UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Christian Employers Alliance, Plaintiff, vs. United States Equal Employment Opportunity Commission, et al., Defendants.	)	File No. 1:21-cv-00195

TRANSCRIPT OF MOTION HEARING

Taken at
United States Courthouse
Bismarck, North Dakota
May 2, 2022

BEFORE THE HONORABLE DANIEL M. TRAYNOR
-- UNITED STATES DISTRICT COURT JUDGE --

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(The above-entitled matter came before the Court, the Honorable Daniel M. Traynor, United States District Court Judge, presiding, commencing at 10:10 a.m., Monday, May 2, 2022, in the United States Courthouse, Bismarck, North Dakota. The following proceedings were had and made of record in open court:)

THE COURT: We'll open the record in Christian Employers Alliance versus USEEOC, et al., Civil Case 21-CV-195. I'm District Judge Dan Traynor.

Will counsel for the plaintiff Christian Employers Alliance identify themselves for the record.

MR. BOWMAN: Good morning, Your Honor. Matthew Bowman for the plaintiff.

MR. REED: Good morning, Your Honor. Jacob Reed for plaintiff.

THE COURT: Good morning, gentlemen.

And on behalf of the EEOC?

MR. NEWMAN: Hi. Jeremy Newman for the US Department of Justice on behalf of defendants.

THE COURT: All right. Is that the way he's going to sound?

Where's your microphone, sir?

MR. NEWMAN: I'm sorry. It's in front of the room. Hold on. Let me -- are you able to hear any better when I'm

standing here?

THE COURT: Yes.

MR. NEWMAN: Okay. If you'll give me a minute --

THE COURT: I'd prefer to be able to hear you than for you to use the podium.

MR. NEWMAN: All right. Okay. Sorry. Can you hear me all right now?

THE COURT: Yes, much better.

This matter is before the Court today on preliminary injunction which the plaintiff filed on October 21 of 2021. The defendants filed a response on November 22 of 2021. A reply was filed on December 23 of 2021, along with a request for hearing which was granted in March. Christian Employers Alliance asked this Court to enjoin enforcement of the mandates under four grounds: The Religious Freedom Restoration Act, the Free Exercise rights, the free speech rights, and the Administrative Procedures Act.

We're here on the plaintiff's motion. So either Mr. Reed or Mr. Bowman, you may proceed.

MR. REED: Thank you, Your Honor. May I use the podium?

THE COURT: You may. Hopefully without an echo.

MR. REED: May it please the Court, Jacob Reed for Christian Employers Alliance.

Your Honor, just over a year ago this very Court in

Religious Sisters of Mercy Versus Azar rejected the same standing arguments the government asserts today, and it held that a Catholic association with the same religious views as CEA members were entitled to an exemption from the Government's mandates under the Religious Freedom Restoration Act. This case is in all material respects no different from that case. Just as it did there, the federal government has attempted to impose its orthodoxy on religious employers and healthcare providers.

Time and time again, through multiple final rules, notices, guidance documents, even an executive order and in litigation papers, the Government claims that Section 1557 of the Affordable Care Act and Title VII compel the provision and performance of dangerous and controversial gender-transition procedures. In fact, since this Court's ruling last February in *Religious Sisters*, both HHS and the EEOC have doubled down on their attempt to impose their mandates on religious employers and healthcare providers.

THE COURT: Mr. Reed, just a matter of housekeeping, this is Judge Welte's order, not this Court's order; so refer to it as Judge Welte's order. He's in the District of North Dakota but he's a separate United States District Court Judge.

MR. REED: Yes, Your Honor. Judge Welte's order.

THE COURT: That's fine.

MR. REED: So just as Judge Welte did in that case,

the Court here can take the straightforward approach and simply and at a minimum extend the same religious freedom protections as it did to the Catholic plaintiffs there to CEA members here, but relief on all of CEA's claims is warranted.

Your Honor, I'll first address the threshold jurisdiction issues and then move on to the merits of the case.

This is a proper pre-enforcement action under well-settled Eighth Circuit and Supreme Court precedent. A plaintiff need not wait for enforcement or prosecution to challenge a law. Rather, the Supreme Court's three-factor test as articulated in *Susan B. Anthony List versus Driehaus* governs when injury is satisfied for standing purposes. The court there stated that an imminent injury sufficient to confer standing is satisfied when the plaintiff alleges an intention to engage in a course of conduct arguably affected with constitutional interests. That's the first factor. Two, but that conduct is arguably prohibited by the laws they challenge. That's the second factor. And, three, there exists a credible threat of prosecution thereunder.

With regard to the claims against both HHS and EEOC, the first factor is satisfied and the Government doesn't contest so. The conduct CEA members engage in here is affected with constitutional interests. Their provision of healthcare services as healthcare providers and their provision of healthcare coverage as employers is governed by the religious

beliefs that sex is immutable and unchangeable. And, again, the Government does not contest that; so the first factor under *SBA List* is satisfied.

The second factor: Whether the conduct is arguably prohibited by the laws being challenged. With regards to the challenge to Section 1557 in HHS's interpretation and application of that law, the conduct is arguably prescribed as Judge Welte found in the *Religious Sisters* case. And we know so for two reasons: In 2016, Health and Human Services issued a final rule that stated that an explicit categorical exclusion of services related to gender-transition services was unlawful on its face. HHS attempted to repeal that rule in 2020, but, again, as Judge Welte reasoned in the *Religious Sisters* case, that repeal never took affect because of two court injunctions issued in the *Walker* case out of New York and the *Whitman-Walker* case out of D.C. As Judge Welte explained, those injunctions, quote, "Collectively reinstated the prior definition of 'on the basis of sex' to include gender identity and sex stereotyping." So, Your Honor, the 2016 HHS rule is on the books today. It applies today with full force and affect to CEA members and it at a minimum arguably prohibits the very conduct they engage in.

But to remove all doubt, just last year, in May, HHS issued a Notification of Interpretation and Enforcement and that notification cited in our complaint and in our motion

stated unequivocally that HHS will enforce Section 1557 of the Affordable Care Act to prohibit discrimination on the basis of gender identity. And to triple down, just two months to this day, Your Honor, on March 2, HHS issued a Notice and Guidance on Gender Affirming Care and it doubled down -- it tripled down on HHS's intent to enforce Section 1557 as prohibiting gender identity discrimination. It even solicited and asked the public to file complaints with HHS if they believed there was gender identity discrimination. That document, Your Honor, stated that, quote, "that federally funded covered entities," which would include CEA's healthcare members, "that restrict an individual's ability to receive medically necessary care, including gender affirming care, based solely on the sex assigned at birth or their gender identity likely violates Section 1557." If HHS saying certain conduct likely violates Section 1557 does not mean that certain conduct is arguably prohibited, I'm not sure what would, Your Honor. As noted, this document was issued two months ago which was after the briefing wrapped up in this.

So I do have copies of that document, Your Honor, and I would like to introduce it as further evidence in support of our motion. I have copies here marked and my cocounsel is ready and willing to email the same to opposing counsel. But, Your Honor, if you would rather us file it with the clerk, we would be happy to do that as well. But with that said, I would

like to introduce Plaintiff's Exhibit 1 into evidence.

THE COURT: Any objection, Mr. Newman?

MR. NEWMAN: No, Your Honor.

MR. REED: Would you like a copy now, Your Honor?

THE COURT: Yes. Do you have a copy of it, Mr. Newman?

MR. NEWMAN: Yes, I do.

THE COURT: Okay. Very good. Plaintiff's Exhibit 1 is accepted and received into the record.

MR. REED: So with that, Your Honor, based on the 2016 Final Rule and HHS's repeated positions that gender identity discrimination is prohibited, CEA's healthcare members' conduct -- their conduct of refusing to provide gender-transition services is at a minimum arguably prohibited by Section 1557 and its regulatory scheme.

Moving to the third factor under *SBA List*, the question is whether there's a credible threat of prosecution under the law being challenged. As Judge Welte reasoned citing to Eighth Circuit precedent, "When a statute is challenged by a party who is a target or object of the statute's prohibitions, there is ordinarily little question of injury." There Judge Welte cited to the *Gaertner* case which also held that when conduct is arguably prohibited as it is here, courts will assume -- they will assume a credible threat of prosecution in the absence of compelling contrary evidence. There is no such

compelling contrary evidence here. HHS has repeatedly -- throughout its briefing, throughout its notice documents, and throughout past enforcement -- taken the position that it will enforce Section 1557 as prohibiting gender identity discrimination.

There is no disavowed enforcement in the Eighth Circuit, in the *281 Care Committee* case, which we cite to, stated that only, quote, "A total lack of enforcement in extreme cases approaching desuetude can undermine standing." Again, as Judge Welte reasoned, "There is no evidence, via official policy or a long history of disuse, that authorities -- that HHS has actually refused to enforce the statute."

