UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; and BISMARCK DIOCESE,

Plaintiffs,

v.

CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 1:24-cv-00142-DMT-CRH

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

TABLE OF CONTENTS

INTRODUCTION

Defendants concede that the PWFA Rule and the Enforcement Guidance require covered employers to accommodate employee abortions, immoral infertility treatments, false pronouns, and access to single-sex spaces by members of the opposite sex. Resp. at 5 (The PWFA Rule requires accomodation for "employees who choose to have (or not have) an abortion." "[T]he PWFA [Rule] may encompass circumstances in which employees seek workplace accommodations for infertility treatments."); *id.* at 7 ("The Guidance also provides examples of harassing conduct that courts have found can contribute to unlawful harassment, such as conduct that includes repeated and intentional misgendering and the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity." (cleaned up)). They also concede that they refused to incorporate Title VII's categorical religious exemption or RFRA's religious exemption, while simultaneously exempting small employers and those employers who would experience an undue hardship. Resp. at 4, 23–24, 30. And Defendants do not dispute that there has been no change to the facts or law since this Court preliminarily enjoined the challenged aspects of the PWFA Rule and the Enforcement Guidance. Because the preliminary-injunction order was correct and because Defendants continue to refuse to disavow enforcement against CBA and its members, summary judgment should be entered forthwith. All of Defendants' arguments to the contrary are incorrect for the reasons stated in the Court's preliminary-injunction order.

ARGUMENT

1. The preliminary injunction should be converted into a permanent injunction before the change in presidential administrations.

The Court's preliminary injunction should be converted into a permanent injunction. Defendants concede there has been no change to the facts or law since the Court granted CBA Plaintiffs'

motion for preliminary injunction and that their arguments were addressed by the Court at the preliminary-injunction stage. Defendants do not dispute that F.R.C.P. 65(a)(2) allows for preliminary-injunction proceedings to be advanced and consolidated with a merits determination to avoid unnecessary and duplicative effort. Defendants' response brief therefore amounts to a motion for reconsideration of the preliminary-injunction order. Because the Court's preliminary-injunction order was correct and there have been no material changes to the facts or law in the interim, summary-judgment should be granted forthwith before the inauguration of a new presidential administration to avoid further unnecessary delays.[1]

2. CBA Plaintiffs have standing.

There are two Article III injuries present here: (1) constitutional and (2) regulatory. Defendants' arguments to the contrary have already been rejected by the Court. *Cath. Benefits Ass'n v.*

[1] CBA Plaintiffs have substantial reason to fear Defendants' delay tactics and relating prejudice resulting from a change in presidential administrations. In CBA's 2016 challenge to EEOC and HHS's gender-transition mandate, Defendants sought *fourteen stays* of that case over the course of four years, after the change in administrations in January 2017. Yet at the end of those unnecessary delays, Defendants' position that covered entities must cover gender-transition services remained the same. This Court therefore enjoined the gender-transition mandate in *Religious Sisters of Mercy* on January 19, 2021, the day before the most recent change in presidential administrations. Yet the delays accomplished Defendants' goal, as CBA Plaintiffs are still litigating issues related to the *Religious Sisters of Mercy* case more than eight years after filing the original suit. Among other things, if Defendants truly took Free Exercise rights seriously, they would not be forcing CBA into protracted years-long litigation as to whether CBA and its members are entitled to a religious exemption. *See Religious Sisters of Mercy et al. v. Becerra et. al.*, 3:16-cv-386 (D.N.D), ECF No. 45 (May 26, 2017) (request to stay), ECF No. 45 (May 26, 2017) (request to extend stay), ECF No. 61 (May 21, 2018) (request to extend stay), ECF No. 62 (July 20, 2018) (request to extend stay), ECF No. 64 (Oct. 18, 2018) (request to extend stay), ECF No. 67 (Jan. 15, 2019) (request to stay), ECF No. 70 (Feb. 19, 2019) (request to extend stay), ECF No. 71 (May 31, 2019) (request to extend stay), ECF No. 76 (Oct. 4, 2019) (request to extend stay), ECF No. 78 (Jan. 2, 2020) (request to extend stay), ECF No. 81 (Apr. 3, 2020) (request to extend stay), ECF No. 83 (Jul. 6, 2020) (request to extend stay), ECF No. 86 (Aug. 5, 2020) (request to extend stay), ECF No. 88 (Oct. 5, 2020) (request to extend stay).

Burrows, 732 F. Supp. 3d 1014, 1022-24 (D.N.D. 2024) (rejecting the same standing arguments repeated by Defendants in their response).

2.1. Pre-enforcement standing is presumed in suits challenging recently promulgated regulations that infringe First Amendment rights.

