

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

Christian Employers Alliance, on
behalf of itself and its members,

Plaintiff,

v.

**United States Equal Employment
Opportunity Commission;**
Charlotte A. Burrows, in her official
capacity as Chair of the United States
Equal Employment Opportunity
Commission; **United States
Department of Health and Human
Services; Xavier Becerra**, in his
official capacity as Secretary of the
United States Department of Health
and Human Services; **Office for Civil
Rights of the United States
Department of Health and Human
Services; Melanie Fontes Rainer**, in
her official capacity as Director of the
Office for Civil Rights of the United
States Department of Health and
Human Services,

Defendants.

1:21-cv-00195-DMT-CRH

**FIRST AMENDED VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, Christian Employers Alliance (CEA), on behalf of itself and its members, asserts for its First Amended Verified Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof, alleges the following:

INTRODUCTION AND NATURE OF THE ACTION

1. This lawsuit challenges two federal regulatory mandates that exceed the government’s statutory and constitutional authority. First, the Equal Employment Opportunity Commission (EEOC) has for many years now misinterpreted and improperly enforced discrimination based on sex in Title VII so as to force religious non-profit and for-profit employers to pay for and provide health plans or health insurance coverage to their employees that cover gender transition surgeries, procedures, counseling, and treatments in violation of the employers’ religious beliefs (the “EEOC Coverage Mandate”).

2. Second, the U.S. Department of Health and Human Services (HHS) issued a final rule in 2016, and recently expressed its present intent to enforce that rule, which interprets Section 1557 of the Affordable Care Act (ACA) and its implementing regulations so as to force religious healthcare providers to perform gender transition surgeries, procedures, counseling, and treatments in violation of their medical judgment and religious beliefs, and to compel and restrict based on viewpoint those providers’ speech (the “HHS Gender Identity Mandate”). The HHS Gender Identity Mandate also regulates health insurers and third-party administrators, forcing them to include coverage of gender transition procedures in the plans of both healthcare and non-healthcare employers.

3. The EEOC Coverage Mandate forces religious employers that provide health insurance to their employees to provide insurance coverage of elective gender transition services—and to pay for elective gender transition services in those health plans—even though doing so violates the religious beliefs of those employers. The HHS Gender Identity Mandate requires health insurers and third-party administrators to include the coverage in those same plans they provide for employers.

4. The HHS Gender Identity Mandate also forces religious healthcare providers to physically perform or facilitate those gender transition services even

though doing so would violate healthcare providers' medical judgment and religious beliefs. That's not all. The HHS Gender Identity Mandate requires those religious healthcare providers to speak positively about these procedures even though they disagree with them and the Mandate prohibits them from offering their full and frank medical opinions, including warning patients of the dangers and risks of these experimental and irreversible procedures.

5. The EEOC's interpretation of Title VII mandates that employers with fifteen or more employees must provide employee health plans or health insurance coverage that cover gender transition surgeries and services, such as medical procedures to transition a biological male to a transgender female or to transition a biological female to a transgender male. The EEOC's interpretation of Title VII also requires coverage for other gender transition services such as supportive counseling/psychotherapy and cross-sex hormone therapy and treatment.

6. Under HHS's interpretation of Title IX's sex nondiscrimination provisions and Section 504's disability nondiscrimination provisions, HHS interprets and enforces Section 1557 to require healthcare providers that receive Federal financial assistance under 42 U.S.C. § 18116 to perform (and refer for) gender transition services, such as performing hysterectomies on healthy women. HHS also compels those providers to use preferred pronouns in medical charting. And HHS prevents those providers from offering their medical opinion and advice on those same procedures, among other requirements.

7. Many religious employers—including CEA and all its members—hold sincerely held religious beliefs that such gender transition surgeries and procedures are morally wrong and harmful to patients. Providing these gender interventions as healthcare providers, or providing coverage of the interventions in their employee health insurance plans, contradicts their beliefs that God purposefully created

humans as either a biological male or female and that a person's biological sex is immutable.

8. Neither the EEOC nor HHS provide religious exemptions from these Mandates.

9. The Mandates force CEA and its members to choose between violating their sincerely held religious beliefs by compliance, or complying with their religious beliefs and facing injury in the form of loss of the opportunity to provide employee insurance, and/or heavy fines, the prospect of expensive and burdensome litigation, possible criminal penalties, and penalties in attorney's fees and costs.

10. On January 19, 2021, Judge Welte held that the EEOC Coverage Mandate and HHS Gender Identity Mandate violated Religious Freedom Restoration Act (RFRA) with respect to an association, employers, and healthcare providers and their health insurers and third-party administrators in the same situations as CEA and its members. The Court permanently enjoined the EEOC and HHS from interpreting or enforcing Title VII or Section 1557 in a manner that would require those plaintiffs to perform gender transition procedures or provide health plans or health insurance coverage to their employees for gender transition procedures. *See Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1153–54 (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).

11. The Eighth Circuit upheld that injunction, *sub nom. Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022), with the exception of its application to the members of the Catholic Benefits Association (CBA) that were not plaintiffs, but the court made that exception only because “[o]ther than the three named plaintiffs who are CBA members—the Diocese, Catholic Charities, and CMA—the CBA has otherwise failed to identify members who have suffered the requisite harm.” *Id.* at 602.

12. In its original complaint, subsequent affidavits, and this amended complaint, CEA has done what the Eighth Circuit said CBA did not do: identify members that are injured by these Mandates and that are not plaintiffs in this case. Namely, CEA has identified Trinity Bible College & Graduate School, located in Ellendale, North Dakota, and the Children's Center Rehabilitation Hospital, located in Bethany, Oklahoma.

13. On behalf of its members, CEA seeks a similar declaratory judgment and permanent injunction against the EEOC Coverage Mandate and HHS Gender Identity Mandate as was provided to the healthcare and non-healthcare entities in *Religious Sisters*.

14. CEA members are similarly situated to the successful *Religious Sisters* plaintiffs with respect to these claims, because all (or virtually all) CEA employers are subject to the EEOC Coverage Mandate, and several CEA members are healthcare entities subject to the HHS Gender Identity Mandate.

15. CEA members are also similarly situated to each other, all having the same Christian faith and convictions with respect to their belief in sex as God-ordained and binary and with respect to their opposition to providing or paying for health insurance coverage of gender transition surgeries and procedures. Therefore, they hold the same religious objections to gender transitions under the EEOC Coverage Mandate and HHS Gender Identity Mandate. The EEOC Coverage Mandate and HHS Gender Identity Mandate impose the same burden on CEA's members—including its Healthcare Members—and puts them to the same unlawful choice.

JURISDICTION AND VENUE

16. This action arises under the Constitution and laws of the United States and therefore this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1361.

17. This Court has authority to award the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, Fed. R. Civ. P. 65, and 42 U.S.C. § 2000bb-1. This Court may review Defendants' unlawful actions and enter appropriate relief as provided by RFRA, 42 U.S.C. § 2000bb-1(c), and the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 701–706. This Court may review and enjoin ultra vires or unconstitutional agency action through an equitable cause of action. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689–71 (1949).

18. This Court has authority to award costs and attorney's fees under 28 U.S.C. § 2412(d) and 42 U.S.C. § 1988(b).

19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1) because Christian Employers Alliance resides in this district, as its place of incorporation is North Dakota. Its registered agent is also in Bismarck, North Dakota.

20. As the result of CEA residing in this district through its place of incorporation and its registered agent, venue is proper in this district because a substantial part of the events or omissions giving rise to the claims occurred in this district.

PARTIES

Plaintiff – Christian Employers Alliance

21. CEA, a North Dakota nonprofit corporation, is a Christian membership ministry that exists to unite and serve Christian non-profit and for-profit employers who wish to live out their faith in everyday life, including their homes, schools, ministries, businesses, and communities.

