multi-chain link of "contingencies" that must occur before standing can exist. Doc. 57, p. 22-23. This argument has been oft rejected in similar litigation.[11] CBA members are subject to the Mandate, and thus standing is presumed. *Ass'n of Am. Railroads*, 38 F.3d at 586; *Texas*, 933 F.3d at 446. And the multi-link chain of contingencies Defendants scare up is actually just one. After this case, an EEOC Commissioner can file a Commissioner's Charge against CBA's members based upon the CBA's statements herein. *See* 42 U.S.C. § 2000e-5(b) (empowering Commissioners to file charge).

Braidwood Management, Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023) is on all fours with this case. There, Christian employers brought a pre-enforcement challenge to EEOC enforcement guidance

---

[11] *Religious Sisters of Mercy*, 55 F.4th at 607 (no further factual development necessary to determine credible threat of enforcement from EEOC exists); *Braidwood Management*, 70 F.4th at 931 (rejecting "EEOC's near talismanic mantra that 'further factual development'" is necessary); *Louisiana*, 705 F. Supp. 3d at 656 (rejecting argument that religious plaintiffs' challenge to EEOC rule was not ripe because of possible contingencies); *Cath. Benefits Ass'n*, 2024 WL 4315021, at *4 (same).

that required covered employers to accommodate certain sexual practices contrary to the employers' faith. As it does here, EEOC outlined a multi-link chain of events that it says would have to occur before the employers' fear of enforcement would be credible. *Id.* at 926. The Fifth Circuit disagreed:

> Plaintiffs' credible-threat analysis is quite simple. First, they admit they are breaking EEOC guidance, which the EEOC does not seriously contest. They posit statutory and constitutional issues with the laws under which they are at risk of being prosecuted. Those issues, they allege, are already forcing plaintiffs to choose either to restrict their religious practices or to risk potential penalties. And the EEOC's actions in *Harris*, which the EEOC won under a less violative set of facts, indicate that plaintiffs, too, have a legitimate fear of prosecution, chilling their rights. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. Finally, the EEOC refuses to declare affirmatively that it will not enforce Title VII against the plaintiffs' policies on homosexual and transgender behavior.

Id. at 926–27; *see also Cath. Benefits Ass'n v. Burrows*, at *4 (adopting *Braidwood*'s reasoning).

Defendants' argument is not new. Since 2016, they have contended that *Defendants*, not the courts, are best positioned to determine the meaning of various religious and conscience protections and that this deprives the courts of jurisdiction. *See* Doc. 51 at 18-19 (collecting arguments from Defendants' previous briefing in related litigation). Most recently, Defendant EEOC made this argument in *Catholic Benefits Association v. Burrows*, contending that "because an employer has religious defenses to" EEOC enforcement and investigations, which "EEOC commits to evaluating . . . on a case-by-case basis," this Court lacked jurisdiction over a pre-enforcement challenge. 2024 WL 4315021, at *4. This Court disagreed, explaining "[a] religious defense is not the same as a religious exemption. The burden of investigation and possible litigation, at the very least, provides a substantial likelihood of added regulatory burden and compliance costs." *Id.*

Finally, Defendants suggest that CBA members are *required* to participate in Defendants' religious consultation procedures before this Court would have jurisdiction. Doc. 57, p. 23 (arguing that CBA members "must" comply with 45 C.F.R. § 92.302 before proceeding to Court). But this argument runs headlong into caselaw that an administrative-exhaustion requirement only exists if "Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision," such that "the failure by a party to exhaust is a jurisdictional bar." *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 996-97 (8th Cir. 2006). "Only statutory exhaustion requirements containing 'sweeping and direct' language deprive a federal court of jurisdiction." *Id.* at 999. Nowhere do RFRA, Section 1557, or Title VII do so. Just the opposite: "RFRA . . . plainly contemplates that *courts* would recognize exceptions—that is how the law works." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006). By contrast, Defendants' religious consultation provisions were created administratively, by Defendants, to defeat CBA members' rights and this Court's jurisdiction. CBA plaintiffs do not have to adjudicate their rights before a biased Article I agency. They can instead file suit under RFRA to have their religious rights adjudicated by an Article III court. *See Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (reversing trial court's dismissal of plaintiff's RFRA claim despite his failure to first seek a religious use exemption in an administrative process created by the DEA).

1.4. Defendants concede CBA Plaintiffs have standing to challenge EEOC's interpretation of Title VII pursuant to *Religious Sisters of Mercy*.

