No. 21-1890

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE CATHOLIC BENEFITS ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of North Dakota

THE CATHOLIC BENEFITS ASSOCIATION'S PETITION FOR REHEARING OR REHEARING EN BANC

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REASONS FOR REHEARING

In this nationally significant religious freedom case, the panel correctly affirmed a permanent injunction in favor of the religious plaintiffs but wrongly found that one plaintiff, The Catholic Benefits Association ("CBA"), lacks associational standing to represent "unnamed members." *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022). The latter ruling squarely conflicts with settled Circuit and Supreme Court precedent, which holds that an association may litigate on behalf of members if "any one of them" would have standing to sue in their own right. *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)) (internal quotation marks omitted). The CBA easily meets this standard, particularly because three CBA members, with standing, participated in this suit as plaintiffs. The logic of the panel's decision—that an association must identify every member for which it seeks relief—undermines the very concept of associational standing and would undo the right to group privacy that attends it. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021).

The panel mistook the basis of the CBA's standing, invoking *Summers v. Earth Island Institute* for the proposition that a "statistical probability" of member injury is not sufficient. *See* 55 F.4th at 601–02. But the CBA never claimed its standing was based on statistical probability. It is based, rather, on concrete harm to actual

members—the named plaintiffs and hundreds of others—due to government interpretations of Section 1557 and Title VII. The CBA does not maintain that it "*probably*" has members burdened by these laws. Rather, it has established, and the government does not contest, that the CBA *definitely* has such members—Catholic institutions that, but for injunctive relief obtained through the CBA, are required to perform and cover gender-transition services in conflict with their religious beliefs. This Court has repeatedly found associational standing in circumstances like these. *E.g.*, *Iowa League*, 711 F.3d at 870 (association had standing where "[a]t least some members" were operating in violation of challenged agency rules); *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc) (ACLU had standing based on injury to single member identified only as "John Doe"); *Kuehl v. Sellner*, 887 F.3d 845, 851 (8th Cir. 2018) (association had standing to represent all members based on injury to four specific member-plaintiffs).

The panel's decision, if uncorrected, will inflict real harm on the CBA's members, who will find themselves re-exposed to the government's mandates after remand. Indeed, while this appeal was pending and prior to issuance of the panel decision, a CBA member had to invoke the injunction to block an EEOC enforcement action related to gender-transition coverage. These events unfolded even as the EEOC's lawyers were telling this Court that the enforcement threat was

"hypothetical" and "speculative" and the EEOC had "never" enforced its coverage mandate against a religious employer. *See* Aplts.' Reply Br. at 2. Yet because of the panel's flawed decision, this CBA member, and hundreds of others, now face a renewed threat of RFRA violations from HHS and the EEOC.

Rehearing should be granted to correct the panel's ruling, secure and maintain the uniformity of this Court's decisions, and address issues of exceptional importance. Fed. R. App. P. 35(a); 8th Cir. R. 35A, 40A.

ARGUMENT

I. The panel opinion conflicts with decades of binding precedent on associational standing.

The Catholic Benefits Association's members, directors, and officers are all Catholic, as are the archbishops comprising its ethics committee. A143–A144 ¶¶ 46–52 (verified complaint). The CBA and its members are, as a matter of their Catholic faith and values, morally opposed to the government mandates at issue here. A146–A152 ¶¶ 63, 70–90. The CBA was formed in part "[t]o support Catholic employers ... that, as part of their religious witness and exercise, provide health or other benefits to their respective employees in a manner that is consistent with Catholic values." A143 ¶ 44, A146 ¶ 62. Thus, the CBA's *raison d'etre* is to engage in what the Supreme Court has recognized as an "indispensable libert[y]": "Effective advocacy of both public and private points of view, particularly controversial ones, is

undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

A. This Court's and the Supreme Court's precedents confer standing on an association when it identifies "one of" its members suffering immediate or threatened injury.