22. CEA's registered agent is located in Bismarck, North Dakota.

23. CEA seeks relief on behalf of its current and future members.

24. Shannon O. Royce is the President of Christian Employers Alliance, and has personal knowledge of the facts about CEA and its members asserted herein.

Defendants

25. Defendant Equal Employment Opportunity Commission (EEOC) is a federal agency that administers, interprets, and enforces certain laws, including Title VII. The EEOC is responsible for, among other things, investigating complaints and bringing enforcement actions against employers for discrimination “because of . . . sex” in violation of Title VII.

26. Defendant Charlotte A. Burrows is the EEOC Chair. She is, in this capacity, responsible for the administration and implementation of policy within the EEOC, including investigation and enforcement pursuant to Title VII. She is sued only in her official capacity. References herein to “EEOC” include Burrows, unless the context dictates otherwise.

27. Defendant United States Department of Health and Human Services (HHS) is a federal cabinet agency within the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. §§ 551 and 701(b)(1).

28. Defendant Xavier Becerra is the Secretary of the United States Department of Health and Human Services. Defendant Becerra is sued only in his official capacity. Defendant Becerra is responsible for the overall operations of HHS, including the Department’s administration of Section 1557 of the ACA. References herein to “HHS” include Becerra, unless the context dictates otherwise.

29. Defendant the Office for Civil Rights (OCR) is a component of the United States Department of Health and Human Services. References herein to “HHS” include OCR, unless the context dictates otherwise.

30. Defendant Melanie Fontes Rainer is the Director of the Office for Civil Rights at the United States Department of Health and Human Services. As head of OCR, Defendant Rainer is responsible for enforcing Section 1557, Title IX, and Section 504 on behalf of HHS. References herein to “HHS” include Defendant Rainer, unless the context dictates otherwise. She is sued only in her official capacity.

FACTUAL ALLEGATIONS

I. CEA Members’ Beliefs and Practices Regarding Gender and Sex

31. CEA members are Christ-centered organizations, dedicated to integrating their Christian convictions into every aspect of their operations, whether ministry or business. Their sincerely held religious beliefs include traditional Christian teachings on God’s purposeful design and creation of individuals as male or female, which is a gift from God and immutable.

32. CEA members believe and teach that each human being bears the image and likeness of God, and that the two distinct biological sexes of male and female are complementary and together reflect the image and nature of God.

33. CEA members believe and teach that rejection of one’s biological sex is a rejection of the image of God within that person.

34. CEA members sincerely believe that “[m]ale and female are immutable realities defined by biological sex” and that “[g]ender reassignment surgery is contrary to Christian Values.” *See* Exhibit 1 – Fourth Amended and Restated Bylaws of Christian Employers Alliance, art. I, § 1.3.5.

35. CEA members therefore believe and teach that gender transition and reassignment (and the procedures necessary to accomplish it) are wrong, and that they cannot, as a matter of religious conscience and conviction, knowingly or intentionally perform, participate in, pay for, facilitate, enable, or otherwise support

access to gender transition surgeries and procedures, including through their employer-provided health plans or health insurance coverage.

36. CEA works and advocates for religious freedom of Christian employers seeking to conduct their ministries and businesses according to their religious values.

37. CEA's articles of incorporation state that its purposes are "exclusively religious, charitable, [and] educational." Specifically, the articles state that CEA is organized:

- a. To define and state Christian Ethical Convictions as they relate to religious exercise in the workplace;
- b. To support Christian employers and develop strategies for them, so that they, as part of their religious witness and exercise, may provide health or other employment related benefits to their respective employees and engage in other employment practices in a manner that is consistent with Christian Values;
- c. To work and advocate for religious freedom of Christian and other religious employers seeking to conduct their ministries and businesses according to their religious values;
- d. To support Christian employers in responding to changes in civil law that threaten their ability to conduct their affairs consistent with their Christian Values; and
- e. To make charitable donations to Christian ministries qualifying as religious or charitable organizations.

See Exhibit 2 – Articles of Incorporation of Christian Employers Alliance, art. II.

38. CEA's bylaws contain a "Statement of Faith" and a statement of "Christian Ethical Convictions." *See* Ex. 1, art. I, §§ 1.1, 1.3.

39. Under article I, section 1.2 of the bylaws, the Statement of Faith and Christian Ethical Convictions or the Nicene Creed for the purpose of membership only; and the Christian Ethical Convictions (together with other determinations of faith and values by CEA's board of directors and Ethics Committee) constitute "Christian Values." *Id.* art. I, § 1.2. A person who lives his or her life according to Christian Values is considered to be a Christian. *Id.*

40. All of CEA's directors are (and are required to be) Christians known by their respective pastors. *See id.* art. IV, § 4.2.

41. All of CEA's officers and employees are Christians. *See id.* art. VI, § 6.1.

42. CEA's board also serves as an Ethics Committee, and it conducts outreach as needed to expert Christian ethicists. *Id.* art. V, § 5.1.1.

43. CEA's bylaws state:

Upon request of the Board, its Chair, or the president, the Ethics Committee shall evaluate medical ethical issues and advise the Board of its analysis and recommendation; it shall similarly advise the Board regarding all benefits, products, and services provided by the Alliance [CEA], its affiliates or subsidiaries, or their respective contractors. The purpose of the committee's advice is to help the Board determine whether certain health care coverage, medical services, practices, or medications conform to Christian Values. If they do not, the committee shall recommend to the Board the necessary corrections to achieve conformity with Christian Values.

Ex. 1, art. V, § 5.1.2.1.

44. CEA subscribes to the same religious and ethical commitments with respect to employer-sponsored health insurance that apply to CEA's members.

45. To be a member of CEA, an organization, at a minimum, must be a Christian employer as defined in CEA's bylaws.

46. This includes that the organization agrees with CEA's Statement of Faith or has adopted creeds or statements of faith (such as the Nicene Creed) that

are in harmony and not in conflict with the CEA Statement of Faith and Ethical Convictions.

47. The organization must also “commit to provide health care benefits consistent with Christian Ethical Convictions and to support the right and freedom of Christian employers to do so.” *Id.* art. III, § 3.1.1.

48. CEA defines “Christian Ethical Convictions,” for the purposes of its membership requirements, as follows:

1.3.1. Human life, from the moment of conception to natural death, is sacred. Human life should be honored and protected at all stages of life.

1.3.2. Abortion is the intentional taking of human life or termination of pregnancy at any time from the moment of conception through birth. Abortion is contrary to Christian Values.

1.3.3. The use of human embryonic stem cells acquired from destruction of nascent human life and the use of fetal tissue acquired from abortion is contrary to Christian Values.

1.3.4. Suicide and assisted suicide are contrary to Christian Values.

1.3.5. Male and female are immutable realities defined by biological sex. Gender reassignment is contrary to Christian Values.

1.3.6. Marriage is a lifelong, permanent, and monogamous heterosexual union.

1.3.7. Unless a Member has exhausted all alternatives that do not create a greater transgression of Christian Values, and such Member has taken all reasonable steps to avoid all such transgressions, a Member cannot—consistent with Christian Values—provide services for, healthcare coverage of, reimbursement for, or access to:

A. Abortions and abortion inducing drugs and devices.

B. Treatments derived from human embryonic stem cells acquired from destruction of a fertilized ovum, or from fetal tissue acquired from an abortion.

C. Assisted suicide.

D. Gender reassignment therapies and surgery.

E. Counseling affirming or encouraging any acts or behavior violating Christian Values, or

F. Any medical treatments, procedures, or medication contrary to Christian Values.

1.3.8. All people have the God-given right to exercise their faith freely, without interference from the government.

1.3.9. Christians are called to exercise their faith in every area of their lives—their homes, schools, ministries, businesses, and communities.

