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

THE RELIGIOUS SISTERS OF MERCY, *et al.*, *Plaintiffs,* v. ALEX M. AZAR, Secretary of the United States Department of Health and Human Service, *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. ALEX M AZAR, Secretary of the United States Department of Health and Human Service, *et al.*, *Defendants.*	No. 3:16-cv-432

MEMORANDUM IN SUPPORT OF CBA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PERMANENT INJUNCTIVE AND DECLARATORY RELIEF [ORAL ARGUMENT REQUESTED]

The Catholic Benefits Association, Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association – Plaintiffs in Case No. 3:16-cv-432 – submit this memorandum in support of their Motion for Partial Summary Judgment and for Permanent Injunctive and Declaratory Relief ("Motion"), which is being filed contemporaneously herewith. Plaintiffs

request summary judgment on their claims under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 ("RFRA"), and request permanent injunctive and declaratory relief against Defendants, as more fully described herein and in their accompanying Motion.

I. INTRODUCTION

In 2016, the Department of Health and Human Services ("HHS"), in coordination with the Equal Employment Opportunity Commission ("EEOC"), promulgated a rule interpreting Section 1557 of the Affordable Care Act. The gist of Section 1557 is that federally funded health programs and activities cannot discriminate on the basis of sex. HHS's rule, the "2016 Rule," radically expands that prohibition into a mandate that requires healthcare providers and other entities to perform and provide coverage for gender-transition and abortion services – even when these services violate their good-faith medical judgments and sincerely held religious beliefs. *See* 81 Fed. Reg. 31,376 (May 18, 2016). The EEOC committed to work with HHS to expand this mandate beyond the healthcare context by requiring any employer subject to Title VII of the Civil Rights Act of 1964 to cover gender-transition services in its health plan. *See id.* at 31,432. And even though the text of Section 1557 (by incorporating Title IX) contains both a religious-organization exemption and an abortion exemption, HHS refused to incorporate such exemptions into its rule, thereby forcing a needless confrontation between its novel (and medically controversial) healthcare mandate and the longstanding federal protections for rights of conscience and religious exercise. CBA Pls.' Verified Second Am. Comp. ("SAC") ¶¶ 70-90.

To violate Defendants' mandate means the loss of federal funding, civil and criminal penalties, agency enforcement actions, and exposure to private lawsuits. To comply means forsaking conscience and religious faith. Either choice is devastating for Catholic organizations like Plaintiffs and their members. *See* SAC ¶¶ 162-174, 220-241.

In recognition of the severe burden the 2016 Rule places on religious organizations, a federal district court in Texas preliminary enjoined then later vacated portions of the rule, telling HHS to reconsider. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (preliminary injunction); *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019) (vacatur and remand to agency). Similarly, this Court entered a temporary stay of enforcement prohibiting HHS from enforcing portions of the 2016 Rule against Plaintiffs in this case. ECF No. 36.

Years passed and HHS kept promising a new rule. It finally announced one in June 2020. The new rule, the "2020 Rule," would have repealed the prior mandate, leaving organizations free to decide, based on their medical and religious judgment, whether to perform or cover gender-transition and abortion services. *See* Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 37,187-88 (June 19, 2020). The new rule also would have recognized that organizations cannot be forced to violate their consciences and religious beliefs in the provision or coverage of health services. *See id.* at 37,193, 37,207.

Had it taken effect, the 2020 Rule may have resolved some of the substantive issues in this case. (It did not, however, address the EEOC's imposition of a transgender services coverage mandate under Title VII.) But the new rule never became operative.

A few days after it was announced, the Supreme Court decided *Bostock v. Clayton County*, holding that an employer violates Title VII's ban on sex discrimination if it fires someone "simply for being . . . transgender." 140 S. Ct. 1731, 1753 (2020). Even though the Court was careful to say it was not "prejudg[ing]" how its logic might apply in other contexts like healthcare, and even though it expressed "dee[p] concer[n] with preserving the promise of the free exercise of religion,"

several states and private plaintiffs quickly brought legal challenges to the 2020 Rule, invoking *Bostock* and asking that the 2020 Rule be enjoined and the 2016 Rule be reinstated.

Two district courts obliged. In *Walker v. Azar*, the district court, finding that the 2020 Rule was "contrary to *Bostock*," "stay[ed] the repeal of the 2016 definition of discrimination on the basis of sex"; ordered that the 2016 Rule's "definitions of 'on the basis of sex,' 'gender identity,' and 'sex stereotyping' . . . will remain in effect"; and preliminarily enjoined HHS "from enforcing the repeal." 2020 WL 4749859, at *1, *10 (E.D.N.Y. 2020). In *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, the district court issued a nationwide preliminary injunction enjoining the 2020 Rule to the extent it "eliminated 'sex stereotyping' from the [2016] Rule's definition of 'discrimination on the basis of sex,'" and barring HHS "from enforcing its incorporation of [a] religious exemption" into the new rule. 2020 WL 5232076, at *1, *45 (D.D.C. 2020).

Together, these "overlapping injunctions," *see id.* at *41 (quotation omitted), stay implementation of the 2020 Rule and resurrect those portions of the 2016 Rule vacated in *Franciscan Alliance*. The effect of these injunctions is to reinstate the same state of affairs, and reimpose upon Plaintiffs the same severe burdens, that they faced when they brought this lawsuit in 2016. If Plaintiffs' request for relief was critical then, it is even more critical now. Plaintiffs request that the Court enter summary judgment on their claims under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4 (Counts XI and XII of their Second Amended Complaint), together with permanent injunctive and declaratory relief.