Because of the importance of associations in the structure of constitutional governance, the Supreme Court has long permitted an association to sue as a "representative of its members" if "its members would otherwise have standing to sue in their own right" and certain other requirements, not disputed here, are met. *See Kuehl*, 887 F.3d at 851 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). An association is not required to show that *all* of its members would have standing, nor must it identify *every* member on whose behalf relief is sought. On the contrary, to "invoke the court's jurisdiction," an association need only "allege that its members, *or any one of them*, are suffering immediate or threatened injury." *Warth*, 422 U.S. at 511 (emphasis added); *see also United Food & Commercial Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996) (*Hunt* "requir[es] an organization suing as representative to include *at least one member* with standing" (emphasis added)). As long as the suit is germane to the association's purpose, the existence of at least one member with standing assures the

"adversarial vigor" necessary to satisfy Article III requirements. *United Food*, 517 U.S. at 555.

Consistent with *Hunt* and *Warth*, this Court has repeatedly affirmed the one-member requirement for associational standing. Thus in *Iowa League*, Judge Gruender, for a unanimous panel that included Judge Smith, wrote that "[t]he League need not establish that all of its members would have standing to sue individually so long as it can show that 'any one of them' would have standing." 711 F.3d at 869 (quoting *Warth*, 422 U.S. at 511). And the Court had no trouble finding associational standing based on "League members' affidavits" showing that "[a]t least some members" were in violation of EPA rules. *Id.* at 870. The Court went on to invalidate those rules in total—a ruling that benefited all League members, not just those identified in affidavits. *See id.* at 878. Nothing in *Iowa League* suggests the association's unnamed members had to identify themselves in order to invoke the Court's ruling or block EPA enforcement. *See also Kuehl*, 887 F.3d at 851 (where claims of association members don't turn on "individualized proof," they can be "resolved in the group context").

Likewise, in *ACLU Nebraska Foundation v. City of Plattsmouth*, this Court, sitting en banc, held that the ACLU had standing to pursue constitutional claims "on behalf of its members" based on injury to a single ACLU member identified in court

filings only as "John Doe." 358 F.3d 1020, 1031 (8th Cir. 2004) (panel opinion); 419 F.3d at 775 n.4 (en banc) (expressly "adopting the reasoning of the panel opinion on this point"). The Court reasoned that "Doe is a member of the ACLU and, for the reasons explained above, he has standing to sue, as would other members making the same allegations." 358 F.3d at 1031. No other members were named or identified. Rather, an uncontested affidavit from an ACLU state director simply said there were "over 800 members in Nebraska, including twelve in Cass County," and "[s]ome of these members" came into "direct and unwelcome contact" with the challenged monument. *Id.* at 1026; *see* 186 F. Supp. 2d 1024, 1029 & n.5 (D. Neb. 2002). This Court had no trouble concluding the ACLU could "participat[e] in this action to assert the rights and interests of its local members, including John Doe." 358 F.3d at 1026.

B. The CBA identified three members who are suffering immediate or threatened injury, along with many others similarly affected.

Under these settled and unremarkable precedents, the CBA easily established associational standing in this case. First, the CBA brought this action along with three *named* members who are also plaintiffs: Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association, each of whom is injured by the government's interpretations of Section 1557 and Title VII. The panel, following the district court, found that these named member-plaintiffs have standing to sue in their

own right. *Religious Sisters*, 55 F.4th at 606–07. And because the government did not contest any other element of associational standing, this finding alone suffices to establish the CBA's right to "invoke the court's jurisdiction," *Warth*, 422 U.S. at 511, and maintain this action as a "representative of its members," *Kuehl*, 887 F.3d at 851; *see ACLU Nebraska*, 358 F.3d at 1031.