Id. art. I, § 1.3.

49. Nonprofit organizations must satisfy three additional criteria to qualify for membership. They must:

(i) subscribe to [CEA's] Statement of Faith or Nicene Creed; (ii) affirm that either its highest executive officer or a majority of its governing body is Christian, and (iii) either have Section 501(c)(3) status or be specially approved by the President as being non-profit.

Id. art. III, § 3.1.2.

50. For-profit organizations must satisfy two additional criteria for membership. They must affirm that:

(i) Christians (or trusts or other entities wholly controlled by such Christians) own 51% or more of the Member, and (ii) 51% or more of those persons comprising the Member's governing body, if any, are Christians.

Id. art. III § 3.1.3.

51. CEA is strongly committed to maintaining a high threshold in its membership criteria, including in being a Christian employer, the Statement of Faith, the Christian Ethical Convictions (including those concerning healthcare services, coverage and reimbursements), and Christian governance or control of nonprofits and for-profits.

52. Under CEA's bylaws members pay dues, but the bylaws do not specify the amount of dues owed. CEA leadership may adjust the amounts owed for dues

based on the needs and purposes of CEA. CEA does not consider any particular dues amount to be an essential criterion for membership, other than the requirement that members pay the dues that CEA requires.

53. CEA members provide health benefits to their employees through insured group health plans or self-funded plans, with the possible exception of a few very small business members.

54. CEA has numerous members.

55. CEA has multiple members that are principally engaged in the business of providing healthcare and that receive Federal financial assistance under 42 U.S.C. § 18116.

56. CEA members include for-profit entities, as well as non-profit entities.

57. Most of CEA's members employ more than fifteen employees and are "employers" as defined in Title VII.

58. The commitment of CEA members to complying with Christian Values and Christian Ethical Convictions in their provision of healthcare services and health insurance or coverage benefits is part of CEA members' religious witness and religious exercise.

59. To avoid violating their religious beliefs, CEA members wish to sponsor health plans that categorically exclude coverage of gender reassignment therapies, treatments, procedures, medication, or counseling affirming or encouraging such reassignment or transition (collectively, "gender transition services").

60. Pursuant to these commitments, CEA members that provide health plans or health insurance coverage to their employees either already categorically exclude coverage for gender transition services or desire to categorically exclude such coverage for gender transition services.

61. Moreover, to avoid violating their religious beliefs, CEA members that are principally engaged in providing healthcare services cannot perform or refer for gender transition services.

II. Identification of CEA Members Injured by the Mandates

62. CEA's members include 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").

63. Both Trinity Bible College and the Children's Center meet CEA's membership criteria.

64. Both affirm the Statement of Faith and Christian Ethical Commitments set forth in CEA's Bylaws.

65. Neither is a member of the Catholic Benefits Association.

66. Both have more than fifteen employees and are "employers" as defined in Title VII, and both sponsor health insurance coverage or health plans for their employees.

67. Both are therefore subject to Title VII's nondiscrimination requirements, and are directly affected by the EEOC Coverage Mandate, and their health issuers or third-party administrators are subject to HHS's Gender Identity Mandate.

68. Both 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.

69. Both thus face potential liability from Defendants, or the loss of the opportunity to provide employee health insurance, for exercising their religion by categorically excluding coverage for gender transition services in their health plans.

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

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

72. The Children's Center is therefore subject to the nondiscrimination provisions interpreted and enforced by HHS (including Section 1557, Title IX, and Section 504) and is directly affected by the HHS Gender Identity Mandate.

73. But the Children's Center has religious, moral, ethical, conscientious, medical, and free speech objections to the practices described in this complaint that are required by the HHS Gender Identity Mandate.

74. The Children's Center has practiced healthcare and firmly intends to continue to do so consistent with its faith and its commitments as a CEA member, 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.

75. 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 IX and Section 504) and Title VII, all as interpreted and enforced by Defendants, because of their religiously guided provision of insurance coverage and medical services, as described above and in this complaint.

III. The EEOC Coverage Mandate

A. The EEOC's interpretation of Title VII mandates employers to provide coverage for gender transition services in their health plans.

76. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual . . . because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1).

77. Title VII also makes it unlawful to discriminate against an employee “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” *Id.*

78. Health plans and health insurance coverage are part of an employee’s “compensation, terms, conditions, or privileges of employment.” *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

79. Title VII defines an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 2000e(b).

80. Congress enacted the Pregnancy Discrimination Act in 1978 to further define what constitutes “sex” discrimination under Title VII. It specified that the terms “because of sex” or “on the basis of sex” include “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000e(k).

81. The EEOC has responsibility for interpreting and enforcing Title VII.

82. When Congress passed Title VII and amendments thereto, it did not understand the term “sex” to include sexual orientation or gender identity; rather it understood the term to mean one of the two binary sexes: biological male or biological female.

83. But the EEOC interprets discrimination on the basis of sex in Title VII as encompassing discrimination on the basis of gender identity. *See* Exhibit 3 – EEOC, Sex-Based Discrimination.¹ (“Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII.”)

84. This has been the EEOC’s consistent interpretation for almost ten years.

85. The EEOC has applied its interpretation to require employers with fifteen or more employees that provide health plans or employee health insurance coverage to pay for and provide gender transition services within those benefits (the “EEOC Coverage Mandate”).

86. If employers fail to provide health plans that cover gender transition services, they risk facing serious and harsh penalties—including costly and detrimental civil liability—for discriminating against an individual with respect to his “terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1).

87. The EEOC’s interpretation of discrimination based on sex in Title VII thus categorically prohibits employers from excluding gender transition services in their group health plans.

88. The EEOC has issued recent guidance confirming that employers must provide and pay for these gender transition services.

89. For example, the EEOC has stated that “under Title VII employers cannot discriminate against individuals ***based on sexual orientation or gender identity*** with respect to:

¹ Also available at <https://www.eeoc.gov/sex-based-discrimination>.

- hiring
- firing, furloughs, or reductions in force
- promotions
- demotions
- discipline
- training
- work assignments
- pay, overtime, or *other compensation*
- *fringe benefits*
- *other terms, conditions, and privileges of employment.*²

Exhibit 4 – EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (emphasis added).

90. The EEOC has also stated: “It is illegal for an employer to discriminate against an employee in the payment of wages or *employee benefits* on the bases of . . . sex (*including gender identity, sexual orientation*, and pregnancy)

Employee benefits include . . . insurance” Exhibit 5 – EEOC, Prohibited Employment Policies/Practices (emphasis added).²

91. The EEOC’s interpretation is unequivocal, as exemplified by its own guidance and statements: employers must provide self-identified transgender individuals with gender transition services in their health plans.

92. Failure to do so amounts to discrimination under Title VII. *See id.*

93. The EEOC has specifically enforced the EEOC Coverage Mandate by requiring employer health plans to cover “medically necessary care based on transgender status.” *See, e.g.,* EEOC, Deluxe Financial to Settle Sex Discrimination

² Also available at https://www.eeoc.gov/prohibited-employment-policiespractices#terms_and_conditions.

Suit on Behalf of Transgender Employee, 2016 WL 246967 (Jan. 21, 2016) (noting that three-year consent decree with employer “provides that, as of January 1, 2016, [employer’s] national health benefits plan will not include any partial or categorical exclusion for otherwise medically necessary care based on transgender status”).

94. In one case in June 2016, a transgender male sued Dignity Health—a large healthcare system that includes many Catholic hospitals—for maintaining an employee health plan or health insurance coverage that categorically excluded coverage for gender transition services. *See Order, Robinson v. Dignity Health*, No. 16-CV-3035 YGR (N.D. Cal. Dec. 6, 2016), 2016 WL 7102832, at *1 (granting stay).