Finally, Defendants concede that this Court and the Eighth Circuit have already ruled in *Religious Sisters of Mercy* that CBA members have standing to challenge EEOC's interpretation of Title VII to require coverage of gender-transition services and that that interpretation is unchanged.

Doc. 57, p. 25-26. Defendants try to sidestep the Eighth Circuit's controlling decision in *Religious Sisters* by arguing that CBA's injury arises from third-party lawsuits. Doc. 57, p. 26. That is incorrect. "Private enforcement is simply an additional available remedy." *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 62 (9th Cir. 2024). And, as such, it "does not undercut redressability." *Id.*

Furthermore, CBA respectfully requests that the Court enjoin EEOC from issuing any notice-of-right-to-sue letters (NRTS) arising from the Mandate. CBA Plaintiffs did not request this relief initially in their motion. However, since that motion was filed, intervening authority from this Court holds that an injunction of the NRTS is proper. In *Catholic Benefits Association v. Burrows*, 2024 WL 4315021, at *10, this Court preliminarily enjoined EEOC from issuing any NRTS against a CBA member that would require the member to accommodate employee abortions, false pronouns, or access to single-sex spaces under the Pregnant Workers Fairness Act or Title VII. The Court explained, "[a] letter to an employee from an agency detailing a right to sue is still a determination of the agency that the organization is not subject to a religious exemption, which would bar any suit." *Id.* That is, EEOC cannot burden CBA members' religious rights with its errant interpretation of Title VII through its investigation process, which includes the NRTS. The Western District of Louisiana also recently enjoined EEOC from issuing NRTS in a challenge brought by the United States Conference of Catholic Bishops, the Diocese of Lake Charles, and the Diocese of Lafayette. *Louisiana v. Equal Emp. Opportunity Comm'n*, 705 F. Supp. 3d 643, 664 (W.D. La. 2024) ("EEOC is preliminarily enjoined with respect to the above-listed parties from . . . issuing

any Notice of Right to Sue with respect to the same."). These intervening decisions support CBA's revised request.[12]

2. The participation of individual CBA members is not required.

The Government does not dispute that the sworn testimony of CBA's members submitted with the CBA's amended complaint at paragraphs 13-44 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*, 55 F.4th at 601-02 (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*, 513 F. Supp. 3d at 1137. Citing *Harris v. McRae,* 448 U.S. 297, 321 (1980), the Government argues that CBA cannot satisfy the third prong of the associational-standing test because associational standing is inappropriate in Free Exercise and RFRA cases. Doc. 57, p. 32-35. This argument is incorrect for three reasons.

---

[12] Defendants argue that CBA's claims are not ripe. However, because CBA Plaintiffs have standing to challenge the Mandate, CBA Plaintiffs' claims are "necessarily . . . ripe for judicial review." *Religious Sisters of Mercy*, 55 F.4th at 608; *see also Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1145 (D.N.D. 2021) (Because CBA's challenge to the Mandate "present[ed] purely legal questions—whether the challenged interpretations of federal law violate the RFRA . . . —and need no additional factual development," the case was ripe).

2.1. 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*, 513 F. Supp. 3d at 1137 ("The CBA easily satisfies the second and third requirements for associational standing."), and *Catholic Benefits Association v. Burrows*, 2024 WL 4315021, at *6 ("The Court does not find merit in the argument that the CBA has not established all its members hold identical views and therefore participation of individual members is essential.").

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 participation of CBA's members is required—"[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)).

2.2. 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*, 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*, 2022 WL 1573689, at *8, 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.*

2.3. *McRae* is inapposite.

Third, the Government's argument is wrong on the merits, because the decisions it relies on are inapposite. *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, 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* Doc. 46, ¶¶ 78-99. As stated in the CBA's amended 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 ¶ 51. 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.

Doc. 46-3, p.1, CBA Nonprofit Employer App. for Membership; *see also* Doc. 46-1, CBA Articles, art. VI, Members; Doc. 46-2, p. 1, CBA Bylaws, art. 3.1.2; Doc. 46-4, 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." Doc. 46, ¶ 88 (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 service providers and employers to perform and insure gender-transition services cannot be determined on an association-wide basis. Doc. 57, p. 33-34. 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. All.*, 2022 WL 1573689, at *8 (rejecting the Government's argument).

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.

