UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JAMES DOBSON FAMILY INSTITUTE and USATRANSFORM d/b/a UNITED IN PURPOSE, Plaintiffs, v. XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Defendants.	Case No. 4:24-cv-00986-O

PLAINTIFFS' REPLY IN SUPPORT OF COMBINED MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Defendants concede that HHS and EEOC's AGT Mandate requires Plaintiffs and their third-party administrators ("TPAs"), health insurers, pharmacy benefit managers ("PBMs"), and service providers to cover gender-affirming care, abortion, and immoral infertility treatments. Resp. at 4–5 (noting that health plans cannot exclude "health services related to gender transition or other gender-affirming care"); *id.* at 6 (arguing covered entities violate Section 1557 if they "refuse[] to provide an abortion . . . because of the patient's race or disability."). Defendants similarly concede that the PWFA Rule requires covered employers to accommodate employee abortions and immoral infertility treatments. Resp. at 15 (The PWFA "protects employees who choose to have . . . an abortion."). Defendants concede the Harassment Guidance interprets Title VII to require covered employers to use false pronouns and give access to single-sex spaces to members of the opposite sex. Resp. at 12 ("'The Guidance also provides examples of 'harassing conduct' that . . . contribute to unlawful harassment, including 'repeated and intentional misgendering' and 'the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.'"). And Defendants concede that they refused to import: (1) Title IX's categorical religious exemption into the AGT Mandate; (2) Title VII's categorical religious exemption into the AGT Mandate, the PWFA Rule, and the Harassment Guidance; or (3) the exemption required by RFRA under the holdings of courts cited at footnote two of Plaintiffs' motion (including from this district). Defendants' concessions that the challenged mandates proscribe on their face Plaintiffs' conduct without meaningful religious exemption doom Defendants' opposition. "[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which

the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020).

Defendants instead rely on a web of justiciability arguments that boil down to a core assertion that Plaintiffs' claims are speculative. But this tactic has been repeatedly rejected. Most notably, Defendants fail to grapple with *Braidwood Management., Inc. v. EEOC*, 70 F.4th 914, 926–27 (5th Cir. 2023), in which the Fifth Circuit rejected identical arguments in a challenge to EEOC policy brought by Christian employers. Just as in *Braidwood*, Defendants "refuse[] to declare affirmatively that [they] will not enforce Title VII, [the PWFA, or Section 1557] against the plaintiffs' policies on . . . transgender behavior," abortion, immoral infertility treatments, and gender transition. That refusal ends the debate and entitles Plaintiffs to relief here.

ARGUMENT

1. This case is justiciable.

1.1. Plaintiffs and their health plans are governed by the AGT Mandate.

The AGT Mandate regulates Plaintiffs and their members in two ways: first, through regulation of Plaintiffs TPAs and health insurers; and, second, through regulation of Plaintiffs employment policies. Both show Plaintiffs' injury.

1.1.1. The 2024 Rule interpreting Section 1557 regulates Plaintiffs.

First, Plaintiffs' health insurers, TPAs, PBMs, and service providers are covered entities under the 2024 Rule that must comply with the AGT Mandate. The 2024 Rule's AGT requirements apply to: "Any project, enterprise, venture, or undertaking to: (i) Provide or administer health-related services, health insurance coverage, or other health-related coverage; [or] (ii) Provide assistance to persons in obtaining health-related services, health insurance coverage, or other health-related coverage." 89 Fed. Reg. at 37,694, *codified* at 45 C.F.R. § 92.4. Defendants concede that

TPAs, health insurers, PBMs, and service providers that receive federal financial assistance (such as those relied on by Plaintiffs and their members, *see* Doc. 1-1, ¶ 2; Compl. at ¶ 162; Doc. 1-3, ¶ 25) are covered entities. Resp. at 19 (conceding Plaintiffs "utilize TPAs . . . covered under the Final Rule"). This means that Plaintiffs may not pursue a moral option for their health plans. Because Plaintiffs cannot contract with TPAs and insurers who receive federal financial assistance (nearly all TPAs and insurers in the United States do), they cannot give their employees health insurance consistent with their religious beliefs.

Defendants argue instead that TPAs are immunized from liability for their member's plan design under ERISA, and therefore Plaintiffs lack standing to sue to ensure their health plans are administered consistent with their religious belief by the TPAs, insurers, PBMs, and service providers. Resp. at 19. Defendants' argument tightropes the duty of candor as it is directly contrary to the text of the Section 1557 Rule:

> Regarding the commenter's point that third party administrators are required under ERISA to administer plans consistent with the plan's terms, . . . while we acknowledge that ERISA requires plans to be administered consistent with the documents and instruments governing the plan, **ERISA further provides that it is not to be construed to impair or supersede other Federal laws, including regulations issued under such laws. Courts have held that ERISA's requirement to comply with the terms of the plan must not be construed to invalidate or impair section 1557.**

89 Fed. Reg. at 37,549 (emphasis added). In support of the 2024 Rule's assertion that Section 1557 trumps ERISA, the Rule at footnote 66 cites to *C. P. by & through Pritchard v. Blue Cross Blue Shield of Ill.*, 2022 WL 17788148, at *8, 10 (W.D. Wash. Dec. 19, 2022) for the proposition that "ERISA's requirement at 29 U.S.C. 1104(a)(1)(D) to administer a plan's terms as written 'is subservient to Section 1557, outlawing discrimination, which is dominant.'" The 2024 Rule also cites *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018), for the same proposition that ERISA

cannot be "construe[d] . . . to impair Section 1557. Nothing in Section 1557, explicitly or implicitly, suggests that TPAs are exempt from the statute's nondiscrimination requirements." 89 Fed. Reg. at 37,549 n.66. Simply put, the Rule makes clear that Section 1557 trumps any requirement in ERISA that requires TPAs to administer health plans as written.