95. The plaintiff’s complaint asserted a violation of Title VII, claiming that “[d]iscrimination on the basis of transgender status or gender nonconformity is discrimination on the basis of ‘sex’ under Title VII.” Complaint at ¶ 54, *Robinson v. Dignity Health*, No. 3:16-CV-03035 EDL (N.D. Cal. June 6, 2016), 2016 WL 3154023.

96. The EEOC filed an amicus brief in the case in support of the plaintiff, arguing that the employer’s transgender exclusion violated Title VII by denying the plaintiff “access to medically necessary treatment for his gender dysphoria, a serious health condition directly related to the fact that he is transgender.” Amicus Brief of EEOC in Support of Plaintiff and in Opposition to Defendant’s Motion to Dismiss, *Robinson v. Dignity Health*, No. 4:16-cv-03035 YGR, 2016 WL 11517056 (N.D. Cal. Aug. 22, 2016).

97. The EEOC has also taken enforcement actions against other employers for the “categorical exclusion” from their health plans of “services related to transgender treatment/sex therapy.” *See Exhibit 6 – Allen Smith, Wal-Mart Loses*

Perfect LGBTQ Rating Because of Transgender Harassment, Soc’y for Human Res. Mgmt., Nov. 30, 2017.³

98. The EEOC during the current administration maintains its commitment to enforce Title VII as prohibiting the exclusion of gender transition services from employer-provided health plans or health insurance coverage.

99. Based on its interpretation of “sex” under Title VII, the EEOC would pursue Title VII enforcement actions against employers with gender transition services exclusions or limitations in their health plans.

100. Since promulgating the guidance and taking the positions and enforcement actions described above, the EEOC has consistently maintained its interpretation and application of Title VII.

101. The EEOC has, for many years, enforced the Mandate and has even cooperated with HHS to ensure employer healthcare plans cover gender transition procedures. *See* 81 Fed. Reg. 31,375, 31,432 (July 18, 2016) (HHS explaining that in enforcement of Section 1557 of the ACA that it will “refer or transfer [a] matter to the EEOC” if HHS “lacks jurisdiction over an employer”).

102. The EEOC’s official position is that exclusion or limitation of gender transition services from employer-provided health plans or health insurance coverage violates Title VII.

103. CEA members, as part of their religious exercise, wish to arrange their employer-provided health plans or health insurance coverage to contain an explicit categorical exclusion or limitation of coverage for all health services related to gender transition.

³ Also available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wal-mart-lgbtq-rating.aspx>.

104. Under EEOC’s interpretation of Title VII, such an exclusion would be an unlawful act by the CEA member employer.

B. Enforcement mechanisms under Title VII.

105. Employers in violation of Title VII—as interpreted by the EEOC—face enforcement actions brought by federal agencies or by individuals who allege they have been discriminated against.

106. The EEOC has investigatory authority for alleged Title VII violations, may serve notices of charges of discrimination, and “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. § 2000e-5(b).

107. The EEOC may also bring a civil action against an employer. *Id.* § 2000e-5(f)(1).

108. Employers may also face private lawsuits brought by parties claiming a violation of Title VII.

109. An employer found to be in violation of Title VII can be enjoined from engaging in the unlawful practice, and can be ordered to take “affirmative action as may be appropriate . . . or any other equitable relief” that a court deems “appropriate.” *Id.* § 2000e-5(g)(1).

110. An employer found to have engaged in such an unlawful employment practice may also be liable for costs and the attorney’s fees of the prevailing party. *Id.* § 2000e-5(k).

111. And employers can be liable for compensatory damages, as well as punitive damages. *Id.* § 2000e-5(e)(3)(B); *see also* 42 U.S.C. § 1981a.

112. CEA members face the threat of all these enforcement mechanisms for failing to comply with the EEOC Coverage Mandate.

IV. The HHS Gender Identity Mandate

A. Relevant background of Section 1557 and HHS's current interpretation and enforcement of Section 1557.

113. Section 1557 of the ACA prohibits discrimination in “health program[s] or activit[ies]” that receive federal funding. 42 U.S.C. § 18116(a).

114. A “health program or activity” includes “all of the operations of entities principally engaged in the business of providing healthcare that receive Federal financial assistance.” 45 C.F.R. § 92.3(b).

115. And for entities not principally engaged in the business of providing healthcare, the nondiscrimination provisions of Section 1557 apply to that entity’s operations “only to the extent any such operation receives Federal financial assistance.” *Id.*

116. Multiple CEA members are principally engaged in the business of providing healthcare and receive Federal financial assistance (the “Healthcare Members”).

117. Thus, Section 1557’s nondiscrimination provisions apply to the Healthcare Members.

118. Section 1557 does not contain listed prohibited grounds for discrimination itself, but incorporates the nondiscrimination provisions of four preexisting civil rights statutes: (1) Title VI of the Civil Rights Act of 1964 (prohibits discrimination based on race, color, national origin); (2) Title IX of the Education Amendments of 1972 (prohibits discrimination based on sex); (3) the Age Discrimination Act of 1975 (prohibits discrimination based on age); and (4) [Section 504 of] the Rehabilitation Act of 1973 (prohibits discrimination based on disability). 42 U.S.C. § 18116(a).

119. HHS interprets and applies Section 1557, Title IX, and Section 504, together and separately, as prohibiting gender identity discrimination, requiring provision of gender transition services and insurance coverage.

120. Title IX prohibits discrimination “on the basis of sex.” 20 U.S.C. § 1681(a).

121. Thus, Section 1557—by incorporating Title IX—prohibits discrimination “on the basis of sex” in “health program[s] or activit[ies]” that receive Federal financial assistance.

122. Section 1557 gives the Secretary of HHS authority to “promulgate regulations to implement” the section. 42 U.S.C. § 18116(c).

123. And HHS did so in 2016 by issuing a final rule titled Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (the “2016 Rule”).

124. The 2016 Rule covered virtually the entire U.S. healthcare system.

125. The 2016 Rule defined discrimination “on the basis of sex” under Section 1557 as “discrimination” based on “sex stereotypes” and “gender identity,” among other things. 81 Fed. Reg. at 31,467 (formerly codified at 45 C.F.R. § 92.4).

126. The 2016 Rule’s interpretation of discrimination on the basis of sex thus required any healthcare provider that accepted federal funds⁴ to perform gender-transition services.

127. HHS further explained this nondiscrimination requirement in the 2016 Rule. For example: “A provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals.” 81 Fed. Reg. at 31,455.

⁴ Which is most healthcare providers in the United States. *See* 81 Fed. Reg. at 31,446 (“we concluded that almost all practicing physicians in the United States are reached by Section 1557 because they accept some form of Federal remuneration or reimbursement apart from Medicare Part B.”).

128. As a result, the 2016 Rule forced healthcare providers covered by Section 1557 to perform gender transition services—including hysterectomies, mastectomies, hormone treatments, and plastic surgery—on completely healthy individuals, and without medical reasoning, if the doctor performed analogous services in other, non-transition medical practices. 81 Fed. Reg. at 31,455.

129. In December of 2016, a Texas district court held that HHS lacked statutory authority under Section 1557 and Title IX to prohibit discrimination on the basis of gender identity in its 2016 Rule, and that religious healthcare providers had a substantial likelihood of success against that mandate under the Religious Freedom Restoration Act (RFRA). *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695–96 (N.D. Tex. 2016).

130. In October of 2019, the same Texas district court issued a final judgment, declaring the 2016 Rule violated the Administrative Procedure Act (APA) and RFRA. The court vacated the gender identity language from the 2016 Rule, but declined to issue a nationwide injunction. *Franciscan All., Inc. v. Burwell*, 414 F. Supp. 3d 928, 945 (N.D. Tex. 2019).