Defendants concede that the first two elements of the *Susan B. Anthony List* standard for pre-enforcement standing are present. CBA Plaintiffs (1) intend to "engage in a course of conduct arguably affected with a constitutional interest," (2) "arguably proscribed by a statute," the PWFA and Title VII as interpreted by the PWFA Rule and the Enforcement Guidance. *Religious Sisters of Mercy*, 55 F.4th at 603 (Plaintiffs included CBA). Defendants only dispute the third element—whether the threat of prosecution is credible. A credible threat of prosecution exists because Defendants will not disavow enforcement of the PWFA Rule or the Enforcement Guidance, which under *Religious Sisters of Mercy* "is actually a concession that it may do so." *Cath. Benefits Ass'n*, 732 F. Supp. 3d at 1022. And in any event, in pre-enforcement challenges to recently promulgated regulations and policies such as the PWFA Rule (effective on June 18, 2024) and the Harassment Guidance (effective on April 29, 2024) that restrict First Amendment rights, standing is presumed. Courts "assume a credible threat of prosecution" in a "pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict" First Amendment rights. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (collecting cases).

Defendants assert that they have never instituted an enforcement action against a religious employer in a case involving gender identity. Resp. at 11. That is incorrect. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566 (6th Cir. 2018), which was one of the consolidated cases considered by the Supreme Court in the *Bostock* litigation, involved an EEOC enforcement action against a Christian employer for its faith-based employment policies regarding gender

identity. In that case, as here, EEOC strenuously opposed the Christian employer's religious-freedom defenses. *Id.* at 581–91. This hostility to religious freedom is consistent with EEOC's recent actions in *Lange v. Houston County*, No. 22-13626 (11th Cir. 2023), in which it filed an *amicus* brief in support of a plaintiff 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). In that brief, the EEOC 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 EEOC 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 "enforcement authority under Title VII." *Id.* at 1–2. It is also consistent with the EEOC's refusal to grant religious exemptions to religious groups in recent litigation against mandates under the PWFA, Title VII, and Section 1557 of the Affordable Care Act brought by the United States Conference of Catholic Bishops, Catholic University of America, the Diocese of Lake Charles, the Religious Sisters of Mercy, the Christian Employers Alliance, the Franciscan Alliance, the Diocese of Fargo, the Diocese of Bismarck, Braidwood Management, and the CBA. Defendants similarly argue that EEOC has never enforced the PWFA Rule against any employer regarding abortion or fertility care. Resp. at 11. But that is only because the PWFA Rule was enacted last summer and was promptly enjoined by this Court, the Northern District of Texas, and the Western District of Louisiana. *Texas v. Garland*, 719 F. Supp. 3d 521 (N.D. Tex. 2024); *Louisiana v. Equal Emp. Opportunity Comm'n*, 705 F. Supp. 3d 643, 649

(W.D. La. 2024). It is Defendants' burden to "identify a long history of nonenforcement against the plaintiffs and others like them," *Religious Sisters of Mercy*, 55 F.4th at 606, and they have not done so.

And yet, an enforcement action is just a matter of time. Catholic employers (and CBA members) are regularly sued after EEOC investigation, claims-processing, and enforcement for policies related to Catholic teaching on IVF, *Herx v. Diocese of Fort Wayne-South Bend*, 48 F.Supp.3d 1168 (N.D. Ind. 2014); gender identity, *C. P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, 2022 WL 17788148 (W.D. Wash. Dec. 19, 2022) (concerning Catholic hospital); same-sex marriage, *Doe v. Catholic Relief Services.*, 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). Defendants attempt to distinguish these cases because they were litigated by private parties. Resp. at 11. But they resulted from EEOC first investigating and approving the suit. In *Herx*, for example, EEOC subjected the plaintiff-Diocese (and CBA member) to an investigation, rejected the Diocese's religious-freedom defenses that its policies regarding IVF were faith-based, and "conclude[ed] that the Diocese had terminated Mrs. Herx's employment in violation of Title VII." *Herx*, 48 F. Supp. 3d at 1173.

Defendants argue that "numerous contingencies would all have to occur" for a threat of enforcement to be credible. Resp. at 11-12. This argument has been repeatedly rejected in similar litigation.[2] CBA members are subject to the PWFA Rule and the Guidance, and thus standing is

[2] *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 the Final Rule was not ripe because of possible contingencies).

presumed. *See* Section 2.2, *infra*. And the multi-link chain of contingencies Defendants conjure up is actually just one. After this case, a 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). The Fifth Circuit has rejected these arguments in *Braidwood Management., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023), and its analysis is on all fours here:

> Plaintiffs' credible-threat analysis is quite simple. First, they admit they are breaking EEOC guidance . . . . 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. . . . Finally, the EEOC refuses to declare affirmatively that it will not enforce Title VII against the plaintiffs' policies . . . .

70 F.4th at 926-927.

Defendants argue that *School of the Ozarks v. Biden*, 41 F.4th 992 (8th Cir. 2022) supports their position that CBA's harm here is speculative. Resp. at 12-13. That is incorrect. In *Ozarks*, the government defendant had expressly agreed to provide the plaintiff in that case a blanket religious exemption from the challenged interpretation. *Id.* at 999. And in *Ozarks* the government had never enforced the interpretation that was being challenged. *Id.* Here, by contrast, Defendants have neutered Title VII's blanket religious exemption and have specifically enforced their errant readings of the statutes as recently as January 2024. *See Roxanna B.*, 2024 WL 277871, at *12.

