

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

CHRISTIAN EMPLOYERS ALLIANCE,

Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.

Defendants.

CIVIL CASE NO. 1:21-cv-00195-
DMT-CRH

JUDGE DANIEL M. TRAYNOR

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Oral Argument Requested

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INTRODUCTION

CEA is asking for the same religious protections that this Court already granted to similar plaintiffs in *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1134–43 (D.N.D. 2021), *judgment entered sub nom. Religious Sisters of Mercy v. Cochran*, No. 3:16-CV-00386, 2021 WL 1574628 (D.N.D. Feb. 19, 2021). Like CEA, those plaintiffs are an association of religious businesses, non-profits, and health care entities that have religious objections to gender transition coverage and performance Mandates under Title VII and the Affordable Care Act. Indeed, since this Court’s February ruling in *Religious Sisters*, the government has publicly insisted even more forcefully that it is committed to enforcing both Mandates under Title VII and the Affordable Care Act. Compl. ¶¶ 82, 116, ECF No. 1. This Court granted the *Religious Sisters* plaintiffs relief under the Religious Freedom Restoration Act (RFRA), and rejected all of the same standing and ripeness arguments the government again urges here. The religious exercise of CEA’s members is no less valuable than that of the entities who obtained relief in *Religious Sisters*, and its members should similarly receive protection.

The government could have fully reserved its rights and avoided the burden imposed by litigating this motion if it had simply agreed to allow the language of the *Religious Sisters* injunction to protect CEA’s members, too, unless and until the Eighth Circuit reverses that order. And this Court could resolve this motion just as simply—without relitigating the arguments it already overruled—by entering an order extending the same scope of injunctive relief to CEA and its members. And, if the Court wishes, once CEA and its members have a protective injunction the case could be stayed pending the *Religious Sisters* appeal.

That is the simplest way to resolve this motion. As to the government’s specific arguments, CEA makes this reply in support of its motion.

ARGUMENT

I. CEA has Article III standing to pursue its claims.

Standing requires three elements: (1) an injury in fact, (2) that is traceable to defendants, and (3) that is redressable by judicial relief. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). CEA’s members need not sit back and wait for enforcement under Title VII or Section 1557 to suffer an Article III injury. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (“*SBA List*”). Rather, a plaintiff can challenge a law’s constitutionality *before* he faces prosecution or enforcement. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749 (8th Cir. 2019).

A. CEA faces a credible threat of injury to confer standing.

The injury in fact element is satisfied—and a preenforcement suit proper—if “there is a substantial risk that the harm will occur.” *SBA List*, 573 U.S. at 158. (citation and quotation marks omitted). Under *SBA List*, “a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Id.* at 159 (citation and quotation marks omitted). This standard is “forgiving” and “lenient” when a party brings First Amendment challenges. *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699–700 (8th Cir. 2021). CEA satisfies each *SBA List* factor.

1. CEA members engage in conduct affected with constitutional interests.

First, CEA members “inten[d] to”—and do—“engage in a course of conduct arguably affected with a constitutional interest.” *SBA List*, 573 U.S. at 159. CEA members, as employers, offer health insurance coverage to employees that reflect their Christian faith and convictions. Mem. in Supp. of Mot. for Prelim. Inj. at 3-5, ECF No. 6-1 (“MPI”); Royce Decl. ¶¶ 6–33, ECF No. 6-2; Compl. ¶¶ 52–54. And CEA’s Healthcare Members perform medical services consistent with their faith and

convictions. *Id.*; Compl. ¶¶ 52, 55. These behaviors are affected with constitutional interests under the Free Exercise Clause and the Free Speech Clause of the First Amendment (and, notably, the religious exercise protections of RFRA, which are derivative of the Free Exercise Clause). Because CEA members’ religious exercise and speech guide their current and future provision of health insurance and medical services, “it is certainly affected with [] constitutional interest[s].” *SBA List*, 573 U.S. at 162 (citation and quotation marks omitted). As a result, all of CEA’s claims are affected with a constitutional interest, “regardless of the precise legal theory.” *Telescope Media*, 936 F.3d at 750.