Pritchard, and the 2024 Rule's reliance on it, demonstrates why Defendants' arguments fail. There, a parent of a transgender child attempted to circumvent RFRA and other federal conscience protections by suing the secular TPA of the parent's Catholic employer's health plan (not the employer itself), because the employer's health plan excluded gender-affirming care for religious reasons. 2022 WL 17788148, at *1. The TPA defended on the ground that ERISA requires TPAs to administer member health plans as written. *Id.* at 6–7. The TPA also argued that its member's health plan design was protected by RFRA and related religious exemptions. *Id.* at 9–10. Echoing the 2024 Rule, the court rejected both arguments and ruled that the TPA could not administer the religious employer's health plan's exclusion of gender affirming care because Section 1557's anti-discrimination requirement trumped ERISA. *Id.* at *6–*7, *10. Disagreeing with *Franciscan Alliance,* the court in *Pritchard* found that the TPA was a covered entity under Section 1557 and that a TPA "has an independent duty to comply with Section 1557" regardless of ERISA and the employer's exclusions in its health plan. 2022 WL 1778148 at *8–*9. Accordingly, *Pritchard*, and the 2024 Section 1557 Rule's reliance on it, is precisely why Plaintiffs' have standing to challenge the 2024 Rule. By requiring TPAs to cover gender-affirming care regardless of the plan design of the employer, the 2024 Section 1557 Rule requires TPA-administered plans to cover AGT services. That is why *Franciscan Alliance* previously concluded that if a plaintiff's decision about what health coverage is provided to its employees is affected by HHS's interpretation of Section 1557,

the plaintiff has standing to challenge that interpretation. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 678 (N.D. Tex. 2016).[1]

1.1.2. EEOC's tandem interpretation of Title VII requires AGT benefits.

Second, as covered employers under Title VII, the 2024 Rule requires Plaintiffs and their members to cover and accommodate gender transition and immoral infertility treatments in employee health plans. The 2024 Rule declares that although HHS lacks jurisdiction over "employment practices," 89 Fed. Reg. at 37,552, it will "transfer matters to the EEOC or DOJ where OCR lacks jurisdiction over an employer," *id.* at 37,624, 37,627; *see also* 87 Fed. Reg. at 47,877 ("For example, OCR will transfer matters to the EEOC where OCR lacks jurisdiction over an employer responsible for the benefit design of an employer-sponsored group health plan.").

Defendants argue that any harm related to their interpretation of Title VII to require gender-affirming care coverage and immoral infertility treatments is "purely speculative." Resp. at 21. But this misunderstands the Article III injuries caused by the AGT Mandate. Plaintiffs have suffered injury from the AGT Mandate in at least four independent ways:

(1) **the additional burden of complying with the AGT Mandate in the form of the "case-by-case" assessment of religious exemptions and the adoption of new health plans and related policies**, *Ass'n of Am. Railroads v. Dep't of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *see also Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (same); *Christian Emps. All. v. EEOC*,

[1] In Section 1557 litigation, courts have repeatedly extended injunctive relief to employers "and any insurers or TPAs [to the extent they administer the employer's] health plans." *E.g.*, *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1154 (D.N.D. 2021) (subsequent history omitted); *Christian Employers*, 719 F. Supp. 3d at 928 (same).

2022 WL 1573689, at *5 (D.N.D. May 16, 2022) (requiring religious organizations "to prove they are religious or evaluating whether their religious preferences can withstand a case-by-case analysis is a sufficient injury")[2];

(2) **the AGT Mandate is new—issued just this year—and therefore the Fifth Circuit assumes a credible threat of injury**, *see Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020);

(3) **Defendants are actively enforcing their AGT interpretation of Title VII**, *see Lange v. Houston Cnty.* No. 22-13626 (11th Cir. 2023); and

(4) **Defendants refuse to disavow enforcement of the AGT Mandate against Plaintiffs**, *see Braidwood Management*, 70 F.4th at 926–27.

Defendants have no answer for the two courts that have found standing for similar associations of religious employers in cases challenging EEOC's interpretation of Title VII regarding the AGT Mandate. *Religious Sisters I*, 513 F. Supp. 3d 1113, 1142 (D.N.D. 2021) ("*Religious Sisters I*") (enjoining the AGT Mandate under RFRA in favor of several religious organizations); *Christian Emps. All. v. United States Equal Opportunity Comm'n*, 719 F. Supp. 3d 912 (D.N.D. 2024) (enjoining the AGT Mandate under RFRA in favor of an association of Christian employers).