Second, the CBA submitted a verified complaint with sworn statements regarding its many other members and the specific burdens imposed upon them by the government's mandates. Among other things, the CBA stated:

> 55. CBA members include hospitals and other healthcare entities that receive Medicaid and Medicare payments and thus are covered entities under the 2016 Rule.
>
> 56. CBA members include Catholic Charities and other social service organizations that offer counseling and other mental health services, in individual and group settings, that receive Medicaid and Medicare payments and participate in HHS-funded programs and thus are covered entities under the 2016 Rule.
>
> 57. CBA members include employers, including Catholic dioceses and archdioceses, that provide employee health benefits in conjunction with health insurers and TPAs. These insurers and TPAs participate in federally funded marketplaces and thus are covered entities under the 2016 Rule. The 2016 Rule thus constrains CBA members' ability to arrange for and secure health plans that reflect their Catholic values….
>
> 59. CBA members include employers with 15 or more employees who are "employers" within the meaning of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b).

A145–A146; *see also* A185–A189 ¶¶ 220–241 (detailed explanation of specific burdens imposed by Section 1557 and Title VII on members' religious practices).

In the district court, the parties filed cross-motions for summary judgment. While the government contested justiciability on different grounds—which the district court and panel properly rejected—the government did not contest any of the CBA's sworn, factually detailed averments regarding its members and their injuries. Thus, "[i]t was undisputed on the motions for summary judgment" that the government's actions harmed association members. *Am. Farm Bureau Federation v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016). And the CBA's sworn allegations of member injury were at least as detailed as what the en banc Eighth Circuit found sufficient for standing in *ACLU Foundation*.

True, the CBA did not specifically identify every one of its affected members. But it did not have to. Because an association "need not establish that *all* of its members would have standing," *Iowa League*, 711 F.3d at 869 (emphasis added), it need not name every member for which relief is sought. Here, the three named member-plaintiffs were enough to confer standing on the CBA to seek relief for all affected members. *See ACLU Foundation*, 419 F.3d at 775 n.4; *Kuehl*, 887 F.3d at 851. And even if named members had not participated as plaintiffs, the CBA's detailed and uncontested allegations of member injury were sufficient. *See Heartland*

Acad. Community Church v. Waddle, 427 F.3d 525, 533 (8th Cir. 2005) ("[B]ecause [the association] seeks only declaratory and prospective injunctive relief, the participation of individual students who were affected … is not required."). Indeed, the panel decision itself recognizes that the CBA includes directly affected members. *See Religious Sisters*, 55 F.4th at 593 n.6.

If the ACLU can litigate constitutional claims on behalf of its members based on injury to a single "John Doe," *see ACLU Foundation*, 419 F.3d at 775 n.4, then the CBA can surely do the same based on injury to three specifically identified member-plaintiffs and hundreds of others similarly affected. No decision of the Supreme Court, this Court, or any other Circuit of which we are aware suggests that "unnamed members" can be excluded from relief when the minimum requirements for associational standing have been met.

C. The panel opinion mistakenly believed the CBA was preceding under the statistical-probability theory of standing discarded by *Summers v. Earth Island Institute*.

For its associational-standing analysis, the panel mainly relied on *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). This was error. In *Summers*, unlike here, the associational plaintiff *failed* to "submit affidavits showing, through specific facts that one or more of its members would be directly affected by the allegedly illegal activity." *Id.* at 498–99 (cleaned up). Justice Breyer in dissent posited a "hitherto

unheard-of test for organizational standing" based on "a statistical probability that some of those members are threatened with concrete injury." *Id.* at 497. The Supreme Court rejected that theory of associational standing, but neither the theory nor its rejection has any bearing on this case, because the CBA never sought standing based on statistical probability. Specifically identified CBA members participated in this lawsuit as plaintiffs, and the CBA submitted sworn and undisputed testimony "showing, through specific facts that one or more of its members" were "directly affected by" the government's RFRA violations. *Id.* at 498–99 (cleaned up). *Summers* has no application here, and the panel erred by relying on it.