2. CEA members’ conduct is arguably proscribed by Title VII and Section 1557 and the ensuing Mandates.

Second, CEA members’ religiously guided provision of health insurance coverage and medical services are “arguably proscribed” by Section 1557 and Title VII, via the EEOC Coverage Mandate and HHS Gender Identity Mandate.¹ Indeed, it is clear both from this Court’s order in *Religious Sisters*, and from the government’s own pronouncements in May and June of 2021, Compl. ¶¶ 82, 116, that the government emphatically believes that both Title VII and Section 1557 require health insurance coverage of gender transition services, and that Section 1557 requires health care providers to perform gender transition interventions and to speak to and about patients consistent with their gender identity even where it conflicts with their biological sex.

Regarding Section 1557, CEA’s Healthcare Members are subject to the Affordable Care Act’s prohibition on discrimination on the basis of sex. *See Royce*

¹ The government seems to suggest the “arguably proscribed” standard does not apply. Opp’n to MPI at 26 ECF No. 18 (“Opp’n”) (“But it is not enough that § 1557 ‘arguably’ proscribes actions that CEA members purportedly wish to take . . .”). This conflicts with *SBA List*, 573 U.S. at 162. The government may be mistaking the second *SBA List* factor (arguably proscribed) with its third factor (credible threat of enforcement). *See Opp’n* at 26–27.

Decl. ¶ 13; 42 U.S.C. § 18116; 45 C.F.R. § 92.3 (2020). Section 1557’s regulation—and the Gender Identity Mandate contained therein—has been on the books since 2016. Indeed, this Court already resolved this question, noting that, “HHS tried to repeal the 2016 Rule’s explicit prohibition on gender identity discrimination . . . [b]ut that repeal never took effect.” *Religious Sisters*, 513 F. Supp. 3d at 1138 (quotation marks omitted) (discussing *Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020), *as modified by* 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020), and *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1 (D.D.C. 2020)). *Walker* and *Whitman-Walker* “reinstate[d] the prior definition of ‘on the basis of sex’ to include ‘gender identity’ and ‘sex stereotyping.’” *Id.*

As if to affirm this Court’s view, the government declared in May 2021 that it will “interpret and *enforce* Section 1557’s prohibition on discrimination on the basis of sex to include: . . . discrimination on the basis of gender identity.” Not. of Interp. and Enforc., 86 Fed. Reg. 27984-02, 27,985 (May 25, 2021) (emphasis added); *see* Compl. ¶ 116. This is consistent with what the government declared in the 2016 Rule, which candidly explains that because the rule prohibits gender identity discrimination, a healthcare provider cannot decline to perform gender transition services. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,455 (May 18, 2016) (explaining a provider would have to perform a hysterectomy for a transgender man). The government’s brief in this case even maintains it is *required* by *Bostock* to impose this prohibition of CEA members’ conduct. *See* Opp’n at 24. That insistence definitively resolves the question of whether CEA’s Healthcare Members’ categorical exclusion of gender transition services from their health practices is “arguably proscribed” by the government’s Mandates. It is.

Thus, as the *Franciscan Alliance, Inc. v. Becerra* court declared, “[t]he 2021 Interpretation effectuates a legal Penrose staircase to enforce Section 1557 in the

near identical way as, if not an enhanced version of, how the 2016 Rule dictated.” No. 7:16-CV-00108-O, 2021 WL 3492338, at *7 (N.D. Tex. Aug. 9, 2021). And, because Section 1557 applies to all operations of a healthcare entity, 45 C.F.R. § 92.3(b), by its plain text, it “arguably proscribes” CEA members’ conduct. *See SBA List*, 573 U.S. at 162 (finding the text of the law at issue “swe[pt] broadly” and “arguably proscribed” petitioners’ speech).