Defendants posit a multi-chain link of contingencies that must occur before standing can exist to challenge the AGT Mandate. Resp. at 22–24. But this argument has been rejected in similar litigation.[3] Plaintiffs are subject to the AGT Mandate, and thus standing is presumed. *Ass'n of Am.*

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[2] Such case-by-case analysis for UIP with its sixty-five employer members would be particularly burdensome as it would require expensive litigation for each member. *See* Compl. at ¶ 161.

[3] *Braidwood Management*, 70 F.4th at 931 (rejecting "EEOC's near talismanic mantra that 'further factual development'" is necessary); *Religious Sisters of Mercy*, 55 F.4th at 607 (holding no further factual development necessary to determine credible threat of enforcement from EEOC exists); *Louisiana*, 705 F. Supp. 3d at 656 (rejecting argument that religious plaintiffs' challenge to EEOC

Railroads, 38 F.3d at 586; *Texas*, 933 F.3d at 446. And the multi-link chain of contingencies Defendants construct is actually just one. After this case, an EEOC Commissioner can file a Commissioner's Charge against UIP's members based upon the UIP's statements herein. *See* 42 U.S.C. § 2000e-5(b) (empowering Commissioners to file charge).

Braidwood Management is on all fours with this case. There, Christian employers brought a pre-enforcement challenge to EEOC enforcement guidance that required covered employers to accommodate certain sexual practices contrary to the employers' faith. As it does here, EEOC outlined a multi-link chain of events that it says would have to occur before the employers' fear of enforcement would be credible. 70 F.4th at 914, 926. The Fifth Circuit disagreed:

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

Id. at 926–27; *see also Cath. Benefits Ass'n v. Burrows*, 2024 WL 4315021 at *4 (adopting *Braidwood*'s reasoning).[4]

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rule was not ripe because of possible contingencies); *Cath. Benefits Ass'n*, 2024 WL 4315021, at *4 (same).

[4] Defendants are correct in one regard—that Title VII does not require abortion coverage. Resp. at 23 (citing 42 U.S.C. § 2000e(k)). Plaintiffs have never claimed anything to the contrary. The only abortion mandates they challenge arise under Section 1557 (an abortion coverage mandate applicable to TPAs and insurers) and the PWFA (an abortion accommodation mandate applicable to employers), both of which Defendants concede exist.

Defendants also argue that, if Plaintiffs' health plans *categorically* exclude infertility coverage, then Plaintiffs will not be liable for violation of the AGT Mandate. Resp. at 23–24. But Defendants' argument responds to a strawman, not the case before them. Plaintiffs only exclude *immoral* infertility "treatments," such as IVF, surrogacy, and gamete donation, not *all* infertility treatment. Compl. at ¶¶ 134, 147.

1.2. Plaintiffs have Article III standing to challenge the PWFA Rule and the Harassment Guidance.

Defendants' justiciability arguments are much the same for the PWFA Rule and the Harassment Guidance. At the outset, however, Defendants do not dispute that their case-by-case approach to adjudicating religious exemptions is, by itself, Article III injury sufficient to sustain Plaintiffs' claims. *Christian Employers*, 2022 WL 1573689, at *5. Nor are Defendants willing to disavow enforcement against Plaintiffs, which is "'a concession that [they] may' seek enforcement." *Catholic Benefits Association*, 2024 WL 4315021, at *4 (quoting *Franciscan Alliance II*, 47 F.4th at 372). The EEOC regularly prosecutes covered employers for "misgendering" employees and for "gender identity" discrimination. *See* Harassment Guidance § 5.c, n.42 (collecting cases).[5]

First, Defendants argue that Plaintiffs' Article III injury from the PWFA Rule and the Harassment Guidance are speculative. Resp. at 24–26. But as explained above, this argument misunderstands the doctrine of pre-enforcement standing. Courts "assume a credible threat of prosecution" in a "pre-enforcement challenge[] to recently enacted (or, at least, non-moribund) [government

[5] *E.g.*, *Roxanna B. v. Yellen*, EEOC DOC 2020004142, 2024 WL 277871, at *12 (Jan. 10, 2024) (liability imposed for "misgendering and deadnaming"); *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (misuse of pronoun may constitute sex-based harassment); *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 at *10-13 (Apr. 1, 2015) (liability imposed for supervisor's use of incorrect pronouns refusal to allow use of restroom consistent with gender identity).

actions] that facially restrict" First Amendment rights as the PWFA Rule and the Harassment Guidance do. *Speech First*, 979 F.3d at 335 (collecting cases). This is because "one should not have to risk prosecution to challenge a statute"—"especially . . . in First Amendment cases." *Arizona Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). "Were it otherwise, [First Amendment rights]—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Id.* Thus, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Id.*

Second, Defendants argue that any compliance burden associated with the PWFA Rule and the Harassment Guidance is conjectural "self-censorship." Resp. at 26. But the PWFA Rule imposes compliance costs on the face of the regulation, 89 Fed. Reg at 29,175-77. And the Harassment Guidance requires Plaintiffs and their members to change their employee policies *now* to accommodate false pronouns and to eliminate single-sex spaces or fear prosecution for failing to comply with the EEOC's position on Title VII. Defendants' hypothetical multi-chain link of "contingencies" fails for the same reason that it did for the AGT Mandate. Standing is presumed for recently enacted regulations like the PWFA Rule and the Harassment Guidance; courts have repeatedly rejected Defendants' argument; and an EEOC Commissioner may file a charge at any time.