There are, to be sure, strong reasons to invalidate the 2016 Rule on its own terms under the Administrative Procedure Act ("APA"). Section 1557 bans sex discrimination by incorporating Title IX, stating that "an individual shall not, on the ground prohibited under . . . [T]itle IX," be

subject to discrimination in federally funded healthcare programs. 42 U.S.C. § 18116(a). Title IX, in turn, prohibits sex discrimination, but states that it "shall not apply" to religious organizations, 20 U.S.C. § 1681(a)(3), and "shall [not] be construed to require . . . any person . . . to provide or pay for any benefit or service . . . related to an abortion," *id.* § 1688. For HHS to refuse to incorporate these religious and abortion exemptions into its 2016 Rule was contrary to law at the outset. *See Franciscan Alliance*, 227 F. Supp. 3d at 691. Yet when HHS sought to correct its error in the 2020 Rule, the district court in *Whitman-Walker Clinic* enjoined it, finding that HHS's "incorporation of the religious exemption contained in Title IX" was itself contrary to law under the APA. 2020 WL 5232076, at *45. And in several other legal challenges to the 2020 Rule, plaintiffs likewise seek to preclude HHS from respecting religious freedom in its rulemaking, dimming the prospects for any regulatory religious exemption.[1]

There is no reason for Plaintiffs (or this Court) to continue to ride this administrative-judicial seesaw, nor should Plaintiffs have to wait yet another four years for an uncertain regulatory process to play out. This is because, regardless of how Section 1557, Title VII, and related federal laws are interpreted, RFRA protects Plaintiffs' religious exercise. "RFRA operates as a kind of super statute" and "supersedes [the] commands" of federal law when it burdens religious practices. *Bostock*, 140 S. Ct. at 1754. Thus, even if present and future interpretations of federal law require healthcare providers to perform, and employers to cover, gender-transition and abortion services, RFRA entitles Plaintiffs and their members to an exemption permitting them to perform and cover only those services that are consistent with their religious convictions.

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[1] *See BAGLY v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-11297, Compl., ECF No. 1 (D. Mass. July 9, 2020); *New York v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-05583, Compl., ECF No. 1 (S.D.N.Y. July 20, 2020); *Washington v. U.S. Dep't of Health & Human Servs.*, Compl., No. 20-cv-01105, Compl., ECF No. 1 (W.D. Wash. July 16, 2020).

Accordingly, Plaintiffs ask the Court to enter summary judgment on their RFRA claims, to declare unlawful any interpretation of Section 1557 and related federal laws (including Title IX and Title VII) that would require Plaintiffs and their members to perform or cover gender-transition and abortion services in violation of their sincerely held religious beliefs, and to permanently enjoin HHS and the EEOC from enforcing any such interpretation against Plaintiffs, their members, and their respective insurers or third party administrators ("TPAs").

II. STATEMENT OF UNCONTESTED MATERIAL FACTS

Plaintiff The Catholic Benefits Association ("CBA") exists to help its members, all Catholic institutions, carry out their callings and operate in a manner that complies with their Catholic convictions. SAC ¶ 44. Plaintiffs Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association are members of the CBA. *Id.* ¶¶ 12, 25, 32. All Plaintiffs and all CBA members are Catholic institutions that adhere to the teachings of the Catholic Church on issues such as abortion, sterilization, and the nature of the human person. *Id.* ¶ 70. Some operate health care programs or activities as part of their ministry. *Id.* ¶ 55-57. All seek to offer their employees generous health benefits. *Id.* ¶ 44. The CBA brings this action on behalf of itself and its members. *Id.* ¶ 60-64.

As Catholic institutions, CBA members believe that all persons should be treated with dignity. Because their Catholic faith teaches that gender transitions and abortions are immoral and harmful, CBA members cannot facilitate these services, either by performing them directly or by covering them in their health plans. *Id.* ¶¶ 70-90. Yet pursuant to Section 1557 and related federal laws, including Title VII, Defendants have promulgated a series of rules and policies (the "Mandate") that force CBA members to do just that. *Id.* ¶¶ 220-241. If CBA members refuse to comply with the Mandate, they face financial ruin: health care institutions will be cut off from

Medicare and Medicaid funding, and employers are threatened with federal enforcement actions and damages liability. *Id.* ¶¶ 162-174.

A. Pursuant to Section 1557 and Title VII, Defendants require healthcare providers and employers to perform and provide coverage for gender-transition and abortion services.

The Mandate has its genesis in a final rule promulgated in 2016 by HHS with support and input from the EEOC. The memorandum brief filed today by Plaintiffs Religious Sisters of Mercy et al. in Case No. 16-cv-00386 (ECF No. 96-1) well describes the Mandate and its key provisions requiring organizations to provide health services related to gender transition and abortion, and to cover these services as part of their employee health plans. Plaintiffs hereby incorporate the description of and arguments regarding the Mandate set forth in the contemporaneous briefing of the Religious Sisters of Mercy. Plaintiffs write separately to describe the EEOC's role in promulgation and enforcement of the Mandate and the effects of the Mandate on CBA members.

By its terms, Section 1557 bars sex discrimination only in the context of health programs and activities that receive federal funds. So HHS defined a "covered entity" subject to its Mandate as "any entity that has a health program or activity, any part of which receives Federal financial assistance from [HHS]." 81 Fed. Reg. at 31,445. As a practical matter, this includes most healthcare providers, such as physicians, hospitals, and clinics, as well as most health insurers and TPAs. *See* SAC ¶ 125. But HHS also recognized that its Mandate had wider implications because Section 1557 is not the only federal law that bans sex discrimination. Title IX (which Section 1557 expressly incorporates, *see* 42 U.S.C. § 18116(a)) prohibits sex discrimination in federally funded educational programs and activities. *See* 20 U.S.C. § 1681(a). And critically here, Title VII prohibits sex discrimination by any employer with 15 or more employees – regardless of whether it receives federal funds. *See* 42 U.S.C. §§ 2000e-2(a), 2000e(b).

The EEOC is the federal agency principally responsible for interpreting and enforcing Title VII. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988). When HHS promulgated the Mandate, it coordinated with the EEOC to broaden the Mandate to all Title VII employers, even those that do not operate federally funded health programs. HHS achieved this result in three steps.