The same is true for Title VII. The EEOC has not wavered from its nearly decade-old interpretation *and enforcement* of the Title VII Coverage Mandate, requiring gender transition services coverage in employer provided health insurance. On the contrary, since this Court ruled in *Religious Sisters*, EEOC has enthusiastically reiterated its view. Compl. ¶ 82. And other courts have held that the same conduct CEA members do or intend to engage in here *actually* violate Section 1557 and Title VII. *See Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018) (“Section 1557 also prohibits discrimination on the basis of gender identity”); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020) (health plan that excluded coverage of vaginoplasty and mammoplasty for transgender persons was “discriminatory on its face”).

3. There is a credible threat of enforcement.

Third, CEA’s members face a credible threat of enforcement because: (1) their behavior is arguably proscribed; (2) there is past enforcement and present intent to enforce; and (3) any person can file a complaint leading to government enforcement.

First: “When a statute is challenged by a party who is a target or object of the statute’s prohibitions, there is ordinarily little question that the statute has caused him injury.”² *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) (cleaned up). A credible threat of enforcement arises “when a course of

² Plaintiffs also claim procedural injuries under the APA, and those provide an independent basis for standing. *See Iowa League of Cities*, 711 F.3d at 870–71.

action is within the plain text of a statute.” *Religious Sisters*, 513 F. Supp. 3d at 1139 (citation omitted). As noted above, this is true here. And this Court in *Religious Sisters* readily found healthcare plaintiffs there the “objects of Section 1557 and its implementing regulations,” and employers with more than 15 employees “squarely within Title VII’s reach.” *Id.* at 1136, 1141.

Second: Despite the government’s denial of a history of enforcement, Opp’n. at 12–13, 18, in fact there is such a history. EEOC has long enforced its interpretation of Title VII. *See Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 585 (6th Cir. 2018). This includes specifically requiring gender transition health insurance coverage. *Fletcher*, 443 F. Supp. 3d at 1028 (concerning a categorical exclusion of gender transition services from a health insurance plan). As to HHS, in 2016 multiple complaints were filed against religious entities for refusing to provide gender transition services—and HHS investigated such claims. *See Conforti v. St. Joseph’s Healthcare System, Inc.*, No. 2:17-cv-00050, 2017 WL 67114, at ¶ 81 (D.N.J. Jan. 5, 2017) (HHS investigating claim against Catholic hospital for not performing gender transition surgery); Admin. Compl., *ACLU v. Ascension Health, U.S. Dep’t of Health & Human Servs., Office for Civil Rights* (Oct. 25, 2016), available at <https://perma.cc/26A8-7G95>.

Only a “[t]otal lack of enforcement . . . in extreme cases approaching desuetude” can undermine standing. *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011). Even in-court assurances of non-enforcement by the government do not negate standing. *See Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019). But the opposite exists here: in May and June, 2021, the government insisted it *will enforce and is enforcing* these Mandates, Compl. ¶¶ 82, 116, and in this case the government refuses to disavow enforcement of these Mandates. The government’s “general commitment to follow preexisting religious freedom and conscience protections [cannot] thwart standing.” *Religious Sisters*, 513 F. Supp. 3d at 1140.

Third: A credible threat of enforcement is “bolstered” by the fact anyone can file a complaint against a CEA member, causing administrative investigations— itself “harm sufficient to justify pre-enforcement review.” *SBA List*, 573 U.S. 164-65. The government’s assertion that its investigation of a claim somehow does not “count” towards the credible threat of enforcement fails. Being subject to an HHS or EEOC investigative procedure, in which the agencies can use a variety of tools to demand documents, witnesses, and other compliance on pain of loss of funding “provides substantial additional support for the conclusion” that this case is “justiciable.” *Id.* at 166 (citation omitted). And the threat of those investigatory burdens imposes substantial pressure on entities to violate their religious beliefs, which constitutes a substantial burden under RFRA. Finally, as noted, the Section 1557 rule restricts the free speech of Healthcare Members, rendering the injury inquiry here “forgiving” and “lenient.” *Turtle Island Foods*, 992 F.3d at 699–700.