To the contrary, in the 2016 Rule, HHS vowed to take robust enforcement of the nondiscrimination provisions and in 2020, it stated it would vigorously enforce the nondiscrimination provisions. In fact, Your Honor, when the *Religious Sisters*' case went up on appeal to the Eighth Circuit, one judge from the Eighth Circuit poignantly asked the government's attorney whether the Government could disavow enforcement. And the government's attorney responded, quote, "The Government is not in a position to disavow any future enforcement." So that settles the matter. HHS is ready, willing, and able to take enforcement action against religious healthcare providers.

And, again, just to add to that, Your Honor, the court in *SBA List* held that a threat of format is bolstered when private parties can file complaints which causes investigations itself, quote, "Harm sufficient to justify pre-enforcement review," and that is the case here. There have been multiple private party complaints and lawsuits filed against religious healthcare providers. We cite them -- we cite to them in our briefs: The *Tovar* case out of Minnesota, *Hammons* case out of Maryland, *Pritchard* case out of Washington, and the *Conforti* case specifically filed against the Catholic health hospital [verbatim] out of New Jersey.

So with that, there is a credible threat of prosecution under Section 1557 as HHS interprets and enforces it. That is sufficient to confer standing to challenge the gender identity mandate.

Moving to Title VII and the claims against the Equal Employment Opportunity Commission. Again, CEA's members, their conduct is affected with constitutional interest. It is based on their sincerely held religious beliefs. Their provision of healthcare coverage falls in line with their beliefs. The Government does not contest otherwise.

Second, the conduct they engage in, which is a categorical exclusion for these services under their health plans -- it is arguably prohibited by Title VII. We know this for multiple reasons. Since 2012, ten years ago, the EEOC has

interpreted Title VII to prohibit gender identity discrimination. They have taken enforcement action under that interpretation, notably the *Harris Funeral Homes* case and the *EEOC case versus Rent-a-Center* case out of Illinois where they filed lawsuits against private parties for gender identity discrimination.

And, again, the EEOC doubled down just in June of last year. The EEOC chair, who is a defendant in this case, issued a technical assistance document -- excuse me -- stating that, quote, "Under Title VII, employers cannot discriminate against individuals based on gender identity with respect to fringe benefits and other terms, conditions, and privileges of employment."

Exhibits 4 and 5 to our complaint, Your Honor, state the same thing. The EEOC has unequivocally stated that employment benefits include insurance coverage; therefore, the way EEOC interprets Title VII, it violates Title VII to categorically refuse to provide gender -- dangerous and harmful gender-transition services.

The Eighth Circuit in *Telescope Media* case, which was a pre-enforcement action, stated that where the Government, quote, "Makes clear and publicly announces that an antidiscrimination law prohibits certain conduct, that that is sufficient to confer an imminent injury for standing purposes." What the EEOC has done here has attempted to impose a tyranny

of small decisions. That is, they continually issue guidance documents and notices. They take litigation positions that state that the very conduct CEA members engage in here is prohibited by Title VII. They attempt to evade judicial review by claiming RFRA might apply in a future case if they decide to bring an enforcement action, but that misunderstands what the purpose of the RFRA statute is. As Judge Welte reasoned, "A general commitment to follow preexisting religious freedom and conscious protections cannot thwart standing. The Government is always bound to implement the law consistent with RFRA and simply repeating what the statute already commands does not diminish the probability that HHS could review a member's fact specific RFRA concerns but then decide to pursue enforcement anyways." That is what happened in the *Harris Funeral Home* case and that's what could happen here; and there is an imminent threat of that.

To be sure the Government will argue RFRA will apply in the future and protect someone, but, again, RFRA can be used, quote, "As a claim to obtain appropriate relief." That is in the plain language of the statute. That is what the Congress -- that's the language Congress used when it passed RFRA in 1993.

So the relevant inquiry is whether the members' conduct is arguably prohibited by the statute being challenged. Here the statute being challenged is Title VII as it is

enforced by the EEOC. And that statute makes claim that a refusal to provide coverage for these services is prohibited.

Again, there's a credible threat of enforcement. That's the third SBA List factor. The Government continues to disavow any enforcement. In fact, it has issued probable cause findings in the past against private employers.

So you have -- in these instances you have private parties filing EEOC complaints against employers, and the EEOC has issued probable cause final determinations stating that a refusal to cover these dangerous gender-transition services does violate Title VII. To point to one example, *Fletcher v. Alaska*, there is a -- EEOC issued a determination that stated, quote, "A categorical exclusion of gender reassignment treatment and services from its health plan results in adverse treatment of its employees based on sex including gender identity," and that is a violation of Title VII.

And I should also point out, Your Honor, here we have CEA members that currently exclude these dangerous services in their health plan. So there's no question they're under an imminent threat of prosecution, which could result in heavy fines, liability, administrative procedures, burdens, et cetera.

THE COURT: And where are they located, these members?

MR. REED: Where are they located?

THE COURT: Yeah.

MR. REED: Geographically, throughout the country, Your Honor. There's many members within CEA.

THE COURT: In all 50 states?

MR. REED: If not all 50, it would be very close thereto.

THE COURT: Okay. And how do they become a member?

MR. REED: So if you look at our Complaint, Your Honor, we attach the bylaws and there's strict membership criteria. They have to subscribe to certain religious beliefs. Part of those religions beliefs is that they must, you know, believe that sex is immutable and unchangeable and they have to meet other certain criteria depending whether they're for profit or nonprofit. But there's very strict membership criteria and those are set out in the bylaws which I believe are Exhibit 2 to our Complaint.

THE COURT: Right. And then do you provide the health insurance coverage through your alliance? Is that how you do it?

MR. REED: No, Your Honor. My understanding is each individual employer provides -- they contract for their own health insurance.

THE COURT: Okay. And does that health insurance then need to subscribe to the beliefs that CEA holds and your entities individually hold?

MR. REED: Yes. That's correct, Your Honor. In fact, if you look at the bylaws, one of the requirements is that members will take all steps possible to exclude these services from their health plans.

THE COURT: All right. Do you have any health plans among your members that provide these services?

MR. REED: We do, Your Honor. And that was the point I was getting at. So there are -- you know, if you want to -- let's split the members in two: There's those that currently exclude it -- sure, there's an imminent force of enforcement there -- and there's others that currently cover it, but they don't want to, and that's a chill on their constitutionally protected rights.

So if you look at the *281 Care* case out of the Eighth Circuit, there the Court held that plaintiffs must only establish that he would like to engage in constitutionally protected activity but he is chilled from doing so by existence of the law. The Eighth Circuit in *Turtle Island* case said that, you know, for pre-enforcement First Amendment challenges, it's a lenient standing requirement in that it is satisfied when plaintiff's intended future conduct is arguably prescribed. So the current members that cover it, they don't do so because they want to. By all means, they want to -- they want to exclude these services. They don't believe they're helpful to their employers. They believe they're harmful and

it, you know, violates their religions beliefs. But they're fearful of acquiring a plan with an exclusion for fear of prosecution from the EEOC.

THE COURT: Are the plans without those benefits available or not available in some states because of state regulation?

MR. REED: Your Honor, I don't know exactly off the top of my head. I would imagine some states might have those regulations. If so, however, those state laws would also violate the religious practice and beliefs and, you know, obviously state law has to comply with the Constitution.

THE COURT: Does the Christian Employers Alliance itself have standing to challenge Section 1557 or does it have standing only through its associated members?

MR. REED: So the standing would be associational standing to challenge.

THE COURT: Okay.

MR. REED: And we believe that that standing inquiry is met, as Judge Welte held in the *Religious Sisters* case; right. There the CBA, the Catholic Benefits Association, confirmed that its membership included Catholic healthcare entities that receive federal funds and, therefore, they were placed on the same equal footing as the named healthcare providers in that case.

Here we have stated throughout our Complaint, in our

motion and our reply, that CEA does include healthcare members that are subject to Section 1557. They are primarily engaged in providing healthcare services, and they refuse to perform these dangerous and controversial gender transitions.

THE COURT: Are there any actual complaints or EEOC actions pending against Christian Employers Alliance or any of its members?

MR. REED: To my knowledge, there's none currently pending, Your Honor. But, again, that's why this is a pre-enforcement case. We're seeking to obtain relief so they can continue about their business which is compliant with their religious beliefs.

THE COURT: All right.

MR. REED: So with that, Your Honor, the credible threat of enforcement under both Section 1557 and Title VII is met and that, again, is sufficient to confer an injury for pre-enforcement standing purposes.

THE COURT: Isn't the jurisdictional question the matter that's now pending before the Eighth Circuit?

MR. REED: It is, Your Honor. Yes.

THE COURT: Okay. And arguments been held on that? We're just waiting for the circuit to render a decision; right?

MR. REED: That's correct. So arguments were held in December and we're just awaiting, you know, for the court to issue its decision.