D. If uncorrected, the panel opinion will create inter- and intra-circuit splits.

Not only is the panel opinion inconsistent with Circuit precedents like *ACLU Foundation*, *Iowa League*, and *Kuehl*. It also diverges from *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368 (5th Cir. 2022), a decision to which the panel otherwise closely hewed. *Franciscan*, just like this case, involved a challenge to the gender-transition mandate by an associational plaintiff, the Christian Medical and Dental Association ("CMDA"). There, as here, the association didn't identify all its members but rather demonstrated associational standing via testimony showing that *some* members were injured by the mandate. *See e.g.*, Gov't's Rule 60(b) Mot. to Modify Order at 2, Franciscan, No. 7:16-cv-00108 (N.D. Tex. Sept. 13, 2021), ECF 208

("Plaintiffs have not disclosed the identities of all of their members...."). The district court expressly found associational standing because the CMDA showed "that at least one identified member has suffered or would suffer harm." *See* 227 F. Supp. 3d at 680. And again, just like this case, the district court entered permanent injunctive relief protecting the association and its members. *See Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 378 (N.D. Tex. 2021), *amended*, 2021 WL 6774686 (N.D. Tex. Oct. 1, 2021). In its appeal in *Franciscan*, the government did not challenge associational standing, and the Fifth Circuit affirmed the injunction. *See* 47 F.4th at 379.

There is no material difference between the associational plaintiff in *Franciscan* and the associational plaintiff here. Yet, if the CBA had filed this lawsuit in the Fifth instead of the Eighth Circuit, all of its members, named and unnamed, would be protected by injunctive relief. In this respect, the panel's decision conflicts with *Franciscan*, even though the panel carefully and correctly followed the Fifth Circuit's analysis in every other respect.

II. This petition presents questions of exceptional importance: the religious freedom of the CBA's members and their right of association.

A. The injunction has already protected one unnamed CBA member—protection now imperiled by the panel's decision.

In this appeal, HHS and the EEOC repeatedly insisted that the threat of enforcement was "hypothetical" and "speculative." Aplts.' Op. Br. at 2, 18. "[T]he government … has not threatened any enforcement action against plaintiffs," they told the Court. *Id.* at 2. The "EEOC has not initiated any related Title VII enforcement activity against plaintiffs" and "has not taken a position … on how, if at all, Title VII should be enforced against religious employers that object to providing insurance coverage for gender-transition services." *Id.* at 3; *see also* Aplts.' Reply Br. at 2 ("EEOC has never brought an enforcement action in court against *any* employer to challenge the employer's exclusion of gender-transition services in its health plan, let alone an objecting *religious* employer." (emphases in original)).

Yet while this appeal was pending, the EEOC was doing just that. In October 2022, the CBA was notified by one of its members, a Catholic ministry with "Catholic" in its name, that the EEOC had begun an enforcement action for its refusal to provide gender-transition coverage. The EEOC demanded reams of information from this CBA member (hereafter "Catholic Ministry"), including "all contracts" with insurers and third party administrators, "all benefits and/or health

plans," "all hard copy and/or electronic communications and/or notes" regarding health plans, "all medically necessary reason(s) for which [Catholic Ministry] has covered hysterectomy procedures," and "the software and/or additional data systems" used by Catholic Ministry to manage health benefits.

In securing injunctive relief below, the CBA worked with the government to address a scenario like this. After the injunction first entered, the government requested, and the CBA agreed, to modify it to include the following protocol:

> [I]f either agency, unaware of an entity's status as a CBA member … takes any of the above-described [enforcement] actions, the CBA member and the CBA may promptly notify a directly responsible agency official of the fact of the member's membership in the CBA … and its protection under this order. Once such an official receives such notice from the CBA member and verification of the same by the CBA, the agency shall promptly comply with this order with respect to such member….

A820.