4. RFRA authorizes this suit.

The government’s rebuttal is to argue that somehow RFRA precludes this suit rather than enabling it. Specifically, the government seems to contend that because RFRA itself *might* shield a members’ conduct (the government refuses to say RFRA *will actually* protect them), then it is unclear whether Title VII or Section 1557 proscribe their conduct, or that there is a credible threat of enforcement.

The government’s position is untenable for several reasons. Initially, the injury in fact standard asks whether legal requirements “*arguably*” apply to CEA members, not whether they do apply *if* one considers RFRA. *SBA List*, 573 U.S. at 160. The Mandates themselves encompass CEA members’ behavior on their face, and the government continues to refuse to say RFRA actually protects anyone.

More fundamentally, the government’s view would largely negate the RFRA statute. RFRA says a person whose religious exercise has been burdened “may

assert that violation *as a claim* or defense in a judicial proceeding and obtain appropriate relief against a government.” 42 U.S.C. § 2000bb-1 (emphasis added). As “relief” a Court may *order* an exemption, as happened in *Religious Sisters*. But the government reads the “relief” language out of RFRA and insists a plaintiff must wait to raise RFRA in response to specific enforcement, that is, only as a defense.

The government’s position cannot be reconciled with previous RFRA litigation. Besides the *Religious Sisters* ruling, this can be shown in the decade of litigation over the Affordable Care Act’s contraceptive mandate. This Court, the Eighth Circuit, and the Supreme Court all considered *pre-enforcement* challenges to an HHS *rule* under the ACA, and all granted RFRA exemptions to the claimants. *See, e.g., Christian Employers Alliance v. Azar*, No. 3:16-cv-309 (D.N.D. May 15, 2019); *Dordt College v. Burwell*, 801 F.3d 946 (8th Cir. 2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Scores of such cases were handled by most federal circuits. None of those courts dismissed the claims based on the theory that RFRA precludes pre-enforcement review because it raises uncertainty over how the mandate might apply in a specific case. Nor was the contraceptive mandate rule any more targeted than the gender identity Mandates being challenged here. The Mandates here unequivocally prohibit any categorical exclusion or limitation on providing gender transition services as being “unlawful on its face.” 81 Fed. Reg. at 31,429; *see also* Compl. ¶¶ 76–77. CEA’s members explicitly and categorically exclude or limit the provision of gender transition insurance coverage and gender transition medical services. Compl. ¶¶ 34, 52–55, 77, 84, 127–29. There is no uncertainty about what these Mandates require or how RFRA would apply.

The government’s view turns RFRA into a statute that prohibits, rather than authorizes, claims to be filed. The government implies that because RFRA overrides statutory or regulatory mandates, those mandates do not actually exist and therefore behavior is not arguably proscribed so as to establish standing to sue. This

negates the plain text and the commonsense operation of the RFRA statute: RFRA operates by acknowledging that sometimes the government imposes mandates violating religious liberty *even though that is illegal under RFRA*, and therefore religious persons need the right to sue to protect themselves to restore law and order in the operation of the executive branch. The government cannot plausibly read RFRA to mean it can impose whatever substantial burden on religion it wants without affirming that RFRA will actually apply, and no one can ever challenge those mandates. RFRA explicitly creates a right to sue, it does not nullify that right.