2.2. The PWFA Rule and the Enforcement Guidance impose a regulatory burden on CBA Plaintiffs.

Defendants do not dispute that the compliance cost of the PWFA Rule is written onto the face of the regulation, 89 Fed. Reg. 29,096, 29,175-77 (detailing compliance cost); or that the Enforcement Guidance requires covered employers to change their policies and handbooks to give access to single-sex spaces and accommodate false pronouns; or that "[t]he burden of investigation and possible litigation, at the very least, provides 'a substantial likelihood of added regulatory burden

and compliance costs, '" *Cath. Benefits Ass'n*, 732 F. Supp. 3d at 1022; or that an "additional regulatory burden" "undeniably [creates] a . . . '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). Defendants instead argue that the regulatory burden imposed by the PWFA Rule and the Enforcement Guidance are not actual or imminent "unless and until" an employee requests accommodation. Resp. at 21. But that mistakes two distinct doctrines of Article III standing—pre-enforcement review (which requires a credible threat of enforcement) and regulatory burden (which does not). The regulatory burden exists separate and apart from the admitted credible threat of enforcement because of the cost of adopting policies compliant with the PWFA Rule and the Enforcement Guidance—not accommodating any specific employee's request. Because Defendants do not dispute that the PWFA Rule and the Enforcement Guidance impose an added regulatory burden by way of compliance costs, *see* Compl. ¶¶ 52, 56, 117, 133, 159, 160, CBA Plaintiffs have standing.

2.3. Declaratory relief and a permanent injunction will redress CBA Plaintiffs and their members' injuries.

Defendants argue that judgment in favor of the CBA Plaintiffs would not redress CBA's members' harms because a private party could still sue a CBA member. Resp. at 14-15. This is incorrect for two reasons. First, CBA Plaintiffs request the Court enjoin the PWFA Final Rule and the Harassment Guidance, and declare that neither the PWFA nor Title VII require CBA members to accommodate abortion, immoral infertility treatments, false pronouns, or access to single-sex spaces, which will ameliorate the harm associated with Defendants' errant interpretations of the PWFA and Title VII. Second, "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.*

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

An association like the CBA may sue on behalf of its members if: "(1) the individual members would have standing to sue in their own right; (2) the organization's purpose relates to the interests being vindicated; and (3) the claims asserted do not require the participation of individual members." *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 986 (8th Cir. 2011). Defendants dispute only the third element of this test, Resp. at 15-17, which under binding Eighth Circuit precedent is satisfied if CBA "seeks only declaratory and prospective injunctive relief." *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 533 (8th Cir. 2005). The CBA seeks only declaratory and prospective injunctive relief. It thus has associational standing.

Defendants overlook this and argue with *no* evidentiary support that CBA members' beliefs differ regarding abortion, immoral infertility treatments, false pronouns, and access to single-sex spaces by members of the opposite sex. Resp. at 15-16 (disputing without evidentiary support CBA "members' uniform beliefs on the matters at issue here"). That argument is insulting, wrong, and beside the point. First, CBA has explained in meticulous detail its members' beliefs in its verified complaint and through the sworn statements of the archbishops of Baltimore and Minneapolis-St. Paul (both of whom are members of the CBA board) and the bishops of Bismarck, North Dakota and Baker, Oregon. For example:

- "[E]lective or '[d]irect abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law.' CCC ¶ 2271, *see also Dignitas Infinita*, ¶ 47 (quoting John Paul II, Encyclical Letter *Evangelium Vitae* ¶ 58 (March 25, 1995))." Compl. ¶ 65.

- "[M]ethods [of infertility treatment that] involve third parties (medical technicians, donor gametes, or surrogate wombs); separate fertilization from the conjugal act; or methods that entail conception outside of a marriage recognized as valid by the Church are a violation of the dignity of the persons involved and are gravely immoral. ERD at ¶ 38." Compl. ¶ 73.

- "Requiring a person to identify another by a sex other than his or her God-gifted sex would be to require such a person to act against central, unchangeable and architectural teachings of the Catholic faith. It would also contradict the teachings of the Bible concerning God's creative sovereignty, contradict reason and truth, and betray our sacred obligation not to knowingly harm other persons, particularly the most vulnerable. The implications are so much greater than whether to utter the words "he" or "she." Instead, to demand that a Catholic deny another's sex is asking him or her to avow another religious worldview." Compl. ¶ 79.

- "Requiring a Catholic institution to admit persons of one sex into a space reserved for the opposite sex violates the Catholic theological commitment to modesty—the preservation of respect for the dignity of the person. In many circumstances, such a requirement would also undercut CBA members' concern for an environment safe from embarrassment or misconduct." Compl. ¶ 84.

Contrary to Defendants' suggestion, Resp. at 15-16, CBA's membership criteria require that each employer be Catholic and provide employee policies and benefits consistent with Catholic teaching as carefully defined by CBA's bylaws. Non-profit members must be listed in *The Official Catholic Directory* or certified by CBA's secretary as being Catholic as defined by CBA's bylaws. Compl. ¶ 37. For-profit members must be majority-owned or governed by Catholics and must adopt written policies that it will not provide any employment benefits "inconsistent with Catholic values" (such as accommodations for abortion, immoral infertility treatments, false pronouns, or access to single-sex spaces). Compl. ¶ 38.