Third, as to the Harassment Guidance specifically, Defendants argue that a "guidance" document cannot be challenged by Plaintiffs. Resp. at 27–28. But that argument runs headlong into *Braidwood Management*, which found Article III standing for Christian employers in their pre-enforcement challenge to "EEOC guidance." 70 F.4th at 926–27; *see also Louisiana*, 705 F. Supp. 3d at 655–56 (same). An enforcement action is just a matter of time. Christian employers are regularly sued with EEOC assistance for their policies related to Christian teaching on IVF, *Herx*

v. Diocese of Fort Wayne-South Bend, 48 F.Supp.3d 1168 (N.D. Ind. 2014); gender identity, *C. P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, 2022 WL 17788148 (W.D. Wash. Dec. 19, 2022) (concerning a Catholic hospital); same-sex marriage, *Doe v. Cath. Relief Servs.*, 618 F. Supp. 3d 244 (D. Md. 2022) (subsequent history omitted); *Starkey v. Archdiocese of Indianapolis,* 41 F.4th 931 (7th Cir. 2022); and abortion, *Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130 (3d Cir. 2006). Indeed, a recent report shows that the Defendants' sister agency brings 70% of its enforcement actions against faith-based schools even though they serve less than 10% of students nationally. *See* Jon Schweppe, *The Department of Education's Office of Enforcement: The Obscure Agency Leading a Crusade Against Christian Colleges and How New Data Proves the Bias*, p. 14 (Nov. 2024), available at https://bit.ly/3VQYWRK.

1.3. Plaintiffs' claims are ripe for adjudication.

Article III standing and ripeness often "boil down to the same question." *Susan B. Anthony List*, 573 U.S. at 157, n. 5 (citation omitted). As in *Braidwood Management*, this case is ripe for judicial resolution because no additional factual development is needed to issue declaratory and injunctive relief. 70 F.4th at 930. Plaintiffs have set forth the necessary facts under oath in the complaint, the declarations, and in the motion, and this case "present[s] purely legal questions." *See CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (finding that petitioners presented a "purely legal question" that was ripe for review). At the same time, denying judicial review would inflict significant practical harm on Plaintiffs by forcing them to either follow their religious beliefs or face serious and harsh penalties under the statutes. *Braidwood Management*, 70 F.4th at 931.

1.4. Traceability and redressability are present.

Defendants argue that traceability and redressability are not present because the possibility of private enforcement exists alongside government enforcement of the challenged mandates. Resp. at 28–30. But "[p]rivate enforcement is simply an additional available remedy," as Defendants can enforce Title VII and Section 1557 through a government-initiated enforcement action. *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 62 (9th Cir. 2024). The *additional* availability of private-party enforcement "does not undercut redressability." *Id.*[6] And in any event, the burden of EEOC's investigation, conciliation, and claims-processing of any charge of discrimination (all of which must precede a private-party suit) will be stopped by Plaintiffs' requested relief.

1.5. The participation of individual UIP members is not required.

Defendants also dispute UIP's associational standing, arguing without any factual support that UIP's members' belief and practices are not uniform regarding the moral questions at issue here. Defendants are incorrect. As a condition of UIP membership, UIP member-employers must agree not to provide benefits for or accommodate: "(1) abortion, (2) abortion-inducing drugs and devices, (3) treatments derived from human embryonic stem cells or fetal tissue acquired from acquired from destruction of a fertilized ovum or from abortion, (4) assisted suicide, (5) gender transition services including without limitation puberty blockers, cross-sex hormones, gender

[6] Concerning Plaintiffs' challenge to the Harassment Guidance, Defendants argue that *School of the Ozarks v. Biden*, 41 F.4th 992 (8th Cir. 2022) supports their position that CBA's harm here is speculative. Resp. at 30. Not so. In *Ozarks*, the government defendant had expressly agreed to provide the plaintiff in that case a blanket religious exemption from the challenged interpretation. *Id.* at 999. And in *Ozarks*, the government had never enforced the interpretation that was being challenged. *Id.* Here by contrast, Defendants have neutered Title VII's blanket religious exemption and have specifically enforced their errant readings of the statutes as recently as January 2024. *See Roxanna B.*, 2024 WL 277871, at *12.

reassignment surgeries, and gender conforming surgeries, and (6) counseling affirming or encouraging any such acts." Compl. at ¶¶ 128–29, 134, 146–47, 157; *see also* Seifert Decl.; Strachan Decl. Further, Defendants' argument fails for a related reason. Participation of individual members is not required, where "an organizational plaintiff seeks only declaratory and prospective injunctive relief." *Christian Employers*, 719 F. Supp. 3d at 921 (citing *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013); *Warth v. Seldin*, 422 U.S. 490 (1975); *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 533 (8th Cir. 2005)).