First, the Mandate declares that health plan exclusions for transition-related health services are discriminatory. *See* 81 Fed. Reg. at 31,429, 31,472 (making it unlawful for covered entities to categorically exclude or limit coverage "for all health services related to gender transition" and to deny or limit coverage for "specific health services related to gender transition" when doing so "results in discrimination against a transgender individual"). Second, the Mandate defines health insurers and TPAs to be covered entities, which means that when these entities provide insurance coverage or administer benefits for employer-sponsored plans, they must ensure that transition-related services are covered – even when the employer is not itself a covered entity. *See id.* at 31,432 (requiring compliance with the Mandate by "an entity that receives Federal financial assistance [and] is principally engaged in providing or administering health services, health insurance coverage, or other health coverage"). Finally, for non-covered entities that are outside HHS's "jurisdiction" and that refuse to cover transition-related services in their health plans, HHS said it would coordinate with the EEOC to address the matter:

> As part of its enforcement authority, [HHS] may refer matters to other Federal agencies with jurisdiction over the entity. Where, for example, [HHS] lacks jurisdiction over an employer responsible for benefit design, [HHS] typically will refer or transfer the matter to the EEOC and allow that agency to address the matter. The EEOC has informed [HHS] that, provided the filing meets the requirements for an EEOC charge, the date a complaint was filed with [HHS] will be deemed the date it was filed with the EEOC . . . .

Id.

The EEOC had already begun enforcing this aspect of the Mandate pursuant to its Title VII authority. When the Mandate was promulgated in 2016, official EEOC guidance interpreted Title VII's ban on sex discrimination to prohibit discrimination based on "transgender status." *See* SAC ¶ 156. And between 2016 and today, the EEOC has specifically enforced this interpretation to require employers to pay for gender-transition services as part of employee health coverage:

- The EEOC sued an employer and later entered into a three-year consent decree which provided that, "as of January 1, 2016, [employer's] national health benefits plan will not include any partial or categorical exclusion for otherwise medically necessary care based on transgender status." EEOC, Deluxe Financial to Settle Sex Discrimination Suit on Behalf of Transgender Employee, 2016 WL 246967 (Jan. 21, 2016).

- In 2016, the EEOC submitted an amicus brief in *Josef Robinson v. Dignity Health*, No. 3:16-cv-03035 (N.D. Cal. 2016), arguing that a hospital's categorical exclusion of coverage for gender transition services in its employee health plan violated Title VII. *See* SAC ¶ 158.

- The EEOC has taken enforcement action against other employers on the same grounds. *See* Soc'y for Human Res. Mgmt., Wal-Mart Loses Perfect LGBTQ Rating Because of Transgender Harassment, Nov. 30, 2017 (highlighting EEOC enforcement action against Wal-Mart for "categorical exclusion" from its health plans of "services related to transgender treatment/sex therapy").[2]

The EEOC still maintains this interpretation of Title VII. Even while HHS tried (unsuccessfully) to repeal the Mandate in its 2020 Rule, the EEOC has never backed off its view that Title VII requires employers to cover gender-transition services in their health plans. SAC ¶¶ 160-161. In this regard, the scope of the Mandate is breathtakingly broad. It is not just physicians, hospitals, clinics, insurers, TPAs, and other healthcare providers (i.e., covered entities) that are subject to the gender-transition coverage requirement. Rather, according to Defendants' interpretation of federal law, every employer in the United States subject to Title VII – whether or

[2] Available at https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wal-mart-lgbtq-rating.aspx.

not it operates a health program, and whether or not it receives federal funds – must cover gender-transition services in its health plan.[3]

This aspect of Defendants' Mandate has concretely harmed CBA members. In 2016, two Catholic dioceses, both members of the CBA, received involuntary notices from their insurers that their health plans had begun covering gender-transition services, including cross-sex hormone therapy, male-to-female surgeries, and female-to-male surgeries.[4] When these members, who are not "covered entities," called their insurers to demand removal of this coverage, the insurers stated that coverage was required by Defendants' Mandate. SAC ¶¶ 136-140. In addition, CBA members with self-insured plans have taken steps to ensure their plans reflect their religious convictions and exclude gender-transition and abortion coverage. But the TPAs that administer these plans have demanded that CBA members indemnify the TPA or otherwise accept the TPA's liability, thereby forcing members to take on expanded legal obligations in the event Defendants or a private party seeks to enforce the Mandate against TPAs. *Id.* ¶¶ 21-22, 240, 244.

B. Defendants' Mandate substantially burdens the religious practices of CBA members.

CBA members' exercise of religion is substantially burdened by the Mandate because it coerces them, under the threat of severe economic losses and penalties, to provide and cover gender-transition services and abortions contrary to their Catholic faith. SAC ¶¶ 220-241.

CBA members that qualify as covered entities must perform gender transition and abortion

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[3] Title VII applies to any employer with 15 or more employees. According to the U.S. Census Bureau, there are over 875,000 such employers in the United States. *See* SAC ¶ 111.

[4] Covered male-to-female surgeries include orchiectomy and penectomy (removal of testicles and penis) and clitoroplasty, labiaplasty, and vaginoplasty (creation of a clitoris, labia, and vagina). Covered female-to-male surgeries include mastectomy, hysterectomy, vulvectomy and vaginectomy (removal of vulva and vagina), and metoidioplasty and phalloplasty (creation of penis). *See* SAC ¶ 136-140, SAC Exs. E and F.

services and must support efforts to transition in their counseling and mental health programs. *Id.* ¶¶ 127-129. Covered entities must alter their speech and advice to conform with HHS's conclusions about proper care, including agreeing to use a patient's preferred pronouns. *Id.* ¶¶ 130-131. Covered entities also must cover gender transition and abortion services in their employee health plans. *Id.* ¶¶ 132-136. Failure to comply risks the loss of federal funding, civil and criminal penalties, and other forms of liability. *Id.* ¶¶ 162-174.

As explained, CBA members that are not covered entities must comply with the Mandate by covering gender transition and abortion services in their health plans, either because their insurer or TPA (a covered entity) requires it or because these members are subject to Title VII. As a result of coordination between HHS and the EEOC, every CBA member with at least 15 employees is subject to civil enforcement actions and other penalties if it fails to comply with the Mandate's coverage requirements. *Id.* ¶¶ 161, 165-167, 171-174.

The CBA's own religious practices are burdened by the Mandate. The CBA is a membership organization whose mission is to help its members—Catholic organizations located in North Dakota and elsewhere[5]—exercise their right to practice their faith in their professions and workplaces, including their right to offer health care services and to provide employee health benefits consistent with Catholic values. *Id.* ¶ 44. Defendants' Mandate makes these aspects of the CBA's religious exercise virtually impossible.