Second, Defendants argument is legally irrelevant. "An organizational plaintiff need not establish all its members would have standing to sue individually so long as it can show that any one of them would have standing." *Christian Emps. All. v. United States Equal Opportunity Comm'n*, 719

F. Supp. 3d 912, 921 (D.N.D. 2024) (citing *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013)). Because CBA Plaintiffs have identified two members who are not parties to the suit (the Archdiocese of Minneapolis-St. Paul and the Diocese of Baker, Oregon), CBA may sue on behalf of its unnamed members.

Defendants similarly assert without any evidentiary support or citation to caselaw that if the harm caused by the PWFA Rule and the Enforcement Guidance differs among CBA members, CBA cannot sue on behalf of its members. Resp. at 16. This argument is again both factually incorrect and legally irrelevant. The harm suffered by covered CBA members is the same: the PWFA Rule and the Enforcement Guidance violate CBA members' rights under the APA, RFRA, and the First Amendment. Defendants suggest that CBA Plaintiffs are asserting a ministerial-exception claim, Resp. at 16, but they are not. Furthermore, associational standing is present so long as CBA identifies a member who has suffered the requisite harm and the relief sought is a prospective injunction or declaratory relief.

Defendants again argue that CBA Plaintiffs' claims are fact-dependent, thereby precluding associational standing. Resp. at 17. Not so. The questions presented by this suit concern whether Defendants exceeded their statutory authority under the APA; have substantially burdened CBA's members' religious beliefs in violation of RFRA and the Free Exercise Clause; and burdened CBA members' Free Speech and associational rights. Defendants have adduced no evidence these claims cannot be decided on an associational basis. The non-binding authority cited by Defendants (*Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004)) actually supports CBA's standing

here. Because CBA "seeks a purely legal ruling without requesting that the federal court award individualized relief to its members," it has associational standing. *Bano*, 361 F.3d at 714.[3]

Defendants also rely on *Harris v. McRae*, 448 U.S. 297, 321 (1980), but that decision is plainly distinguishable. *McRae* held that the association who brought that case could not assert a free-exercise claim on behalf of its members, because the association "concede[d]" that there was a "diversity of view[s] within [its] membership" concerning the religious belief at issue, 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.*

2.4.1. The Government is precluded from relitigating this issue.

Over the last decade, the government has repeatedly litigated and lost the argument that the CBA lacks associational standing absent the participation of individual CBA members. In *Catholic Benefits Association v. Sebelius*, 24 F. Supp. 3d 1094, 1100–01 (W.D. Okla. 2014), for example, the government argued that the religious burden on CBA members "var[ies] from employer to

[3] Defendants argue relatedly that CBA's claims are not ripe because further factual development is needed. Resp. at 17. But 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 *Braidwood Management*, this case is ripe for judicial resolution because no additional factual development is needed to issue declaratory and injunctive relief. 70 F.4th at 930. Plaintiffs have set forth the necessary facts under oath in the complaint, the declarations, and in the motion, and this case "present[s] purely legal questions." *See CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (finding that petitioners presented a "purely legal question" that was ripe for review). At the same time, denying judicial review would inflict significant practical harm on CBA Plaintiffs by forcing them to either follow their religious beliefs or face serious and harsh penalties under the PWFA and Title VII. *Braidwood Management*, 70 F.4th at 931.

employer" and thus CBA could not satisfy prong three of the test for associational standing. *Id.* at 1100. The court rejected that argument, reasoning that it "is abundantly clear that all of the CBA's members abide by Catholic conviction" and thus could sue on an associational basis. *Id.* at 1101. The court explained that where "[t]he CBA is seeking an injunction on its members' behalf, . . . this is the type of relief [that] . . . if granted, will inure to the benefit of those members of the association actually injured." *Id.* (cleaned up). This Court has also ruled that participation of individual CBA members is not required in suits like this. *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1137.[4]

The Government is thus precluded from re-litigating this issue under the doctrine of "mutual defensive collateral estoppel" which "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). Because this "issue of . . . law"—whether the CBA may assert a RFRA claim on behalf of its members—"[wa]s actually litigated and determined by a valid and final judgment, and the determination [wa]s essential to the

[4] The Defendants have lost this argument in similar, non-CBA suits as well. In *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 680 (N.D. Tex. 2016), a case which challenged Defendants' gender-transition mandate, HHS 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.*

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).

3. The PWFA Rule and the Enforcement Guidance violate RFRA.

3.1. No further factual development is necessary.

Defendants argue that the PWFA Rule and the Enforcement Guidance do not violate RFRA because it is possible that Defendants might themselves grant CBA members a religious exemption after a lengthy and burdensome investigation, requiring CBA members to prove their religiosity to Defendants thousands of times over. Resp. 18-20. But Defendants' refusal to commit to religious exemptions for CBA members as required by Title VII and RFRA means the PWFA Rule and the Enforcement Guidance are violating CBA members' RFRA rights now. "[T]he government's assertion that it has not to date evaluated whether it will enforce" the statute "is actually a concession that it may do so." *Cath. Benefits Association*, 732 F. Supp. 3d at 1022. And "[b]eing forced to employ someone to represent the company who behaves in a manner directly violate of the company's convictions is a substantial burden and inhibits the practice of [the plaintiff's] beliefs." *Id.* at 1026 (quoting *Braidwood*, 70 F.4th at 938).