So with respect to that, Your Honor, I think, you know, kind of a straightforward approach. If Your Honor wishes to issue a narrow decision here, Your Honor could simply extend that religious protection to CEA members here and if Your Honor desires, could stay the case pending the decision from the Eighth Circuit. That would, you know, protect members but at the same time, you know, we would -- you could wait for instruction from the Eighth Circuit.

THE COURT: Is Judge Welte's case stayed pending the circuit decision?

MR. REED: Judge Welte's case is the case on appeal.

THE COURT: Correct. But is it stayed pending the circuit decision?

MR. REED: There is a permanent injunction protecting the religious plaintiffs.

THE COURT: So why would I stay enforcement with regard to CEA if Judge Welte didn't stay it in his case?

MR. REED: Well, he did, Your Honor. He issued a permanent injunction which protected the religious plaintiffs.

THE COURT: Okay. But he didn't stay his order?

MR. REED: No, he did not stay, Your Honor. So, yeah, let me be clear about that. He did not -- he issued a permanent injunction saying HHS and EEOC cannot enforce these mandates and that was appealed. So right now EEOC and HHS cannot bring any enforcement action against the *Religious*

Sisters plaintiffs.

THE COURT: All right.

MR. REED: So I was just saying, you know, Your Honor could extend that action to CEA members here.

THE COURT: Okay. Very good.

MR. REED: So moving to the merits, Your Honor. I'm sure Your Honor is well aware of the four factors to issue a preliminary injunction. The most, you know, important factor, if you will, is success on the merits. With regard to our RFRA claims -- CEA's RFRA claim, the Government cannot burden one's religious exercise without satisfying strict scrutiny. That is, they must advance a compelling interest by the least restrictive means. So here there's a substantial burden on CEA members' exercise. We know this in at least two ways. There's a substantial burden on religious exercise when, A, noncompliance would result in substantial adverse practical consequences -- and we have that here. The healthcare members currently do not perform these harmful gender-transition services. CEA members -- some of them currently have exclusions for these services as we just discussed.

THE COURT: I thought you said that some of them have it in their health insurance coverages?

MR. REED: Some do, Your Honor.

THE COURT: So how do we know they're not performing these procedures currently?

MR. REED: So let's split it down. So we're challenging two laws here: Section 1557, that applies to what we dub the healthcare members.

THE COURT: Right.

MR. REED: They're healthcare entities; they're doctors and nurses at hospitals, et cetera; so they're subject to Section 1557. And as we set out in our complaint and in our motion, those healthcare providers currently would refuse to perform gender-transition services.

THE COURT: Okay. And they're your members and they perform other types of surgeries but don't perform those types of surgery?

MR. REED: That's correct, Your Honor.

THE COURT: Okay.

MR. REED: Now with regard to the other half -- so the claim against EEOC and Title VII, that has to do with health insurance coverage not physically performing the services. And there we have some members --

THE COURT: Churches, schools, other entities that don't perform surgeries but have health insurance for their members?

MR. REED: Exactly.

THE COURT: Or for their employees?

MR. REED: For their employees, right. Exactly.

THE COURT: Okay. And do any of those provide

coverages for these types of surgeries?

MR. REED: So some do. That's the chill factor.

THE COURT: Right.

MR. REED: So they only do because of fear of prosecution.

THE COURT: So for those that do, how do we know that none have actually performed the surgery?

MR. REED: Have actually covered them?

THE COURT: Correct.

MR. REED: Well, to my knowledge, none have. But, again, that goes back to the purpose of the lawsuit to obtain religious protection so that in the future if an employee of a, you know, religious institution wants one of these services, that they would not have to pay for them through their insurance plan.

THE COURT: So let me go down a rabbit hole a little bit here. Because some insurance coverages offer this type of benefit, if you want to call it that, and some don't. Are your members disadvantaged in the insurance marketplace by having to only retain health insurance coverages that have this -- that don't have this benefit? So, for instance, they have Coverage A which is the deluxe coverage that covers everything and it's the greatest thing since sliced bread for employees, but that provides gender-transition surgery coverage; and then they have Coverage X that is not so good, doesn't cover a lot of things

that employees would benefit from, but it also doesn't provide coverage for gender-transition surgeries. Are your associated members obliged to get Coverage X even though it is inferior of your coverage to Coverage A?

MR. REED: Well, according to CEA's bylaws, they ought to acquire Coverage X, that is a coverage with the exclusion.

THE COURT: And doesn't that by its very nature harm your -- the entities that are members of CEA because you have to deal in a marketplace where you have to pick, arguably, less robust health insurance coverages?

MR. REED: Well, I don't think it harms them practically because they're complying with their religious beliefs which is -- which is more important than the practical implications.

THE COURT: Sure. But let's say it doesn't cover cancer treatment in Coverage X, but it's covered in Coverage A and cancer is not related to gender transition or anything like that, but they've got a really high detectible or some exclusion for certain types of cancers. But because your members have to get Coverage X and they can't get Coverage A because of the way that this federal Government has forced these health insurance agencies or health insurance companies to provide various forms of coverage, doesn't that disadvantage your members?

MR. REED: Well, I think to be clear, Your Honor, the only difference between Coverage A and X is that there's a exclusion for gender-transition services.

THE COURT: No. Let's say Coverage X also doesn't cover cancer surgery or it doesn't cover five other things that are common, not gender transition related coverages, but Coverage A has it all.

MR. REED: Well, and I think that goes back to why these mandates harm them. Because you have the federal Government telling not only employers but, you know, the insurance industry that you have to cover these services and then you have health insurers only offering certain plans where what should occur is the same coverage should be offered but there should be -- the only difference between Plan A and B would be the exclusion of gender-transition services.

THE COURT: Or Plan A should be offered with the option of excluding gender-transition surgery?

MR. REED: Precisely, Your Honor. Precisely.

THE COURT: So that your members can get the very same benefit as available for every other person in the United States except their religious beliefs are respected.

MR. REED: Exactly, Your Honor. That's exactly so.

And just to point to an example from the *Religious Sisters* case, there you do have because of the --

THE COURT: But your case is not against health

insurers, is not an equal protection claim, but do you have potentially an equal protection claim against these religious or these health insurers that are basically saying you've got to cover -- we only offer the boilerplate coverage that requires you to do gender-transition surgery and we won't offer anything other than that?

MR. REED: Well, I think, you know, arguably so. The claim would still be against the Government for imposing these mandates on the industry.

THE COURT: Right.

MR. REED: But I think the RFRA claim and the Free Exercise claim and Equal Protection claim would be derivative of that. That, you know, they're picking and choosing what beliefs are okay and what are not, and here they're picking against the religious beliefs that believe sex is immutable and unchangeable.

THE COURT: Do your members have to have certain limitations on their coverages? For instance, they don't cover spouses or children for the risk that a spouse or child might obtain gender-transition surgery or be of the same gender.

MR. REED: I want to make sure I'm understanding Your Honor's question. So is the question do CEA members provide full coverage for families and would that extend to them?

THE COURT: Correct.

MR. REED: Yeah, they do.

THE COURT: They do?

MR. REED: They do. And part of the reason they do is their religious beliefs, as we set out in our complaint, is -- you know, they don't only offer insurance coverage because they're obliged to because, you know, they have to under federal law. They do so because they care for their employees. You know, they want to provide coverage for their employees. They want to make sure they have healthcare coverage. They care about them sincerely and their religious beliefs compel them to offer health insurance. But the fact is they shouldn't be put to the -- you know, their toes to the fire of, well, if your religious beliefs say you have to care for your employees, you have to perform these other services that violate your religious beliefs. That is a substantial burden on their religious exercise and so that's why we have a substantial burden under RFRA.

You know, the Government can't hang the Sword of Damocles over their head saying you have to do certain things that violate your religious beliefs or if you don't, then you'll face penalties, liability, lawsuits, et cetera.

THE COURT: Well, they say in their guidance -- don't they? -- that they're going to enforce it consistent with Supreme Court precedent. And does that indicate that they aren't intent on pursuing it with regard to your Association and your members?

MR. REED: It does not, Your Honor. So, again, this goes back to the government's argument that, you know, RFRA might protect CEA members if they decide to bring enforcement, if they decide to pull the trigger. But that's not the standard. The standard is whether the conduct is arguably prohibited.

So you look -- in any pre-enforcement challenge, Your Honor, there's two bodies of law: So there's the body of law you're challenging, here that's Section 1557 of the ACA and Title VII; the second body of law is the body of law that the plaintiff says, you know, trumps the first body of law. That's the body of law that gives us relief. So for standing -- whether there's an imminent injury, whether there's a credible threat of enforcement -- you only look to the first body of law. So here you only look to Section 1557 and its regulatory scheme and you only look to Title VII and it's regulatory scheme. And as we -- you know, as we just went through the *SBA List* factors, there is an arguable threat of prosecution under those two statutes.