When the CBA learned the EEOC had taken enforcement action against Catholic Ministry, it promptly invoked the protocol. By letter dated October 7, 2022, the CBA notified the responsible EEOC official of Catholic Ministry's membership in the CBA and attached a copy of the injunction as well as supporting affidavits from both the CBA's president and Catholic Ministry's legal counsel. That documentation is attached hereto in redacted form. The EEOC has taken no action since then.

That the government insisted on adding this protocol to the injunction in the first place was reason enough to reject its suggestion of "hypothetical" enforcement. But that the protocol had to be invoked to block *actual* EEOC enforcement against a CBA member fatally undermines everything the government argued in this appeal—about justiciability in general and associational standing in particular. The injunction provides concrete, critically needed protection to CBA members like Catholic Ministry. Securing that protection is why the CBA exists, why it brought this lawsuit, why it sought and obtained injunctive relief on members' behalf, and why it has standing to represent their interests here.

Yet now, the panel's flawed decision imperils this protection. In ruling that the CBA cannot represent "unnamed members," the panel has re-exposed Catholic Ministry and its fellow CBA members to the government's mandates—mandates already ruled unlawful and which the government does not even try to defend on the merits.

It is no answer to say that unnamed members can bring their own lawsuits. While all CBA members have the same religious objection to the mandates, not all have the resources or wherewithal to mount a legal challenge, particularly given the extraordinarily complicated legal history of this case, as the panel's extended discussion makes clear. Nor would that promote judicial economy. On the contrary,

it would inundate the federal courts with hundreds of RFRA lawsuits, forcing HHS and the EEOC to defend them individually; it would multiply attorney fee awards against the government; and it could yield inconsistent results, spawning yet more litigation. Associational litigation exists to avoid these problems—to channel a large set of essentially identical member claims into a single proceeding to be "resolved in the group context." *Kuehl*, 887 F.3d at 851.

B. The right of association is deeply embedded in our constitutional structure, as the Supreme Court recently reaffirmed in *Americans for Prosperity*.

Alexander de Tocqueville recognized associational rights as part of America's constitutional genius, writing that "freedom of association has become a necessary guarantee against the tyranny of the majority. [N]owhere are associations more necessary to prevent either the despotism of the parties or the arbitrariness of the prince than in countries whose social state is democratic." DEMOCRACY IN AMERICA 218–19 (Arthur Goldhammer trans., Library of America 2004). The Supreme Court recently reaffirmed this age-old right in *Americans for Prosperity Foundation v. Bonta*, observing that the "compelled disclosure of affiliation with groups engaged in advocacy" is "as effective a restraint on freedom of association as other forms of governmental action." 141 S. Ct. at 2382 (cleaned up).

Yet the panel opinion undermines the CBA's and its members' associational privacy. Because the CBA advocates a faithfully Catholic and thus "controversial" viewpoint on issues like gender identity and gender transitioning, requiring it to disclose member identities as a condition of its advocacy puts those members at the mercy of boycotts, reprisals, and the forces of cancel culture. *NAACP v. Alabama*, 357 U.S. at 462–63. "Such risks are heightened in the 21st century and seem to grow with each passing year." *Americans for Prosperity*, 141 S. Ct. at 2388.

That is why a member disclosure requirement must meet "exacting scrutiny" and be "narrowly tailored to the interest it promotes." *Id.* at 2385. In this vein, the district court crafted a sensible injunction. The injunction bars HHS and the EEOC from enforcing their unlawful mandates against the CBA's members. But if an agency takes enforcement action unaware of an organization's CBA membership, the injunction sets out a simple protocol for establishing membership status and invoking judicial protection. This is a workable solution, as confirmed by the CBA's recent experience with its member, Catholic Ministry, and the EEOC. And the government has not suggested any difficulty with compliance. Indeed, it was the government itself who proposed the protocol.

The CBA should not have to choose between advocating for members' legal protection and maintaining their associational privacy. The First Amendment

protects both, the injunction protects both, and the panel should have affirmed in full without eliminating the CBA's associational standing.