Defendants do not contest that CBA members are objects of these regulations on their face or that the regulations facially mandate conduct in violation of Catholic beliefs. Nor do Defendants contest that RFRA authorizes this suit separate and apart from any voluntary religious consultation provisions provided by Defendants. "A person whose religious exercise has been burdened in violation of this section may assert that violation **as a claim** or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c) (emphasis added). "RFRA makes clear that **it is the obligation of the courts** to consider whether exceptions are required under the test set forth by Congress." *Gonzales v. O Centro Espirita Beneficente Uniao do*

Vegetal, 546 U.S. 418, 434 (2006) (emphasis added). That means CBA Plaintiffs must either (1) comply with the mandates to avoid liability thereby violating their faith or (2) live under a Sword of Damocles awaiting an enforcement action. Nor do Defendants identify any additional facts they would need to determine whether a religious exemption is called for in light of the CBA members' categorical position. CBA members will not accommodate the immoral benefits mandated by Defendants as a matter of religious conscience. No further factual development is necessary.

While EEOC claims it takes religious freedom seriously, its actions show otherwise. For example, the EEOC recently inserted the agency in a Ninth Circuit appeal involving a Christian ministry's (World Vision's) employment policies regarding its traditional, Christian understanding of marriage as a heterosexual union, arguing that Title VII's religious exemption does not apply to a claim of sex discrimination, even where the employer's decision was based on its well-known and longstanding religious beliefs about marriage. Brief for the EEOC as *Amicus Curiae* in Support of Appellee and in Favor of Affirmance, *McMahon v. World Vision, Inc.*, No. 24-3259, at 7-16 (Oct. 28, 2024) ("World Vision argues that the § 2000e-1(a) exemption extends to cases like this, where the employer has discriminated against an employee because of sex. That is incorrect."), *available at* https://bit.ly/4gjAhgS. EEOC's argument is wrong for the reasons stated by Judge Easterbrook in his textualist concurrence in *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 945–47 (7th Cir. 2022) (Easterbrook J., concurring). But more importantly for this case, this *amicus* brief shows that EEOC is actively taking the most limited possible view of religious conscience protections and would certainly do so in any enforcement action. *See* Rachel Morrison, EEOC Says Title VII's Religious-Organization Exemption Doesn't Apply to Sex Discrimination Claims, National Review Online (Dec. 10, 2024), *available at* https://bit.ly/3DdXClu.

Defendants assert that a case-by-case approach to religious-freedom exemptions was their only option in the PWFA Rule. Resp. at 19. That, too, is incorrect. Defendants could have imported Title VII's religious exemption and correctly interpreted it to apply to employment decisions of a religious employer motivated by religious belief. EEOC could have granted a blanket religious exemption under RFRA to any religious employer who objects to accommodating abortion, immoral infertility treatments, false pronouns, or access to single-sex spaces by members of the opposite sex as a matter of religious belief. "Religious freedom cannot be encumbered on a case-by-case basis." *Cath. Benefits Ass'n v. Burrows*, 732 F. Supp. 3d 1014, 1026 (D.N.D. 2024).

3.2. The PWFA Rule and the Enforcement Guidance impose a substantial burden.

Defendants briefly suggest that CBA members might in certain circumstances accommodate employee's direct abortions, immoral infertility treatments, false pronouns, or access to single-sex spaces. Resp. at 20-21. This argument is confusing at best as CBA Plaintiffs have clearly articulated through the sworn testimony of two archbishops and two bishops CBA members' beliefs and categorical opposition to accommodating direct abortion, immoral infertility treatments, false pronouns, and access to single-sex spaces by members of the opposite sex. Compl. ¶¶ 65-84 (verified by Archbishop Lori and Bishop Kagan); *see also, e.g.*, Cary Decl. ¶ 13 ("The Diocese does not and will not provide any workplace accommodation for an employee to obtain a direct abortion."); *id.* ¶ 19 ("The Diocese does not and will not provide any workplace accommodation for an employee to undergo, assist, or encourage immoral infertility procedures."); Hebda Decl. ¶ 22 ("The Archdiocese does not make accommodation for its employees to engage in the violation of the moral teachings of the Church. It does not and will not provide any workplace accommodation for an employee to obtain a direct abortion or to undergo or otherwise participate in immoral infertility procedures."); *id.* ¶ 8 ("8. Requiring a person to identify another by a sex other than their God-

gifted sex would be to require him or her to act against central, unchangeable and architectural teachings of the Catholic faith.").