Citing *Harris v. McRae*, 448 U.S. 297, 321 (1980), Defendants argue religious freedom claims cannot be adjudicated on an associational basis. But *McRae* is clearly distinguishable. There, the Court held that the association bringing the case could not assert a free-exercise claim on behalf of its members because the association "concede[d]" that there was a "diversity of view[s] within [its] membership" concerning the religious belief at issue, the permissibility of abortion. *Id.* at 321. The association in *McRae* further conceded that it had no association-wide stance on the permissibility of abortion because it is a "determination which must be ultimately and absolutely entrusted to the conscience of the individual before God." *Id.* Accordingly, the Court held "that the participation of individual members . . . is essential to a proper understanding and resolution of their free exercise claims." *Id.* By contrast, Defendants do not contest here that all UIP members share the same belief that accommodating gender-affirming care, abortion, immoral infertility treatments, false pronouns, and access to single sex spaces violates their Christian faith. Compl. at ¶¶ 128–29, 134, 146–47, 157; *see also* Seifert Decl.; Strachan Decl. As stated in the complaint, UIP employer members must promise to operate their organizations consistent with Christian values, and expressly agree not to accommodate or cover abortion, related drugs, gender-affirming care,

immoral infertility treatments, and gender ideology. Compl. at ¶ 157; *see also* Seifert Decl. at ¶ 24. Defendants attempt to conjure "numerous fact-specific" issues that cannot be decided on an association-wide basis. Resp. at 31. But none of those alleged issues deal with the question presented by Plaintiffs' complaint and motion: whether UIP members' *categorical* refusal to accommodate certain employee requests is protected by RFRA.

Defendants also contend that their compelling interest, if any, in forcing the Plaintiffs to violate their faith cannot be determined on an association-wide basis. Resp. at 34. But the Government lacks evidence of compelling interest as to *any* Plaintiff. As just one example, the AGT Mandate "still leaves gaps, including in the government's own healthcare programs," and therefore cannot "be regarded as protecting an interest of the highest order." *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1148; *see also Franciscan Alliance*, 227 F. Supp. 3d at 693 ("[T]he government's own health insurance programs, Medicare and Medicaid, do not mandate coverage for transition surgeries; the military's health insurance program, TRICARE, specifically excludes coverage for transition surgeries . . . ."); *Christian Employers*, 2022 WL 1573689, at *8 (rejecting the Government's same argument). The same is true for Title VII and the PWFA Rule. Because those statutes exempt a broad swath of employers—*e.g.*, any with less than 15 employees—the Government cannot establish a compelling interest in forcing Plaintiffs to violate their beliefs.

Ultimately, Defendants' argument turns religious freedom on its head. The compelling-interest requirement is part of the *Government's* burden to show why a substantial burden upon religious practice is justified. But Defendants' argument here reverses that constitutional logic, turning an element of strict scrutiny (which the Government must satisfy) into a precondition for asserting a RFRA claim at all. Nothing in RFRA or case law supports that move. Defendants claim that they

can promulgate policies that, in a single stroke, equally burden the religious practices of thousands of like-minded institutions across the country, but that those institutions cannot associate to challenge them. *McRae* did not announce such a categorical prohibition on associations asserting claims of religious freedom. That is why numerous decisions since *McRae* have ruled religious-freedom claims can be asserted by an association, and that *McRae* is distinguishable because of the diversity of religious views at play in that case.[7] If it were otherwise, believers' First Amendment right of association would be destroyed. "Religious groups are the archetype of associations formed for expressive purposes." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S.

[7] *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Lab.,* 471 U.S. 290, 303 n.26 (1985) ("Petitioner Larry La Roche is an associate and a former vice-president of the Foundation. The Foundation also has standing to raise the free exercise claims of the associates, who are members of the religious organization as well as employees under the Act."); *Cath. Benefits Ass'n v. Burrows*, 2024 WL 4315021, at *6 (D.N.D. Sept. 23, 2024) ("The CBA Has Associational Standing" to assert RFRA claim.); *Arizona Yage Assembly v. Garland*, 2023 WL 3246927, at *4 (D. Ariz. May 4, 2023) (holding church had associational standing to assert RFRA claim on behalf of its members in challenge to Controlled Substances Act); *Christian Employers*, 2022 WL 1573689, at *4–5 (holding that Christian association could challenge Mandate under RFRA on behalf of its members); *Word Seed Church v. Vill. of Hazel Crest*, 533 F. Supp. 3d 637, 649 (N.D. Ill. 2021)(holding association of churches had associational standing to assert RLUIPA and free exercise claims); *Fields v. Speaker of the Pennsylvania House of Representatives*, 251 F. Supp. 3d 772, 783 (M.D. Pa. 2017) (holding association could assert free-exercise claim on associational basis); *Franciscan All.*, 227 F. Supp. 3d at 680 (holding that the Christian Medical and Dental association could assert RFRA challenge to the Mandate, and rejecting the Government's invocation of *McRae*); *Cath. Benefits Association*, 24 F. Supp. 3d at 1100–01 (holding that the CBA could assert a RFRA claim on behalf its members); *Big Hart Ministries Assoc., Inc. v. City of Dallas*, 2013 WL 12304552, at *9-10 (N.D. Tex. Mar. 25, 2013) (distinguishing *McRae* and *Cornerstone* and holding that religious organization had associational standing); *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1205–06 (D. Nev. 2009) (holding that group of Indian tribes could assert religious-freedom claims on behalf of their members and rejecting the Government's invocation of *McRae*), *aff'd in part, rev'd in part on other grounds*, *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009); *C.L.U.B. v. City of Chicago*, 1996 WL 89241, at *15 (N.D. Ill. Feb. 27, 1996) (rejecting Defendant's invocation of *McRae* and holding association could assert free-exercise claim on behalf of its members).