So, you know, the Government is trying to turn RFRA on its head. RFRA can be used as a pre-enforcement sword, if you will. It is not only a shield. In the government's view, RFRA could only ever be asserted as an affirmative defense. So, you know, the Supreme Court has recently as the *Little Sisters of Mercy* case -- *Little Sisters of the Poor* -- excuse

me -- held that the Government must consider RFRA. That RFRA applies to all federal law. In that respect, it's equivalent to the Constitution.

So take the *SBA List* case, that was a pre-enforcement First Amendment free speech challenge. In the government's view, the SBA plaintiff could never have brought that lawsuit because the First Amendment would have arguably protected them if the state decided to bring prosecution later. But that's not the test. The test is whether the statute being challenged prohibits the conduct. You don't consider whether there's a relief statute -- that's RFRA here, the First Amendment, and *SBA List, 281 Care Committee*, *Turtle Island*, all pre-enforcement First Amendment challenges -- but you only look at the first statute for standing purposes.

So what the Government really is doing here is conflating standing with the merits. They're conflating whether RFRA prevents us from walking through the doors of the courthouse, not whether it gives us -- they're conflating that with whether it gives us relief. So -- and it does give us relief.

Back to the substantial burden, noncompliance with these mandates results in adverse practical consequences. That is, you know, the healthcare members could lose all federal funding -- that's Medicare, Medicaid. Very ubiquitous in the healthcare industry. They could lose all of that for adhering

to their religious beliefs.

Second, compliance with these mandates would cause members to violate their religious beliefs and that's what we have with the chill factor, with the members who have the current coverage but they only have it because of fear of prosecution. That is a substantial burden on their religious exercise. So with the substantial burden established, the burden shifts to the Government to say, well, we have a compelling interest to violate your religious beliefs and the Government makes no attempt to satisfy that. They do not assert any compelling interest and they do not assert that any such interest would be achieved through these mandates by the least restrictive means. That's the strict scrutiny test under RFRA and the Government never even attempts to satisfy it. With that there's a RFRA violation and that should entitle CEA members to injunctive relief.

THE COURT: You've asked for a nationwide injunction or to enforce -- enforcement of HHS's 2016 Rule and 2021 Notice of Enforcement and the resulting HHS gender identity mandate and EEOC's agency guidance and the resulting EEOC coverage mandate. This would apply to everyone nationwide. Why should this Court issue a nationwide junction when Judge Welte didn't do it in the *Religious Sisters of Mercy* case?

MR. REED: Sure, Your Honor. So just, you know, to be clear upfront, at a minimum we request the RFRA protection;

so an injunction as applied to CEA members.

THE COURT: How do I do it or how would this Court do it with regard to your CEA members without knowing who your CEA members are?

MR. REED: So we can do it -- Your Honor could do it the same way as Judge Welte did. So there the Catholic Benefits Association brought an associational standing, and the Government was concerned about that. So if you look at Judge Welte's order, he states, you know, there's four factors that in the event the Government would bring an enforcement action, you know, then the member would notify the agency; and as long as these four factors are met, which was they're not already protected by an injunction, namely the *Franciscan Alliance* injunction -- which was a similar case out of Texas -- that they've met all requirements of membership. So that's a way Your Honor could fashion relief to protect the anonymous CEA members.

With regard to your question about a nationwide injunction, so Judge Welte declined to rule on that based on judicial comity. That he -- he saw it that it would interfere with the Court orders in the *Walker* case and *Whitman-Walker* case, but there's three reasons that it wouldn't. First, those orders in those two cases -- which just to bring back to Your Honor's remembrance, those cases enjoined HHS's 2020 Rule. They were not final judgments. They're preliminary

injunctions; so that's one reason comity should not apply.

Two, as I just mentioned, those courts enjoined the 2020 Rules repeal of the 2016 Rule. So it's a little convoluted but in 2016, HHS issues, you know, the rule we had talked about earlier. In 2020, they tried to, you know, 180 degree reverse that.

THE COURT: *Walker* and *Whitman-Walker* reset the table to the 2016 Rule by enjoining a change made in 2020?

MR. REED: That's correct, Your Honor. So the Court orders in those two cases only affect the 2020 Rule; so they're saying you can't apply the 2020 Rule. So Your Honor could issue a nationwide injunction against the 2016 Rule which remains in effect and that would not interfere with the court orders in *Walker* and *Whitman-Walker*.

And, third, those decisions in those cases predated the 2021 notice, that's the Notification of Interpretation and Enforcement that HHS issued just last May. And these -- the 2016 Rule and the 2021 notice violate the APA. The 2016 Rule is contrary to Title IX in Section 1557. There Congress did not -- when it passed those laws, did not intend sex to mean gender identity. They meant it as a binary distinction between biological men and women. That's set out through our briefs. We cite to multiple provisions of the ACA that explicitly talk about male and female.

The same thing with Title IX, when Congress passed

the Affordable Care Act in 2010, Title IX had never to that day been defined to prohibit gender identity discrimination. All the courts that addressed it deemed sex to mean biological differences between male and women. So the HHS's, you know, reinterpretation of those laws violate the APA because they're contrary to the plain language of the statutes.

If Your Honor wants to look to a good reasoned analysis, the *Franciscan Alliance* court, Judge O'Connor's decision in 2016, he issued a preliminary injunction on these same grounds and he looked to the text, structure, and purpose of the ACA and held that there was no authority for HHS to redefine sex within the ACA.

Second, Your Honor, that would go to the 2016 Rule -- that's how you could enjoin the 2016 Rule. With respect to the 2021 notice, that is a 180-degree reversal of position from the 2020 Rule. Now, mind you, the 2020 Rule was enjoined. But just because two courts enjoin, the 2020 Rule does not relieve HHS of its procedural obligations to comply with the Administrative Procedure Act. What that means --

THE COURT: Could it even do that when the pending -- when there's litigation pending in the country? Don't they have to stop what they're doing?

MR. REED: It could not do that by any other means than through a final rule. That requires notice and comment. You know, it has to allow the public an opportunity to present

comments and arguments and they have to respond to those and they have to issue a rational basis why they agree or disagree with those comments. The 2021 notice issued in May of last year -- there was no notice and comment. There was no interim final rule. They just issued it. They just sent it out.

THE COURT: Was there any notice and comment with regard to the 2016 Rule?

MR. REED: Absolutely. That was a final rule. That was a final rule that underwent notice and comment. And part of the government's, you know, rebuttal is that that's somehow not final agency action. It's a final rule, unequivocally can be challenged under the APA.

And with that, Your Honor -- so the 2021 Notice violated the procedural protections of the APA as well. There was no notice and comment. It did not offer any explanation whatsoever why it reversed course just one year after issuing the 2020 Rule and the 2020 Rule stated that, you know, sex as it's used in Section 1557 only meant the biological distinctions.

THE COURT: The *Walker* and the *Whitman-Walker* cases were not appealed. Those were district court decisions that were enjoining the 2020 Rule and they just sat there? They didn't go to the D.C. Circuit or to the -- I think it's First or Second Circuit; right?

MR. REED: Well, Your Honor, the Government did

appeal initially, and then you have a change of administration and those appeals were voluntarily dismissed by the Government last November.

THE COURT: Okay.

MR. REED: So November of 2021.

THE COURT: All right.

MR. REED: And unless Your Honor has any further questions, I would, you know, ask the Court for a chance to address the Court on rebuttal.

THE COURT: All right. Thank you, Mr. Reed.

Mr. Newman -- or just a moment. Do we need a break?

All right. Mr. Newman, you may proceed.

MR. NEWMAN: Your Honor, can you hear me?

THE COURT: I can hear you.

MR. NEWMAN: Okay. Thank you.

Your Honor, may it please the Court, Jeremy Newman for the Department of Justice for the defendants.

Plaintiff cannot ascribe to the Government agency a position that the agency has not taken, file a lawsuit challenging that position, and then obtain an injunction against that position in federal court. Yet that is what plaintiff attempts to do here.

Plaintiff challenges supposed mandates of EEOC and HHS requiring all employers and healthcare providers to offer insurance coverage and to perform gender-transition services

regardless of religious objections but neither (audio distortion) has enacted such a mandate. Any opinion on the legality of such a hypothetical mandate would be an advisory opinion and Article III --

THE COURT: What's the Notification of Interpretation and Enforcement? Isn't that how you plan --

MR. NEWMAN: So, Your Honor, I believe you're referring to the main --

THE COURT: Isn't that what you are using to notify entities within the Christian Employers Alliance and other entities throughout the country how you plan to enforce Section 1557?

MR. NEWMAN: Well, first of all, Your Honor, the May 2021 Notice states very clearly that HHS will abide by RFRA and all applicable laws. So in terms of the relevant context here, which is whether there will be any enforcement in violation of RFRA, the Notice states very clearly that HHS is going to abide by RFRA, but also that --

THE COURT: So where's the religious exemption?