[5] CBA members include over 1,000 Catholic employers across the United States, including over 60 Catholic dioceses and archdioceses, as well as Catholic hospitals, Catholic Charities, Catholic schools, and other Catholic ministries and businesses. *See* SAC ¶¶ 52-57 (describing CBA members).

C. Due to the injunctions against the 2020 Rule, the Mandate remains in effect and continues to burden Plaintiffs' religious practices.

HHS's 2020 Rule sought to "substantially repea[l] much of the 2016 Rule," 85 Fed. Reg. at 37,161, including the former rule's definition of "on the basis of sex," *id.* at 37,178. The 2020 Rule would have ensured that providers are "free to use their best medical judgment, consistent with their understanding of medical ethics," in providing health care, *id.* at 37,187; would have "explicitly incorporate[d] relevant statutory exemptions from Title IX, including abortion neutrality and the religious exemption," *id.* at 37,162; and would have clarified that Section 1557 must be interpreted consistent with RFRA and other federal laws protecting conscience and religious exercise, *id.* at 37,204-05.

But shortly before and shortly after the 2020 Rule's effective date of August 18, 2020, it was enjoined by two district courts. The first was the Eastern District of New York, which on August 17, 2020 found that plaintiffs were likely to succeed on the merits of their APA claim and entered a preliminary injunction against the 2020 Rule. *See Walker*, 2020 WL 4749859, at *1, *9. The court acknowledged that the 2016 Rule had been vacated in *Franciscan Alliance* and "agree[d] that it has no power to revive a rule vacated by another district court." *Id.* at *7. Yet the court "stay[ed] the repeal of the 2016 definition of discrimination on the basis of sex," ordered that this definition (along with the 2016 definitions of "gender identity" and "sex stereotyping") "will remain in effect"; and preliminarily enjoined HHS "from enforcing the repeal." *Id.* at *10.

On its heels was a decision by the federal district court in the District of Columbia, which on September 2, 2020 issued a nationwide preliminary injunction against key portions of the 2020 Rule. *Whitman-Walker Clinic*, 2020 WL 5232076, at *45. This court also acknowledged that it had "no authority . . . to disregard the final order of a district court vacating part of a regulation." *Id.* at *13. But it purported to distinguish between what it called the "'gender identity' portion" of

the 2016 Rule, which had been vacated, and the rule's "prohibition on discrimination based on sex stereotyping," which supposedly had not. *Id.* at *14. So the court enjoined the 2020 Rule to the extent it "eliminated 'sex stereotyping' from the [2016] Rule's definition of 'discrimination on the basis of sex.'" *Id.* at *1, *45. The court also faulted HHS for respecting religious freedom in the 2020 Rule, suggesting that "a blanket religious exemption" might "allow for discrimination on the bases prohibited by Section 1557 or for the denial of health services to women." *Id.* at *28 (quoting 81 Fed. Reg. at 31,379) (internal quotation marks omitted). The court thus enjoined HHS "from enforcing its incorporation of [a] religious exemption" in the new rule. *Id.* at *45.[6]

Together, the injunctions in *Walker* and *Whitman-Walker Clinic* stay implementation of the 2020 Rule, prevent repeal of the 2016 Rule, and reinstate Defendants' Mandate. The Mandate is grounded in HHS's interpretation of the prohibition of discrimination "on the basis of sex" in Section 1557, a phrase HHS defined to encompass both "gender identity" and "termination of pregnancy." *See* 81 Fed. Reg. 31,376 (summary of 2016 Rule). The court in *Walker* "stay[ed] the repeal" of that definition, ordered that definition (along with the 2016 definitions of "gender identity" and "sex stereotyping") to "remain in effect," and "preclude[d] the [2020 Rule] from

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[6] Other legal challenges to the 2020 Rule are pending. In *BAGLY v. U.S. Department of Health and Human Services*, for example, the plaintiffs seek to invalidate the 2020 Rule's elimination of "gender identity" and "termination of pregnancy" from the definition of sex discrimination, saying it will "embolden discrimination . . . on the basis of gender identity" and "embolden refusals of reproductive healthcare." No. 20-cv-11297, Compl., ECF No. 1, ¶¶ 231-32 (D. Mass. July 9, 2020); *see also New York v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-05583, Compl., ECF No. 1, ¶¶ 96, 234 (S.D.N.Y. July 20, 2020) (challenging "[t]he 2020 Rule's removal of the mandate that covered entities treat transgender people consistent with their gender identity" and removal of the abortion mandate because it will "further stigmatize abortion" and "embolden providers to deny abortion care"); *Washington v. U.S. Dep't of Health & Human Servs.*, Compl., No. 20-cv-01105, Compl., ECF No. 1, ¶ 1(W.D. Wash. July 16, 2020) (challenging the 2020 Rule's elimination of "sex stereotyping and gender identity from the definition of prohibited 'sex' discrimination").

becoming operative." 2020 WL 4749859 at *1, *10. The *Whitman-Walker Clinic* court purported to distinguish between a "gender identity" portion and a "sex stereotyping" portion of the 2016 Rule, and then "enjoined . . . the repeal" of the latter portion. But even that court acknowledged that these two "portions" could not be "meaningfully separated" because "the belief that an individual should identify with only their birth-assigned sex is such a sex-based stereotype." 2020 WL 5232076, *23. Thus, however denominated, the requirement of the 2016 Rule that healthcare providers and employers like Plaintiffs provide and cover gender-transition services remains in effect and continues to burden their religious exercise.

The nationwide injunction in *Whitman-Walker Clinic* also prohibits "incorporation of the religious exemption contained in Title IX." *Id.* at *45. Although the court noted that "[n]othing in [its] decision" implicated the ACA's protections for conscience (including objections to abortion) and RFRA's protections for religious exercise, the court's invalidation of a "blanket religious exemption" essentially requires religious claimants to file lawsuits invoking these protections and to seek religious exemptions on case-by-case basis. This is itself a burden on religious exercise because it forces religious claimants into an expensive and time-consuming litigation process, often beset by delays and uncertainty – as this case demonstrates. Regardless, even while these two injunctions keep the Mandate alive, they preserve the right to seek judicially crafted, RFRA-based exemptions. *See id.* at *29. That is the relief Plaintiffs are requesting here.