171, 200 (2012) (Alito and Kagan, J., concurring). "Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have acted as critical buffers between the individual and the power of the State." *Id.* at 199 (cleaned up). Defendants' associational standing arguments must be rejected, too.

2. The AGT Mandate violates RFRA.

The AGT Mandate violates RFRA because it prohibits Plaintiffs from categorically excluding gender-affirming care, abortion, and immoral infertility treatments from their health plans. The AGT Mandate does so without evidence that granting Plaintiffs a religious exemption would undermine any purported interests the AGT Mandate may serve. And even if there were a compelling governmental interest, Defendants have a less-restrictive means available to them: direct provision of the services at issue.

Defendants respond with two counterarguments. First, in circular fashion, they argue that because Plaintiffs are not complying with the AGT Mandate, the AGT Mandate imposes no burden on Plaintiffs. Resp. at 32. But that is true in every pre-enforcement case—a plaintiff files suit before enforcement occurs to protect their constitutional rights.

Second, Defendants argue that the AGT Mandate makes "clear that they operate in compliance with RFRA." Resp. at 33. HHS specifically argues its religious "notification" or "consultation" provision deprives this Court of jurisdiction because HHS, not this Court, is best positioned to adjudicate Plaintiffs' rights in the first instance. *Id.*; *see also* 45 C.F.R. § 92.302 and commentary at 89 Fed. Reg. at 37,655-61. EEOC similarly points to its "enhanced procedures" for religious exemptions as depriving this Court of jurisdiction. *Id.* at 27; *see also* 89 Fed. Reg. at 29,147 n.245 (stating EEOC's enhanced procedures "will apply to charges filed under any of the statutes that

the EEOC enforces"). But neither the "consultation" provision nor the "enhanced" procedures defeat this Court's jurisdiction.

Start first with the fact that these provisions do not allow UIP members to assert their rights on an associational basis. Instead, UIP members must engage in these processes, case-by-case, sixty-five separate times for the present UIP members. "Government harassment of religious organizations requiring them to prove they are religious or evaluating whether their religious preferences can withstand a case-by-case analysis is [itself] a sufficient injury" to give rise to Article III standing. *Christian Employers*, 2022 WL 1573689, at *5. And Defendants' "reliance on [their] case-by-case standard constitutes 'a concession that it may' seek enforcement" against Plaintiffs. *Cath. Benefits Ass'n*, 2024 WL 4315021, at *4.

Second, the fact that consultation cannot occur on an associational basis harms UIP itself and violates UIP members' right of association guaranteed by the First Amendment. That right, among other things, allows individuals and institutions to associate to amplify their voices and collectively vindicate their rights. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201 (2023) (permitting association to vindicate equal protection rights of their members in civil suit). In this "precarious time for people of religious faith in America" marked by "the repeated illegal and unconstitutional administrative actions against one of the founding principles of our country, the free exercise of religion," *Cath. Benefits*

Ass'n, 2024 WL 4315021, at *1; *see also id.* *1 n.2, UIP's members came together to protect the rights to operate their organizations consistent with their faith. Compl. at ¶¶ 154–55.

Third, HHS's consultation provision can only be accessed by "recipients." 45 C.F.R. § 92.302(b). "Recipients" are "health programs or activities, any part of which" receives federal financial aid "directly or indirectly." 89 Fed. Reg. at 37,526; 45 C.F.R. § 92.2. As the Government concedes, Plaintiffs are not direct recipients of federal funds. Their standing to challenge the AGT Mandate derives from the requirements placed on their TPAs, insurers, PBMs, and service providers. Thus, Plaintiffs and their members, who are nevertheless subject to the AGT Mandate by way of their TPAs or insurers, cannot even access this option.

Fourth, Defendants' religious consultation procedures are not anonymous. For example, Defendants promise that, upon receipt of a FOIA request, they will disclose the names and submissions of those who consulted with HHS about a religious exemption, creating a "Hall of Shame" opportunity for activists ready to punish those seeking such protection. *Id.* at 37,555, 37,660.[8] This is contrary to "longstanding Supreme Court authority supporting standing for organizations whose injured members are not named." *Speech First, Inc. v. Shrum*, 92 F.4th 947, 950–51 (10th Cir. 2024) (citing *NAACP v. Alabama*, 357 U.S. at 458–59; and *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 53 (2006), both involving anonymous membership organizations). To sustain the attempt to compel disclosure of UIP's members' identities, Defendants would have to establish "a substantial relation between the disclosure requirement and a sufficiently important

[8] Exposing those with religious exemption in a "Hall of Shame" is not hypothetical. *See* Andrew T. Walker, *How the Education Department Shames Religious Schools—and How It can Stop*, National Review Online (December 20, 2016), *available at* https://www.nationalreview.com/2016/12/religious-liberty-education-department-title-ix-religious-exemptions-schools-list/.

governmental interest and that the disclosure requirement be narrowly tailored to the interest it promotes," which it has made no attempt to do. *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021). Viewed in this light, it becomes clear that the purpose of Defendants' consultation procedure is to eliminate religious individuals' and entities' ability to associate.