MR. NEWMAN: So RFRA itself --

THE COURT: Don't you need to have a religious exemption to comply with the law?

MR. NEWMAN: Yes, but so --

THE COURT: So where is it?

MR. NEWMAN: One thing -- so it's in RFRA itself.

And just to take a step back here, there is no binding regulation currently in force governing gender-transition procedures. And one of the things that Mr. Reed said about the 2016 Rule is actually not correct. So the 2016 Rule is not currently in effect. It was vacated by the *Franciscan Alliance* court.

THE COURT: Nationwide?

MR. NEWMAN: And although the -- and although the cases in 2020 --

THE COURT: Was it vacated nationwide?

MR. NEWMAN: Yes. Yes. It was vacated nationwide in 2019, and then in 2020, the HHS enacted a new rule and the *Walker* court and the *Whitman-Walker* court preliminarily enjoined parts of that rule but they acknowledged in the court decisions that they did not have the power to revive a rule that had been vacated by another court. So the 2016 Rule in terms of gender identity is not in effect and HHS is not enforcing it because it was vacated by *Franciscan Alliance* court. Now the May --

THE COURT: So why did your agency issue this Notification of Interpretation and Enforcement if you have no rule? What are you enforcing?

MR. NEWMAN: It's a -- it's a guidance document. It's a general statement of policy. It's common for agencies to (audio interruption) for the benefit of the public in terms

of how the agency interprets the law and here --

THE COURT: Well, what law?

MR. NEWMAN: Here the agency --

THE COURT: What law? You said -- hold on. Hold on. You said there is no law but this notification of interpretation is how you're going to enforce the law. So what law provides for enforcement of discrimination on the basis of gender identity?

MR. NEWMAN: So Section 57, the statute -- so the Section 57 incorporates Title IX and Title IX prohibits discrimination on the basis of sex and what the -- what the May 2021 Notice does is it indicates HHS's interpretation that in light of Supreme Court's *Bostock* decision at Section 57, which prohibits sex discrimination, reaches gender identity discrimination. Now, it does not go further than that in saying exactly what that means, how that will operate in any specific factual situation other than to specify that HHS is going to apply Section 57 in accordance with RFRA. And, in fact, there's been --

THE COURT: So what is gender-affirming care?

MR. NEWMAN: Gender affirming care is an umbrella term that -- that -- it includes therapies, includes hormone therapy, includes counseling, includes -- it includes essentially care for gender dysphoria.

THE COURT: For a child?

MR. NEWMAN: But, again --

THE COURT: For a child?

MR. NEWMAN: Sorry?

THE COURT: Plaintiff's Exhibit 1 says -- you have a copy of it but it says -- Plaintiff's Exhibit 1 says, "Parents or caregivers who believe their child has been denied healthcare, including gender affirming care on the basis of that child's gender identity, may file a complaint with OCR." So you're inviting them to file complaints against agencies concerning their child. What age is the child that has this gender dysphoria?

MR. NEWMAN: Well, now I think we're getting into hypothetical facts and --

THE COURT: No, I'm reading --

MR. NEWMAN: What I'm thinking is that --

THE COURT: No. I'm reading Plaintiff's Exhibit 1 which is from your Office for Civil Rights. And it says, "Parents or caregivers who believe their child has been denied healthcare, including gender affirming care, on the basis of that child's gender identity, may file a complaint with OCR." So does gender affirming care include hormone therapy?

MR. NEWMAN: It could in some cases.

THE COURT: Does gender affirming -- hold on. Does gender affirming care include surgery?

MR. NEWMAN: It can in some cases.

THE COURT: So if Christian Employers Alliance entities are not providing coverage to change the gender of their employees' children, you're inviting the parents to file complaints with OCR; right?

MR. NEWMAN: Well, I don't think that's the case because the agency has --

THE COURT: Hold on. You just told me that gender affirming care includes hormone therapy and surgery for children. So what age of child?

MR. NEWMAN: Your Honor, the fact that HHS has never enforced this statute to require anyone, religious or otherwise --

THE COURT: I'm asking you today -- interpret what do you mean by "child." How old is the child?

MR. NEWMAN: I don't believe that HHS has made a determination in terms of, you know, any age cutoff in this context, Your Honor.

THE COURT: Okay. So what is the age cutoff?

MR. NEWMAN: I don't -- I don't feel that I could -- I don't feel that I could --

THE COURT: How about a newborn? Baby is born one day and parent decides I don't like the gender, I want this girl to be a boy or I want this boy to be a girl. That's gender affirming care under your definition?

MR. NEWMAN: No, I don't think so, Your Honor.

THE COURT: It's not? Then where is the exception for a newborn child under your agency's guidance here?

MR. NEWMAN: So I think -- so at the distinction between -- between an agency guidance document and a binding regulation. Agency guidance does not have the force of law. Your Honor, I'd point to something -- a case by the --

THE COURT: Well, then why are you inviting complaints? If it doesn't have the force of law, why are you inviting complaints? I can't get gender-transition surgery for my one-day-old newborn and I want to file a complaint because of that. Isn't that covered by your federal civil rights law? You say parents or caregivers who believe their child has been denied healthcare, including gender affirming care, on the basis of that child's gender identity may file a complaint with OCR.

MR. NEWMAN: No. No, Your Honor. And section -- so -- so first let me -- HHS will -- to the extent HHS receives any complaints, it will -- if HHS chooses to take any action, it will -- it will look at the facts of each case and apply RFRA based on the -- based on the facts of each case. And -- and so we only have --

THE COURT: So you say you'll provide hormones for a five-year-old but not a newborn? Where's the cutoff?

MR. NEWMAN: Your Honor, HHS has not determined precisely where -- HHS has not taken the approach of saying,

you know, these precise things are violations and these things are not. Rather, HHS will handle complaints on a case-by-case basis. There's a highly generalized statute reaching discrimination on the basis of sex which is a -- Supreme Court in *Bostock* determines reaches discrimination on the basis of gender identity --

THE COURT: Does that include gender identity for newborn children or five-year-old children?

MR. NEWMAN: No, Your Honor. I think it's --

THE COURT: Is that what the Supreme Court intended?

MR. NEWMAN: No. No, Your Honor.

THE COURT: Did the Supreme Court intend that once a child is born if the parent doesn't like the gender, they can suddenly decide that they're going to cut off the genitalia and have the gender reassigned at birth?

MR. NEWMAN: No. No, Your Honor. And I think it's -- I think it's inconceivable that --

THE COURT: Well, isn't that gender -- isn't that gender affirming care?

MR. NEWMAN: No. No, Your Honor.

THE COURT: You told me it was. You told me surgery, hormone therapy -- that's gender affirming care.

MR. NEWMAN: But it, Your Honor, depends on the -- on the context and it --

THE COURT: So what about the context -- what about

the context in my scenario makes it not an appropriate case for enforcement?

MR. NEWMAN: It seems -- and, again, we're using a hypothetical situation but it seems inconceivable on any set of facts that there would be a situation where there would be a newborn who -- who would have a condition that required that kind of treatment.

THE COURT: Well, the parents just decide they want a different gender.

MR. NEWMAN: I think --

THE COURT: You know, a son was born and I wanted a girl or vice versa.

MR. NEWMAN: Your Honor, if somebody filed a complaint like that, it's inconceivable that HHS would take the position that refusing to perform that type of surgery on a newborn would constitute discrimination on the basis of sex.

THE COURT: Okay. So we've established the far outside parameter. How about a five-year-old?

MR. NEWMAN: I think that is --

THE COURT: Five-year-old one day wants to be an astronaut. The next day the five-year-old wants to be -- is a boy -- born a boy but wants to be a girl, and the parent files a complaint on the basis of their five-year-old's desire to be the different gender. How is your agency going to handle that one?

MR. NEWMAN: I think it's -- I think that it's -- you know, again, I think it's inconceivable that there would be a determination by HHS that a -- that a five-year-old would require gender reassignment surgery. But, again, I think that --

THE COURT: Okay. How about a ten-year-old? What I'm trying to get at here, Mr. Newman, is when are you going to respond favorably to parents or caregivers who believe their child has been denied healthcare including gender affirming care on the basis of that child's gender identity? You've just told me that a newborn and a five-year-old don't get that kind of treatment for your office. How about a ten-year-old?

MR. NEWMAN: Your Honor -- so HHS is currently going through a process of rule making. As I said, there's no binding regulation currently in force. HHS is currently in the process of promulgating a new rule. It was -- it's going through the regulatory process. When that -- when they issue a notice of proposed ruling, there will be an opportunity for parties to notice -- to issue comments on the rules. At this point --

THE COURT: So what rule are you enforcing in Plaintiff's Exhibit 1? What complaint are you -- what complaint are you dealing with? Sorry to talk over you. But what complaint are you dealing with?

MR. NEWMAN: I don't -- I don't believe there is a

complaint. HHS has -- HHS has never enforced the statute to require any -- any healthcare provider to provide gender -- gender-transition services.