III. ARGUMENT

"Summary judgment is required 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Rodenburg LLP v. Certain Underwriters at Lloyd's, London*, 2020 WL 3455716, at *4 (D.N.D. 2020) (quoting Fed. R. Civ. P. 56(a)). Plaintiffs are entitled to summary judgment on their RFRA claims and to permanent injunctive and declaratory relief against Defendants. Any interpretation of federal law

that requires CBA members to perform and cover gender-transition and abortion services unlawfully burdens their religious exercise. Defendants promulgated such an interpretation in 2016 – HHS under Section 1557 (and by extension, Title IX) and the EEOC under Title VII – and their Mandate remains in effect now. HHS's effort to repeal the Mandate has been enjoined by two district courts, and the EEOC has never changed its official position that Title VII requires employers to cover gender transitions. But the Mandate, as applied to CBA members, cannot survive the rigorous scrutiny that RFRA demands. Defendants do not have a compelling interest in forcing CBA members to facilitate gender transitions and abortions, nor have they pursued that interest by the least restrictive means. Thus, even if the Mandate is a proper interpretation of federal law, it cannot be applied to CBA members.

A. *Bostock* does not support the Mandate and, in any event, expressly preserves RFRA-based exemptions.

The district courts in *Walker* and *Whitman-Walker Clinic* reasoned that *Bostock* requires reinstatement of the 2016 Rule. Although Plaintiffs are entitled to a RFRA-based exemption regardless, it is worth pausing to explain why these courts are wrong, why *Bostock* does not support this interpretation of federal law.

Bostock held that terminating an employee "simply for being . . . transgender" is a violation of Title VII's ban on discrimination "because of . . . sex." 140 S. Ct. at 1753. Thus, an employer transgressed Title VII when it fired a biological male employee who wished to "live and work . . . as a woman." *Id.* at 1738 (quotation omitted). Because the employer did not fire biological female employees who wished to live and work as women, the Court explained, the biological male employee had been treated differently "because of . . . sex." *See id.* at 1741 (explaining that an employer violates Title VII if it "fires a transgender person who was identified as a male at birth but who now identifies as a female," but "retains an otherwise identical employee who was

identified as female at birth").

Importantly, *Bostock* does *not* hold that the term "sex" in Title VII means "gender identity" or "transgender status," as if one simply swaps out one term for the other in the statute and then asks, for example, whether discrimination "because of . . . gender identity" has occurred. Rather, *Bostock* "assum[es]" that "sex" refers to biological sex, *i.e.*, to the "biological distinctions between male and female," *id.* at 1739, and the Court's logic is built upon a simple but-for test:

> If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee – put differently, if changing the employee's sex would have yielded a different choice by the employer – a statutory violation has occurred.

Id. at 1741; *see also id.* at 1739 ("[A] but-for test directs us to change one thing at a time and see if the outcome changes.").

The Court in *Bostock* was careful to cabin its logic to the context of employment terminations, noting that this was the "only question" before it. *Id.* at 1753. While the dissent warned that the Court's decision would have implications for other areas of law, including Title IX and Section 1557, *see id.* at 1781 (Alito, J., dissenting), the Court's majority declined to "prejudge" those questions, *id.* at 1753 (maj. op.). And the dissent's concerns notwithstanding, *Bostock* cannot be read to require healthcare providers and employers to perform or cover gender-transition services (much less abortion).

In the first place, sex-based distinctions in healthcare are not only routine, but often required by the standard of care. Objective, biological differences between men and women necessitate different medical services and interventions. See 85 Fed. Reg. at 37,184 ("The biological differences between men and women . . . are in many ways even more relevant in the health setting."). It is not "discrimination" to tailor healthcare to men or to women specifically. Indeed, the opposite is true: to fail to take into account these biological differences could cause

harm to patients. *See id.*

Second, a healthcare provider that refuses to perform a service in aid of a patient's gender transition does not discriminate on the basis of sex under *Bostock*. To see why, imagine two biologically female patients: one requests a hysterectomy due to uterine cancer, and the other requests a hysterectomy so she can transition to living as a man. A hospital that performs the hysterectomy for the first patient but not the second has not engaged in discrimination on the basis of sex within the meaning of *Bostock*. In distinguishing between the two cases, the hospital has not "intentionally relie[d] in part on an individual [patient's] sex." 140 S. Ct. at 1741. Indeed, both patients are biologically female, so sex is irrelevant to the hospital's decision. Rather, the hospital differentiates between the two cases based on the medical reasons for the procedure (to treat cancer vs. gender dysphoria). Whether this hospital must perform the same procedure for two biologically female patients with two different medical conditions is simply not a question that *Bostock* answers. Nor does *Bostock*'s other formulation of the but-for test – whether hypothetically "changing the [patient's] sex would have yielded a different choice by the [hospital]" – alter the conclusion. If a biological male patient were to request a hysterectomy, he too would be denied the treatment.

In any event, the *Bostock* Court took pains to note that, even if its logic extended beyond the context of employment terminations, it was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution," a guarantee that "lies at the heart of our pluralistic society." 140 S. Ct. at 1754. The Court specifically emphasized RFRA: "Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." *Id.* This is such a case.

B. The Mandate substantially burdens CBA members' religious exercise.

The Mandate already has resulted in concrete burdens on CBA members' religious exercise. As noted, several CBA members have been forced either to cover gender-transition services in their health plans or to take on liability for excluding gender-transition and abortion coverage. And because the Mandate's central provisions "remain in effect," *Walker*, 2020 WL 4749859, CBA members continue to face serious economic repercussions, including the loss of federal funding, civil and criminal penalties, agency enforcement actions, private lawsuits, and damages liability, if they adhere to their religious convictions and refuse to comply with the Mandate.

As a result, the Mandate imposes a substantial burden on CBA members' religious exercise. The district court correctly so held in *Franciscan Alliance*. *See* 227 F. Supp. 3d at 692. For its part, HHS has conceded the merits of Plaintiffs' RFRA claim, stating in its 2020 Rule that "[t]he Department agrees with the court in *Franciscan Alliance* that particular provisions in the 2016 Rule violated RFRA as applied to private plaintiffs." 85 Fed. Reg. at 37,206.