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.[13] If it were otherwise, believers' First Amendment right of association would be

---

[13] *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."); *Cath. Benefits Ass'n v. Burrows*, 2024 WL 4315021, at *6 (D.N.D. Sept. 23, 2024) ("The CBA Has Associational Standing" to assert RFRA claim.); *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 *4-5 (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

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 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).

3. CBA's future members should be protected in the interest of judicial efficiency.

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." Doc. 46, ¶ 45. 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

Defendant's invocation of *McRae* and holding association could assert free-exercise claim on behalf of its members).

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).

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 it here. Undeterred, the Government again argues against extending injunctive relief to the CBA's future members. Doc. 57, p. 38-39. Indeed, 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)). Just last month, this Court *again* protected CBA's future members. *Cath. Benefits Ass'n*, 2024 WL 4315021, at *10 ("Third, Judicial efficiency weighs in favor of protecting future members."). And other courts have similarly entered injunctions protecting future members of 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").

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 [materially] 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.

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.

4. 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, Doc. 57, p. 35-36, 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.* But for all the reasons stated above, CBA's members have standing because they're regulated parties, and they face a credible threat of enforcement.

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. Doc. 57, p. 35-36. 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.

Indeed, CBA Plaintiffs must change their policies and speech now or live under a Sword of Damocles until enforcement. The 2024 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, 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, 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.

5. The 2024 Rule requires CBA members to perform abortions.

Defendants admit that the 2024 Rule includes an abortion mandate but deny CBA members have standing to challenge it. Doc. 57, p. 14. This is so, Defendants argue, because the 2024 Rule makes a distinction between abortions refused for conscientious reasons, and abortions refused on "discriminatory" grounds, for example "race or disability" or sex. *Id.* But that is precisely what CBA members fear. If a CBA member will provide a similar procedure in other contexts, will they have to do so for abortions if that would consist of race or sex or disability discrimination? *See* 89 Fed. Reg. at 37,576 ("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."); *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 spontaneous miscarriages, then the 2016 Rule barred a later refusal to perform those procedures for abortions."). For CBA members, Defendants' distinction is non-existent. For example, CBA members oppose sex-selective abortions that so often occur in IVF process because

they're *sex*-selective.[14] CBA members oppose abortions of children with down syndrome that have, in the United States, nearly "eliminated" such individuals, because of the child's *disability*.[15] That is, a CBA members' motivation for refusing to perform an abortion might very well be disability or sex or disability, *i.e.* grounds prohibited by the 2024 Rule.

6. Defendants' motion to dismiss should be denied.

Finally, Defendants' motion to dismiss should be denied for all the reasons stated herein. Additionally, Defendants' motion to dismiss is improper because it does not address the CBA Plaintiffs' remaining claims under the APA and the First Amendment, which are currently stayed. Any dismissal of those claims would be improper.

7. Plaintiffs respectfully request oral argument.

Given the import of the issues in this case, Plaintiffs respectfully request the Court set the parties' motion for an in-person oral argument at a time convenient for the Court.

---

[14] *See* Congregation for the Doctrine of Faith, *Donum Vitae Instruction On Respect For Human Life In Its Origin And On The Dignity Of Procreation Replies To Certain Questions Of The Day* (Feb. 22, 1987) ("Certain attempts to influence chromosomic or genetic inheritance are not therapeutic but are aimed at producing human beings selected according to sex or other predetermined qualities. These manipulations are contrary to the personal dignity of the human being and his or her integrity and identity."), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

[15] St. John Paul II, *Evangelium Vitae* (Mar. 25, 1999) ("[I]t not infrequently happens that these techniques are used with a eugenic intention which accepts selective abortion in order to prevent the birth of children affected by various types of anomalies. Such an attitude is shameful and utterly reprehensible, since it presumes to measure the value of a human life only within the parameters of 'normality' and physical well-being, thus opening the way to legitimizing infanticide and euthanasia as well."), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html.

