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

THE RELIGIOUS SISTERS OF MERCY, *et al.*, *Plaintiffs,* v. ALEX M. AZAR, Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	No. 3:16-cv-386 **Plaintiffs' Combined Reply in Support of Their Motion for Partial Summary Judgment, or in the Alternative, Preliminary Injunction, and Opposition to Defendants' Motion to Dismiss**
CATHOLIC BENEFITS ASSOCIATION, *et al.* *Plaintiffs,* v. ALEX M AZAR, Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	No. 3:16-cv-432

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INTRODUCTION

On the merits of this four-year-old dispute, HHS has little to say. That is no surprise, because HHS has already conceded—repeatedly—that using Section 1557 to compel Plaintiffs to perform and insure gender-transition procedures or abortions violates the Religious Freedom Restoration Act. It also violates the Administrative Procedure Act and the Spending Clause, as we have explained. ECF No. 96-1 (Mem.).

Lacking any serious response on the merits, HHS puts all its eggs in the justiciability basket, pretending as if its latest regulation has made this dispute disappear. Specifically, HHS maintains that by promulgating the 2020 Rule, it has eliminated the requirement that Plaintiffs perform and insure objectionable procedures—and Plaintiffs are living in an "alternate reality" by thinking otherwise. ECF Nos. 111, 113 (Opp.) at 25.

But HHS is mistaken. The problem is that while HHS may have *tried* to eliminate the objectionable requirement, it failed—for multiple reasons Plaintiffs have explained and HHS does not rebut. First, the 2020 Rule did not change the status quo. Instead of replacing the 2016 Rule's definition of "sex" discrimination with a new one disavowing "gender identity," HHS expressly tied the meaning of the 2020 Rule to the Supreme Court's decision in *Bostock v. Clayton County*—which HHS no doubt hoped (and the Solicitor General argued) would rule that Title VII's ban on "sex" discrimination does *not* include "gender identity" discrimination. The problem is that the Supreme Court ruled the opposite—and now the 2020 Rule doesn't do what HHS hoped it would do. Indeed, as two Justices explained in *Bostock* itself, application of *Bostock*'s reasoning to Section 1557 could require "employers and healthcare providers" like Plaintiffs "to pay for or to perform" "sex reassignment procedures" contrary to "their deeply held religious beliefs." 140 S. Ct. 1731, 1781-82 (2020) (Alito, J., dissenting). So the only party living in an alternate reality is HHS.

But *Bostock*-plus-the-2020-Rule isn't the only way Plaintiffs remain imminently

threatened. Rather, the very 2016 Rule that HHS now attempts to portray as the sole source of Plaintiffs' injuries *still applies*. In the wake of *Bostock*, States and interest groups sued HHS over the 2020 Rule, asserting that it wasn't explicit *enough* about banning "gender identity" discrimination and that its attempt to exempt even *some* operations of otherwise-covered religious institutions was unlawful. These plaintiffs succeeded: Two federal courts have now held that relevant portions of the 2016 Rule "remain in effect," and one has enjoined the 2020 Rule's religious exemption. So even if HHS were right that the only problem is the 2016 Rule—and it isn't—HHS's argument would be futile, as the 2016 Rule continues to threaten Plaintiffs.

For these reasons and more, this case is fully justiciable. Plaintiffs remain subject—today, under existing law—to potentially massive financial penalties for practicing medicine in accordance with their longstanding religious beliefs and medical judgment. And HHS's whistling past the graveyard only becomes more obvious in light of the imminent change in Administrations. The (insufficient) changes in the 2020 Rule came about only after the current Administration took over for the last one. But on January 20, the Administration will change yet again. And the incoming Administration has already vowed to enforce Section 1557 on behalf of "the LGBTQ+ community" without regard to any "religious exemptions." Ex.F-10.

There can be no clearer illustration of why Plaintiffs need injunctive relief that will protect their fundamental rights regardless of which Administration is in charge of HHS. And as Plaintiffs already explained—in merits arguments HHS has failed to rebut—they are entitled to that relief. Accordingly, the Court should grant Plaintiffs' motion and deny HHS's motion to dismiss.

ARGUMENT

I. This case is justiciable.

A. Plaintiffs have standing.

Rather than address the merits, HHS grasps at justiciability, arguing that Plaintiffs lack standing to bring this case. Opp.9-19. HHS is wrong; this case is fully justiciable. Plaintiffs seek to practice medicine and provide health insurance without having to perform or insure gender transitions or abortions. Mem.2-4. As interpreted by HHS, however, Section 1557 of the Affordable Care Act requires them to perform and insure these procedures. And if Plaintiffs violate Section 1557, they are subject to massive financial penalties, private lawsuits, and other enforcement proceedings, *id.* at 17-18—a fact HHS nowhere disputes.

This dilemma suffices for standing. For one thing, "[w]hen a plaintiff is the object of government action, 'there is ordinarily little question that'" the plaintiff has standing. *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 777 (8th Cir. 2019) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). That is this case—Plaintiffs, as recipients of federal healthcare funds, "are the objects of" Section 1557 (and HHS's applications thereof), so they "have standing" to seek an injunction against it here. *Id.*

Moreover, "a plaintiff need not wait for an actual prosecution or enforcement action before challenging a law[.]" *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749 (8th Cir. 2019) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014)). Rather, the plaintiff has standing if he shows (1) "a course of conduct arguably affected with a constitutional interest"; (2) that this "conduct is arguably proscribed by the" challenged statute; and (3) "a credible threat of enforcement." *Driehaus*, 573 U.S. at 161-67 (cleaned up); *accord Alexis Bailly Vineyard*, 931 F.3d at 778-79. These are the well-settled requirements for "establish[ing] an injury in fact in a pre-enforcement constitutional challenge," *Jones v. Jegley*, 947 F.3d 1100, 1103

(8th Cir. 2020), yet HHS never cites them. And here, each is met.

First, Plaintiffs' conduct is "affected with a constitutional interest." *Driehaus*, 573 U.S. at 161 (internal quotation marks omitted). Plaintiffs' refusal to perform or pay for gender transitions and abortions is an exercise of their religious beliefs protected by the First Amendment. Mem.2-4; *see, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146-47 (10th Cir. 2013) (en banc) (RFRA protects constitutional rights), *aff'd*, 573 U.S. 682 (2014); *see also Telescope Media*, 936 F.3d at 750 (desire to engage in First Amendment-protected conduct "means [plaintiffs'] other claims are affected with a constitutional interest too, regardless of the precise legal theory"); Opp.2 n.1 (conceding Plaintiffs' sincere religious exercise). And Plaintiff North Dakota seeks to vindicate its sovereign right not to be coerced to carry out federal policies via "post-acceptance … conditions" on federal funds—a right protected by Article I's Spending Clause. *E.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 575-85 (2012) (cleaned up); *see Alexis Bailly Vineyard*, 931 F.3d at 778 (Commerce Clause).