CONCLUSION

The Catholic Benefits Association respectfully requests panel or *en banc* rehearing to correct the panel's erroneous ruling on associational standing, bring its decision in line with settled Circuit and Supreme Court precedent, and ensure continued RFRA protection for the CBA's members.

Respectfully submitted January 23, 2022,

/s/ Ian Speir

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this petition complies with the type-volume limitation in Fed. R. App. P. 35(b)(2)(A), as it contains 3,754 words.

s/ Ian Speir
Ian Speir

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Participants who are registered CM/ECF users will be served by the CM/ECF system.

s/ Ian Speir
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October 7, 2022

Shannon De Jong, Investigator
Equal Employment Opportunity Commission
[redacted]
SHANNON.DEJONG@EEOC.GOV

Re: Notification regarding [redacted]'s membership in The Catholic Benefits Association and instruction to cease and desist from enforcement in Charge No. 551-2020-[redacted]

Ms. De Jong:

I write on behalf of The Catholic Benefits Association ("CBA") and its member, Catholic [redacted] ("[redacted]").

The CBA and its members, including [redacted], are protected by a permanent injunction issued by the federal court in *Catholic Benefits Ass'n v. Cochran*, No. 3:16-cv-00386, ECF No. 133 (D.N.D. Feb. 19, 2021), attached hereto as Exhibit 1 ("Injunction"). The Injunction prohibits the EEOC "from interpreting or enforcing Title VII . . . against the CBA and its members in a manner that would require them to provide insurance coverage for gender-transition procedures." Ex. 1, p.3. The court's order applies to everyone at the EEOC, including its "agents, officers, commissioners, employees, and anyone acting in concert or participation with them," and bars the EEOC from "pursuing, charging, or assessing any penalties, fines, assessments, *investigations*, or other enforcement actions." *Id.* (emphasis added).

[redacted] is a CBA member in good standing and satisfies the criteria set forth in the Injunction. *See* Exhibit 2 (Decl. of Doug Wilson); Exhibit 3 (Decl. of [redacted]). Because [redacted] is protected by the Injunction, the EEOC is legally barred from pursuing any enforcement action, including an investigation, related to [redacted]'s refusal to provide insurance coverage for gender-transition procedures. Among other things, this means the EEOC must immediately cease its investigation in pending Charge No. 551-2020-[redacted] dismiss that proceeding, and take no further action. [redacted] will not be responding to the EEOC's recent request for information pertaining to that charge.

You may not have been aware that [redacted] is a CBA member. In this situation, the Injunction provides that "the CBA member and the CBA may promptly notify a directly responsible agency official of the fact of the member's membership in the CBA" and its satisfaction of the Injunction's criteria. Ex. 1, p.4. "Once such an official receives such notice from the CBA member and verification of the same by the CBA, *the agency shall promptly comply with this order with respect to*

such member." *Id.* (emphasis added). This letter constitutes such notice to the EEOC and to you as a directly responsible agency official.

The Injunction does not prohibit the EEOC from accepting a charge, notifying a CBA member of a charge, or issuing a right-to-sue notice. *See id.* pp.4–5. But these are the *only* actions the EEOC may take where, as here, a charge is predicated on the failure to provide gender-transition coverage. At this point, the only action the EEOC may take in Charge No. 551-2020-[redacted] is the issuance of a right-to-sue notice.

If you have further questions, please contact me and [redacted] ([redacted]).