131. In 2020, HHS reversed course and repealed and replaced the 2016 Rule with a new rule that removed the 2016 Rule’s gender identity language (i.e., it removed the definition of “on the basis of sex” as including gender identity and sex stereotypes). Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority.” 85 Fed. Reg. 37,160 (June 19, 2020) (the “2020 Rule”).

132. HHS stated in the 2020 Rule that it would not interpret Section 1557 (and Title IX as incorporated) as prohibiting discrimination on the basis of gender identity. *See id.* at 37,168 (“the 2016 Rule’s extension of sex-discrimination protections to encompass gender identity was contrary to the text of Title IX.”).

133. However, after HHS promulgated the 2020 Rule, two district courts entered injunctions declaring that the gender identity language from the 2016 rule must remain in effect. *Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020), modified by 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020); *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1 (D.D.C. 2020).

134. And the *Whitman-Walker Clinic* court also prohibited the 2020 Rule from incorporating Title IX’s religious exemption. *Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 43–46; *see also* 20 U.S.C. § 1681(a).

135. On January 20, 2021, President Biden signed an executive order requiring that Section 1557 and Title IX be interpreted to include gender identity as a protected trait. Executive Order 13,988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

136. Effective May 10, 2021, HHS issued a Notification of Interpretation and Enforcement, stating that it would interpret and enforce Section 1557 as prohibiting discrimination on the basis of gender identity (as well as sexual orientation). 86 Fed. Reg. 27,984, 27,985 (May 25, 2021) (“2021 Notice of Enforcement”); *see also* Press Release, HHS OCR, HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity (May 10, 2021), <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>.

137. The 2021 Notice of Enforcement stated that HHS would comply with RFRA “and all other legal requirements” and “any applicable court orders that have been issued in litigation involving the Section 1557 regulation.” 86 Fed. Reg. at 27,985.

138. But the 2021 Notice of Enforcement did not detail how HHS would comply with RFRA, “all other legal requirements,” and the injunctions and court orders entered related to Section 1557.

139. As a result of the 2016 Rule, the lawsuits enjoining its application, the 2020 Rule, the lawsuits enjoining its application, Executive Order 13,988, and HHS’s 2021 Notice of Enforcement, the current status of Section 1557 is a “Humpty-Dumpty Scheme” that has been “put back together again.” *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 371 (N.D. Tex. Aug. 9, 2021) (as amended Aug. 16, 2021).

140. In effect, HHS’s current interpretation and enforcement of Section 1557 is nearly identical to the 2016 Rule.

141. The Fifth and Eighth Circuits have both affirmed permanent injunctions against the HHS Gender Identity Mandate on behalf of affected entities. *Religious Sisters of Mercy*, 55 F.4th 583 (8th Cir. 2022); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368 (5th Cir. 2022).

142. To the extent any substantive component of the 2020 Rule, or Section 1557 itself, is interpreted (incorrectly) to prohibit discrimination based on gender identity—as the 2016 Rule and 2021 Notice of Enforcement—Plaintiff challenges those as well.

143. HHS’s interpretation and enforcement of Section 1557 prohibits gender identity discrimination by any entity principally engaged in providing healthcare that receives Federal financial assistance (referred to as the “HHS Gender Identity Mandate”).

B. HHS requires CEA’s Healthcare Members to perform gender transition services.

144. The HHS Gender Identity Mandate thus requires covered healthcare providers to perform the following (but not limited to):

- a. Prescribe puberty blockers off-label from the FDA-approved indication to treat gender dysphoria and initiate or further transition in adults and children;
- b. Prescribe hormone therapies off-label from the FDA-approved indication to treat gender dysphoria in all adults and children;
- c. Provide other continuing interventions to further gender transitions ongoing in both adults and minors;
- d. Perform hysterectomies or mastectomies on healthy women who believe themselves to be men;
- e. Remove the non-diseased ovaries of healthy women who believe themselves to be men;
- f. Remove the testicles of healthy men who believe themselves to be women;
- g. Perform a process called “de-gloving” to remove the skin of a man’s penis and use it to create a faux vaginal opening;
- h. Remove vaginal tissue from women to facilitate the creation of a faux or cosmetic penis;
- i. Perform or participate in any combination of the above mutilating cosmetic procedures to place a patient somewhere along the socially constructed gender identity spectrum;
- j. Offer to perform, provide, or prescribe any and all such interventions, procedures, services, or drugs;
- k. Refer patients for any and all such interventions, procedures, services, or drugs;
- l. End or modify their policies, procedures, and practices of not offering to perform or prescribe these procedures, drugs, and interventions;

- m. Say in their professional opinions that these gender intervention procedures are the standard of care, are safe, are beneficial, are not experimental, or should otherwise be recommended;
- n. Treat patients according to gender identity and not sex;
- o. Express views on gender interventions that they do not share;
- p. Say that sex or gender is nonbinary or on a spectrum;
- q. Use language affirming any self-professed gender identity;
- r. Use patients' preferred pronouns according to gender identity, rather than using no pronouns or using pronouns based on biological sex;
- s. Create medical records and coding patients and services according to gender identity, not biological sex;
- t. Provide the government assurances of compliance, providing compliance reports, and posting notices of compliance in prominent physical locations, if the 2016 Rule's interpretation of the term sex governs these documents;
- u. Refrain from expressing their medical, ethical, or religious views, options, and opinions to patients when those views disagree with gender identity theory or transitions;
- v. Allow patients to access single-sex programs and facilities, such as mental health therapy groups, breastfeeding support groups, post-partum support groups, educational sessions, changing areas, restrooms, communal showers, and other single-sex programs and spaces, by gender identity and not by biological sex; and
- w. Pay for or provide insurance coverage for any or all objectionable procedures, drugs, interventions, or speech.

145. The Healthcare Members are healthcare providers that receive Federal financial assistance and are thus under an immediate threat of enforcement of the HHS Gender Identity Mandate.

146. The Healthcare Members cannot refuse Federal financial assistance because of the ubiquity of federal healthcare programs such as Medicare, Medicaid, and the State Children's Health Insurance Program (CHIP).

147. The HHS Gender Identity Mandate forces the Healthcare Members to perform or provide all of the practices listed in paragraph 144 above. For example:

- a. The Healthcare Members' religious beliefs prohibit them from performing or referring for gender transition services because they believe that the sexes of male and female are immutable and God-ordained. But the HHS Gender Identity Mandate requires them to do so.
- b. The HHS Gender Identity Mandate limits the Healthcare Members' ability to engage in speech advising patients of their medical judgment about gender-transition procedures and it forces them to express views on gender procedures that they do not share, refer to gender as non-binary and on a spectrum, and use gender-affirming language.
- c. The HHS Gender Identity Mandate forces the Healthcare Members to allow biological males in female restrooms, locker-rooms, recovery rooms, screening areas, etc., and vice-versa.
- d. The HHS Gender Identity Mandate also compels the Healthcare Members to engage in speech that inaccurately refers to sex—including using inaccurate pronouns and patient coding—in medical records and billings.

- e. The HHS Gender Identity Mandate also chills CEA members' speech because it punishes them for discussing their medical opinions and advice with patients regarding gender transition services.
- f. The HHS Gender Identity Mandate requires the Healthcare Members directly, and the insurers and third-party administrators of their employer-sponsored health plans, to provide insurance plans or coverage encompassing gender transition interventions. But the Healthcare Members' commitments as members of CEA prohibit them from providing coverage of those interventions.

148. The Healthcare Members currently do not have past or current policies or practices in their healthcare activities that comply with these objectionable practices, and they wish to continue their current policies and practices in the future, rather than change their practices to conform to the government's mandate.

149. The Healthcare Members have religious, moral, ethical, conscientious, medical, and free speech objections to these practices. These practices also expose the Healthcare Members to increased risk of malpractice liability, especially if patients regret a transition and allege that they received insufficient information.