Second, Plaintiffs' conduct is at least "arguably proscribed by" Section 1557 as interpreted by HHS. *Driehaus*, 573 U.S. at 162 (cleaned up). HHS explicitly said as much in 2016, issuing a formal rule interpreting Section 1557's prohibition on "sex" discrimination to include discrimination based on "gender identity" and "sex stereotyping" and stating that this interpretation meant that categorical refusals to perform or insure gender transitions (such as Plaintiffs') are "unlawful on [their] face." 81 Fed. Reg. 31,375, 31,467, 31,429 (May 18, 2016); *see also id. at* 31,435-36, 455 (providers must perform transition procedures if they would perform similar procedures for other purposes); *id.* at 31,392 (forbidden "sex stereotype" "include[s] the expectation that individuals consistently identify with only one of two genders").

And while HHS recently attempted to repeal the 2016 Rule's definition of "sex" discrimination, 85 Fed. Reg. 37,160 (June 19, 2020), other courts have enjoined that effort, ruling that that the 2016 Rule's "definitions of 'on the basis of sex,' 'gender

identity,' and 'sex stereotyping'" "remain in effect." *Walker v. Azar*, No. 20-cv-02834, 2020 WL 4749859, at *10 (E.D.N.Y. Aug. 17, 2020); *see also Whitman-Walker Clinic, Inc. v. HHS*, No. 20-cv-01630, 2020 WL 5232076, at *14, *45 (D.D.C. Sept. 2, 2020) (enjoining "HHS's elimination of the 2016 Rule's definition of sex discrimination as including … sex stereotyping," thus "le[aving] … the 2016 Rule's prohibition on discrimination based on sex stereotyping" in place (emphasis omitted)).

Moreover, even the 2020 Rule itself continues to interpret Section 1557 to prohibit "gender identity" discrimination. Instead of defining "sex" discrimination, the 2020 Rule pointed to the Supreme Court's then-pending decision in *Bostock v. Clayton County*, noting that "the Court's construction" of "sex" discrimination there could guide "application" of the 2020 Rule. 85 Fed. Reg. at 37,168, 37,178. And the Supreme Court ultimately held that Title VII's prohibition on "sex" discrimination *does* encompass discrimination based on "transgender status." *Bostock*, 140 S. Ct. at 1741. Thus, the 2020 Rule, like the 2016 Rule, at least arguably "encompass[es] discrimination based on … gender identity"—as HHS itself argued and one other federal court has already held. *Washington v. HHS*, No. C20-1105-JLR, 2020 WL 5095467, at *8 (W.D. Wash. Aug. 28, 2020); *see also* Mem. in Supp. of Mot. to Dismiss, *BAGLY v. HHS*, No. 1:20-cv-11297-PS (D. Mass. Oct. 14, 2020), ECF No. 22 (HHS arguing that "ensuring Section 1557 is construed to cover discrimination based on gender identity and pregnancy/termination of pregnancy is *more likely* to bear fruit under the 2020 Rule than under the 2016 Rule").

Third, Plaintiffs face a "credible threat of enforcement." *Driehaus*, 573 U.S. at 164-67. This requirement follows from the first two except in "extreme cases approaching desuetude." *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011). This case—where the challenged statute, Section 1557, was enacted in 2010 and has since been the subject of two major rulemakings by HHS—isn't such a case. *See id.* (challenged statute was "adopted comparatively recently and was amended fewer than five

years before this suit was filed").

Moreover, although a demonstrated history of enforcement isn't necessary, *id.*, the history of Section 1557's enforcement confirms the credibility of the threat Plaintiffs face here. The 2016 Rule was promulgated contemporaneously with lawsuits filed by transgender individuals under Section 1557 seeking to force hospitals and other healthcare providers like Plaintiffs to perform or provide insurance coverage for transition procedures. *See, e.g.*, *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015); *Conforti v. St. Joseph's Healthcare SZAys.*, No. 2:17-cv-00050, 2017 WL 67114 (D.N.J. Jan. 5, 2017). Following its enactment, and before it was enjoined, HHS enforced the 2016 Rule itself, entertaining a complaint against a Catholic hospital[1] and investigating the State of Texas for maintaining policies similar to North Dakota's here.[2] Today, the plaintiffs in the cases challenging the 2020 Rule seek a ruling requiring *all* "hospitals and health care systems" to perform transition procedures and abortions—"religiously affiliated" or otherwise. Compl. at 39, *Whitman-Walker*, No. 20-cv-1630 (D.D.C. June 22, 2020), ECF No. 1. And the incoming Administration has already vowed to enforce just such requirements, stating it will enforce the Affordable Care Act's supposed "nondiscrimination protections for the LGBTQ+ community" and "reverse" "religious exemptions" for "medical providers" like Plaintiffs. Ex.F-10.

Given all this, there is "little doubt [Plaintiffs] will face legal consequences" for continuing their policies—meaning they have standing to press this case. *Telescope Media*, 936 F.3d at 750; *see 281 Care Committee*, 638 F.3d at 630 ("threats and the filing of one complaint[]" demonstrated plaintiffs' "fear" was "reasonabl[e]").

Indeed, this case is even easier than previous cases in which the Eighth Circuit

[1] Admin. Compl., *ACLU v. Ascension Health*, U.S. Dep't of Health & Human Servs., Office for Civil Rights (Oct. 25, 2016), https://perma.cc/26A8-7G95.

[2] Reply Br. in Supp. of State Pls.' Mot. for Prelim. Inj. at 10-11, *Franciscan All., Inc. v. Burwell*, No. 7:16-cv-00108-O (N.D. Tex. Dec. 2, 2016), ECF No. 56.

has found pre-enforcement challenges justiciable. In *United Food & Commercial Workers International Union v. IBP, Inc.*, for example, the defendant officials submitted affidavits affirming that they had "no 'present plan' to enforce" the challenged statute against the plaintiff's conduct. 857 F.2d 422, 429 (8th Cir. 1988). Yet the Eighth Circuit held that was insufficient to defeat standing because "changes in leadership" might generate a different result. *Id.* at 429-30 (cleaned up).