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) "[A] religious exercise need not be mandatory for it to be protected under RFRA." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). Under RFRA, the government substantially burdens the exercise of religion when it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs" either by "condition[ing] receipt of an important benefit upon conduct proscribed by a religious faith" or by "den[ying] such a benefit because of conduct mandated by religious belief." *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 937 (8th Cir. 2015) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)) (internal quotation marks omitted), *vacated on other grounds*, 2016 WL 2842448 (U.S.

May 16, 2016); *see Christian Employers Alliance v. Azar*, 2019 WL 2130142, at *1 (D.N.D. 2019) (noting that "the Court remain[s] bound by" *Sharpe Holdings*).

CBA members exercise religion when they choose both to provide generous health coverage benefits and to obey their consciences and refrain from performing, encouraging, funding, covering in their health plans, or otherwise participating in gender-transition and abortion services. Catholic teaching on the nature of the human person and on abortion is familiar and well-documented, and CBA members, including Plaintiffs, adhere to those teachings. See SAC ¶¶ 70-90. Their conscientious decision to refuse to participate in gender transition and abortion, and their efforts to exclude coverage of these services from their health plans, unquestionably qualify as the exercise of religion under RFRA. *See Sharpe Holdings*, 801 F.3d at 937 (refusal to comply with HHS's contraceptive mandate was exercise of religion).

It is likewise unquestionable that the Mandate substantially burdens the religious exercise of the CBA and its members. "When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, there has never been a question that the government imposes a substantial burden on the exercise of religion." *Id.* at 938 (alteration and quotation omitted). The Mandate forces CBA members to choose between their faith and substantial financial consequences.

Covered entities. By virtue of their religious convictions, CBA members that provide healthcare services, such as Catholic physicians and Catholic hospitals, cannot participate in gender transitions or abortion procedures. SAC ¶¶ 79-83, 86-87. Catholic Charities and other CBA members offering counseling services cannot support their patients' efforts to transition away from their biological sex. *Id.* ¶¶ 75-78. Nor can any of these members provide employee health coverage for gender transitions and abortions. *Id.* ¶¶ 229-232. Yet by adhering to their religious convictions,

CBA members who are covered entities risk financial penalties, agency enforcement actions, private lawsuits, and more. *Id.* ¶¶ 162-174.

Non-covered entities. CBA members that are not covered entities are nevertheless affected by the Mandate's requirement that their health plans cover gender-transition and abortion services. For some members' health plans, gender-transition coverage has already, involuntarily, been imposed by their insurance carrier. *Id.* ¶¶ 136-140. And even if these members could find an insurer willing to exclude such coverage, they still risk enforcement actions and litigation by the EEOC, which has maintained its view (reflected in the Mandate) that Title VII requires such coverage. *Id.* ¶ 160-161. Even CBA members that self-insure and contract with TPAs for administration of employee health benefits have been forced to indemnify their TPAs, or accept their TPAs' liability, against the risk that the health plan will be found out of compliance with the Mandate. *Id.* ¶¶ 21-22, 240, 244. This, too, is a substantial burden on religious exercise because it negatively affects members' ability to "earn income, borrow, and plan for their financial future." *Cf. Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006).

C. The Mandate does not satisfy strict scrutiny.

Because the Mandate imposes a substantial burden on Plaintiffs' religious exercise, it is invalid unless Defendants carry their burden of demonstrating that it passes strict scrutiny. Strict scrutiny under RFRA is "exceptionally demanding." *Sharpe Holdings*, 801 F.3d at 943 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)) (internal quotation marks omitted). Under that test, the government must demonstrate that the Mandate furthers an interest "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And it "bear[s] the burden of demonstrating that the regulation is the least restrictive means of achieving a compelling interest." *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) (citing 42 U.S.C. § 2000bb-1(b)). Defendants cannot carry either end of their burden.

1. The Mandate furthers no compelling interest.

Under strict scrutiny, "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). The government's asserted interests fail for several reasons.

First, the Mandate asserts "a compelling interest in ensuring that individuals have nondiscriminatory access to health care and health coverage." 81 Fed. Reg. at 31,380. But under RFRA, such "'[b]roadly formulated,' or 'sweeping' governmental interests are inadequate." *Sharpe Holdings*, 801 F.3d at 943 (citations omitted). Rather, RFRA requires courts "to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the [Mandate] in [this case]." *Hobby Lobby*, 573 U.S. at 726-27. HHS now agrees that that it has "no compelling interest in forcing the provision, or coverage," of gender-transition procedures. 85 Fed. Reg. at 37,188; *see also id.* at 37,193 (declining to reimpose the "termination of pregnancy" provisions of the 2016 Rule because of longstanding federal protections for conscience and religious exercise).

Not only is the government's interest too broadly formulated, it is not at issue here. Although the Mandate expresses concern with transgender individuals "being refused medical treatment based on bias against them," 81 Fed. Reg. at 31,460, it acknowledges that "[n]one of the commenters supporting a religious exemption asserted that there would be a religious basis for generally refusing to treat LGBT individuals for a medical condition, for example, refusing to treat a broken bone or cancer." *Id.* at 31,379. As the Chairman of the U.S. Conference of Catholic Bishops has stated, "[t]he Catholic Church consistently affirms the inherent dignity of each and every human person and advocates for the wellbeing of all people, particularly the most vulnerable." SAC ¶ 72. The Catholic Church in general, and CBA member healthcare providers in particular, are committed to treating people with gender dysphoria with "compassion, sensitivity,

and respect." *Id*. ¶¶ 71-74.

Nor does the government have a compelling interest in forcing Plaintiffs to cover these services in their health plans. "A law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014). The government has exempted its own health insurance programs from gender-transition coverage. For example, TRICARE, the military's insurance program, does not cover "surgery for gender dysphoria," and it protects the religious beliefs of physicians who object to performing gender-transition procedures. SAC ¶ 152. Further, Medicare and Medicaid do not require coverage for gender reassignment surgery, but allow states and local administrators to make coverage determinations on a case-by-case basis.[7] This coverage determination was based on the conclusions of HHS's own experts that "there is not enough evidence to determine whether gender reassignment surgery improves health outcomes" because while some studies "reported benefits," "*others reported harms*."[8] Under RFRA, the government cannot have a "compelling" interest in a policy that it is not even "willing to pursue itself." *Franciscan Alliance*, 227 F. Supp. 3d at 692-93.