THE COURT: Isn't that what you are inviting in Plaintiff's Exhibit 1? You're inviting those complaints to be filed; correct?

MR. NEWMAN: Correct.

So I also want to shift to the grounds of ripeness because I think this -- plaintiff's claim is not ripe. There's a two-prong test for ripeness which is the fitness for judicial decision and whether plaintiff will suffer hardship from withholding court consideration. And the fitness for judicial decision really depends on whether a -- whether a case will -- whether a case needs further factual development.

And here, you know, again, there's -- there are just, you know, highly general statements of the agencies but -- that generally statutes reach gender identity discrimination, but that RFRA is in force as well and that they'll abide by RFRA. And so what you really have is sort of applying the RFRA test to a hypothetical set of facts. And the RFRA test, I think -- burdens someone's religious exercise. It needs to further a compelling government interest and be the least restrictive means. And Supreme Court in *O Centro* held that that test is satisfied through the application of the law to the particular claimant whose sincere exercise of religion is being

substantially burdened. And just this past March in a case called *Ramirez v. Collier*, 142 S. Ct. 1264, another case involving RFRA's sister statute RLUIPA that applies RFRA in the prison context, but the Supreme Court held that this test required the court to take one case at a time considering only the particular claimant whose sincere exercise of religion is being substantially burdened.

And what I think those cases get is the facts matter when applying the RFRA test, but what the -- what the plaintiffs are -- are essentially asking here is a broad ruling that there could never be any situation in which it would ever satisfy the RFRA test to enforce these statutes against their members and that that goes against what the Supreme Court directed by dealing with one case at a time.

And just to get into, you know, why the facts matter is that --

THE COURT: So hold on a second. What type of uncertainty are you going to create in the insurance marketplace beyond the uncertainty that the change in administration has done from a rule that's in and out and in and out? Are you going to create incredible uncertainty in the insurance marketplace by saying "we're going to handle it one complaint at a time"? So you're creating a situation where Christian Employers' members can't get the primo health insurance coverages because you're creating a situation where

health insurers are having to provide this coverage, can't provide a rider accepting this coverage for certain employers, like Christian Employers Alliance, and as a result, they have to go to Coverage X which doesn't cover cancer or some other types of coverages. Isn't your agency, by saying we're going to handle this one complaint at a time, creating such uncertainty in the marketplace that you're disadvantaging people who have these deeply held religious beliefs and basically telling them they have to take a seat in the back of the bus?

MR. NEWMAN: No. No, Your Honor. Not at all. And there's -- there's no, you know --

THE COURT: Aren't you telling them they can't have the same type of health insurance as everybody else? They have to have --

MR. NEWMAN: No, Your Honor.

THE COURT: -- they have to have Plan X.

MR. NEWMAN: HHS has not required anyone to get a lesser Coverage X, you know. There's no -- there's no evidence of that.

THE COURT: No. But you require that the coverage be provided in the health insurance, don't you?

MR. NEWMAN: HHS has, you know -- and, again, HHS has never -- has never enforced the statute to require coverage of gender identity services and certainly not against any

religious objector. So HHS does not -- HHS has not taken any action to -- that would -- that would require people who did not want to cover these services to offer lesser coverage to the employees. There's, you know, simply no evidence of that in the record. I don't believe that's ever happened.

And in terms of -- you know, in terms of applying the RFRA to one case at a time, that's just what the Supreme Court held and demanded because that test requires the assessment of the particular claimant's religious belief and whether there's a compelling interest requiring whether that particular --

THE COURT: So we need to have litigation to see if they really believe it, their religious belief? Is that why we're having it one case at a time? We just want to put them to the test?

MR. NEWMAN: No. So a sincere religious belief is one element of the test. In practice -- in the case law when a party asserts a sincere religious belief in court, and the Government very -- very rarely doubt that unless there's some specific reason in the record to cast out an incredibility but I think we're --

THE COURT: So why do we need to wait for one case at a time when we know that they have these deeply-held religious beliefs?

MR. NEWMAN: Because it gets to the whether -- whether compelling a particular provider to provide these

services -- whether there's a compelling Government interest in compelling that particular provider and whether that's the least restrictive means of doing so. And, you know, it depends on in what other -- you know, if someone requires care, what other options are there available to get that person care. And is there really -- and is there really anything less restrictive where the person who requires the care can still get the care without the objecting person providing it. That's a highly factual specific scenario that, you know, can't be assessed over all of the, you know, hundreds or thousands of members.

THE COURT: So the CEA and entities like it just have to wait for hundreds or thousands of complaints to decide or to allow courts to determine the outside parameters of their deeply-held religious beliefs. Is that what you're suggesting?

MR. NEWMAN: No. There's a -- so, you know, again, there's been zero enforcement actions up until this point but hypothetically --

THE COURT: Or stated a better way, to determine whether there's a sufficient Government interest that trumps their deeply-held religions beliefs.

MR. NEWMAN: Yes, but let me get back to sort of the process --

THE COURT: So doesn't that chill -- doesn't that put a chill on their deeply-held religious beliefs?

MR. NEWMAN: I don't believe it does for two reasons: One is the lack of enforcement up until this point, and the other is even if -- hypothetically, if the first enforcement action in history were instituted, both HHS and EEOC have a robust process in place that offers multiple procedural protections. Mr. Reed used the metaphor of the "Sword of Damocles." I don't believe that that's an accurate metaphor at all because there's a multistep administrative process followed by a judicial review process where they would be able to assert their religious claims every step of the process.

So for HHS the first step, if it did wish to pursue enforcement, would be to notify the party the failure to secure compliance by voluntary means; and then if that's unsuccessful, there needs to be an administrative hearing on record; and if there's a conclusion after that administrative hearing that there's been a violation, then the party can seek review in court. And it's similar with EEOC. It begins with a employee bringing a charge of discrimination. The EEOC looks into it and decides whether there's reasonable cause to believe that a violation has occurred. If there is, then it goes to a conciliation process to see if it can be resolved; and if not, then EEOC determines whether or not to enforce. And, again, if EEOC does enforce by bringing an action in District Court, there's no --

THE COURT: And this, by your characterization, would

happen hundreds or thousands of times against these Christian Employers?

MR. NEWMAN: No. No, I don't think so. You know, again, Title VII has been in place for 58 years. And as Justice Gorsuch has indicated in *Bostock*, it's always been clear from the beginning from the plain text that that -- that that statute reached gender identity discrimination and yet there's been zero enforcement actions in all that time. So if the agencies are approaching this very cautiously, and I don't believe that there's any --

THE COURT: Because I think that, when Justice Gorsuch said that, no one actually thought that.

MR. NEWMAN: Well, EEOC took the position back in 2012, Your Honor, that Title VII reached -- reached gender identity discrimination. So at the very least it's been a decade since the EEOC has taken that position. And yet the EEOC has not once enforced against anyone in this context of failing to cover gender transition in their employee health plans. So you --

THE COURT: Have you had complaints filed in the 12 years that you've had this interpretation in place?

MR. NEWMAN: There have been complaints filed and the agencies have not -- have not taken enforcement actions in response to --

THE COURT: Have they gone through conciliation

stage?

MR. NEWMAN: I believe so. But conciliation is -- actually, by statute the conciliation is confidential. It's actually a crime to reveal what happens in conciliation. So I can't say -- I can't really say more on that but --

THE COURT: Have they gone to the hearing stage?

MR. NEWMAN: No, Your Honor.

THE COURT: Okay. So they've been determined in the point of conciliation to be subject to a religious objection or what? We don't know?

MR. NEWMAN: Again, the EEOC conciliation process is confidential and so I can't reveal details of that. But certainly there's no evidence in this case or in any of the other similar litigation that's been brought of any, you know, enforcement action against religious objector, you know, going to any advanced stage.

THE COURT: So at least hundreds of thousands of times, you're suggesting that the Christian Employers Alliance will need to at least go to the conciliation stage before your agency determines that their religious beliefs should be respected?

MR. NEWMAN: No. No, Your Honor. I'm not saying that. I think that it's -- you know, EEOC and HHS have stated that they -- they plan to -- that they'll abide by RFRA and they will -- you know, I think that to the extent that -- and,

again, they never have, but to the extent that they do begin any procedures against any religious-objecting entity, they will hear RFRA objections at the earliest possible stage and certainly RFRA is a very demanding test. I think there's every reason to think that in many cases HHS and EEOC will decide not to proceed in light of RFRA. But with the transactions here simply --

THE COURT: Mr. Newman, why do religious entities need to be subject to this type of harassment by your agency? Isn't that what this is?

MR. NEWMAN: Your Honor, I would dispute that there's been any harassment. There hasn't --

THE COURT: No. But, I mean, a complaint is filed; you go to the conciliation process; you determine whether RFRA applies. And so, you know, hundreds or thousands of times your agency is going to subject these people with deeply-held religious beliefs to a litmus test to determine whether or not you really believe it?