CONCLUSION

By CBA's count, the Mandate has now been enjoined as illegal on both RFRA and non-RFRA grounds in at least seven cases since 2016:

1. *Texas v. Becerra*, 2024 WL 3297147, at *1 (E.D. Tex. July 3, 2024) (explaining that "federal agencies are attempting to impose a sweeping new social policy by manipulating and perverting the statutory text that constrains them" and enjoining the 2024 Rule).
2. *Tennessee v. Becerra*, 2024 WL 3283887, at *14 (S.D. Miss. July 3, 2024) (enjoining 2024 Rule).
3. *Fla. v. Dep't of Health & Hum. Servs.*, 2024 WL 3537510, at *20-21 (M.D. Fla. July 3, 2024) (enjoining 2024 Rule).
4. *Christian Emps. All. v. United States Equal Opportunity Comm'n*, 2024 WL 935591, at *10-11 (D.N.D. Mar. 4, 2024) (permanently enjoining the Mandate, including EEOC's interpretation of Title VII).
5. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 609 (8th Cir. 2022) (affirming injunction of the Mandate except as to CBA's associational standing).
6. *Neese v. Becerra*, 640 F. Supp. 3d 668, 687 (N.D. Tex. 2022) (awarding declaratory relief that Section 1557 does not require physicians to provide gender-transition services).
7. *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 378 (N.D. Tex. 2021) (enjoining HHS from interpreting or enforcing Section 1557 to require gender-transition services (subsequent affirmance by Fifth Circuit omitted)).

Those seven cases, two of which reached the Fifth and Eighth Circuits respectively, involve both APA and RFRA challenges to the Mandate. Notwithstanding the fact that ten federal courts, encompassing fourteen federal judges have said that the Mandate is illegal and can be challenged pre-

enforcement, Defendants, who insist they take religious conscience protections seriously, persist in attempting to force CBA's members to perform and cover procedures that violate their sincerely held religious beliefs. For all the reasons stated by this Court and other courts, Defendants' Mandate should be enjoined.

Respectfully submitted,

/s/ Andrew Nussbaum

L. Martin Nussbaum
Andrew Nussbaum
First & Fourteenth PLLC
2 N. Cascade Ave., Suite 1430
Colorado Springs, CO 80903
(719) 428-2386
martin@first-fourteenth.com
andrew@first-fourteenth.com
Attorneys for Plaintiffs

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

DECLARATION OF MOST REVEREND WILLIAM LORI

1. My name is William Lori. I am over 21 and capable of making this declaration. I have not been convicted of a felony or crime involving dishonesty. The facts I state here are within my personal knowledge, and if I were called upon to testify to these facts, I could and would competently do so.

2. I have served as the Chairman of the board of directors for the Catholic Benefits Association ("CBA") from its inception over ten years ago. I also serve as the Archbishop of the Archdiocese of Baltimore. The Archdiocese of Baltimore is a CBA member. I provide this declaration both as a CBA leader and CBA member.

3. While the CBA's legal form is that of a § 501(c)(3) nonprofit, nonstock corporation, it functions as an association. In fact, after reviewing what Alexis de Tocqueville

said about associations, the CBA trademarked the phrase "power of association" in 2021 because that phrase so well described the CBA's purpose.

4. In his 1835 commentary, DEMOCRACY IN AMERICA, he saw that associations were part of our constitutional fabric.

> When Americans have a feeling or idea they wish to bring to the world's attention, they will immediately seek out others who share that feeling or idea and, if successful in finding them, join forces. From that point on, they cease to be isolated individuals and become a power to be reckoned with, whose actions serve as an example; a power that speaks, and to which people listen.

5. Because of the power of Catholic employers coming together, especially in the face the growing number of state and federal rules pushing them to compromise on their values, thousands of Catholic employers have united within the Catholic Benefits Association so that, together, they might find solutions permitting them to focus on the work of their ministries and their Catholic-owned businesses in a manner that is consistent with their Catholic values.

6. The Catholic Benefits Association now serves over 1,400 Catholic employers plus over 7,000 Catholic parishes. These 8,400 employers include 87 Catholic dioceses and archdioceses and many Catholic charities, colleges, schools, hospitals, skilled nursing centers, nursing homes, senior residences, Catholic-owned business, and others.

7. The CBA is presently engaged in two lawsuits against two federal agencies. In those lawsuits, we are seeking religious exemption for our members from immoral mandates. I understand that the government's position in those cases is that, while it says it respects and cares for religious liberty rights, it insists that those rights cannot be determined on an association-wide basis but only on a "case-by-case" basis.

8. It would be devastating to the CBA if the federal agencies promulgating the immoral mandates refuse to consider CBA's requests for religious exemption on an association-wide basis and, instead, require the CBA to apply for religious exemption one

member at a time. This would destroy the CBA's own exercise of religion, its free speech rights, and its right to petition the government.

