

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

CATHOLIC BENEFITS ASSOCIATION,
DIOCESE OF FARGO, and CATHOLIC
CHARITIES NORTH DAKOTA

Plaintiffs,

v.

SYLVIA M. BURWELL, Secretary of the
United States Department of Health and
Human Services; UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES; JENNY R. YANG,
Chair of the United States Equal Employment
Opportunity Commission; and UNITED
STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Defendants.

Case No. 3:16-cv-00432-DLH-ARS

**RESPONSE TO DEFENDANTS' EXPEDITED
MOTION FOR TECHNICAL CORRECTION**

On January 6, Defendants filed an “Motion for Technical Correction” of the temporary injunction issued by Judge Erickson on December 30. Both the December 30 order and the Defendants’ January 6 were cross-filed in this case, brought by the Catholic Benefits Association (“CBA”) and two of its named members, and in *Religious Sisters of Mercy v. Burwell*, No. 3:16-cv-386. For the reasons stated in the Religious Sisters of Mercy’s response brief, Dkt. No. 34, No. 3:16-cv-386, Plaintiffs agree that Defendants’ Motion for Technical Correction is without merit. “The Court’s injunction is not ambiguous, so there is nothing to ‘correct.’ And to the extent HHS seeks to *narrow* the injunction, its arguments are meritless.” *Id.* at 1. Plaintiffs concur that the December 30 order is appropriate in scope as to HHS’s Section 1557 Rule and that the Court should deny Defendants’ motion.

Plaintiffs stress, however, that the Court's order does not take note of the difference in scope between the *Religious Sisters of Mercy* case and the *CBA* case. While both cases seek relief from HHS's Section 1557 Rule, the Catholic Benefits Association also seeks relief against the EEOC. Plaintiffs' lawsuit stresses that HHS has declared that where it "lacks jurisdiction' over a transgender discrimination claim, it will 'transfer the matter to EEOC and allow that agency to address the matter' under Title VII." Dkt. 4 at 5 (quoting 81 Fed. Reg. 31,376, 31,432 (May 18, 2016)). And just as HHS claims that Title IX bars all gender identity discrimination, so EEOC has asserted that Title VII "forbid[s] any employment discrimination based on gender identity." *Id.* (quoting EEOC, "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers ("EEOC Statement"), https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

Plaintiffs' legal arguments against the HHS's Section 1557 Rule and the EEOC Statement are virtually identical. Both agencies' actions are unlawful under the Administrative Procedure Act, and for the same reasons. *Id.* at 8-10. Both agencies' actions also violate the Religious Freedom Restoration Act because they substantially burden CBA members' religious exercise and cannot survive strict scrutiny. *Id.* at 12-19. Thus, given that the Court has properly stayed enforcement of HHS's Section 1557 Rule in this case and in the *Religious Sisters of Mercy* case, Plaintiffs ask this Court to enter an additional stay, *applicable only in this case*, which prohibits the EEOC from infringing on CBA members' rights until such time as the Court rules on Plaintiffs' pending motion for a temporary restraining order.

Plaintiffs also note that HHS has indicated in another related case, *Franciscan Alliance v. Burwell*, No. 7:16-cv-108 (N.D. Tex.), that it is unsure how its efforts to defend its Section 1557 Rule may be affected by the change in administrations. *Id.*, Dkt. 62 at 2 (HHS "unable to provide

assurances” as to its litigation strategy); Dkt. 65 (HHS’s litigation strategy determined by Solicitor General, a position presently unoccupied).

Given these circumstances, Plaintiffs respectfully submit that the *CBA* case, and perhaps the *Religious Sisters of Mercy* case as well, would benefit from a telephonic case management conference with the Court. A telephonic conference would give the Court an opportunity to hear from all parties and discern how best to preserve the status quo before the Court is able to hear and decide the parties’ pending motions for injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2017, the foregoing notice was served on all parties via ECF.

/s/ Eric N. Kniffin