3.3. Defendants have not adduced evidence that satisfies strict scrutiny.

Defendants offer broadly formulated, generalized interests in eliminating workplace discrimination and "ensuring that qualified employees can remain in the workforce while receiving healthcare." Resp. at 21-22. These asserted interests are not even specific to the challenged aspects of the PWFA Rule and Enforcement Guidance (abortion, immoral infertility treatments, access to single-sex spaces, and false pronouns), let alone specific to the CBA members as required by law. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 801 F.3d 927, 937 (8th Cir. 2015). More importantly, Defendants have no response to CBA Plaintiffs' argument that the exemptions to the PWFA Rule and the Enforcement Guidance undermine any claim to a compelling governmental interest. *See* Doc. 36 at 19-20. If the Defendants can exempt some employers from these immoral mandates, then they lack a compelling interest in forcing religious employers to do so.

Similarly, Defendants have not employed the least-restrictive means. If workplace accommodation of abortion by religious employers was the only means of eradicating workplace discrimination, Congress would not have granted religious employers a blanket exemption in Title VII, the PWFA, or RFRA. If workplace accommodation of abortion by religious employers was the only means of eradicating workplace discrimination, Congress would not have exempted all employers with fewer than 15 employees, those employers who would experience an undue hardship, or religious employers.

4. The PWFA Rule and the Harassment Guidance violate the Free Exercise Clause.

The mandates at issue here violate the Free Exercise Clause in two primary ways. First, the mandates reserve to Defendants the discretionary right to consider whether a religious claimant is entitled to exemption on a case-by-case, individualized basis. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 537 (2021); *see also Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (noting strict scrutiny required when religious exemption depends upon "individualized governmental assessment"). Defendants' object that this case "is nothing like" *Fulton*; *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 688 (9th Cir. 2023) (en banc); or *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822, 838 (N.D. Tex. 2022), Resp. at 24, but they offer no explanation why their purported "case-by-case" exemption mechanism or their "enhanced procedures" are not a system of individualized exemptions that trigger strict scrutiny. Defendants' preferred approach reserves them the right to make an "individualized assessment of the reasons" for non-compliance, which triggers strict scrutiny. *Navy SEALs*, 578 F. Supp. 3d at 838.

Second, the Mandates are littered with secular exemptions—for example, for employers of less than 15 employees and for employers experiencing undue hardship—ensuring that strict scrutiny is triggered under *Tandon*. Defendants respond that these exemptions apply to secular and religious organizations alike. Resp. at 23-24. Yet *Tandon* rejected this argument: "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021).

5. The PWFA Rule and the Enforcement Guidance violate CBA members' right to association and free speech.

The mandates at issue here also violate CBA Plaintiffs' and their members' right to expressive association by prohibiting them from hiring and retaining employees in ways consistent with their faith. Under Defendants' interpretations of Title VII and the PWFA, Plaintiffs must facilitate and speak consistently with employee abortions, immoral infertility treatments, access to single-sex spaces, and false pronouns. Defendants do not dispute that Plaintiffs are engaged in expression around these issues. Therefore, Plaintiffs are entitled to judgment on their expressive-association claim. Defendants counter that this claim is not ripe, because Plaintiffs may raise it in Defendants' administrative proceedings. Resp. at 25. But that argument is incorrect for all the reasons stated above. The mandates proscribe Plaintiffs' right of expressive association on their face, and Defendants refuse to disavow enforcement. That is sufficient for pre-enforcement review.

Defendants also argue that *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), forecloses Plaintiffs' claim regarding expressive association. But the claim in *Hishon* did not infringe the defendant-employer's expression and is thus inapplicable here. Indeed, Defendants do not even attempt to grapple with *Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, 571 F. Supp. 3d 571, 615 (N.D. Tex. 2021), which directly supports Plaintiffs' expressive-association claim.

As to speech, Defendants contend that the mandates do not prohibit "the making of general statements regarding an employer's mission or religious beliefs." Resp. at 25. But the Plaintiffs are not asking this Court to determine whether Plaintiffs' "general statements" of beliefs are protected. They instead seek protection for their specific employment practices regarding individual employees and value-laden conversations with such employees, consistent with their religious faith. Nor do Plaintiffs' claims concern conduct alone. For example, the PWFA Rule bars

"unwelcome, critical comments" of employee abortions and infertility treatments. 89 Fed. Reg. at 29,218. And the Harassment Guidance explicitly prohibits "misgendering" an employee. Harassment Guidance n.42; id. § II(A)(5)(c). "[T]he Complaint clearly shows the CBA uses language that goes far beyond general statements." *Cath. Benefits Ass'n*, 732 F. Supp. 3d at 1023.