9. Such a rule would also be devastating to CBA members as it would gravely burden their free exercise rights, free speech rights, petition rights, and rights to associate.

10. There are many reasons why refusing association-wide religious exemption and limiting consideration request for religious exemption to a case-by-case basis would be so devastating to the CBA and its members.

11. The federal regulations that the CBA has addressed are many. Each has been quite complex. The CBA was born in the wake of 2010 regulations issued jointly by the United States Department of Labor, the United States Treasury, and the United Stated Department of Health and Human Services ("HHS"). Those regulations involved oft-changing agency interpretations of a provision in the Affordable Care Act related to mandating women's protective services. The federal agencies interpreted the women's protective services provision as mandating health plan coverage of contraceptives, abortifacients, and sterilization. That provision was part of a very lengthy and complicated Affordable Care Act. The "contraceptive mandate" regulation was modified by other lengthy regulations over a dozen times. That mandate was the subject of litigation in over 100 cases at levels of the District Courts, the Courts of Appeal, and the Supreme Court, and many of those cases resulted in precedents that themselves became relevant in the ongoing litigation.

12. In 2016, HHS issued a regulation interpreting another provision of the Affordable Care Act that barred discrimination on the basis of sex. HHS's regulation interpreted the prohibition of sex discrimination as requiring coverage of abortion and gender transition services. That regulation, almost 100 pages in length, was also modified by subsequent regulations and challenged in several lawsuits. It was replaced in 2024 by another regulation that is the subject of this lawsuit and is 181 pages in length. Altogether the

government has forced the CBA to litigate now for almost eight years to acquire exemption from these two regulations.

13. Few if any of the attorneys regularly serving CBA members have expertise in the complex procedural, substantive, statutory, regulatory, and constitutional law implicated by the regulations addressed by the CBA for its members. Neither the Archdiocese of Baltimore nor any of our CBA members could afford the cost of hiring counsel just to explain what these regulations mean let alone to research the various possible sources of statutory or constitutional exemptions so that the particular member could then submit an application or request for religious exemption to the federal agency.

14. The CBA has engaged in extended and successful litigation for its members, first, with regard to the 2010 "contraceptive" mandate and, second, with regard to the 2016 gender transition services mandate. The attorneys fee petition we submitted in each of those cases exceeded $1 million. Even if one assumed that, on a mass production scale, the CBA could submit administrative applications, on a member-by-member basis, for religious exemption for $10,000 each in order to comply with the government's preferred case-by-case consideration, this would result in costs of $84 million. If each of our members had to engage their own counsel to submit such applications, the cost per application would be far higher.

15. By coming together in an association that seeks religious liberty protections for these and other regulations, the cost to CBA members is only their membership dues of $1.50 per covered employee monthly. The CBA has not raised its dues from its inception.

16. But there are other costs associated with case-by-case applications for religious exemption. Each such application would require a CBA member to submit its name to the relevant federal agency and to admit that it must either violate the agency's regulation or its Catholic values. Thus, those whose applications were rejected would likely become subject to an enforcement action. Given our cancel culture and given that such applications would be

subject to discovery by third parties upon receipt of FOIA requests as occurred with the Title IX religious exemption applicants, case-by-case consideration would have a profound chilling effect on Catholic employers' willingness to seek legal protection of their religious exercise. Such employers would reasonably fear of being accused of making reprehensible choices, of becoming the target of individual or class-based lawsuits, of becoming disqualified for grants from foundations, and of becoming disqualified for government contracts.

17. The cost of litigation and the loss of anonymity that would necessarily occur if a Catholic employer had to request religious exemption on a case-by-case basis would pressure many Catholic employers to compromise their religious principles.

18. Because case-by-case consideration of applications for temporary administrative religious exemption would have so many chilling effects on CBA members, such a process would not only discourage members from asserting their religious liberty rights but also their constitutional rights to associated with like-minded Catholic employers.

19. Some of the regulations that morally compromise Catholic employers involve subtle ethical issues. By coming together as an association, the CBA has substantial theological and ethical expertise that it shares with its members.

20. Finally, it is also my understanding that the protections offered by the federal agencies under the special procedures they have created would, if successful, provide employers' religious liberty exemption limited to the administrative process. This means that, if there were an enforcement action or a private lawsuit against a CBA member, the member would have to establish its eligibility for religious exemption a second time.

Executed on the ___ day of October 2024.

+William E. Lori

Most Rev. William Lori