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

THE RELIGIOUS SISTERS OF MERCY, *et al.*, *Plaintiffs*, v. SYLVIA BURWELL, *et al.*, *Defendants*.	NO. 3:16-cv-00386-DLH-ARS **Plaintiffs' Response to Defendants' Expedited Motion for Technical Correction**

INTRODUCTION

Under the guise of a "Motion for Technical Correction," Defendants (HHS) urge the Court to make an unnecessary, premature, and erroneous ruling on the scope of its temporary injunction. But the Court should reject this invitation. 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.

ARGUMENT

The crux of HHS's argument is that the Court's Order "*might* be read to stay enforcement of the Rule as a whole." Docket No. 26, p. 3 (emphasis added). According to HHS, this means that the "continued enforceability" of various provisions of the new Rule—such as provisions related to race, disability, or limited English proficiency—is "subject to question." *Id.* at 4. But this interpretation of the Court's Order is strained. The Order does not purport to stay enforcement of the Rule "as a whole." It stays enforcement only "as against the named plaintiffs," and only "in these two cases." Docket No. 23, p. 2. Thus, the scope of the stay is governed by the scope of the

cases. Indeed, HHS has not identified *any* specific action it wishes to take that it believes is forbidden by the Court's order; its claim is entirely theoretical and speculative.

Even HHS doesn't seem to believe its strained interpretation of the Order. On January 3—four days after this Court's Order, but before filing its motion for "correction"—HHS issued a public "Notice" in response to the nationwide injunction in *Franciscan Alliance v. Burwell*, No. 7:16-cv-108 (N.D. Tex. Dec. 31, 2016). *See* Exhibit A. In that Notice, HHS stated that, although it is enjoined from enforcing the Rule's provisions on "gender identity" and "termination of pregnancy," it "will continue to enforce" the other provisions of the Rule—"including its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other sex discrimination provisions—to the full extent consistent with the Court's order." *Id.* If HHS believes that this Court's order prohibits it from enforcing the other "important protections" of the Rule, then this Notice was misleading.

In short, there is no need for any "correction." By its own terms—and according to HHS's own public pronouncements—HHS remains free to enforce the provisions of the Rule that are not at issue in this case.

Far from "correcting" the Court's Order, HHS's Motion would artificially narrow the scope of Plaintiffs' claims. According to HHS, there are "two—and only two—aspects of HHS's final rule" at issue in the case: the interpretation of "sex" to mean "(1) gender identity and (2) termination of pregnancy." Docket No. 26, p. 2. According to HHS, "Plaintiffs' claims are restricted to what they allege the Rule requires of them *related to that particular interpretation*"; accordingly, the Court should stay "only those two aspects of the Rule." *Id.* (emphasis added).

But while the Rule's provisions related to "gender identity" and "termination of pregnancy" are an important part of *one* of Plaintiffs' APA claims, they are not the *only* basis for those claims. Plaintiffs also allege that the Rule independently violates the APA by refusing to include a religious exemption or an abortion exemption, even though Title IX and the Affordable Care Act require it to do so. Docket No. 6, pp. 18-20. As the court held in *Franciscan Alliance*, this "conflict with [Title IX]" independently "renders [the Rule] contrary to law under the APA." Order at 38, *Franciscan Alliance v. Burwell*, No. 7:16-cv-108 (N.D. Tex. Dec. 31, 2016), Docket No. 62.

Nor are Plaintiffs' claims limited to the APA. Among other things, Plaintiffs claim that forcing them to perform or cover gender transitions or abortions violates the Religious Freedom Restoration Act (RFRA). Docket No. 6, pp. 21-28. As the court held in *Franciscan Alliance*, "Plaintiffs have demonstrated a substantial likelihood of success on their claim that the challenged Rule violates RFRA." Order at 42, *Franciscan Alliance v. Burwell*, No. 7:16-cv-108 (N.D. Tex. Dec. 31, 2016), Docket No. 62.

If Plaintiffs prevail on these APA or RFRA claims—as the plaintiffs have in *Franciscan Alliance*—the appropriate relief is not an order forbidding HHS only from invoking certain magic words (*i.e.*, "gender identity" or "termination of pregnancy"); it is an order forbidding HHS from enforcing its ban on sex discrimination without including Title IX's religious and abortion exemptions, and forbidding the government from forcing Plaintiffs to violate their religious beliefs and medical judgment. Regardless of HHS's chosen label—whether "gender identity," "termination of pregnancy," "sex," "sex stereotypes," or something else—HHS cannot ignore Title IX's exemptions or force Plaintiffs to perform gender transitions or abortions in violation of their religious beliefs and medical judgment.

* * * * *

To the extent HHS's motion seeks to clarify the Court's Order, it is unnecessary: The Order is clearly limited to the issues "in these cases." To the extent HHS's motion seeks to narrow the scope of Plaintiffs' claims, it should be rejected. Plaintiffs are not trying to stop HHS from using only certain magic words; they are trying to stop HHS from forcing them to perform and cover gender transitions and abortions in violation of their religious beliefs and medical judgment. The Court's Order currently protects them from that, and it should not be changed. Instead, the most appropriate course would be for HHS to agree to a preliminary injunction that would allow Plaintiffs to remain protected while the parties litigate the case in an orderly fashion. To date, HHS has refused Plaintiffs' requests to agree to this sensible course.

CONCLUSION

The motion should be denied.

Respectfully submitted this 20th day of January, 2017.

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CERTIFICATE OF SERVICE

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

/s/ Luke W. Goodrich
Luke W. Goodrich

EXHIBIT A

Print

HHS Office for Civil Rights in Action

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January 3, 2017

Notice of Preliminary Injunction Against Enforcement of Section 1557 Rule Provisions on Gender Identity and Termination of Pregnancy

The U.S. District Court for the Northern District of Texas issued an opinion and order on December 31, 2016 in *Franciscan Alliance, Inc. et al v. Burwell*. The order preliminarily enjoins HHS from enforcing, on a nationwide basis, the provisions of the regulation implementing Section 1557 of the Affordable Care Act that prohibit discrimination based on gender identity or termination of pregnancy.

Section 1557 of the Affordable Care Act is critical to ensuring that individuals, including some of our most vulnerable populations, do not suffer discrimination in the health care and health coverage they receive. HHS is therefore disappointed by the Court's decision to preliminarily enjoin certain important protections against unlawful sex discrimination in our health care system.

HHS's Office for Civil Rights will continue to enforce the law - including its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other sex discrimination provisions - to the full extent consistent with the Court's order.

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