150. The HHS Gender Identity Mandate thus puts the Healthcare Members to an impossible choice: (a) violate your religious, moral, ethical, conscientious, medical, and free speech beliefs and perform these gender transition services; or (b) abide by your religious, moral, ethical, conscientious, medical, and free speech beliefs, refuse to perform these gender transition services, and face punishment for "discriminating on the basis of gender identity." The only other option is to exit healthcare practice.

C. Enforcement mechanisms under Section 1557.

151. The enforcement mechanisms available under Title VI, Title IX, Section 794, and the Age Discrimination Act are all available under Section 1557. 42 U.S.C. § 18116(a).

152. Further, if a covered healthcare provider—such as one of the Healthcare Members—violates the HHS Gender Identity Mandate, it may lose federal healthcare program funding, could face potential civil lawsuits, and may be investigated by OCR or the Attorney General. *See, e.g.*, 20 U.S.C. § 1682. HHS and OCR can also pursue “any other means authorized by law” to enforce the HHS Gender Identity Mandate. *Id.*

153. Violators of the HHS Gender Identity Mandate can also be subject to civil enforcement proceedings, debarment from doing business with the federal government, and liability under the False Claims Act, including civil penalties up to \$10,000.00 per false claim “plus 3 times the amount of damages which the Government sustains because of” any false claim. *See* 31 U.S.C. § 3729, *et seq.*; *see also* 45 C.F.R. §§ 86.4, 92.4.

154. Violators of the HHS Gender Identity Mandate may also be subject to criminal penalties. 18 U.S.C. §§ 287, 1001, 1035, 1347, 1516, 1518. For example, violators may face up to five years’ imprisonment and criminal monetary penalties for making a materially false statement in connection with the delivery of or payment for healthcare benefits or services. 18 U.S.C. § 1035; *see also* 42 U.S.C. §§ 1320a-7b(a), 1320a-7b(c).

155. Section 1557 also provides a private right of action for which alleged violators of the HHS Gender Identity Mandate may have to defend, at significant cost, and potentially face liability in those cases. Those private lawsuits could also subject violators to significant attorney’s fees awards under 42 U.S.C. § 1988.

156. Upon information and belief, HHS and OCR are now actively investigating, enforcing, and implementing the HHS Gender Identity Mandate.

157. Upon information and belief, Defendants do not believe that RFRA or other laws require any exemptions from the HHS Gender Identity Mandate.

158. HHS currently recognizes no RFRA exemptions under its interpretation of Section 1557 except those ordered by a court.

159. Currently, HHS (and OCR) enforces the HHS Gender Identity Mandate and those found to be in violation of the HHS Gender Identity Mandate may face loss of federal funding, private right of action civil liability, civil liability to the government, attorney's fees, civil penalties, False Claims Act liability, and criminal penalties.

160. CEA members face the threat of all these enforcement mechanisms for failing to comply with the HHS Gender Identity Mandate.

IRREPARABLE HARM AND INJUNCTIVE RELIEF

161. Judge Welte and the Eighth Circuit in *Religious Sisters of Mercy* held that the EEOC Coverage Mandate and HHS Gender Identity Mandate violate RFRA with respect to religious employers and religious healthcare providing entities.

162. The Court's injunction in *Religious Sisters of Mercy* protected religious healthcare and non-healthcare entities in their provision of employee health plans or coverage, and the entities' insurers and third-party administrators with respect to provision of those plans and coverage, and it protected the healthcare entities' as to their provision of health care services and health insurance plans or coverage.

163. As of the date of this filing, the EEOC Coverage Mandate and HHS Gender Identity Mandate remain in effect as applied to CEA members.

164. And since the injunction in *Religious Sisters of Mercy* on January 19, 2021, HHS has reiterated its intent to enforce Section 1557 as prohibiting discrimination based on gender identity, meaning the Healthcare Members face an immediate threat of enforcement requiring them to perform gender transition services.

165. Currently, CEA members are forced to choose between paying for and providing group health plans that cover gender transition services, losing the opportunity to provide that employee benefit, or withholding that coverage and risking enforcement of Title VII by EEOC, and mandates on their health insurers and third-party administrators through HHS.

166. In addition CEA's Healthcare Members, are forced to choose between performing gender transition services, or refusing to do so and risking enforcement of Section 1557 by HHS, in addition to being subject to the mandate on their employer-sponsored health insurance.

167. Absent relief from this Court, CEA members are currently threatened by the EEOC and HHS with time and financially-consuming investigations, civil lawsuits, fines, and other enforcement mechanisms if they refuse to perform gender transition services in accordance with their Christian beliefs or offer group health plans in a manner that reflect their Christian Values and beliefs.

168. CEA members face irreparable harm from EEOC's and HHS's enforcement of the Mandates absent relief from this Court.

169. Preliminary and permanent injunctive relief is necessary to redress this irreparable harm.

170. CEA challenges Defendants' enforcement of the EEOC Coverage Mandate, whether from EEOC interpretations or guidance, or in the alternative from Title VII itself.

171. CEA Healthcare Members challenge Defendants’ enforcement of the Gender Identity Mandate, whether from the 2016 Rule or the May 10, 2021 Notice of Enforcement, or in the alternative the 2020 Rule, or Section 1557, Title IX, Section 504, or their implementing regulations.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Religious Freedom Restoration Act — 42 U.S.C. § 2000bb-1 (Against Defendants EEOC and Burrows)

172. CEA incorporates by reference paragraphs 1–171.

173. As set forth above, CEA members’ sincerely held religious beliefs prohibit them from paying for, providing, or otherwise offering group health plans that cover gender transition services.

174. CEA members exercise these sincerely held religious beliefs by paying for, providing, and offering group health plans that specifically exclude coverage for gender transition services, or by seeking to do so where possible.

175. CEA members’ compliance with these beliefs by maintaining these exclusions constitute the exercise of religion. *See* 42 U.S.C. § 2000bb-2(4); *see also* 42 U.S.C. § 2000cc-5(7).

176. CEA members’ exercise of religion “involves ‘not only belief and profession but the performance of (or abstention from) physical acts.’” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014), (quoting *Emp. Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

177. CEA members wish to exercise their religion by abstaining from subsidizing and facilitating gender transition services, which contradict their beliefs.

178. RFRA prohibits the government from substantially burdening a person’s exercise of religion unless the government can demonstrate that applica-

tion of the burden to that person is in furtherance of a compelling governmental interest and is the least restrictive means of achieving it.

179. This Court previously held the government cannot meet that standard as applied to a similar association of Catholic non-profit and for-profit plaintiffs because of religious objections similar to those held by CEA members. *See Religious Sisters of Mercy*, 513 F. Supp. 3d at 1153–54.

180. Likewise, the government cannot meet that standard here.

181. The EEOC Coverage Mandate compels CEA members to violate their religious beliefs by paying for, providing, or otherwise offering group health plans that cover gender transition services, subject to penalties.

182. As such, EEOC's enforcement of the EEOC Coverage Mandate substantially burdens CEA members' exercise of religion.

183. The EEOC does not have a compelling interest in enforcing the EEOC Coverage Mandate as applied to CEA members.

184. The EEOC Coverage Mandate is not the least restrictive means of furthering any purported compelling governmental interest.

185. Myriad alternative forms of regulation would accomplish any purported compelling governmental interest without infringing on CEA members' religious exercise.

186. For example, the government could provide separate and independent coverage of gender transition services for persons who do not otherwise have such coverage.

187. The EEOC Coverage Mandate cannot survive strict scrutiny under RFRA.

188. The EEOC's interpretation of sex discrimination under Title VII and the resulting EEOC Coverage Mandate, and the EEOC's impending threat of enforcing it against CEA members, violate RFRA.