Here, HHS hasn't even represented a lack of intent to enforce Section 1557 against Plaintiffs, much less submitted sworn testimony to that effect. *See Driehaus*, 573 U.S. at 165 ("[R]espondents have not disavowed enforcement if petitioners make similar statements in the future."). And, in fact, HHS *can't* make any binding representation about the *next* Administration's intent to enforce Section 1557. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383-84 (2d Cir. 2000); *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005). Instead, as we've explained, the next Administration has already spoken for itself, stating that it intends to "[g]uarantee the Affordable Care Act's" supposed "nondiscrimination protections for the LGBTQ+ community" and "reverse" "religious exemptions" for "medical providers" like Plaintiffs. Ex.F-10. This is why Plaintiffs have sought relief by January 20, Mem.37—a date whose significance HHS never disputes.

In the face of all this, HHS's challenge to justiciability fails. Particularly given the "'sensitive nature of constitutionally protected'" religious exercise, "[s]tanding analysis … is intended to allow challenges based on this type of injury." *281 Care Committee*, 638 F.3d at 630-31 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)); *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("free speech" and "free exercise" are "intangible harm[s] constitut[ing] injury in fact").

B. HHS's counterarguments fail.

HHS's argument to the contrary turns on a mischaracterization of the relationship between the 2020 and 2016 Rules. HHS asserts that because only the 2016 Rule "explicitly" interprets Section 1557 to bar gender-identity discrimination, Plaintiffs lack standing now that HHS has "repealed the 2016 Rule's definition of 'on the basis of sex' through the 2020 Rule." Opp.11, 19.

HHS is incorrect. For one thing, HHS's argument hinges on the notion that the 2020 Rule *successfully* repealed the 2016 Rule. But again, multiple courts have enjoined the 2020 Rule and reinstated relevant portions of the 2016 Rule. In *Walker*, the court enjoined "the repeal of the 2016 definition of" "on the basis of sex," thus reinstating that definition *tout court*—including, specifically, "'gender identity.'" 2020 WL 4749859, at *10. And in *Whitman-Walker*, the court reinstated the 2016 Rule's definition of "sex" discrimination to include "sex stereotyping"—a form of "discrimination" that (the court said) "encompass[es] gender identity." 2020 WL 5232076, at *23 (cleaned up); *see also id.* ("cannot be meaningfully separated"). According to other federal courts, then, the supposed repeal of the 2016 Rule was ineffective, because that repeal was itself deemed unlawful and has now been enjoined—a straightforward point that distinguishes all the cases about (actually) repealed statutes and regulations offered by HHS (at 11-12).

In any event, HHS's reliance on the 2020 Rule would fail even if the relevant portions of that Rule had in fact taken effect. That's because ("explicitly" or not) the 2020 Rule *itself* proscribes gender-identity discrimination—which is more than enough to create standing under *Driehaus*, 573 U.S. at 163 ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge … a law to confess that he will in fact violate that law."); *accord 281 Care Committee*, 638 F.3d at 630 ("plaintiffs need only allege they wish to engage in activity that the challenged activity 'arguably covers'").

Again, although the 2020 Rule attempted to "repeal[] the 2016 Rule's definition

of 'on the basis of sex,'" it "decline[d] to replace it with a new regulatory definition." 85 Fed. Reg. at 37,178. Rather, it pointed to the Supreme Court's then-forthcoming decision in *Bostock*, stating that it intended to permit "application of the [*Bostock*] Court's construction." *Id.* at 37,168. Then, in *Bostock*, the Supreme Court held that Title VII's prohibition on "sex" discrimination covers discrimination on the basis of "transgender status." 140 S. Ct. at 1741. Thus, by expressly incorporating *Bostock*, even the 2020 Rule indicates that HHS interprets Section 1557 to mean that "employers and healthcare providers" like Plaintiffs can be "requir[ed] … to pay for or to perform" "sex reassignment procedures" contrary to "their deeply held religious beiefs," *id.* at 1781-82 (Alito, J., dissenting)—exactly the unlawful requirement Plaintiffs seek to avoid here.

Plaintiffs discussed *Bostock* at length, Mem.12-14, 25, 29-32, but HHS barely acknowledges its existence, *cf.* Opp.22. Yet in other cases, HHS has had no difficulty recognizing the significance of *Bostock* to interpreting the 2020 Rule.

Indeed, in *Washington*, HHS successfully defeated a challenge to the 2020 Rule on standing grounds precisely by arguing that "in light of *Bostock*," covered entities may interpret the 2020 Rule to require them to retain the same "sex" discrimination "policies or practices" required by the 2016 Rule. Resp. to Show Cause Order at 6-7, *Washington*, No. C20-1105-JLR (W.D. Wash. Aug. 26, 2020), ECF No. 71; *see Washington*, 2020 WL 5095467, at *8 (adopting this argument). And HHS elsewhere has gone even further, explaining that efforts to apply Section 1557 to prohibit "gender identity" and "termination of pregnancy" discrimination are in fact "*more likely* to bear fruit under the 2020 Rule than under the 2016 Rule." Mem. in Supp. of Mot. to Dismiss at 14, *BAGLY*, No.1:20-cv-11297-PS, ECF No. 22. Having now told multiple other courts that the 2020 Rule *does* at least arguably prohibit gender-identity discrimination, HHS can't now "turn around … and repudiate" that notion; indeed, because it prevailed on this ground in *Washington*, judicial estoppel bars it from doing

so. *DeVito v. Chi. Park Dist.*, 270 F.3d 532, 535 (7th Cir. 2001); *see United States v. Hamed*, 976 F.3d 825, 828-30 (8th Cir. 2020).

Nor is it surprising that HHS has previously embraced the notion that *Bostock* may apply to Section 1557. Although the "sex" discrimination ban incorporated into Section 1557 is that of Title IX, not Title VII, two Circuits have already concluded that *Bostock* extends to Title IX. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020); *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, 968 F.3d 1286, 1304-05 (11th Cir. 2020). Further, even before *Bostock*, several district courts had already interpreted Section 1557 to cover "gender identity" discrimination and thus require provision or coverage of gender-transition procedures. Mem.39. Plaintiffs dispute the merits of these decisions. *Id.* at 25-32. But the decisions nonetheless show that there is a real, "objective[]" threat to Plaintiffs' constitutionally-protected conduct—justifying their "ask[ing] the federal courts to consider their claim." *281 Care Committee*, 638 F.3d at 630-31.

For all these reasons, it is HHS, not Plaintiffs, who is offering an "alternate reality." Opp.1, 25. In *actual* reality, under *current* law—including the revived provisions of the 2016 Rule, the 2020 Rule interpreted in light of *Bostock*, and Section 1557 itself—Plaintiffs are subject to a proscription on "gender identity" discrimination. And HHS has already explained what such a proscription would mean: covered entities like Plaintiffs "would have to revise [their] polic[ies] to provide [transition] procedure[s]" or face multimillion-dollar penalties. 81 Fed. Reg. at 31,455. Plaintiffs are entitled to seek an injunction protecting them from that result.