Sincerely,

Ian Speir
Nussbaum Speir Gleason PLLC

cc: [redacted].
In-House Legal Counsel, [redacted]
[redacted]

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

The Religious Sisters of Mercy, et al., Plaintiffs, vs. Norris Cochran, Acting Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	**ORDER FOR ENTRY OF JUDGMENT** Case No. 3:16-cv-00386

Catholic Benefits Association, et al., Plaintiffs, vs. Norris Cochran, Acting Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	Case No. 3:16-cv-00432

Before the Court is the Plaintiffs' unopposed motion for entry of final judgment and for extension of time to file for fees and costs. Doc. No. 132. On January 19, 2021, the Court granted the Plaintiffs' motions for summary judgment in part, entering a permanent injunction against the Defendants, and granted the Defendants' motion to dismiss in part. Doc. No. 124. On February 18, 2021, the Plaintiffs voluntarily dismissed all claims not previously resolved by the Court's order. Doc. No. 131.

Upon review, the Plaintiffs' motion (Doc. No. 132) is **GRANTED**. Accordingly, the Court **ORDERS** as follows:

The Clerk of Court is directed to enter judgment in favor of Plaintiffs Religious Sisters of Mercy, Sacred Heart Mercy Health Care Center (Alma, MI), SMP Health System, University of Mary, Catholic Benefits Association ("CBA"), Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association (collectively, the "Catholic Plaintiffs") as to their claims under the Religious Freedom Restoration Act ("RFRA") challenging the interpretations of Section 1557 and Title VII that require the Catholic Plaintiffs to perform and provide insurance coverage for gender-transition procedures.

The Clerk of Court is directed to enter judgment in favor of the Defendants as to Plaintiff State of North Dakota's claims under the Spending Clause. See Fed. R. Civ. P. 56(f).

The Court **DECLARES** that Defendant U.S. Department of Health and Human Services' ("HHS") interpretation of Section 1557 that requires the Catholic Plaintiffs to perform and provide insurance coverage for gender-transition procedures[1] violates their sincerely held religious beliefs without satisfying strict scrutiny under the RFRA. Accordingly, the Court **PERMANENTLY ENJOINS AND RESTRAINS** HHS, Acting Secretary Cochran, their divisions, bureaus, agents, officers, commissioners, employees, and anyone acting in concert or participation with them, including their successors in office, from interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), or any implementing regulations thereto against the Catholic Plaintiffs in a manner that would require them to perform or provide insurance coverage for gender-transition procedures, including by denying federal financial assistance because of their failure to perform or provide insurance coverage for such procedures or by otherwise pursuing,

[1] As used in this order, the term "gender-transition procedures" includes surgery, counseling, provision of pharmaceuticals, or other treatments sought in furtherance of a gender transition.

charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions.

The Court further **DECLARES** that Defendant Equal Employment Opportunity Commission's ("EEOC") interpretation of Title VII that requires the CBA and its members to provide insurance coverage for gender-transition procedures violates their sincerely held religious beliefs without satisfying strict scrutiny under the RFRA. Accordingly, the Court **PERMANENTLY ENJOINS AND RESTRAINS** the EEOC, Chair Burrows, their divisions, bureaus, agents, officers, commissioners, employees, and anyone acting in concert or participation with them, including their successors in office, from interpreting or enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., or any implementing regulations thereto against the CBA and its members in a manner that would require them to provide insurance coverage for gender-transition procedures, including by denying federal financial assistance because of their failure to provide insurance coverage for such procedures or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions.

The relief provided in this order shall be restricted to the Catholic Plaintiffs, their present and future members, anyone acting in concert or participation with them, and their respective health plans and any insurers or third-party administrators ("TPA") in connection with such health plans. To come within the scope of this order, a CBA member must meet the following criteria:

(a) The employer is not yet protected from interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions by any other judicial order;

(b) The CBA has determined that the employer meets the CBA's strict membership criteria;

(c) The CBA's membership criteria have not changed since the CBA filed its initial complaint on December 28, 2016; and

(d) The employer is not subject to an adverse ruling on the merits in another case involving interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions.

Neither HHS nor the EEOC violates this order by taking any of the above-described actions against any CBA member, anyone acting in concert or participation with a CBA member, or a CBA member's health plans and any insurers or TPAs in connection with such health plans if the agency officials directly responsible for taking these actions are unaware of that entity's status as a CBA member or relevant relationship to a CBA member.