189. If Title VII is deemed to prohibit discrimination on the basis of sexual orientation or gender identity as set forth in the agency action, EEOC's enforcement of this aspect of Title VII should be enjoined for the same reasons set forth in this claim.

190. CEA requests a preliminary and permanent injunction prohibiting enforcement of the EEOC Coverage Mandate against it and its members, and a declaratory judgment declaring the EEOC Coverage Mandate to violate RFRA.

SECOND CLAIM FOR RELIEF
Violation of the First Amendment — Free Exercise Clause
(Against Defendants EEOC and Burrows)

191. CEA incorporates by reference paragraphs 1–171.

192. The EEOC Coverage Mandate is not a neutral law of general applicability.

193. The EEOC Coverage Mandate is not generally applicable because Title VII does not cover employers that employ fewer than fifteen employees and it exempts other employers.

194. Even if the EEOC Coverage Mandate is facially neutral, the EEOC does not apply it generally to all employers.

195. The EEOC Coverage Mandate is riddled with individualized exemptions, but no exemption is given for religious beliefs.

196. The EEOC Coverage Mandate targets and discriminates against CEA members—and other employers that hold the same Christian Values and religious beliefs regarding gender transition and gender transition services.

197. The EEOC Coverage Mandate substantially burdens CEA members' exercise of religion as described above, including through its penalties.

198. The EEOC Coverage Mandate does not further a compelling governmental interest.

199. The EEOC Coverage Mandate is not narrowly tailored to achieve any purported compelling governmental interest.

200. The EEOC Coverage Mandate is not the least restrictive means of furthering any purported compelling governmental interest.

201. The EEOC Coverage Mandate cannot survive strict scrutiny under the First Amendment.

202. The EEOC's interpretation of sex discrimination under Title VII and the resulting EEOC Coverage Mandate, and the EEOC's impending threat of enforcing it against CEA members, violate the Free Exercise Clause of the First Amendment.

203. If Title VII is deemed to prohibit discrimination on the basis of sexual orientation or gender identity as set forth in the agency action, EEOC's enforcement of Title VII should be enjoined for the same reasons set forth in this claim.

204. CEA requests a preliminary and permanent injunction prohibiting EEOC's enforcement of the EEOC Coverage Mandate against it and its members, and a declaratory judgment declaring the EEOC Coverage Mandate to violate the Free Exercise Clause of the First Amendment.

THIRD CLAIM FOR RELIEF

Violation of the Religious Freedom Restoration Act — 42 U.S.C. § 2000bb-1 (Against Defendants HHS, Becerra, OCR, and Rainer)

205. CEA incorporates by reference paragraphs 1–171.

206. As set forth above, CEA Healthcare Members' sincerely held religious beliefs prohibit them from providing, offering, performing, facilitating, or referring for gender transition services, including (but not limited to) all the healthcare practices described in the factual allegations above, and the provision of employee health plans or coverage.

207. CEA Healthcare Members exercise their sincerely held religious beliefs by providing healthcare services and by expressing messages in their healthcare practices.

208. CEA Healthcare Members exercise their religious beliefs by providing healthcare to low-income and underserved populations in health programs and activities that receive Federal funds.

209. CEA Healthcare Members' compliance with these beliefs and speech about these beliefs constitute the exercise of religion. *See* 42 U.S.C. § 2000bb-2(4); *see also* 42 U.S.C. § 2000cc-5(7).

210. CEA Healthcare Members' exercise of religion "involves 'not only belief and profession but the performance of (or abstention from) physical acts.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014), (quoting *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

211. CEA Healthcare Members wish to exercise their religion by providing healthcare services without having to perform or refer for gender transition services.

212. CEA Healthcare Members wish to exercise their religion by speaking to patients about gender transition services according to their medical, religious, and ethical judgment.

213. RFRA prohibits the government from substantially burdening a person's exercise of religion unless the government can demonstrate that application of the burden to that person is in furtherance of a compelling governmental interest and is the least restrictive means of achieving it.

214. This Court previously held the government cannot meet that standard as applied to a similar association of Catholic non-profit and for-profit plaintiffs because of religious objections similar to those held by CEA members. *See Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d at 1153–54.

215. Likewise, the government cannot meet that standard here.

216. The HHS Gender Identity Mandate compels CEA Healthcare Members to perform gender transition services in violation of their religious beliefs and imposes an unconstitutional condition on their receipt of Federal funding.

217. HHS thus exposes CEA Healthcare Members to civil liability and penalties, described above, as well as criminal penalties under 18 U.S.C. §§ 287, 1001, 1035, 1516, 1518; 42 U.S.C. §§ 1320a-7b(a), 1320a-7b(c).

218. The HHS Gender Identity Mandate also compels the health insurers and third-party administrators to include coverage of gender transition services in the health plans and coverage of CEA's healthcare and non-healthcare members.

219. HHS thus puts CEA's members in the position of complying with their religious beliefs and therefore being unable to provide employer-sponsored health plans or coverage, or violating their religious beliefs in providing coverage that includes gender transition services.

220. As such, the HHS Gender Identity Mandate substantially burdens CEA Healthcare Members' exercise of religion.

221. HHS does not have a compelling interest in enforcing the HHS Gender Identity Mandate as applied to CEA Healthcare Members, or their insurers and third-party administrators with respect to the operation of the CEA members' plans.

222. The HHS Gender Identity Mandate is not the least restrictive means of furthering any purported compelling governmental interest.

223. Myriad alternative forms of regulation would accomplish any purported compelling governmental interest without infringing on CEA Healthcare Members' religious exercise.

224. The HHS Gender Identity Mandate cannot survive strict scrutiny under RFRA.

225. HHS has not and will not enforce the HHS Gender Identity Mandate in compliance with RFRA.

226. HHS's interpretation of sex discrimination under Title IX as incorporated in Section 1557, and disability discrimination under Section 504, and the resulting HHS Gender Identity Mandate, and HHS's impending threat of enforcing it against CEA Healthcare Members, violate RFRA.

227. If Section 1557, Title IX, or Section 504 are deemed to prohibit discrimination on the basis of sexual orientation or gender identity as set forth in the agency action, HHS's enforcement of those provisions should be enjoined under RFRA for the same reasons set forth in this claim.

228. CEA requests a preliminary and permanent injunction prohibiting HHS's enforcement of the HHS Gender Identity Mandate against it and its Healthcare Members, and their insurers and third-party administrators with respect to the operation of the CEA members' plans, and a declaratory judgment declaring the HHS Gender Identity Mandate to violate RFRA.

229. CEA requests this relief whether the current HHS Gender Identity Mandate arises from the 2016 Rule or the 2021 Notice of Enforcement, or both, from any still-in-effect sections of the 2020 Rule or applicable court orders, or from any HHS regulations imposing the same mandate.

FOURTH CLAIM FOR RELIEF
Violation of the First Amendment — Free Exercise Clause
(Against Defendants HHS, Becerra, OCR, and Rainer)

230. CEA incorporates by reference paragraphs 1–171.

231. The HHS Gender Identity Mandate is not a neutral law of general applicability.

232. The HHS Gender Identity Mandate is not generally applicable because HHS does not apply it generally to all healthcare providers, and exempts many healthcare providers.

233. Specifically, the HHS Gender Identity Mandate does not apply to healthcare providers that do not receive Federal funding or that do not “principally” provide healthcare.

234. This selective applicability imposes an unconstitutional condition on receiving Federal funds.

235. And the HHS Gender Identity Mandate is not generally applicable because it provides exemptions for similar conduct based on secular and non-religious reasons, but no exemption is given for religious beliefs.

236. The HHS Gender Identity Mandate is not neutral because HHS targets and discriminates against CEA Healthcare Members—and other employers that hold the same Christian Values and religious beliefs regarding gender transition and gender transition services.