None of HHS's other arguments show otherwise. First, attempting to blunt the impact of the *Walker* and *Whitman-Walker* injunctions, HHS argues that because the Northern District of Texas in *Franciscan* had already vacated the 2016 Rule's "gender identity" and "termination of pregnancy" provisions, those provisions couldn't have been "put back in place by [the *Walker* and *Whitman-Walker*] injunctions." Opp.11,

14. But the *Walker* opinion itself disagrees. Indeed, the controlling, remedial portion of *Walker* couldn't have been more explicit: "the definitions of '*on the basis of sex*,' '*gender identity*,' and 'sex stereotyping' currently set forth in [the 2016 Rule] *remain in effect*." *Walker*, 2020 WL 4749859, at *10 (emphasis added); *see also Walker v. Azar*, 2020 WL 6363970, at *1 (E.D.N.Y. Oct. 29, 2020) (reaffirming this language).

In any event, the question whether *Walker* purported to revive portions of the 2016 Rule vacated in *Franciscan* is ultimately irrelevant. According to HHS itself, the *Franciscan* court did "not vacate[]" the 2016 Rule's definition of "sex" discrimination to include "sex stereotyping." Opp.7. And both *Walker* and *Whitman-Walker* plainly did revive *that* provision, in the process reasoning that gender-identity discrimination is "inherently" a form of sex stereotyping, and thus that reviving the sex-stereotyping provision would also "necessarily … proscri[be]" gender-identity discrimination. *Walker*, 2020 WL 4749859, at *7 (cleaned up); *see Whitman-Walker*, 2020 WL 5232076, at *23. Thus, even if *Walker* hadn't purported to revive the 2016 Rule's "gender identity" provision itself, HHS's argument is beside the point: whether these courts label it "gender identity" discrimination or "sex stereotyping," they have in fact revived the core prohibition of the 2016 Rule that HHS pretends here is dead and buried.

Next, attempting to turn *Walker* and *Whitman-Walker* into arguments *against* standing, HHS collects cases supporting the proposition that parties "subject to an injunctive order issued by" one court have to either obey or appeal it, rather than "collaterally attack" it in another. Opp.13-14 & n.2 (quoting *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980)). But Plaintiffs aren't "subject to" the *Walker* and *Whitman-Walker* injunctions, and this lawsuit isn't a "collateral attack" on them. Plaintiffs aren't attempting to restore the 2020 Rule; they're seeking an order from this Court that, whatever the governing rule (2016, 2020, or otherwise), HHS can't apply *Section 1557* to force *them* to perform or insure gender

transitions or abortions. ECF No. 96-9 (proposed order). That question isn't at issue in *Walker* or *Whitman-Walker*, neither of which involve any party seeking relief against Section 1557 or pressing RFRA or Spending Clause claims, and neither of which address anything other than APA challenges to the 2020 Rule itself. *See, e.g.*, *Whitman-Walker*, 2020 WL 5232076, at *42 ("nothing in this Court's Order affects the application of RFRA").

And indeed, HHS's attempt to marshal *Walker* and *Whitman-Walker* as reasons to deny standing gets the relevant analysis precisely backwards. For if HHS were correct that there was such "overlap" between this suit and *Walker* and *Whitman-Walker* that "the court that first had jurisdiction" should be the one to "resolve the issues," Opp.13 n.2 (internal quotation marks omitted), then *this Court* would be the proper forum for the litigation, and the *Walker* and *Whitman-Walker* courts would have been the ones to have erred by "exercis[ing] jurisdiction" over the "duplicative litigation," *id.* (internal quotation marks omitted); *see* ECF No. 1 (case filed November 2016); *compare Walker*, 2020 WL 4749859, at *5 (case filed June 2020). Yet HHS never argued any such thing in *Walker* or *Whitman-Walker*. And for good reason: because the "general policy against concurrent federal litigation" that HHS cites—namely, that the same plaintiff "may not pursue multiple federal suits against the same party involving the same controversy at the same time," *Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 953-54 (8th Cir. 2001)—has no application here.

Rather, the posture of this case is analogous to recent litigation involving the back-and-forth over another mandate initially issued, then repealed, by HHS—the "contraceptive mandate." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2372-73 (2020). There, as here, the Obama Administration issued regulations applying the ACA to require provision of religiously objectionable medical services. *Id.* at 2373-75. There, as here, that requirement was held to violate

RFRA, *e.g.*, *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927 (8th Cir. 2015), *vacated on other grounds, HHS v. CNS Int'l Ministries*, No. 15-775, 2016 WL 2842448 (May 16, 2016), and the Trump Administration issued new regulations purporting to repeal the mandate, *see Sharpe Holdings, Inc. v. HHS*, No. 2:12 CV 92 DDN, 2018 WL 1520031, at *2 (E.D. Mo. Mar. 28, 2018). And there, as here, those new regulations were themselves enjoined by two other district courts as violating the APA, thus bringing the mandate back "in[to] effect." *Id.* (internal quotation marks omitted). When religious objectors then sued over the mandate, *see DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019), or pressed forward on preexisting suits challenging it, *see Sharpe Holdings*, 2018 WL 1520031, at *2, their cases were not dismissed for lack of standing or mootness; rather, at least 17 courts across the country—including one in this District—issued injunctive relief, and HHS never even *contested* justiciability. *DeOtte*, 393 F. Supp. 3d at 498-514; *see Sharpe Holdings*, 2018 WL 1520031, at *2 (following injunctions against new regulations, "the government … dropped its mootness challenge").[3] Plaintiffs likewise have standing here.

[3] *See also*:

- Order, *Ass'n of Christian Schs. v. Azar*, No. 1:14-cv-02966 (D. Colo. Dec. 10, 2018), ECF No. 49;
- Order, *Ave Maria Sch. of Law v. Sebelius*, No. 2:13-cv-00795 (M.D. Fla. July 11, 2018), ECF No. 68;
- Order, *Ave Maria Univ. v. Sebelius*, No. 2:13-cv-00630 (M.D. Fla. July 11, 2018), ECF No. 72;
- Order, *Catholic Benefits Ass'n LCA v. Hargan*, No. 5:14-cv-00240 (W.D. Okla. Mar. 7, 2018), ECF No. 184;
- *Christian Emps. All. v. Azar*, No. 3:16-cv-00309, 2019 WL 2130142 (D.N.D. May 15, 2019);
- Order, *Colo. Christian Univ. v. HHS*, No. 1:13-cv-02105 (D. Colo. July 11, 2018), ECF No. 84;
- Order, *Dobson v. Azar*, No. 13-cv-03326, 2019 WL 9513153 (D. Colo. Mar. 26, 2019);
- Order, *Dordt Coll. v. Azar*, No. 5:13-cv-04100 (N.D. Iowa June 14, 2018), ECF No. 89;
- Order Amending Injunction, *E. Tex. Baptist Univ. v. Azar*, No. 4:12-cv-03009 (S.D. Tex. Aug. 10, 2020), ECF No. 163;
- Order, *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa. July 5, 2018), ECF No. 153;

Third, HHS says this case isn't justiciable because the 2020 Rule "incorporates" Title IX's religious exemption and acknowledges that it must be "'implemented consistent with'" RFRA. Opp.14-15 (quoting 85 Fed. Reg. at 37,205). But as for the Title IX exemption, one of Plaintiffs' claims in this suit is that the 2020 Rule failed to incorporate the exemption in a way that would actually protect them, Mem.32-34—a concern HHS's brief fails to dispel, *see infra* Part II.C.