By not allowing UIP members to assert their rights collectively in court, Defendants' religious consultation processes themselves injure UIP members' constitutional rights. The District of North Dakota has already concluded as much: "In this regulatory environment, agencies seem to be enacting illegal regulations but drafting them in such a way as to make a legal challenge difficult because of standing." *Cath. Benefits Ass'n*, 2024 WL 4315021, at *3 n.4. This maneuver is simply another step in Defendants' "legal Penrose staircase" that forces covered employers to a "Kafka-esque burden . . . in even deciding whether the [Mandate] applies to [them]—much less how and to what extent it applies." *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 373 n.10 (N.D. Tex. 2021) (subsequent history omitted). "The executive branch should not be permitted to prevent judicial review of agency actions that clearly violate the civil liberties of American citizens." *Cath. Benefits Ass'n*, 2024 WL 4315021, at *3 n.4.

Finally, HHS admits that any "enhanced procedure" religious exemption only applies during the administrative proceeding and could be contested all over again during any subsequent litigation, 88 Fed. Reg, 37,522, 37,702, codified at 45 C.F.R. § 92.301. It also admits that the denial of a religious exemption in the "enhanced procedure" will trigger an enforcement action against the applicant. 88 Fed. Reg. 37,522, 37,657.

The Defendants' argument is not new. Since 2016, they have contended that *Defendants*, not the courts, are best positioned to determine the meaning of various religious and conscience

protections and that this deprives the courts of jurisdiction. *See, e.g.,* Defs.' Opp'n to Pls.' Mot. Prelim. Inj. at 2–3, *Christian Emps. All. v. U.S. Equal Opportunity Comm'n*, No. 1:21-CV-195, 2022 WL 1573689 (D.N.D. May 16, 2022) (No. 18) (emphasis added) (asserting that "both agencies' affirmation that any future decisions about whether to file any enforcement actions will account for RFRA and other religious defenses"); *id.* at 13 ("Indeed, the agency materials that CEA challenges, such as the HHS Notification and EEOC Document, stress that any future enforcement action based on gender-identity discrimination will be fact-specific and account for all relevant religious-practice exemptions, as well as RFRA."); *id.* at 24 ("And it further stressed that HHS, in any future enforcement actions, would 'comply with [RFRA]' and all applicable court orders."). Most recently, Defendant EEOC made this argument in *Catholic Benefits Association v. Burrows*, contending that "because an employer has religious defenses to" EEOC enforcement and investigations, which "EEOC commits to evaluating . . . on a case-by-case basis," the court lacked jurisdiction over a pre-enforcement challenge. 2024 WL 4315021, at *4. The court disagreed, explaining "[a] religious defense is not the same as a religious exemption. The burden of investigation and possible litigation, at the very least, provides a substantial likelihood of added regulatory burden and compliance costs." *Id.* Unsurprisingly, courts have roundly rejected this argument.

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

Defendants make the same arguments regarding the PWFA Rule and the Harassment Guidance, citing their "enhanced procedures" and "case-by-case" approach to conscience protections as eliminating this Court's jurisdiction under RFRA. Resp. at 35–39. These arguments are wrong for the same reasons as above. The doctrine of pre-enforcement allows Plaintiffs (who are admittedly violating the PWFA Rule and the Harassment Guidance) to seek a declaration and injunction

from this Court to protect their First Amendment rights. And the doctrine of associational standing allows UIP to seek relief on behalf of its members.

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

Defendants argue that because Plaintiffs make distinctions between moral and immoral fertility treatments, "it is far from clear every accommodation request will necessarily burden Plaintiffs' religion." Resp. at 39. But that argument once again misses the point. Plaintiffs will not accommodate *any* infertility treatments they deem to be immoral according to their religious beliefs.

Defendants thus cannot explain why further factual development is needed to determine whether RFRA protects Plaintiffs' categorical position.

Defendants attempt to argue the PWFA Rule and the Harassment Guidance further compelling interests in ensuring employee access to abortions, ending workplace discrimination against women, and promoting "the economic well-being of working mothers." Resp. at 50. Yet none of those interests are stated at the level of specificity required by RFRA, which requires EEOC to identify "the harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). EEOC has made no attempt to meet the *Gonzales* burden here (and cannot do so anyway). Indeed, to take EEOC's argument seriously would mean that EEOC's interest in eliminating sex discrimination would justify suits requiring every single Catholic diocese—of almost 200 in the United States—to prove they qualify for religious exemption with regard to their practice of ordaining only men.

EEOC also argues that the PWFA Rule is the least restrictive means of accomplishing its goals, arguing that forcing Christian employers to accommodate employee abortions is the only means available to increase access to abortion. Resp. at 51–52. But there are many alternatives available. For example, the Government could require employers to give their employees certain amounts of paid time off that can be invoked without requiring the employee to state the reason why. Alternatively, the Government could require abortionists to accommodate an employee's work schedule. Both alternatives would eliminate the concern presented here: forcing employers to knowingly accommodate, and thereby become complicit with, their employees' immoral conduct.

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

The mandates at issue here also violate the Free Exercise Clause in two primary ways. First, the mandates reserve to Defendants the discretionary right to consider whether a religious claimant is entitled to exemption on a case-by-case, individualized basis. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 537 (2021); *see also Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (noting strict scrutiny required when religious exemption depends upon "individualized governmental assessment"). Defendants' object that this case "is nothing like *Fulton*," Resp. at 44, but they offer no explanation why their purported "consultation" provision and "enhanced procedures" are not a system of individualized exemptions that trigger strict scrutiny.

