

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

THE RELIGIOUS SISTERS OF MERCY,
et al.

Plaintiffs

v.

ALEX M. AZAR, II, Secretary of the
United States Department of Health and
Human Services, *et al.*

Defendants

Case No. 3:16-cv-00386

CATHOLIC BENEFITS ASSOCIATION,
et al.,

Plaintiffs

v.

ALEX M. AZAR, II, Secretary of the
United States Department of Health and
Human Services; UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES; Victoria Lipnic,
Acting Chair of the United States Equal
Employment Opportunity Commission; and
UNITED STATES EQUAL
EMPLOYMENT OPPORTUNITY
COMMISSION

Defendants

Case No. 3:16-cv-00432

**STATUS REPORT OF PLAINTIFFS THE CATHOLIC BENEFITS
ASSOCIATION, DIOCESE OF FARGO, CATHOLIC CHARITIES
NORTH DAKOTA, AND CATHOLIC MEDICAL ASSOCIATION**

Plaintiffs in Case No. 3:16-cv-00432, namely, The Catholic Benefits Association, Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association (collectively “CBA Plaintiffs”) hereby provide this status report to the Court.

CBA Plaintiffs’ Status Report on August 5, 2020 discussed their RFRA and other claims

in this case, the *Franciscan Alliance* decision, the Supreme Court’s decision in *Bostock*, and the Trump administration’s recent rule (the “2020 Rule”) repealing the Obama administration’s prior rule (the “2016 Rule”) which had defined “sex” in Section 1557 to encompass “gender identity” and “termination of pregnancy.” The Status Report also highlighted five recent lawsuits against HHS challenging the 2020 Rule. Since August 5, two district courts have enjoined the 2020 Rule or aspects of it; their decisions are summarized below. One lawsuit, *Washington v. U.S. Department of Health and Human Services*, No. 20-cv-01105 (W.D. Wash.), was dismissed for lack of standing. Two others remain pending. See *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth (BAGLY) v. U.S. Dep’t of Health & Human Servs.*, No. 20-cv-11297 (D. Mass.); *New York v. U.S. Dep’t of Health & Human Servs.*, No. 20-cv-5583 (S.D.N.Y.).

The district court in *Asapansa-Johnson Walker v. Azar*, No. 20-2834FBS-MG (E.D.N.Y.), concluded that the 2020 Rule is “contrary to *Bostock*” and that the repeal of the 2016 Rule was “contrary to law.” ECF No. 23, at 2, 23 (Aug. 17, 2020). While acknowledging that a sister district court in *Franciscan Alliance* had vacated the 2016 Rule, the court in *Asapansa-Johnson Walker* purported to “sta[y] the repeal of the 2016 definition of discrimination on the basis of sex” and order that the prior rule’s “definitions of ‘on the basis of sex,’ ‘gender identity,’ and ‘sex stereotyping’ . . . will remain in effect.” *Id.* at 25. The court also “preliminarily enjoin[ed] the defendants from enforcing the repeal” of the 2016 Rule. *Id.*

The district court in *Whitman-Walker Clinic, Inc. v. U.S. Department of Health and Human Services*, No. 20-cv-01630 (D.D.C.), enjoined the 2020 Rule in part. Noting that the 2016 Rule prohibited discrimination on the basis of both “sex stereotyping” and “gender identity,” and that *Franciscan Alliance* had vacated only (what the court called) the “‘gender identity’ portion” of the 2016 Rule, ECF No. 55, at 30-31 (Sep. 2, 2020), the court enjoined the 2020 Rule to the extent that it “eliminated ‘sex stereotyping’ from the prior Rule’s definition of

‘discrimination on the basis of sex,’” *id.* at 2, 101. The court also held that it was erroneous for HHS to interpret Section 1557 to include a religious exemption, *id.* at 66-67, and enjoined HHS “from enforcing its incorporation of the religious exemption,” *id.* at 101.

These decisions create significant legal uncertainty regarding the interpretation and application of Section 1557. The court in *Asapansa-Johnson Walker* reinstated the substance of the 2016 Rule despite vacatur of that rule in *Franciscan Alliance*. The court in *Whitman Walker Clinic* invalidated the 2020 Rule’s religious exemption but suggested that RFRA, among other laws, may still offer protection for religious organizations. Relief under RFRA is, of course, precisely what CBA Plaintiffs are seeking in this case, and the legal uncertainty created by these decisions may heighten the need for it.

CBA Plaintiffs are still evaluating *Asapansa-Johnson Walker* and *Whitman Walker Clinic* for whether and how they impact CBA Plaintiffs’ claims, the vacatur order in *Franciscan Alliance*, and the basis for a continued stay in this case. These recent decisions may necessitate lifting the stay and resolving CBA Plaintiffs’ claims, particularly their request for declaratory and injunctive relief against interpretations of Section 1557 that would force them and their members to provide or cover medical procedures in violation of their sincerely held religious beliefs. Of note, too, is the fact that the court in *Franciscan Alliance*, while it vacated the 2016 Rule, denied an injunction to the plaintiffs there, and they have since appealed that decision, seeking relief similar to what CBA Plaintiffs have sought here.

Given the unusual and uncertain state of the law on issues at the heart of this case, CBA Plaintiffs request that the Court (i) set another status report deadline in 60 days but also (ii) recognize that CBA Plaintiffs may, during that period, file a motion or other document apprising the Court of their views on whether and how this case should proceed.

DATED: October 5, 2020.

Respectfully submitted,

s/ Ian Speir

L. Martin Nussbaum

Ian Speir

Nussbaum Speir Gleason PLLC

2 N. Cascade Ave., Suite 1430

Colorado Springs, CO 80903

(719) 428-4937

martin@nussbaumspeir.com

ian@nussbaumspeir.com

*Attorneys for Plaintiffs The Catholic Benefits
Association, Diocese of Fargo, Catholic Charities
North Dakota, and Catholic Medical Association*

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 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.

s/ Ian Speir

Ian Speir