Whether under RFRA, the APA, or any other cause of action, such “Orwellian Newspeak” does not shield the government from suit. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 865 (8th Cir. 2013). In both these Mandates, the government has imposed “a concrete application of a policy,” then “hedg[ed]” them “within a disclaimer about hypothetical future contingencies”—that is, the government’s contention that RFRA might apply in the future while refusing to say it will actually apply. *Id.* Such hedging “does not insulate regulated entities from the binding nature of the obligations and similarly cannot serve to inoculate the agency from judicial review.” *Id.* The Eighth Circuit has rejected the government’s view that a straightforward mandate “is somehow transformed into something less than a prohibition” merely because the government “couch[ed] an interdiction within a pro forma reference to [their own future] discretion.” *Id.* Instead, persons who face government burdens on their religious exercise actually face them, and governments that refuse to relieve those burdens voluntarily are subject to a “claim” for “appropriate relief.”

B. CEA members’ injury is traceable to the government, and a favorable ruling from this Court will redress their harm.

CEA members’ injury is traceable to the government because it “possess[es] authority to enforce the complained-of provision[s].” *Calzone v. Hawley*, 866 F.3d

866, 869 (8th Cir. 2017). In *Religious Sisters*, the Court held HHS had authority to enforce Section 1557, and EEOC had authority to enforce Title VII, so the injury was caused by the government. 513 F. Supp. at 1139, 1142. So too here.

The government cannot avoid judicial review by blaming the injury on the underlying statutes and not on their agency action, for two reasons. *See* Opp’n. at 20. First, whether Title VII and Section 1557, or the agencies’ rules and policies, prohibit CEA members from refusing gender transition coverage and services is a merits question—and therefore it is not appropriately considered in reviewing standing. *Turtle Island Foods*, 992 F.3d at 699; *Am. Farm Bureau Fed’n v. E.P.A.*, 836 F.3d 963, 968 (8th Cir. 2016). Second, whether the Mandates originate from the statutes or agency rules and policies does not change the fact that the government Defendants “possess authority to enforce the complained-of provision[s]” under *Calzone*. The “relevant inquiry is whether” CEA’s injury “can be traced to allegedly unlawful conduct of the defendant[s], not to the provision of law that is challenged.” *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). Here, the injury derives from the agencies’ authority to enforce the Mandates.

Redressability is not lacking simply because CEA’s requested injunction would not stop private persons from instituting complaints. Injunctive relief against the agencies’ illegal rules and actions provides *some* relief—real relief—from “a discrete injury” traceable to the government. That establishes redressability. *281 Care*, 638 F.3d at 631 (citation omitted). CEA members “need not show that a favorable decision will relieve [their] *every* injury.” *Id.* (emphasis in original).

II. CEA has associational standing on behalf of its members.

The government claims CEA does not have associational standing because CEA does not name any member affected, citing. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 986 (8th Cir. 2011). Opp’n. at 30–32. This is incorrect for

several reasons. First, “individual participation is not normally necessary when an association seeks prospective or injunctive relief for its members.” *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) (cleaned up). Second, CEA has described some of its specific members in this Court and this circuit. *See Christian Emp. All. v. Azar*, No. 3:16-cv-309 (D.N.D. Complaint filed August 29, 2016) (describing CEA members in North Dakota); *State of Mo. v. Biden*, No. 21-3494 (8th Cir. Motion filed Nov. 5, 2021) (describing CEA member in Arkansas). CEA’s verified complaint here pleads that all their members ascribe to CEA’s beliefs concerning this case. Compl. ¶¶ 30–55. Nor must an individual member be named to show it would have standing to sue on its own. *Nat’l Fed’n of the Blind of Neb., Inc. v. Outlook Neb., Inc.*, No. 8:10CV418, 2011 WL 4802643, at *7 (D. Neb. Oct. 11, 2011). Members may remain anonymous. *Religious Sisters*, 513 F. Supp. 3d at 1137.³ CEA’s Complaint is verified, and the motion supported by the Declaration of CEA President Shannon Royce, both which specify that multiple members are subject to Section 1557—the Healthcare Members—and that nearly all of its employer members as subject to Title VII. Royce Decl. ¶¶ 12–13. And both describe (under oath) how the Mandates harm these members. CEA has thus made “specific allegations” showing that *at least* one member “ha[s] suffered or w[ill] suffer harm.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)⁴. Since CEA can show that at least one member can sue individually, it has standing to sue on behalf of all members.