Moreover, even if the 2020 Rule's incorporation of the Title IX exemption *would* protect Plaintiffs, that still couldn't defeat justiciability here. That's because (as HHS acknowledges) the *Whitman-Walker* court enjoined the 2020 Rule's incorporation of the exemption, 2020 WL 5232076, at *27-29—so the exemption currently protects nothing. Of course, as HHS notes, *Walker* and *Whitman-Walker* are on appeal—but "[s]tanding is assessed under the facts existing when the complaint is filed," *Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 901 (8th Cir. 2008) (internal quotation marks omitted), not under those that might exist in the future given one possible outcome of other litigation. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 628 n.5 (2018) ("Because the [challenged] Rule remains on the books for now, the parties retain a concrete interest in the outcome of this litigation[.]" (internal quotation marks omitted)); *Texas v. EEOC*, 933 F.3d 433, 448-49 (5th Cir. 2019) (agency's "change[of] position" to support plaintiff's view on the merits "does not impact our standing analysis," because "[i]n identifying an injury that confers standing, courts look exclusively to the time of filing" (internal quotation marks omitted)). So the mere "chance of a change" resulting from the *Walker* and *Whitman-*

- *Grace Schs. v. Azar*, No. 3:12-cv-00459, 2018 WL 8755890 (N.D. Ind. June 1, 2018);
- Order, *Little Sisters of the Poor v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), ECF No. 82;
- *Reaching Souls Int'l, Inc. v. Azar*, No. 5:13-cv-01092, 2018 WL 1352186 (W.D. Okla. Mar. 15, 2018);
- Order, *S. Nazarene Univ. v. Hargan*, No. 5:13-cv-01015 (W.D. Okla. May 15, 2018), ECF No. 109;
- Order, *Wheaton Coll. v. Azar*, No. 1:13-cv-08910 (N.D. Ill. Feb. 22, 2018), ECF No. 119.

Walker appeals can't render Plaintiffs' claims based on *current* law nonjusticiable. *City of Kennett v. EPA*, 887 F.3d 424, 433-34 (8th Cir. 2018); *cf. KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 16 (1st Cir. 2012) ("The fact that the case could be rendered moot … does not render the case unripe.").

Alternatively, HHS claims that Plaintiffs' injury is traceable only to the *Whitman-Walker* injunction, not to HHS. Opp.15. But that argument is mistaken. An Article III injury can have more than one cause, *Wieland v. HHS*, 793 F.3d 949, 954-55 (8th Cir. 2015); it needs only to be "fairly traceable" to the defendant, *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). And an injury is "'fairly traceable' where 'the named defendants … possess the authority to enforce the complained-of provision.'" *Alexis Bailly Vineyard*, 931 F.3d at 779 (quoting *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015)). HHS is the agency that enforces Section 1557, so the proper defendant here is HHS—not, as HHS's argument would strangely seem to imply, the U.S. District Court for the District of Columbia. *Cf.* Opp.15.

Nor does the 2020 Rule's acknowledgment that it must be "implemented consistent with" RFRA defeat standing. An agency's general acknowledgment that it must comply with RFRA is no substitute for a court order *requiring* the agency (on pain of contempt) to comply with RFRA in the context of a concrete case involving particular plaintiffs. Indeed, the 2020 Rule's acknowledgment that it is subject to RFRA is a redundancy, since according to RFRA's plain text "'all … implementation of [federal] law'" is *already* subject to RFRA, whether the agency pays lip service to it or not. *Little Sisters of the Poor*, 140 S. Ct. at 2383.

C. This case is neither unripe nor moot.

Finally, switching justiciability grounds, HHS argues that this case is alternatively either moot (because it attempted to repeal the 2016 Rule, Opp.9, 11-12) or unripe (because—it says—Plaintiffs are attempting to enjoin "future regulations," *id.*

at 9, 17-19). But both arguments fail for the same reason: because, as explained, Plaintiffs are challenging *existing* laws (Section 1557 and HHS's currently operative interpretations thereof), not past or future ones.

The cases confirm as much. Ripeness doctrine doesn't "require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013). To the contrary, when a plaintiff (as Plaintiffs here) has standing to bring a pre-enforcement challenge to a statute or regulation, the case is likewise "suitably ripe" so long as the issue presented is primarily "legal rather than factual" and "failure to review would cause significant hardship"—for example, the "chill[ing of] … First Amendment activity." *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997); *accord 281 Care Committee*, 638 F.3d at 631; *see also Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000) (factors must be satisfied "to at least a minimal degree").

In *281 Care Committee*, for example, the district court held that the case wasn't ripe or otherwise justiciable because the challenged statute hadn't been "regularly enforced" for years, so "the prospect of a prosecution [under it] was 'speculative and hypothetical in the extreme.'" 638 F.3d at 627-28. But the Eighth Circuit reversed. The case was ripe, the court explained, because the issues presented "require[d] no further factual development," and—with or without an enforcement action—the challenged statute, "by its very existence, chill[ed] the exercise of the Plaintiffs' First Amendment rights." *Id.* at 631 (internal quotation marks omitted).

So too here. The issues here are purely legal and "require[] no further factual development," *281 Care Committee*, 638 F.3d at 631, as HHS expressly agrees, Opp.2 n.1. And continued uncertainty over whether Plaintiffs can continue providing healthcare consistent with their beliefs (and, for North Dakota, its sovereign interests) will "chill[]" Plaintiffs' religious exercise and the exercise of other constitutional

rights. *Minn. Citizens Concerned for Life*, 113 F.3d at 132; *281 Care Committee*, 638 F.3d at 631; *see* Mem.37-40. Indeed, as of right now, Plaintiffs "must either immediately alter their behavior" by changing their policies with respect to gender transitions "or play an expensive game of Russian roulette" involving millions of dollars of federal healthcare funding—so "this case evinces the requisite degree of ripeness." *Iowa League of Cities*, 711 F.3d at 868; *see also id.* (pointing out—as with Plaintiff North Dakota—that for plaintiff to alter behavior required "taxpayer money").