6. The PWFA Rule violates the APA.

Text. Defendants' only textual argument is that abortion is a "related medical condition[]" to "pregnancy" and therefore Congress intended the PWFA to encompass abortion. Resp. at 26-27. Defendants' argument misreads the PWFA's text. The PWFA requires that employers accommodate "known limitations related to [] pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg-1(1). Elective abortion is not a "medical *condition*" related to pregnancy; it is "better described as a medical 'procedure,'" sought to terminate a pregnancy. *Louisiana*, 705 F. Supp. 3d at 658. So too with fertility treatments. Defendants do not suggest that infertility is a "known limitation . . . related to pregnancy, childbirth, or related medical conditions," 42 U.S.C. § 2000gg-1(1), because a woman who is *infertile* is definitionally *not pregnant*. Defendants' argument to the contrary relies on inapposite sex-discrimination caselaw that discrimination on the basis of the ability to become pregnant is necessarily sex-based discrimination because only women can become pregnant. Resp. at 28-29. But the PWFA does not bar sex discrimination; it requires accommodation of "related medical conditions" to pregnancy.

Defendants' arguments regarding the PWFA's text, and its relation to Title VII and the Pregnancy Discrimination Act, are foreclosed by the Eighth Circuit's decision in *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679–80 (8th Cir. 1996), *abrogated on other grounds by Bragdon v. Abbott*, 524 U.S. 624 (1998) that infertility treatments are not a "related medical condition[]" to "pregnancy" or "childbirth" under the Pregnancy Discrimination Act:

> With the enactment of the PDA in 1978, Congress explicitly amended Title VII of the Civil Rights Act of 1964 to provide that discrimination "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1994). Under general rules of statutory construction, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. v. American Train Dispatchers Ass'n,* 499 U.S. 117, 129 (1991). "Related medical conditions," a general phrase, thus should be understood as referring to conditions related to "pregnancy" and "childbirth," specific terms, unless the context of the PDA dictates otherwise. The plain language of the PDA does not suggest that "related medical conditions" should be extended to apply outside the context of "pregnancy" and "childbirth." Pregnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception. Moreover, the legislative history and the EEOC guidelines do not make any reference to infertility treatments. *See* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (Comm. Print 1980); 29 C.F.R. § 1604.10.

Id. Abortion is also excluded by the logic of *Krauel*. "Pregnancy and childbirth," which concern a live pregnancy, "are strikingly different from" abortion, which terminates a pregnancy. *Id.*

Yet even without *Krauel*, Defendants' argument that Title VII, as amended by the Pregnancy Discrimination Act, set "pregnancy, childbirth, and related medical conditions" as a "term of art" that was "transplanted" into the PWFA fails. Resp. at 27. The case Defendants cite, *George v. McDonough*, says that establishing a term of art takes not "a few stray [court] decisions," but a "mountain" of "regulatory authority" that "captures 'the state of [a] body of law.'" 596 U.S. 740, 749-50 (2022). The "thin stuff" Defendants supply here, *id.* at 749, fall short of establishing that PDA's alleged "meaning was 'well-settled' before the [alleged] transplantation," *Kemp v. United States*, 596 U.S. 528, 539 (2022). EEOC's argument is that: (1) "pregnancy, childbirth, and related medical conditions" in the PDA covers abortion; (2) the PWFA uses that phrase; (3) the PWFA covers abortion. But this ignores significant contextual differences between the statutes. *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803, 807 (8th Cir. 2021) (courts must consider "statutory context"). Namely, the PDA concerns sex discrimination,

whereas PWFA concerns accommodation for medical conditions related to pregnancy. Indeed, the statute's words aren't even the same. The PDA's uses the phrase "*include, but are not limited to* … pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (emphasis added). The PWFA lacks any such expansive language, narrowing coverage to "known limitation[s]."

Major Questions Doctrine. Defendants only counterargument to CBA's invocation of the major questions doctrine is that requiring abortion and immoral-infertility-treatment accommodation in the PWFA Rule was simply a "policy[] decision[] made by Congress itself in adopting language with a well-established meaning." Resp. at 29.[5] But that argument is incorrect for all the reasons stated above. *Krauel* forecloses any such interpretation of Title VII as amended by the PDA, and the argument is wrong on the merits in any event. Abortion and IVF are terms "readily understood by everyone." *Louisiana*, 705 F. Supp. 3d at 658. "If Congress had intended to mandate that employers accommodate elective abortions [or infertility treatments] under the PWFA, it would have spoken clearly when enacting the statute, particularly given the enormous social, religious, and political importance of the[se] issue[s]." *Id.*

Religious exemption. The PWFA incorporates Title VII's religious exemption. The PWFA Final Rule improperly limits this exemption to claims of religious discrimination.

Defendants argue that the PWFA Final Rule does not actually narrow the religious exemption to only discrimination based on religious status, and "entities are free to invoke religion as a

[5] Defendants assert that CBA Plaintiffs did not state in their memorandum in support of their motion for summary judgment that the major questions doctrine applies to the PWFA Rule's inclusion of immoral infertility treatments in addition to abortion. Resp. at 29. That is incorrect. In its memorandum, CBA argued, "the EEOC cannot claim to have authority to create new substantive regulations governing the major questions of abortion accommodation **and immoral infertility accommodation** without providing a 'clear congressional authorization.'" Doc. 36 at 27.

defense to *any* claim under the PWFA" on a case-by-case basis. Resp. at 30 But in the next paragraph, Defendants about face and argue that the religious exemption does not reach "religiously motivated sex discrimination by religious organizations." *Id.*

Constitutional avoidance. Defendants argue that the doctrine of constitutional avoidance is inapplicable because there is no ambiguity in the PWFA. Resp. at 31. CBA Plaintiffs agree that the PWFA is unambiguous and does not require accommodations for abortion and immoral infertility treatments. But if Defendants are right that the statute can be read to include "abortion" and "infertility treatments," then the statute's text *is* ambiguous, and the Court must apply the doctrine of constitutional avoidance.