³ *See also Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring) (“the right to associate anonymously often operates as a vehicle to protect other First Amendment rights”).

⁴ *Summers* rejected an argument that the “statistical probability” that an organization’s member would suffer harm confers standing. 555 U.S. at 497–98. CEA makes allegations about its members’ actual harm, not “statistical probabilities.”

Finally, to further support this standing, CEA is attaching a supplemental declaration to this reply, specifying two members who are subject to both the Section 1557 and the Title VII mandates. *See* Ex. 1, Supplemental Declaration of Shannon Royce. CEA believes this evidence is within the scope of its original verified allegations, but to the extent the Court deems it procedurally necessary, CEA is willing to amend the complaint to include this declaration.

III. CEA’s claims are ripe.

Article III standing and ripeness “boil down to the same question.” *SBA List*, 573 U.S. at 157, n. 5 (citation omitted). The government’s ripeness arguments mirror its standing arguments. As in *Religious Sisters*, this case is fit for judicial resolution because no further factual development is needed to issue an injunction at this stage. 513 F. Supp. 3d at 1145–46. CEA has set forth the necessary facts under oath in both its complaint and in the motion, and this case “present[s] purely legal questions.” *Id.* (citation omitted). Denying judicial review would inflict “significant practical harm” on CEA members by forcing them to either follow their religious beliefs or face serious and harsh penalties under the statutes. *Id.*

IV. A preliminary injunction is needed to prevent imminent harm.

A. CEA is likely to succeed on the merits of its RFRA, Free Exercise, and Free Speech claims.

The government asserts CEA members’ religious exercise is not substantially burdened because there is no threat of enforcement. Opp’n. at 32–34. This simply reiterates their standing argument, which fails for the reasons stated above. As this Court held in *Religious Sisters*, the Mandates impose a substantial burden on religious exercise. *Religious Sisters*, 513 F. Supp. 3d at 1147; *see also* MPI § II.A.2.

Next, the government argues Title VII and Section 1557 are generally applicable because those statutes do not treat religious employers and healthcare providers worse than secular ones. Opp’n. at 35–36. But “it is no answer” that the

Mandates treat some secular employers and providers “as poorly” as CEA members. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). The government’s own insurance programs are comparable, but exempt, and the Supreme Court has instructed this makes a law not generally applicable. *Id.*; see MPI at 27–28.

Finally, the 1557 mandate regulates speech when it requires providers to speak consistent with views they oppose concerning gender. MPI at 30–35. The government may not “ignore constitutional rights” in regulating professionals. *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 439 (1963).

B. CEA is likely to succeed on the merits of its APA claim.

CEA remains likely to succeed on the merits of its APA claim, for three basic reasons. *First*, the government’s interpretation and enforcement of Title VII and Section 1557 are final agency action. They meet all the hallmarks of final, binding agency action under *Iowa League of Cities*, 711 F.3d at 862–65. They “conclusively dispos[e] of” prohibiting gender identity discrimination, they “speak[] in mandatory terms,” and “private parties have reasonably been led to believe that failure to conform will bring adverse consequences.” *Id.* (cleaned up).

EEOC has announced *and enforced* its Coverage Mandate for a decade, insisting on it as recently as June 2021. Allowing EEOC to avoid judicial review of that history of actions would leave agencies free to impose a “tyranny of small decisions.” *Id.* at 873. Indeed, the government now contends *Bostock* requires this position. CEA disagrees, but this renders the government’s position self-binding.