This ripeness analysis isn't affected by the fact that the relief Plaintiffs seek would protect them both now and into the future. *Cf.* Opp.18. A party doesn't have to file an infinite number of successive lawsuits to protect itself against threatened government action that violates its rights. To the contrary, when a plaintiff "faces the threat of future injury due to illegal conduct ongoing at the time of suit," "[i]t can scarcely be doubted that" relief that both "abates that conduct *and prevents its recurrence*" is a legitimate "form of redress." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) (emphasis added).

That unremarkable relief is all Plaintiffs seek here. It's illegal for HHS to apply Section 1557 to require Plaintiffs to perform or insure gender transitions and abortions, so Plaintiffs seek a permanent injunction barring HHS from doing so, now or in the future. *Compare* ECF No. 96-9 (seeking injunction barring HHS "from interpreting and enforcing Section 1557 … against [Plaintiffs] in a manner that would require them to perform or provide insurance coverage for gender-transition procedures and abortions") *with, e.g.*, *Christian Emps. All. v. Azar*, No. 3:16-cv-309, 2019 WL 2130142, at *6 (D.N.D. May 15, 2019) (entering analogous relief under contraceptive mandate: permanent injunction barring HHS from "enforcing the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and any related regulations implementing that provision … against [plaintiff] … to the extent that these laws … require [plaintiff's] members to contract, arrange, pay, or refer for abortion-causing

drugs"); *see also supra* n.3 (all entering similar permanent injunctions).

Mootness precedent likewise only confirms justiciability here. Most centrally, this case isn't moot because Plaintiffs are challenging Section 1557 and HHS's current interpretations of it, not just the 2016 Rule. *Cf.* Opp.11-12. But even if this case were primarily a challenge to the 2016 Rule (it isn't), and even if the 2016 Rule had been effectively repealed (it hasn't), that *still* wouldn't "deprive [this] court of its power to determine the legality of" the Rule, since that "repeal … would not preclude [HHS] from reenacting precisely the same provision" after dismissal of this case. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Further, the Supreme Court has held that the *City of Mesquite* principle applies "*a fortiori*" if, after repealing a challenged rule, the government defendant enacts a "new" rule that "disadvantages [the plaintiffs] in the same fundamental way." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662-63 (1993). Here, the 2020 Rule "disadvantages [Plaintiffs] in the same fundamental way" as the 2016 Rule did, by likewise (or perhaps, given HHS's statements about the 2020 Rule in other litigation, even moreso) requiring them to perform and pay for gender transitions. *Id*; *see supra*. Thus, this case is even more *a fortiori* than the "*a fortiori*" case.

* * *

Plaintiffs have standing, and this case is neither unripe nor moot. Plaintiffs have waited nearly four years since this Court found *Franciscan*'s treatment of the merits of these issues to be "well-reasoned." ECF No. 36 at 2. In the meantime, HHS has failed to eliminate the requirement that Plaintiffs perform and insure medical procedures in violation of their faith, and the sword of massive financial penalties continues to dangle over Plaintiffs' heads—while another new Administration is about to take power, having vowed to enforce Section 1557 against entities like Plaintiffs. It is past time to proceed to the merits.

II. Plaintiffs prevail on the merits.

On the merits, Plaintiffs are entitled to injunctive relief for their RFRA, APA, and Spending Clause claims. Mem.15-37. HHS devotes a mere five pages to the substance of these claims, simply ignoring several key elements and conceding others. And the few arguments HHS does raise are meritless.

A. HHS's interpretation of Section 1557 violates RFRA.

Under RFRA, Plaintiffs are entitled to relief if the government (1) imposes a substantial burden on their religious exercise and (2) fails to satisfy strict scrutiny. Mem.16. Here, both elements of RFRA are essentially uncontested. HHS substantially burdens Plaintiffs' religious exercise by threatening them with multimillion-dollar penalties unless Plaintiffs perform and insure gender transitions or abortions in violation of their religious beliefs. *See Sharpe Holdings*, 801 F.3d at 938 ("When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, there has never been a question that the government imposes a substantial burden on the exercise of religion." (cleaned up)). And HHS has not even attempted to satisfy strict scrutiny.

Indeed, HHS has repeatedly conceded that the same penalties, as imposed by the 2016 Rule, violate RFRA. First, when *Franciscan* held that the 2016 Rule violated RFRA, HHS declined to appeal. Then, in promulgating the 2020 Rule, HHS "agree[d] with the court in *Franciscan*" that "the 2016 Rule violated RFRA." 85 Fed. Reg. at 37,207. And here, HHS has likewise recognized that "the 2016 Rule violated RFRA as applied to private plaintiffs." Opp.15. These concessions are significant because no matter what *legal mechanism* HHS invokes to pressure Plaintiffs to perform and pay for gender transitions or abortions—whether the 2016 Rule, the 2020 Rule, or Section 1557 itself—the RFRA analysis is the same.

In response, HHS doesn't dispute that threatening multimillion-dollar financial penalties is a substantial burden on Plaintiffs' religious exercise. Instead, it says only

that Plaintiffs have "fail[ed] to point to any *existing* interpretation by HHS" that imposes these penalties, and therefore Plaintiffs "lack sufficient injury" to establish a substantial burden. Opp.21 (emphasis added). But this is simply a rehash of HHS's standing argument, and it fails for similar reasons.

First, it improperly conflates the *merits* question of a substantial burden with the *jurisdictional* question of Article III injury. *See Sharpe Holdings*, 801 F.3d at 942-43 (treating substantial burden as a merits issue). The two are analytically distinct, and courts should be "careful not to conflate" them, as HHS does here. *Miller v. Redwood Toxicology Lab'y, Inc.*, 688 F.3d 928, 934 (8th Cir. 2012); *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016) ("The standing inquiry is not, however, an assessment of the merits of a plaintiff's claim.").

More importantly, Plaintiffs *have* pointed to an "existing interpretation by HHS" that imposes a substantial burden. *See supra* Part I. Specifically, if Plaintiffs decline to perform and insure gender transitions and abortions, they are subject to penalties under the "gender identity" and "sex stereotyping" provisions of the 2016 Rule, which have been revived by the injunctions in *Walker* and *Whitman-Walker*. They are also subject to penalties under the 2020 Rule as interpreted in light of *Bostock* and according to HHS's own positions in other litigation. And they are subject to penalties under Section 1557 itself, which HHS can enforce without reliance on any implementing regulations at all. That is more than enough to show a substantial burden.