MR. NEWMAN: Well, first of all, Your Honor, I think that, you know, in the -- there's unlikely to be any challenge to -- any challenge to the sincerity of someone's religious belief.

THE COURT: So then why don't you have a religious exemption? Just make it plain?

MR. NEWMAN: RFRA provides a religious exemption and

EEOC --

THE COURT: And why don't you have it -- why don't you have it in your guidance? Why don't you have it --

MR. NEWMAN: We do have it in our guidance.

THE COURT: -- in the invitation for parents to file complaints concerning their newborn's gender identity?

MR. NEWMAN: It's in the -- it's in the May 2021 guidance from HHS. It says very clearly, "HHS will abide by RFRA in all applicable legal requirements," and I believe that most recent guidance refers back to the May 2021 guidance. And the EEOC has said -- in the technical assistance document that plaintiffs point to, EEOC says that: "In cases involving a religious employer, religious defenses must be taken into account," and that technical assistance document cites another compliance manual. An EEOC compliance manual says that in cases where an employer asserts a RFRA defense, great care must be taken to, you know, honor and the -- the employer's religious rights and it recommends consulting with EEOC Council or the Department of Justice. So EEOC and HHS have both consistently maintained in their guidance that to the extent they ever enforce these statutes, they will abide by RFRA.

THE COURT: Why should this Court find any differently than has already been decided in Judge Welte's *Religious Sisters of Mercy* case?

MR. NEWMAN: Well, Your Honor, the Government

believes that Judge Welte's -- that Judge Welte's decision was wrongly decided. That's on appeal to the Eighth Circuit.

THE COURT: Right.

MR. NEWMAN: It was argued in December and, you know, I'll summarize sort of the reasons why we believe that Judge Welte got it wrong. But certainly to the extent that that decision -- when a decision comes out, it will certainly provide greater guidance to this Court.

But, first, I think Judge Welte misinterpreted the effect and nature of past regulatory actions. Judge Welte concluded that the 2016 Rule on gender identity was still in effect because it was sort of revived by the *Walker* and *Whitman-Walker* decisions. And that's not correct because it was vacated by the *Franciscan Alliance* court, and those subsequent courts acknowledged they couldn't revive a rule that's been vacated.

And with respect to EEOC, Judge Welte concluded that in the 2016 Rule, EEOC and HHS have reached some sort of arrangement or agreement that EEOC would bring enforcement actions and that's not -- that's not true either. First of all, the 2016 Rule has been vacated but all of the preamble of the 2016 Rule said with respect to EEOC, "If a complaint is filed with HHS which is in EEOC's jurisdiction, HHS will send it over to EEOC." They didn't say one way or another what EEOC will do with it. So, you know, but Judge Welte interpreted

both HHS and EEOC as essentially, you know, adopting rules and positions that they hadn't adopted.

Also, Judge Welte accepted plaintiff's assertion in that case that there was a history of enforcement when, in fact, there hasn't been any history or relevant enforcement in terms of either of these agencies penalizing anyone for not providing their coverage under --

THE COURT: You told me there have been complaints. You told me there have been complaints.

MR. NEWMAN: There have been complaints but the agencies have not acted on those complaints.

THE COURT: Yeah. But you've haled the Christian Employers/Religious Mercy Sisters into mediation process, haven't you?

MR. NEWMAN: I don't -- I actually don't believe that that's -- I don't believe that that's true. And there's certainly no, you know -- and none of -- none of plaintiff's members asserted there's been any kind of complaint or specific driving enforcement against them.

But to get back to Judge Welte's order, I think the biggest area where we dispute Judge Welte is in how he resolved the merits of the RFRA claims. Because I think he -- he -- he ruled essentially that it would always violate RFRA to require any of the members to cover a performed gender identity -- sorry -- gender-transition services under any circumstances and

that -- that, I think, ignores, again, what I said before that the test has to be applied based on the specific facts and so that kind of --

THE COURT: What part of their doctrine has an exception?

MR. NEWMAN: Sorry. Excuse me?

THE COURT: What part of their doctrine has an exception? They say this is against our --

MR. NEWMAN: I don't --

THE COURT: -- deeply-held religious beliefs and you said it has to be decided case by case. Where has their doctrine granted you any wiggle room to determine it on the basis of a case by case?

MR. NEWMAN: So the question -- so, first of all, I think it's very likely that most, perhaps all, of the members have a sincere religious belief. That there would be a substantial burden on their rules as exercised. But we don't know that for sure. We don't know who the members are, they're mostly anonymous. But it's likely that most, perhaps all, of them do satisfy that initial step of a sincere religious belief such that performing or covering these services could be a substantial burden.

But then it gets to a compelling -- whether there's a compelling Government interest in compelling that specific party at issue to perform the procedure and whether it's the

least restrictive means. And that is highly fact dependent -- the least restrictive means -- that gets into what other means are available. So, you know, say -- you know, say you have a case of a -- of a patient who needs a procedure that -- and the question is, you know, is compelling this provider to provide that surgery the least restrictive means? And then it depends on what other options are available and that's a --

THE COURT: Where? Like in the geography? Or in the country? Or what? So you're going to make it on the basis of "nobody does it in North Dakota, so they got to drive to Minneapolis-St. Paul to get the procedure done." Are you going to conclude that the Government interest trumps the burden of traveling to Minneapolis, Minnesota, to get this procedure done, so therefore somebody in Bismarck has to do it?

MR. NEWMAN: That's the type of -- that's the type of -- that's the type of inquiry that HHS will -- will consider. And, you know, it might depend on is the -- is the patient -- is the patient indigent? Do they have access to transportation? You know, it may not be someone from North Dakota; it may be someone in Alaska.

THE COURT: So at what point does -- somebody's religious beliefs in Bismarck not the same as somebody's religious beliefs in Minneapolis-St. Paul? Where did that happen? Where is that exception in the Constitution? That you're not able to be an abhorrent in Bismarck but you are in

Minneapolis-St. Paul or Chicago or New York where these procedures are allowed or available?

MR. NEWMAN: Well, I go back to the words that Congress enacted. It was -- Congress set forth -- it's a demanding test, a very demanding test that, you know, burdening someone's religious exercise must be the -- it must be the least restrictive means of satisfying compelling government's interest. And, you know, the Supreme Court said in March that -- in the *Ramirez* case -- this test needs to be applied one case at a time, and that's exactly what HHS has said that it will do. But I don't think that it fits with that need for a case-specific determination to say that there's no circumstance in which any instance could ever satisfy the --

THE COURT: And you indicated one of the circumstances may be geography. So somebody in Bismarck, North Dakota, is not able to be as Christian as somebody in Minneapolis?

MR. NEWMAN: I don't -- you know, I'm -- possibly but I'm not sure. HHS -- again, HHS has not engaged in any enforcement action so HHS has not really grappled with exactly what the -- you know, how the compelling Government -- it could --

THE COURT: Yeah. But these --

MR. NEWMAN: -- that is provided --

THE COURT: Sure. But these are the types of things

that your case-by-case analysis will invite. They'll invite the suggestions that you have to do this procedure or you have to provide this benefit in Bismarck and perform it at the hospital here because the person's indigent, it's too far to travel, whatever. So as a result, your religious beliefs don't matter in Bismarck but they matter if you happen to live in a major metropolitan area.

MR. NEWMAN: Your Honor, the test is -- the test requires consideration of the specific facts and sometimes minute facts can make a difference. Just to go back to the --

THE COURT: So distance -- distance and poverty trump the Constitution?

MR. NEWMAN: No, Your Honor. HHS has not made any determination on any specific facts because it hasn't engaged in any enforcement but, you know, the application of this test can be cumbersome at times. That's what the test demands. To go to the example in the Supreme Court *Ramirez v. Collier* case, that involves a death row inmate who asserted a religious -- during his execution he wanted his pastor to pray with him and touch him during his execution. And the question is was that -- could that burden on his religious exercise be overcome by the compelling Government interest least-restrictive-means test. And the Supreme Court ruled he likely had a valid claim because there were compelling Government interests in ensuring the security of executions, for example. But they noted that

he said that the pastor could touch his leg or lower extremity far away from the IV site. But they said the case might be different if he demanded to be touched closer to the IV site where it could be more disruptive. So that's just one example of that.

THE COURT: Or different if they used an electric chair to perform the execution.

MR. NEWMAN: That would be an entirely different matter. But that's just an example of how the facts matter and courts and the Government has to grapple with this test on a case-by-case basis.

THE COURT: Your response indicates that the Christian Employers Alliance claims sweep more broadly than the *Religious Sisters of Mercy*. How?