As for the gender identity language of the 2016 rule under Section 1557, it is a final rule. 5 U.S.C. § 551. There is no serious legal question that a final legislative rulemaking such as the 2016 rule is “final agency action.” *See, e.g., Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) (a final rule published in the Federal Register after notice and comment rulemaking is final agency action). The

government cites no case suggesting otherwise, and the 2016 rule has been challenged many times. Apparently recognizing this problem, the government does not actually argue that the 2016 rule was not final agency action. Opp'n. at 41. Instead, it contends that the final rule language was vacated. *Id.* That is not relevant, however, since under *Walker* “the definitions of ‘on the basis of sex,’ ‘gender identity,’ and ‘sex stereotyping’ currently set forth in 45 C.F.R. § 92.4 will remain in effect.” *Walker*, 480 F. Supp. 3d at 430; *see also id.* at 427 (holding that *Franciscan Alliance* did not vacate gender identity language from the sex stereotyping definition), and *Walker v. Azar*, 2020 WL 6363970 at *4 (E.D.N.Y. Oct. 29, 2020) (also restoring the 2016 rule’s language requiring gender transition insurance coverage). Final rule language that is in effect is quintessential “final agency action” under the APA. The government thus argues CEA is seeking relief against the *Walker* order, but that is incorrect—CEA is challenging the gender identity language of the 2016 rule, not the *Walker* order. *Walker* did not uphold the 2016 gender identity language *as such*, because that language was not challenged. *Walker* said it “remain[s]” in effect by preventing HHS’s 2020 *repeal* rule, which was challenged, from going into effect. A ruling against the 2016 gender identity language directly, as challenged here, therefore does not conflict with *Walker*. Moreover, nothing in *Walker* prevents a RFRA exemption for religious entities.

Second, despite the government’s objection to CEA’s characterization of the Mandates, the complaint makes clear that CEA challenges the government’s enforcement of its Mandates *and* the statutes and implementing rules and guidance themselves. *See, e.g.*, Compl. ¶ 272, Prayer for Relief § D. As noted above, it is improper to resolve a *ripeness* issue by reaching the *merits* question of whether *Bostock* requires the government’s interpretation of these challenged statutes.

Third, CEA’s claim is not barred because of alternative remedies. Opp’n. at 43. There is no exhaustion requirement under the APA to challenge the 2016 rule or

the EEOC’s binding position—indeed, there is a “presumption favoring judicial review of administrative action.” *Sackett v. E.P.A.*, 566 U.S. 120, 128 (2012); *U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 578 U.S. 590, 600 (2016) (“parties need not await enforcement proceedings before challenging final agency action”). CEA need not wait for the agencies to “‘drop the hammer’ in order to have their day in court.” *Id.* (quoting *Sackett*, 566 U.S. at 127).

C. CEA has established all the factors for injunctive relief.

An infringement of First Amendment rights constitutes irreparable injury. *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). Because CEA’s member’s behavior is arguably proscribed and presents a credible threat of enforcement, and CEA is likely to succeed on its claims, irreparable harm is present. *See Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140 (8th Cir. 1996). Similarly, alleged “delay” in seeking relief does not eliminate the harm, because the harm is continuing and not time-bound. Nor does the history weigh against CEA—CEA was not formed until 2016, *see* ECF No. 1-1, and the Section 1557 Mandate was enjoined “nationwide” for several years under *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016). Only after the 2021 change in administration did the government announce it would enforce these Mandates full steam ahead. Now, absent injunctive relief, CEA members must choose between following their religious beliefs or suffering penalties under the challenged actions.

For similar reasons and those set forth in the motion, the public interest and balance of equities support an injunction protecting constitutionally affected rights. *See* MPI at II.A.3., II.B.3., II.C.2 (government has no compelling interest in enforcing its Mandates against religious employers and providers).

CONCLUSION

CEA’s Motion for Preliminary Injunction should be granted.

Respectfully submitted this 23rd day of December 2021.

/s/ Jacob E. Reed

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December 2021, I electronically filed the above paper with the Clerk of Court using the ECF system, which automatically sends an electronic notification to all attorneys of record.