Given this substantial burden, HHS must "'demonstrate[] that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (quoting 42 U.S.C. § 2000bb-1(b)). But HHS cannot do so. Mem.19-23. Indeed, it doesn't even try. That is no surprise, given that the Government has exempted its own programs from the requirement to perform or insure gender transitions and abortions, defeating any claim of a compelling interest in forcing Plaintiffs

to do the same. Mem.22-23. And the absence of a compelling interest is particularly evident given "the lack of consensus in the medical community" regarding "sex reassignment surgery." *Smith v. Rasmussen*, 249 F.3d 755, 760-61 (8th Cir. 2001).

Nor can HHS prove that forcing Plaintiffs to provide and insure gender transitions and abortions is the least restrictive means to further any compelling interest. Mem.23-24. "If the government wishes to expand access" to these procedures financially, "'[t]he most straightforward" way "would be for the government to assume the cost of providing the[m] … to any … unable to obtain them under their health-insurance policies due to their employers' religious objections.'" *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)). Or "[t]he government could … assist transgender individuals in finding … the growing number of healthcare providers who offer and specialize in those services." *Id.* at 693. In short, less restrictive means are available, and HHS "must use" them. *Holt v. Hobbs*, 574 U.S. 352, 364-65 (2015). Because HHS offers no contrary argument on these points, it concedes them—again.

B. HHS's interpretation of "sex" to include "gender identity" violates the APA.

HHS's interpretation of "sex" discrimination in Section 1557 to include "gender identity" discrimination also violates the APA, because, as Plaintiffs have shown, the statutory prohibition on "sex" discrimination unambiguously refers to discrimination based on biological or anatomical differences between males and females, not "gender identity." Mem.25-32.

HHS does not dispute the merits of Plaintiffs' arguments, but rather contends that the regulatory language in which HHS advanced this interpretation in the 2016 Rule is "no[] longer extant" in light of the 2020 Rule, which doesn't define discrimination "on the basis of sex." Opp.22. But as already explained, the decisions in *Walker* and *Whitman-Walker* prevented the 2020 Rule "from becoming operative," ruled that the

2016 Rule's "definitions of 'on the basis of sex,' 'gender identity,' and 'sex stereotyping" "remain in effect," and explained that "[d]iscrimination based on transgender status—*i.e.*, gender identity" thus remains prohibited. *Walker*, 2020 WL 4749859, at *1, *7, *10; *Whitman-Walker*, 2020 WL 5232076, at *14, *23, *45. HHS faults Plaintiffs for "slicing, dicing, and mixing … the 2016 Rule with the conclusions of the *Walker* and *Whitman-Walker* district courts," Opp.22, but Plaintiffs—and this Court—must take those decisions into account when analyzing the present legal landscape. And according to those decisions, the key portions of the 2016 Rule interpreting "sex" to mean "gender identity"—*do* remain "extant."

In any event, even focusing on the 2020 Rule wouldn't change the analysis. As explained, *supra* at 8-9, in litigation surrounding the 2020 Rule, HHS itself argued that under *Bostock*, "ensuring Section 1557 is construed to cover discrimination based on gender identity and pregnancy/termination of pregnancy is *more likely* to bear fruit under the 2020 Rule than under the 2016 Rule." Mem. in Supp. of Mot. to Dismiss at 14, *BAGLY*, No. 1:20-cv-11297-PS, ECF No. 22 (emphasis in original). And indeed, one court has already adopted HHS's argument and concluded that the 2020 Rule may, "in fact, extend protection against discrimination to LGBTQ individuals." *Washington*, 2020 WL 5095467, at *8.

Therefore, contrary to HHS's doublespeak, the governing regulations continue to prohibit discrimination based on "gender identity." And HHS's failure to contest any of Plaintiffs' APA arguments on the merits proves that HHS's interpretation of "sex" to include "gender identity" violates the APA.

C. HHS's failure to properly incorporate Title IX's religious exemption violates the APA.

HHS's regulations also violate the APA because they fail to fully incorporate Title IX's religious exemption. Mem.32-34. When Congress incorporated Title IX into Section 1557, it unambiguously incorporated a religious exemption that matched Section

1557's scope. *Franciscan*, 227 F. Supp. 3d at 690 ("Congress intended to incorporate the entire statutory structure [from Title IX], including the … religious exemption[]."). That is, just as Title IX placed conditions on education funding, but exempted religious educational institutions, so Section 1557 places conditions on healthcare funding, but exempts religious healthcare institutions. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680 (1986); *United States v. Nature*, 898 F.3d 1022, 1024 (9th Cir. 2018).

But both the 2016 Rule and the 2020 Rule fail to fully incorporate this exemption. Though the 2016 Rule stated that any application of the Rule would "not be required" if it violated "Federal statutory protections for religious freedom and conscience," HHS explicitly refused to exempt religious healthcare providers. 81 Fed. Reg. at 31,380, 31,466. And though the 2020 Rule states that it "shall be construed consistently with" Federal religious and conscience protections, including Title IX's religious exemption, 85 Fed. Reg. at 37,243, elsewhere in the 2020 Rule, HHS stated that only "*educational operation[s]* of an entity may be exempt from Title IX due to control by a religious organization," rather than exempting religious healthcare entities in their entirety. *Id.* at 37,207 (emphasis added).

HHS responds that "the operative regulatory text" makes clear that "HHS incorporated the Title IX religious exemption without alteration." Opp.23; *id.* at 15 n.3. But the 2020 Rule's regulatory text merely says that the 2020 Rule "shall be construed consistently with … Title IX's religious exemptions," without incorporating *any* text from the exemption or explaining the Department's interpretation of its scope. 85 Fed. Reg. at 37,243. Indeed, that language mirrors language in the 2016 Rule stating that any application of the Rule would "not be required" if it violated "Federal statutory protections for religious freedom and conscience." 81 Fed. Reg. at

31,466. And notwithstanding that language, the 2016 Rule did not exempt religious healthcare institutions and violated the APA. *Franciscan*, 227 F. Supp. 3d at 690.