Second, the Mandates are littered with secular exemptions—for employers of less than 15 employees, for employers experiencing undue hardship, and for TPAs and insurers that do not receive federal financial assistance—ensuring that strict scrutiny is triggered under *Tandon*. Defendants respond that these exemptions apply to secular and religious organizations alike. Resp. at 44–46. Yet *Tandon* rejected this argument: "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021).

The Defendants again argue that Plaintiffs do not receive federal financial assistance and therefore have no Free Exercise claim related to the 1557 Final Rule. Resp. at 42–43. For the reasons stated above, however, Plaintiffs' challenge to the 1557 Final Rule stems from the Rule's

foreclosure of a moral health plan option for Plaintiffs. If Plaintiffs cannot contract with a TPA or health insurer who will administer their health plan and its exclusions of abortion, gender-affirming care, and immoral infertility treatments, then Defendants have violated Plaintiffs' right to free exercise.

5. The AGT Mandate, the PWFA Rule, and Harassment Guidance violate the Free Speech Clause.

The mandates at issue here additionally violate Plaintiffs' and their members right to expressive association by prohibiting them from designing employment policies consistent with their faith. Under Defendants' interpretations of Section 1557, Title VII, and the PWFA, Plaintiffs must facilitate and speak consistently with employee gender transitions, abortions, immoral infertility treatments, access to single-sex spaces, and false pronouns. Defendants do not dispute that Plaintiffs are engaged in expression around these issues. Therefore, under Defendants' own view, Plaintiffs are entitled to judgment on their expressive-association claim.

Defendants counter that this claim is not ripe, because Plaintiffs may raise it in an administrative proceeding. Resp. at 47. But that argument is incorrect for all the reasons stated above. The mandates proscribe Plaintiffs right of expressive association on their face, and Defendants refuse to disavow enforcement. That is sufficient for pre-enforcement review.

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

Finally, Defendants contend that the mandates do not prohibit "the making of general statements regarding an employer's mission or religious beliefs." Resp. at 47. But the Plaintiffs are not asking this Court to determine whether Plaintiffs' "general statements" of beliefs are protected. They instead seek protection for their specific employment policies against individual employees and value-laden conversations with such employees, consistent with their religious faith. Nor do Plaintiffs' claims concern conduct alone. For example, the PWFA Rule bars "unwelcome, critical comments" of employee abortions and infertility treatments. 89 Fed. Reg. at 29,218. And the Harassment Guidance explicitly prohibits "misgendering" an employee. Harassment Guidance n.42; *id.* § II(A)(5)(c). Plaintiffs' free speech concerns are warranted.

6. Plaintiffs' request for relief is proper.

Finally, the Court should enjoin any action of Defendants pursuant to the challenged aspects of the AGT Mandate, the PWFA Rule, and the Harassment Guidance, including investigation, agency enforcement, claims processing, and affirmative litigation.[9] This includes EEOC's issuance of notice-of-right-to-sue letters ("NRTS"). In *Catholic Benefits Association v. Burrows*, 2024 WL 4315021, at *10, the court preliminarily enjoined EEOC from issuing any NRTS against the members of an association of religious employers that would require the members to accommodate employee abortions, false pronouns, or access to single-sex spaces under the Pregnant Workers Fairness Act or Title VII. The court explained, "[a] letter to an employee from an agency detailing a right to sue is still a determination of the agency that the organization is not subject to a religious exemption, which would bar any suit." *Id.* That is, EEOC cannot burden religious employers'

[9] Plaintiffs agree with Defendants that Plaintiffs' prayer for relief in paragraphs E, H, and K of their complaint are not presently before the Court because those paragraphs concern Plaintiffs' APA claims, which have been stayed.

rights with its errant interpretations of the PWFA and Title VII through its investigation process, which includes the NRTS. The Western District of Louisiana also recently enjoined EEOC from issuing NRTS in a challenge brought by the United States Conference of Catholic Bishops, the Diocese of Lake Charles, and the Diocese of Lafayette. *Louisiana v. Equal Emp. Opportunity Comm'n*, 705 F. Supp. 3d 643, 664 (W.D. La. 2024) ("EEOC is preliminarily enjoined with respect to the above-listed parties from . . . issuing any Notice of Right to Sue with respect to the same.").

Defendants argue that enjoining EEOC from issuing an NRTS would not redress any harm and would in fact harm Plaintiffs. Resp. at 50. That is incorrect. "Title VII's charge-filing requirement is a processing rule," and the issuance of an NRTS is "mandatory" on EEOC. *Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541, 551 (2019). Here, the proper remedy includes enjoining the Defendants from accepting PWFA charges and issuing right-to-sue notices to PWFA claimants. Because "the PWFA [Rule]," the AGT Mandate, and the Harassment Guidance were promulgated "unconstitutionally" in violation of Plaintiffs' rights, "the acceptance of charges and issuance of right-to-sue notices" must be enjoined. *Texas v. Garland*, 719 F. Supp. 3d 521, 598 (N.D. Tex. 2024).

CONCLUSION

Plaintiffs respectfully request the Court enter judgment in their favor and against Defendants, and award Plaintiffs their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

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Respectfully submitted.

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