/s/ Jacob E. Reed
JACOB E. REED
Attorney for Plaintiff

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

CHRISTIAN EMPLOYERS ALLIANCE,

Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.

Defendants.

CIVIL CASE NO. 1:21-cv-00195-
DMT-CRH

JUDGE DANIEL M. TRAYNOR

SUPPLEMENTAL DECLARATION OF SHANNON O. ROYCE

I, Shannon O. Royce, hereby declare and state as follows:

1. I am over 21 years of age and make this declaration on personal knowledge.
2. I am the President of Christian Employers Alliance (CEA).
3. CEA is a 501(c)(3) nonprofit corporation incorporated in the state of North Dakota.
4. CEA is a Christian membership ministry that exists to unite and serve Christian nonprofit and for-profit employers who wish to live out their faith in every-day life, including in their homes, schools, ministries, businesses, and communities.
5. I have knowledge of the operations and circumstances of CEA's members with respect to their commitment to operating consistent with the

Christian Values of CEA, and to the impact of the laws and policies challenged in this case on CEA's members.

6. Among the members of CEA are Trinity Bible College & Graduate School, located in Ellendale North Dakota ("Trinity Bible College"), and the Children's Center Rehabilitation Hospital, located in Bethany, Oklahoma ("The Children's Center").

7. Both Trinity Bible College and the Children's Center affirm the Christian Values set forth in CEA's Bylaws, and operate their organizations consistent with those values, including as discussed in the complaint with regard to the commitments of CEA's members, and as encompassed by my verification of facts in the complaint.

8. Trinity Bible College and the Children's Center are not members of the Catholic Benefits Association.

9. Trinity Bible College and the Children's Center have more than 15 employees and are "employers" as defined in Title VII, and they each sponsor health insurance coverage or health plans for their employees.

10. Trinity Bible College and the Children's Center are therefore subject to Title VII's nondiscrimination requirements and are directly affected by the EEOC Coverage Mandate, but have sincerely held religious beliefs under which they firmly intend to arrange their employer-provided health insurance coverage or health plans to categorically exclude health services related to gender transition.

11. Trinity Bible College and the Children's Center thus face potential liability from Defendants for exercising their religion by categorically excluding coverage for gender transition services in their health plans.

12. The Children's Center's primary purpose is to provide healthcare and is principally engaged in the business of providing healthcare.

13. The Children's Center participates in health programs and activities receiving federal financial assistance from Defendant HHS, including Medicaid.

14. The Children's Center is therefore subject to the Affordable Care Act's nondiscrimination provisions (including Section 1557) and is directly affected by the HHS Gender Identity Mandate, but has religious, moral, ethical, conscientious, medical, and free speech objections to the practices described in the complaint as being required by the HHS Gender Identity Mandate (*see* Compl. ¶ 123).

15. The Children's Center has practiced healthcare and firmly intends to continue to do so consistent with its faith, including as described in CEA's Christian Values, and including by categorically excluding the provision of health services and speech as required by the HHS Gender Identity Mandate, but fears liability from Defendants and disqualification from federally funded programs if it continues to practice and speak consistent with Christian Values and its faith.

16. As a result, Trinity Bible College and the Children's Center operate under a credible threat of enforcement—either from the government or from private persons—under Section 1557 and Title VII (as interpreted and enforced by Defendants) because of their religiously guided provision of insurance coverage and

medical services, as described above and in the Complaint and my initial Declaration.

17. I wish to clarify a statement from my verification of the complaint (at page 49), that while Christian Employers Alliance is incorporated in North Dakota, I am a resident of the Commonwealth of Virginia. In referring to being a resident of North Dakota, I was intending to speak to CEA's state of incorporation.

I, Shannon O. Royce, a citizen of the United States, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 21st day of December, 2021.


Shannon O. Royce, President
Christian Employers Alliance