However, if either agency, unaware of an entity's status as a CBA member or relevant relationship to a CBA member, takes any of the above-described actions, the CBA member and the CBA may promptly notify a directly responsible agency official of the fact of the member's membership in the CBA (and the CBA member's satisfaction of the (a)-(d) criteria, described above) or the entity's relevant relationship to a CBA member and its protection under this order. Once such an official receives such notice from the CBA member and verification of the same by the CBA, the agency shall promptly comply with this order with respect to such member or related entity.

Nothing in this order shall prevent the EEOC from:

(1) taking any action in connection with the acceptance of a charge for filing regardless of the source, including receiving an online inquiry via the agency's Public Portal or requesting or receiving a questionnaire or other correspondence from the charging

party, when the charge concerns an allegation against a CBA member concerning the exclusion of gender-transition procedures from its insurance coverage;

(2) accepting a charge alleging that a CBA member does not provide insurance coverage for gender-transition procedures, and from entering the charge into the EEOC's computer systems;

(3) serving a notice of the charge upon a CBA member within ten days as required by 42 U.S.C. § 2000e-5(b); or

(4) issuing a right-to-sue notice to a charging party who has filed a charge against a CBA member concerning the exclusion of gender-transition procedures from its insurance plan in accordance with the requirements and procedures set forth in 42 U.S.C. § 2000e-5(b) & (f)(1) and 29 C.F.R. § 1601.28(a)(1) & (2).

The injunction contained in this order replaces the injunction issued in the Court's January 19, 2021 order.

Any motion for attorneys' fees and expenses filed by any prevailing Plaintiff shall be filed within 60 days after the expiration of the deadline to appeal or after final resolution of all appeals, whichever is later.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 19th day of February, 2021.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

In the United States Equal Employment Opportunity Commission
[redacted] *v. Catholic* [redacted]
EEOC Charge No. 551-2020-[redacted]

DECLARATION OF DOUGLAS G. WILSON, JR.

I, Douglas G. Wilson, Jr., being of sound mind and above the age of 18 years, make the following Declaration based on my personal knowledge and information.

1. I am the Chief Executive Officer of The Catholic Benefits Association ("CBA"), a national membership association of Catholic organizations.

2. The CBA has determined that Catholic [redacted] ([redacted]") meets the CBA's strict membership criteria.

3. [redacted] became a member of the CBA effective *June 30, 2014*

4. As a CBA member, [redacted] is protected by the permanent injunction issued in *Catholic Benefits Ass'n v. Cochran*, No. 3:16-cv-00386, ECF No. 133 (D.N.D. Feb. 19, 2021).

5. The CBA's membership criteria have not changed since December 28, 2016.

I declare under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Douglas G. Wilson, Jr.

6 Oct 22
Date

In the United States Equal Employment Opportunity Commission
[redacted] *v. Catholic* [redacted]
EEOC Charge No. 551-2020-[redacted]

DECLARATION OF [redacted], ESQ.

I, [redacted], being of sound mind and above the age of 18 years, make the following Declaration based on my personal knowledge and information.

1. I am the In-House Legal Counsel for Catholic [redacted] ("[redacted]").

2. [redacted] is a member in good standing of The Catholic Benefits Association.

3. As a CBA member, [redacted] is protected by the permanent injunction issued in *Catholic Benefits Ass'n v. Cochran*, No. 3:16-cv-00386, ECF No. 133 (D.N.D. Feb. 19, 2021) ("Injunction").

4. [redacted] satisfies the criteria set forth in the Injunction, specifically criteria (a) and (d) on pages 3–4 thereof: [redacted] is not protected from interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions by any judicial order other than the Injunction; and [redacted] is not subject to an adverse ruling on the merits in another case involving interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions.

I declare under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

[redacted]
[redacted], Esq.

October 6, 2022
Date