Finally, because the compelling interest test is so demanding, even "important interests" usually fail. *Hobby Lobby*, 573 U.S. at 726 (acknowledging public health and gender equality as "important interests"). The Supreme Court has cautioned that "many laws will not meet the test." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Notably, RFRA requires a compelling

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[7] Ctrs. for Medicare & Medicaid Servs., Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (Aug. 30, 2016), https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282.

[8] Ctrs. for Medicare & Medicaid Servs., Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (June 2, 2016) https://www.cms.gov/medicare-coverage-database/de-tails/nca-proposed-decision-memo.aspx?NCAId=282 (emphasis added).

"*governmental*" interest. 42 U.S.C. § 2000bb-1(b) (emphasis added). The Mandate, however, is entirely a species of administrative rulemaking by the two federal agency-defendants here. Congress has never mandated that health providers perform, or that employers cover, gender-transition services, and even *Bostock*'s interpretation of Title VII does not go that far. The lack of a governmental interest (much less a compelling one) is even more clear with respect to abortion: Congress has made clear that it does not want Title VII, Title IX, the ACA, or the receipt of federal funds to coerce anyone into paying for or performing an abortion. *See* SAC ¶¶ 114-120.

2. Defendants have numerous less restrictive means of furthering their interests.

Even assuming the Mandate furthered a compelling governmental interest—and it does not—it fails strict scrutiny because there are numerous less restrictive alternatives. Under RFRA, the government must "come forward with evidence" that "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Sharpe Holdings*, 801 F.3d at 943 (quoting *Hobby Lobby*, 573 U.S. at 728) (internal quotation marks omitted). But numerous alternatives are available here.

If the government wishes to increase access to gender transition services and insurance coverage for those services, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the [procedures] at issue to any [individuals] who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Hobby Lobby*, 573 U.S. at 728. For example, "the government could provide subsidies, reimbursements, tax credits, or tax deductions to employees" or "the government could pay for the distribution of [services] at community health centers, public clinics, and hospitals with income-based support." *Sharpe Holdings*, 801 F.3d at 945. Here, as in *Hobby Lobby* and *Sharpe Holdings*, "the government has not shown that these alternatives are infeasible." *Id.*

The government could also set up an alternative system for provision of benefits. Indeed, HHS did so when it required insurance plans on its own exchanges to offer gender-transition coverage. 81 Fed. Reg. at 31,428. The government need not coerce religious charities when it can use its own marketplaces to ensure this type of care to those who wish to obtain it. *See Sharpe Holdings*, 801 F.3d at 945 (government could not satisfy strict scrutiny because healthcare exchanges remained "viable" alternative for ensuring contraceptive coverage).

"The government could also assist transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and specialize in those services." *Franciscan Alliance*, 227 F. Supp. 3d at 693. Many doctors and hospitals provide medical transition services; in fact, many hospitals have established centers specializing in transgender procedures. *See, e.g.*, Trans Health, *Trans Health Clinics*, http://www.trans-health.com/clinics/ (last updated Feb. 14, 2018) (listing "health clinics that specialize in trans health care"). If the government wants to increase access to gender transition services—and get better care for people who want them—the government could partner with willing professionals to increase access. It could train health care navigators to assist individuals in finding such services, just as it does with assisting individuals to find plans on the exchanges. Such options not only would increase access to health care for transgender individuals; they also would focus on doctors that specialize in transgender issues rather than conscripting unwilling doctors without necessary expertise.

"If a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt v. Hobbs*, 574 U.S. 352, 365 (2015) (alteration and quotation omitted). Exempting the CBA and its members from the Mandate would not frustrate Defendants' interests or prevent them from pursuing the numerous, less restrictive avenues for achieving their

interests. For all these reasons, CBA members are entitled to an exemption, grounded in RFRA, from the Mandate and from any interpretation of federal law, now or in the future, that requires members to provide or cover gender-transition and abortion services in violation of their sincerely held religious beliefs.

D. Declaratory and injunctive relief are warranted.

Having established their entitlement to a RFRA-based exemption, and with HHS having conceded the merits of Plaintiffs' RFRA claims, Plaintiffs are entitled to summary judgment on those claims. In addition, Plaintiffs request declaratory relief and permanent injunctive relief from the present Mandate and any future iterations thereof. RFRA authorizes a court to enter "appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Declaratory and injunctive relief are the ordinary remedies for violations of RFRA, and both forms of relief are necessary here. *See Christian Employers Alliance*, 2019 WL 2130142, at *5 ("Upon careful consideration of the entire record and particularly the Defendants' concession on the merits of Plaintiffs' RFRA claim, the Court finds that a permanent injunction under Rule 65(d) and declaratory relief under 28 U.S.C. § 2201 are warranted.").

Declaratory relief may be issued in order to "clarify the relations between the parties and eliminate the legal uncertainties that gave rise to this litigation." *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992); *see also* 13C Wright, Miller & Cooper, *Federal Prac. & Proc. Juris.* § 3533.5 (3d ed.). A request for a permanent injunction is measured against a four-part test, and Plaintiffs must show (1) they have succeeded on the merits; (2) they will suffer irreparable injury; (3) the threatened injury outweighs any harm Defendants will suffer; and (4) the requested relief is in the public interest. *See Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999) ("The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except

that to obtain a permanent injunction the movant must attain success on the merits." (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc))).

In 2019, this Court granted permanent declaratory and injunctive relief to religious plaintiffs in a similar RFRA challenge. In *Christian Employers Alliance*, a member organization of religious employers requested such relief against HHS's abortifacient mandate. 2019 WL 2130142, at *1. The legal circumstances there were remarkably similar: **(1)** HHS (along with two other federal agencies) had imposed a burdensome healthcare mandate on religious employers, resulting in a raft of RFRA litigation. *See id.* (citing *Sharpe Holdings*, 801 F.3d 927). **(2)** HHS later issued a Final Rule revising its mandate to fully exempt religious employers. *See id.* **(3)** Although the Final Rule should have relieved the burden and resolved the RFRA litigation, before it became operative, two district courts enjoined it as contrary to the APA and ordered HHS to "maintai[n] the status quo that preceded the Final Rul[e]." *California v. U.S. Dep't of Health & Human Servs.*, 351 F. Supp. 3d 1267, 1298 (N.D. Cal. 2019); *see also Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 829 (E.D. Pa. 2019). **(4)** In this Court, the Christian Employers Alliance sought a RFRA-based exemption to the abortifacient mandate and requested permanent declaratory and injunctive relief for its present and future members; the government conceded the merits of the RFRA claim; and this Court granted such relief. *See Christian Employers Alliance*, 2019 WL 2130142, at *2, *5-6.

