

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

THE RELIGIOUS SISTERS OF
MERCY, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, *et al.*,

Defendants.

No. 3:16-cv-386

THE CATHOLIC BENEFITS
ASSOCIATION; DIOCESE OF FARGO;
CATHOLIC CHARITIES NORTH
DAKOTA; and CATHOLIC MEDICAL
ASSOCIATION,

Plaintiffs,

v.

XAVIER BECERRA, *et al.*,

Defendants.

No. 3:16-cv-432

**CATHOLIC BENEFITS ASSOCIATION’S MOTION FOR TELEPHONIC STATUS
CONFERENCE REGARDING FURTHER PROCEEDINGS ON REMAND**

The Catholic Benefits Association, Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association—Plaintiffs in Case No. 3:16-cv-432—respectfully move the Court to set a telephonic status conference to address the scope and timing of proceedings on the general remand issued by the United States Court of Appeals for the Eighth Circuit, and in support state:

1. On April 20, 2021, Defendants filed a notice of appeal of this Court’s order granting summary judgment in favor of the CBA Plaintiffs and the Religious Sisters of Mercy Plaintiffs. Doc. 136. Defendants’ grounds for appeal solely concerned the justiciability of Plaintiffs’ claims.

2. On December 9, 2022, the United States Court of Appeals for the Eighth Circuit affirmed this Court’s order as to the justiciability of the Plaintiffs’ claims individually, holding that the individual Plaintiffs had standing to challenge Defendants’ respective interpretations of Section 1557 of the Affordable Care Act and Title VII of the Civil Rights Act to require provision and coverage of certain “gender-transition services” as burdensome on Plaintiffs’ religious beliefs in violation of the Religious Freedom Restoration Act. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 609 (8th Cir. 2022). The Court of Appeals held, however, that on the factual record before it, the CBA lacked associational standing to sue on behalf of its unnamed members, because the CBA had not identified an additional, non-named-plaintiff member who had standing in its own right sufficient to confer associational standing on the CBA. *Id.* at 601 (To have associational standing, an association must “submit affidavits showing through specific facts that one or more of its members would be directly affected by the illegal activity” (cleaned up and citation omitted).); *see also id.* at 602 (“Other than the three named plaintiffs who are CBA members—the Diocese, Catholic Charities, and CMA—the CBA has otherwise failed to identify members who have suffered the requisite harm.”).

3. The Court of Appeals did not vacate this Court’s injunction, including its protection of CBA’s unnamed members. Instead, it issued a general remand “for further proceedings consistent with this opinion.” *Id.* at 609.

4. The CBA Plaintiffs and the Defendants filed cross-petitions for rehearing, both of which were denied, and the Court of Appeals' mandate issued on March 28, 2023.

5. The CBA Plaintiffs respectfully move the Court to set a telephonic status conference to address the appropriate scope and timing of proceedings on remand for the CBA to present "one or more" individual declarations of non-named-plaintiff CBA members, consistent with the Court of Appeals' direction. *Id.* at 601. The CBA Plaintiffs' request is called for by the Court of Appeals' general remand of the case: "[U]pon a reversal and remand for further consistent proceedings, the case goes back to the trial court for a new determination of the issues presented as though they had not been determined before, pursuant to the legal principles enunciated in the appellate court's opinion, which must be taken as the law of the case." *Poletti v. Comm'r*, 351 F.2d 345, 347 (8th Cir. 1965); *Republican Party of Minnesota v. White*, 416 F.3d 738, 745 (8th Cir. 2005) (same).

6. Apart from attorneys' fees and costs, the only issue remaining to be determined on remand is whether the CBA has non-named-plaintiff members who have standing sufficient to confer associational standing on the CBA.

7. Defendants oppose the requested relief because they have yet to make a determination whether to file a petition for writ of certiorari to the United States Supreme Court. The CBA Plaintiffs respond that with the issuance of the mandate, this Court has jurisdiction over the case to resolve this pressing issue for the CBA's members.

For the reasons set forth herein, the CBA Plaintiffs respectfully request that the Court set a telephonic status conference at its earliest convenience.

Respectfully submitted May 5, 2023,

/s/ Andrew Nussbaum

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2023, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

s/ Andrew Nussbaum

Andrew Nussbaum