MR. NEWMAN: In -- in a -- in a couple of ways. So, first of all -- you got to this point, Your Honor, at this point in your questions of Mr. Reed -- that they are -- they're bringing claims -- they're seeking nationwide injunction the *Religious Sisters of Mercy* court, Judge Welte, only issued an injunction to the plaintiffs and their members. They are also bringing claims that were rejected in the *Religious Sisters of Mercy* touches the APA claim which the Court in the *Religious Sisters of Mercy* rejected on comity grounds and that aspect of Judge Welte's decision we agree with.

You know, Mr. Reed basically made the argument that

in his view HHS's actions are unlawful, and therefore need to be set aside because Section 1557 doesn't reach gender identity discrimination at all. But that's basically the opposite of what the courts in *Walker* and *Whitman-Walker* held. So in those aspects I think make what they're seeking broader than what Judge Welte did in the *Religious Sisters of Mercy*.

THE COURT: Is the notice stating that your agency will comply with RFRA sufficient or is it just boilerplate?

MR. NEWMAN: No, it's not. It's not boilerplate. And it's -- but that's not -- you know, that's not all there is. You know, it's not just that statement. There's -- again, there's been -- there's been zero enforcement actions against religious entities. So that statement is consistent with longstanding action and, you know, again -- during both HHS and EEOC have multistep administrative processes during which, you know, the agencies will consider RFRA arguments and RFRA claims and even into the hypothetical scenario in which there were a court action, a court would then independently apply the RFRA test. So when you combine the consistent guidance of the agency that they'll comply with RFRA with the lack of enforcement with the robust procedural protections, I think that's quite meaningful.

THE COURT: But when you're asking somebody to wait potentially for court action, you're talking about a process where a complaint's been filed, mediation has occurred, agency

has decided to enforce. There's been a judicial determination at the agency level to enforce it against this Christian employer, and then on appeal the Christian employer avails the federal court to provide protection. That's the point at which court protection is available, isn't it?

THE DEFENDANT: Yes. So there's the -- again, both EEOC and HHS have a multistep administrative process, at the end of which there's a right to judicial review.

THE COURT: Isn't that a lot of harassment of religious entities to get to the point of asking the Federal Court to protect them?

MR. NEWMAN: I don't believe it is harassment, Your Honor. And, first of all, it's hypothetical. There haven't been -- you know, and plaintiff's don't point -- doesn't point to any instances of their members being subjected to anything that could be characterized as harassment.

THE COURT: Isn't it harassment to hale an entity or a person, whether or not they're a member of this plaintiff's group, into a mediation process?

MR. NEWMAN: No.

THE COURT: And have them respond to --

MR. NEWMAN: No, Your Honor. No, Your Honor. These are procedures that were, you know, established by Congress that were intended to give parties ample procedural protections and I don't believe that they constitute harassment at all,

even if one of those plaintiff's members went through that process which of course they haven't.

THE COURT: Your response indicates that the agencies actually pursue enforcement against the CEA member, that entity will be able to present its full slate of constitutional and statutory defenses. Doesn't that flip things around the way that they should be? Why should somebody have to prove to an agency that they have a constitutional right? Shouldn't your agency respect the constitutional right in the first instance?

MR. NEWMAN: Yes. So, first of all, it's just as a -- RFRA is a statutory right that goes beyond constitutional protections. But, you know, HHS and EEOC will respect RFRA and if -- if, you know, for example, an employee filed a notice of discrimination with EEOC, at the very beginning the first stage would be EEOC investigating to determine whether there's a reasonable cause to believe that a violation has occurred, EEOC would consider any claim under RFRA at that -- at that earliest stage and if EEOC determines that the plaintiffs -- sorry -- if the employer has a sincere religious belief that's being substantially burdened and that, you know, compelling the employer is to provide a procedure is not the -- is not the least restrictive means supporting a compelling Government interest. They're not going to make a determination that a violation has occurred and it would go no further.

THE COURT: All right. Anything else, Mr. Newman?

MR. NEWMAN: Nothing more from me.

THE COURT: All right. Mr. Reed, do you have any rebuttal?

MR. REED: Yes, Your Honor. I'll try to be brief here. A few points, Your Honor -- three to be exact.

So the government's response, as you just heard, is a big promise to obey the law. They point to their so-called agreement to comply with RFRA in their guidance documents. Your Honor, that is the same as saying "we will comply with the Constitution," and that goes without saying. That does not defeat the suit. The government's take on that, if we were to assume the government's position, would completely eliminate all pre-enforcement constitutional suits and that flies in the case of well-settled precedent.

The Government asks CEA members, as employers and healthcare providers, to simply roll the dice; wait and see what happens; see if we bring enforcement actions; see if people file complaints against you. And the reference to the Sword of Damocles, that isn't sort of pulled out of thin air, Your Honor. That's what the Eighth Circuit said in the *Iowa League of City* case. Specifically there the Court held that we do not require parties to operate beneath the Sword of Damocles until the threat in harm actually befalls them. That's 711 F.3d. 844.

Good example to point to, Your Honor, the *Hobby Lobby*

cases, the contraceptive mandate cases. When you have HHS issuing the contraceptive mandate, you have dozens of cases being filed across the country on RFRA grounds. Not one case was ruled nonjusticiable on standing grounds.

Second, Your Honor, the 2016 Rule HHS speaks to and claims -- the Government claims is not in effect is in effect, specifically regarding the 2016 vacatur the *Franciscan Alliance* court issued. One, that was a preliminary injunction; and, two, it didn't address the language of sex stereotyping. So what the *Walker* court and *Whitman-Walker* courts decided -- and this is the rulings in those cases -- the *Walker* Court held that the definitions of on the basis of sex gender identity and sex stereotyping currently set forth in HHS regulations will remain in effect. That was the language of the *Walker* court.

THE COURT: Mr. Newman suggested that the 2016 Rule has been vacated in *Franciscan Alliance*, is that the case?

MR. REED: That is not the case, Your Honor. It remains in effect today. So *Franciscan Alliance* vacated it at the preliminary injunction phase, but, again, *Walker* and *Whitman-Walker* held that the 2016 Rule must apply today, will remain in effect. So that is fully and in force today and the Court can issue a ruling against that -- on those -- with regards to the 2016 Rule.

Third, Your Honor, this case is ripe. Ripeness and standing boil down to the same question. That's in our briefs.

There's no further factual development here. We have meticulously -- CEA has set forth their religious beliefs throughout our attachments to our complaint, in our verified complaint which is verified by CEA's president throughout the motion in the attached declaration in support. There's no question what CEA members believe and that's all the facts that are needed. You need to know what their religious beliefs are and what the Government is doing to burden those beliefs. That's the factual information needed to conduct the RFRA analysis and that is fully before the Court.

THE COURT: Does somebody's religious beliefs in Bismarck need to give way because of the burden of traveling to Minneapolis-St. Paul?

MR. REED: Absolutely not, Your Honor. The Supreme Court in full and recently -- recent decision, the *Fulton* case said, "If the Government can enforce its ways without burdening religion, it must do so." So that would be whether that's in Bismarck or Minneapolis or Hawaii or wherever. The Government must comply with the First Amendment.

And to conclude, Your Honor, that's what the Government is trying to do here. You mentioned they want religious providers to take a seat at the back of the bus. They're treating them as second-class citizens and they're saying they shouldn't be able to comply with their constitutionally protected religious beliefs.

You mentioned children. We have children healthcare providers and they care for kids. They care about them. That's why they do what they do. That's their very means of existence. They want to help them and they don't believe these dangerous and controversial procedures help them whatsoever. They believe God intentionally designed them as they are and that they are beautifully created and thus they seek to protect them as so.

And concluding, Your Honor, I want to make one technical correction to the record. I believe earlier I stated the Government continues to disavow enforcement. I meant to say they continue to "not" disavow enforcement; they have not done so at all.

THE COURT: Does your -- you've indicated your claim -- does it or does it not include any characteristics that your members are not able to get the types of health insurance coverages that would be available to the general population because of this rule?

MR. REED: They do claim that they are chilled from doing so because of the rule. Yes, Your Honor.

THE COURT: All right.

MR. REED: And in conclusion, Your Honor, I would just ask the Court issue a preliminary injunction at a minimum on RFRA grounds prohibiting HHS or EEOC from enforcing their mandates in such a way that require healthcare members or CEA

members as employers to either perform or cover within their insurance plans these dangerous and controversial gender-transition procedures.

THE COURT: All right. Thank you, Mr. Reed.

MR. REED: Thank you, Your Honor.

THE COURT: And thank you, Mr. Newman.

The Court will take the matter under advisement and issue a written decision in due course. If there's nothing else, we're off the record.

(Proceedings commenced at 11:55 a.m., that same day.)

CERTIFICATE OF COURT REPORTER

I, Ronda L. Colby, a Certified Realtime Reporter and Registered Merit Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated at Bismarck, North Dakota, this 16th day of May, 2022.

/s/ Ronda L. Colby

RONDA L. COLBY, RPR, CRR, RMR
United States District Court Reporter
District of North Dakota
Western Division