Moreover, though HHS faults Plaintiffs for relying on language in the 2020 Rule's preamble, regulations should be "considered in the context of [a] lengthy preamble in the Federal Register," especially when the regulatory text itself is ambiguous. *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1044 (8th Cir. 2020); *Advanta USA, Inc. v. Chao*, 350 F.3d 726, 729 (8th Cir. 2003) (courts can consider a regulation's preamble "to decipher the ambiguous language" of a regulation); *Wyoming Outdoor Council v. U.S. Forest Service,* 165 F.3d 43, 53 (D.C. Cir. 1999) ("[W]e have often recognized that the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules."). Though the *statutory* text of Section 1557 and Title IX unambiguously incorporate a religious exemption for religious healthcare institutions (and not just educational ones), *Franciscan*, 227 F. Supp. 3d at 690, the 2020 Rule's *regulatory* text does not clearly reflect that understanding. And the preamble actively undermines it. Specifically, in response to comments about the scope of the Title IX exemption, HHS stated that the 2020 Rule exempts only "educational operation[s] of an entity … control[led] by a religious organization," 85 Fed. Reg. at 37,207, not all of the entity's operations. Indeed, one court has read the 2020 Rule similarly and suggested that the religious exemption merely exempts "any *educational operation* of an entity controlled by a religious organization engaged in the provision of health care." *Whitman-Walker*, 2020 WL 5232076, at *27 (emphasis added). Accordingly, both the 2016 Rule and the 2020 Rule violate the APA by failing to fully incorporate the religious exemption for religious healthcare providers.

D. HHS's interpretation of Section 1557 violates the Spending Clause.

HHS's interpretation of Section 1557 also imposes unauthorized and coercive conditions on the States, thereby violating the Spending Clause. Mem.34-37. Contrary

to HHS's briefing, private Plaintiffs do not raise a Spending Clause claim "on behalf of the State of North Dakota." Opp.24. North Dakota itself is a Plaintiff in this litigation and brings a Spending Clause challenge in its own capacity as sovereign. And by failing to respond to the merits of North Dakota's arguments, HHS concedes that its interpretation of Section 1557 violates the Spending Clause.

First, Congress never unambiguously conditioned North Dakota and other States' Medicare and Medicaid funds on embracing HHS's expansive definition of "sex." As noted previously, the Eighth Circuit has already held that given "the disagreement regarding the efficacy of sex reassignment surgery," a "State's prohibition on funding of sex reassignment surgery is both reasonable and consistent with the Medicaid Act." *Smith*, 249 F.3d at 761. It is thus settled law in this Circuit that Plaintiff North Dakota did not agree to fund sex-reassignment surgeries by accepting Medicaid funds, *id.*, and accordingly, any interpretation of Section 1557 imposing such a condition contravenes the Spending Clause.

Second, Section 1557 also violates the Spending Clause here because North Dakota stands to lose all its Medicare and HHS funding and faces liability via damages awards and attorneys' fees from private lawsuits. Mem.36-37. "Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when pressure turns into compulsion, the legislation runs contrary to our system of federalism." *NFIB*, 567 U.S. at 577-78 (internal quotation marks omitted). In *NFIB*, the Supreme Court concluded that a lesser threat to eliminate all federal Medicaid funding, which constituted "10 percent of a State's overall budget," was unconstitutionally coercive. 567 U.S. at 582. That same conclusion necessarily follows here, as North Dakota stands to lose even more funding by failing to adopt HHS's interpretation of "sex" discrimination.

Again, HHS does not dispute the merits of North Dakota's Spending Clause arguments and instead rehashes the same threshold jurisdictional arguments that, for

reasons already given, should be rejected. *Supra* Part I. And HHS again confuses this jurisdictional inquiry with the merits of Plaintiff North Dakota's Spending Clause claim, even though the two analyses are not "coterminous" and should not be "collapse[d] into one another." *Webb as next friend of K.S. v. Smith*, 936 F.3d 808, 814 (8th Cir. 2019). Accordingly, the Court should grant summary judgment on North Dakota's Spending Clause claim and deny HHS's motion to dismiss.

III. Injunctive relief is required.

As demonstrated, Plaintiffs satisfy the most important injunctive relief factor, success on the merits. Plaintiffs satisfy the other three injunctive relief factors as well.

***Irreparable Harm*:** Plaintiffs have established irreparable harm because a "RFRA violation satisfies … irreparable harm." *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944, 958 (E.D. Mo. 2014). Absent an injunction, Plaintiffs must violate their faith to comply with unlawful regulations or face massive financial penalties. This loss of religious liberty "unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Similarly, North Dakota suffers irreparable harm to its sovereign interest because HHS's interpretation of Section 1557 strips North Dakota of its right to enforce its own laws in its healthcare programs, requires State facilities to offer transition and abortion procedures, and requires the State to train employees about their new obligations. *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

Tracking its justiciability arguments, HHS asserts again—in a single sentence—that Plaintiffs have not suffered any harm at all. Opp.26. But for reasons already explained, Plaintiffs face the very real threat of enforcement and liability under existing law—namely, under the 2016 Rule as revived by recent litigation, under the 2020 Rule as interpreted in light of *Bostock*, and under Section 1557 itself, which HHS can enforce directly without reference to any implementing regulations. Indeed,

the incoming Administration has already signaled its intent to do just that. Ex.F-10. This is more than enough to show "irreparable injury is likely in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis omitted).

Thus, "in light of the … legal uncertainty regarding" the transgender mandate as to "organizations with religious objections," this Court should "enjoin enforcement of the mandate[.]" *Archdiocese of St. Louis*, 28 F. Supp. 3d at 958. The irreparable-harm factor militates strongly in favor of granting Plaintiffs' motion for summary judgment.

***Balance of Harms*:** "[T]he balance-of-harm and public-interest factors need not be taken into account" here, since "the public interest will perforce be served by enjoining the enforcement of" an invalid law. *Bank One, Utah v. Guttau*, 190 F.3d 844, 847-48 (8th Cir. 1999). Nonetheless, the balance tips for Plaintiffs, as the harms faced by Plaintiffs are severe and the harms to HHS are minimal. Indeed, HHS does not contest the balance-of-harm factor weighs in favor of granting injunctive relief. Opp.26. Thus, this factor also favors Plaintiffs.

***Public Interest*:** The same is true for the public interest. "[I]t is always in the public interest to protect constitutional rights," *Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020) (internal quotation marks omitted), and "[t]his principle applies equally to" the Spending Clause as to RFRA, since RFRA "enforces the First Amendment," *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012). "The public interest in the vindication of religious freedom" thus "favors the entry of an injunction." *Christian Emps. All.*, 2019 WL 2130142, at *6. Additionally, conditioning Plaintiffs' receipt of Medicare and Medicaid funding on violating their religious beliefs hurts the vulnerable people that depend on Plaintiffs' services—the poor, the elderly, and those in underserved rural areas. HHS does not dispute any of this or raise any argument as to why the public interest favors the denial of injunctive

relief. Opp.26. Therefore, the public interest also favors the entry of injunctive relief.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted, and Defendants' motion to dismiss should be denied.

Respectfully submitted this the 6th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2021, the foregoing was served on all parties via ECF.

/s/ Luke W. Goodrich
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