CBA members have the same need for relief from the Mandate at issue in this case, a Mandate that, pursuant to recent injunctions, remains in effect and continues to burden the religious practices of the CBA and its members.

1. The CBA and its members are entitled to a permanent injunction.

The CBA and its members are entitled to a permanent injunction because they have established the merits of their RFRA claim. Regardless of how Section 1557, Title IX, and Title

VII are ultimately interpreted by Defendants, RFRA entitles CBA members to adhere to their religious convictions in providing health services and covering health benefits. HHS concedes this. In regard to the other factors, it is well-established that "a likely RFRA violation satisfies the irreparable harm factor." *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944, 958 (E.D. Mo. 2014) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013)). The balance of harms also clearly favors Plaintiffs, given the Mandate's significant financial consequences. *See id*. (citing *Hobby Lobby*, 723 F.3d at 1147). Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Smith v. South Dakota*, 781 F. Supp. 2d 879, 888 (D.S.D. 2011) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *see also Hobby Lobby*, 723 F.3d at 1147 (same).

2. The CBA and its members need protection from the Mandate.

Although HHS may have hoped that its 2020 Rule would resolve this case and other pending litigation against the Mandate, things have not worked out that way. Several states and allied groups have filed at least four lawsuits seeking to overturn the 2020 Rule and specifically attacking HHS's attempt to accommodate religious exercise. Two district courts have issued injunctions against the 2020 Rule, prohibiting HHS from repealing the 2016 Rule and ordering the Mandate to "remain in effect." And the EEOC has never backed off its own religiously burdensome interpretation of Title VII. This is essentially the same legal state of affairs that persuaded this Court, in the *Christian Employers Alliance* case, to grant declaratory relief and a permanent injunction.

Such relief should extend to both present and future members of the CBA. Although the government has previously opposed extending relief to future members in cases like this, this Court in *Christian Employers Alliance* found "little rational for limiting the injunction to current members" since it would "result in an endless cycle of litigation as new members and the Alliance

seek to protect their rights." 2019 WL 2130142, at *4. The Court's injunction in that case thus applied to current and future members, so long as (1) the member was not yet protected from the mandate by any other judicial order; (2) the member met the Alliance's strict membership criteria, (3) those membership criteria had not changed, and (4) the member was not subject to an adverse ruling on the merits in another case involving the mandate. *See id.* at *6-7; *see also Catholic Benefits Ass'n v. Hargan*, No. CIV-14-240-R, ECF No. 184, at 2 (W.D. Okla. March 7, 2018) (permanent injunction against contraceptive mandate based on same criteria for present and future CBA members); *Reaching Souls Int'l, Inc. v. Azar*, 2018 WL 1352186, at *2 (W.D. Okla. Mar. 15, 2018) (permanent injunction against abortifacient mandate for "all current and future participating employers in the GuideStone Plan"). The same reasoning applies here, and Plaintiffs' accompanying Motion requests injunctive relief based on these same criteria.

Relief also should extend to CBA members' health plans and to insurers and TPAs that insure or offer services in connection with CBA members' health plans. Such relief will ensure that members' insurers and TPAs may lawfully offer coverage and services in connection with health plans that exclude coverage of gender-transition and abortion services. *See Christian Employers Alliance*, 2019 WL 2130142, at *6 (enjoining government from enforcing abortifacient mandate "against the Alliance and its members, their health plans, and their insurers and third-party administrators in connection with Alliance member health plans").

As more fully set out in the accompanying Motion, Plaintiffs generally request two forms of relief. First, Plaintiffs request, on behalf of all present and future CBA members, a permanent injunction barring Defendants from enforcing the Mandate or any interpretation of federal law, whether arising under Section 1557, Title IX, Title VII, or otherwise, that coerces CBA members to provide, perform, or cover health services related to gender transitions and abortions in violation

of their sincerely held religious beliefs. Plaintiffs also request that Defendants be prohibited from interfering with the CBA members' efforts to contract with insurers and TPAs for morally compliant health coverage and benefits administration. Second, Plaintiffs request a declaratory judgment that the Mandate and any similar interpretation of federal law, now or in the future, may not lawfully be applied to the CBA and its present and future members, and that such members have a right, pursuant to RFRA, to refuse to provide, perform, or cover health services related to gender transitions and abortions.[9]

IV. CONCLUSION

For the foregoing reasons, Plaintiffs, and the CBA on behalf of its members, respectfully request that the Court enter summary judgment on their RFRA claims (Counts XI and XII) and issue a permanent injunction and declaratory relief against the Mandate. Plaintiffs also respectfully request oral argument on their Motion.

[9] Plaintiffs Religious Sisters of Mercy et al. in Case No. 16-cv-00386 request a permanent injunction against the Mandate and, in the alternative, a preliminary injunction no later than January 20, 2021, the date on which a new presidential administration can begin imposing financial penalties. Plaintiffs here, on behalf of all CBA members, make the same request in the alternative. Although Plaintiffs are entitled to summary judgment and although a permanent injunction is appropriate where, as here, "nothing remains for the district court to resolve regarding the underlying facts" and the parties "disagree only on questions of law," *Bank One*, 190 F.3d at 847; *see Christian Employers Alliance*, 2019 WL 2130142, at *5 (denying as moot motion for preliminary injunction and entering declaratory and permanent injunctive relief), nevertheless, should the Court not be in a position to grant a permanent injunction at this stage, the Court should issue a preliminary injunction before January 20, 2021, enjoining HHS and the EEOC from enforcing the Mandate (whether under Section 1557, Title IX, Title VII, or otherwise) against CBA members for the pendency of this litigation.

Respectfully submitted November 23, 2020,

s/ *Ian Speir*

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, 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/ *Ian Speir*
Ian Speir