7. The relief requested is proper.

7.1. The relief should extend to all of CBA's members.

Defendants argue that relief should be limited to only CBA's present members. Resp. at 33.[6] CBA seeks relief protecting all of its members, because protecting Catholic employers from government coercion is at the heart of its mission.[7] Once again, collateral estoppel applies because Defendants have litigated and lost this argument before. In *CBA v. Sebelius*, 24 F. Supp. 3d 1094 (W.D. Okla. 2014), CBA filed suit on behalf of its members, seeking an injunction against the Government's contraceptive mandate. The court initially sided with the Government and refused to issue relief that extended to the CBA's future members. *Id.* at 1106-07. The Government's

[6] Defendants also argue that CBA lacks standing to represent even its current members Resp. at 33. But that argument fails for all the reasons stated above that CBA has associational standing.

[7] Restricting relief to the CBA's present members would cripple the CBA. 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." Compl., ¶ 46.

opposition to the protection of CBA's future members resulted in CBA having to file a second lawsuit to seek the same relief for new members: *CBA v. Burwell*, 5:14-cv-685 (W.D. Okla.). After numerous successful motions to extend the Court's preliminary injunction to protect new CBA members, the court found that it was more judicially efficient to issue a permanent injunction that protects CBA's future members. *See* ECF No. 184 at p. 2, *Catholic Benefits Association v. Hagan*, 14-cv-240 (W.D. Okla. Mar. 7, 2018). Having litigated and lost this argument, the Government is estopped from re-raising it. Nor is there anything unusual about CBA's request. This Court has previously entered an injunction protecting future members of a religious association. *Christian Emps. All.*, 2019 WL 2130142, at *5.[8]

Defendants raise concerns about the manageability of protecting unnamed members. Resp. at 33-34. But any such concerns are addressed by the guardrails CBA have placed on its request for relief. Specifically, a CBA member may only come within the ambit of the injunction if:

> (a) the employer is not yet protected from the PWFA, the PWFA Rule, Title VII, and the Harassment Guidance with regard to the issues" challenged; "(b) the CBA has determined that the employer meets the CBA's strict membership criteria"; "(c) the CBA's membership criteria have not substantively changed since the CBA filed this complaint"; (d) the CBA member is not subject to an adverse ruling on the merits in another case involving the PWFA, the PWFA Rule, Title VII, or the Harassment Guidelines with regard to the issues described above; and (e) the CBA member was a member of the CBA at the time of the alleged violation.

Doc. 35 at 5.

[8] *See also Christian Emps. All.*, 2022 WL 1573689, at *9 (injunction inuring to the benefit of "present or future members"); *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1153 ("[I]njunctive relief should extend to the Catholic Plaintiffs' present and future members . . . ."); 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 mandate enforcement against "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").

7.2. The Court properly preliminarily enjoined the NRTS.

The Court should enjoin any action of Defendants pursuant to the challenged aspects of the PWFA Rule and the Enforcement Guidance, including investigation, agency enforcement, claims processing, and affirmative litigation. This includes EEOC's issuance of notice-of-right-to-sue letters ("NRTS"). As the Court previously 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 religious employers' rights with its errant interpretations of the PWFA and 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.").

Defendants argue that enjoining EEOC from issuing an NRTS would not redress any harm and would in fact harm Plaintiffs. Resp. at 34-35. That is incorrect. "Title VII's charge-filing requirement is a processing rule," and the issuance of an NRTS is "mandatory" on EEOC. *Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541, 551 (2019). Here, the proper remedy includes enjoining the Defendants from issuing right-to-sue notices to PWFA claimants. Because "the PWFA [Rule]," and the Enforcement Guidance were promulgated "unconstitutionally" in violation of CBA Plaintiffs' rights, "the acceptance of charges and issuance of right-to-sue notices" must be enjoined. *Texas v. Garland*, 719 F. Supp. 3d 521, 598 (N.D. Tex. 2024). CBA is alternatively entitled to vacatur under the APA.

7.3. In the alternative, CBA is entitled to vacatur.

CBA Plaintiffs agree that vacatur of the PWFA Rule is unnecessary to the extent the Court grants CBA Plaintiffs' requests for declaratory relief and an injunction pursuant to RFRA and 42 U.S.C. § 1983 in full. But if the Court deems it necessary to reach the merits of CBA's Administrative Procedure Act claims, the APA requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). If the Court thus reaches CBA Plaintiffs' APA claim, vacatur is the proper remedy.

CONCLUSION

For the foregoing reasons, CBA Plaintiffs respectfully request the Court grant them a permanent injunction and declaratory relief, reasonable costs and attorneys' fees, and vacatur as necessary as explained above.

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Respectfully submitted,

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