237. The HHS Gender Identity Mandate substantially burdens CEA Healthcare Members’ exercise of religion. HHS exposes CEA Healthcare Members to civil liability and penalties, as well as criminal penalties under 18 U.S.C. §§ 287, 1001, 1035, 1516, 1518; 42 U.S.C. §§ 1320a-7b(a), 1320a-7b(c).

238. The HHS Gender Identity Mandate does not further a compelling governmental interest.

239. The HHS Gender Identity Mandate is not narrowly tailored to achieve any purported compelling governmental interest.

240. The HHS Gender Identity Mandate is not the least restrictive means of furthering any purported compelling governmental interest.

241. The HHS Gender Identity Mandate cannot survive strict scrutiny under the First Amendment.

242. HHS's interpretation of sex discrimination under Title IX as incorporated in Section 1557, and disability discrimination under Section 504, and the resulting HHS Gender Identity Mandate, and HHS's impending threat of enforcing it against CEA Healthcare Members, violate the Free Exercise Clause of the First Amendment.

243. If Section 1557, Title IX, or Section 504 are deemed to prohibit discrimination on the basis of sexual orientation or gender identity as set forth in the agency action, HHS's enforcement of Section 1557 should be enjoined for the same reasons set forth in this claim.

244. CEA requests a preliminary and permanent injunction prohibiting HHS's enforcement of the HHS Gender Identity Mandate against it and its Healthcare Members, and their insurers and third-party administrators with respect to the operation of the CEA members' plans, and a declaratory judgment declaring the HHS Gender Identity Mandate to violate the Free Exercise Clause of the First Amendment.

245. CEA requests this relief whether the current HHS Gender Identity Mandate arises from the 2016 Rule or the 2021 Notice of Enforcement, or both, from any still-in-effect sections of the 2020 Rule or applicable court orders, or from any HHS regulations imposing the same mandate.

FIFTH CLAIM FOR RELIEF
Violation of the First Amendment — Free Speech Clause
(Against Defendants HHS, Becerra, OCR, and Rainer)

246. CEA incorporates by reference paragraphs 1–171.

247. The HHS Gender Identity Mandate restricts CEA Healthcare Members' speech, chills their speech, and compels their speech.

248. The HHS Gender Identity Mandate imposes a viewpoint-based speech regulation on CEA Healthcare Members' speech by prohibiting them from giving

their medical, ethical, and religious views on gender identity and gender transition services to patients and prospective patients.

249. The HHS Gender Identity Mandate compels CEA Healthcare Members' speech by requiring CEA Healthcare Members: to offer gender transition services; to use "preferred" pronouns that are different from an individual's biological sex; to use medical coding and record keeping that identify an individual according to their self-identified gender and not their biological sex; to refer individuals to other healthcare providers if they do not perform the relevant services; to write policies governing speech and information at their medical practices; to provide assurances of compliance with Section 1557; and to post mandatory notices of compliance with Section 1557.

250. CEA Healthcare Members include licensed healthcare providers and entities that have an obligation to provide patients with their professional medical advice on all areas of treatment, such as gender transition. This medical advice is formed based on years of practice, experience, ethical and moral considerations, and the provider's best medical judgment. CEA Healthcare Members' medical judgment is that gender transition services are harmful and unethical to perform on a healthy individual. CEA members desire to express this viewpoint to patients.

251. Healthcare providers have an obligation to provide patients with informed consent, including all facts regarding documented harms associated with transgender services and treatment, as well as the permanence of electing to undergo gender transition.

252. CEA Healthcare Members hold views on the debated topic of gender identity and transition that are contrary to the government's views, but CEA Healthcare Members are prohibited from conveying their medical views on this topic to patients because doing so under the HHS Gender Identity Mandate is considered discrimination based on one's gender identity.

253. The HHS Gender Identity Mandate thus prohibits CEA Healthcare Members from expressing their views and medical concerns on the topic to patients (viewpoint regulation); forces CEA Healthcare Members to use preferred pronouns and gender identity language that is contrary to biological fact (compels speech); and discourages CEA Healthcare Members from having full and frank conversations with their patients and from giving patients proper informed consent (chills speech).

254. CEA Healthcare Members' desire to express views—including giving professional medical advice—on gender identity and gender transition is protected by the First Amendment, but the HHS Gender Identity Mandate prohibits these views and forces CEA Healthcare Members to speak only in accordance with the government's views.

255. The HHS Gender Identity Mandate thus regulates speech based on viewpoint and is presumptively unconstitutional.

256. The HHS Gender Identity Mandate threatens financial burdens on CEA Healthcare Members based on the content of the views they wish to express.

257. The HHS Gender Identity Mandate's speech restrictions, chilling of speech, and compulsion of speech do not further a compelling governmental interest.

258. The HHS Gender Identity Mandate's speech restrictions, chilling of speech, and compulsion of speech is not narrowly tailored to achieve any purported compelling governmental interest.

259. The HHS Gender Identity Mandate's speech restrictions, chilling of speech, and compulsion of speech cannot survive strict scrutiny under the First Amendment.

260. The HHS Gender Identity Mandate and HHS’s impending threat of enforcing it against CEA Healthcare Members, violate the Free Speech Clause of the First Amendment.

261. If Section 1557 of the ACA is deemed to prohibit discrimination on the basis of sexual orientation or gender identity as set forth in the agency action, HHS’s enforcement of Section 1557 should be enjoined for the same reasons set forth in this claim.

262. CEA requests a preliminary and permanent injunction prohibiting enforcement of the HHS Gender Identity Mandate against it and its Healthcare Members, and a declaratory judgment declaring the HHS Gender Identity Mandate to violate the Free Speech Clause of the First Amendment.

263. CEA requests this relief whether the current HHS Gender Identity Mandate arises from the 2016 Rule or the 2021 Notice of Enforcement, or both, or alternatively from any still-in-effect sections of the 2020 Rule or applicable court orders.

SIXTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act — 5 U.S.C. § 701, *et seq.*
(Against All Defendants)

264. CEA incorporates by reference paragraphs 1–171.

265. Defendants are “agencies” under the Administrative Procedure Act (APA). 5 U.S.C. § 551(1).

266. HHS’s 2016 Rule, 2020 Rule, and 2021 Notice of Enforcement are “rules” under the APA and are “final agency action” reviewable by this Court. *See id.* § 551(4); *id.* § 704.

267. EEOC’s practice and guidance that it interprets sex under Title VII as including gender identity, as discussed above and as promulgated in the attached

Exhibits 3, 4, and 5, are “rules” under the APA and are “final agency action” reviewable by this Court. *See id.* § 551(4); *id.* § 704.

268. Together, the above-mentioned rules are referred to as “the agency rules.”

269. The agency rules are unlawful and must be “set aside” because they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “without observance of procedure required by law,” “contrary to constitutional right, power, privilege, or immunity,” and “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *Id.* § 706(2)(A)–(C).

270. The agency rules are not in accordance with law and contrary to constitutional right, power, privilege, and immunity because the agency rules (and their resulting Mandates) violate the First Amendment and RFRA as described in the claims above.

271. Moreover, the agency rules require healthcare providers to perform gender transition services, regardless of whether they are medically necessary as determined by the providers’ medical judgment. This requirement is not in accordance with law and is arbitrary and capricious.

272. The agency rules, namely the HHS rules, dictate appropriate medical treatment and the proper standard of care before a healthcare provider even has an opportunity to examine a patient. HHS’s commandeering of the proper standard of care and necessary treatment usurps the medical judgment of healthcare professionals that take years of education, training, and experience to acquire. Thus, the agency rules are not in accordance with law and are arbitrary and capricious.

273. The HHS rules are not in accordance with Section 1557 or Title IX and exceed the statutory authority thereunder because neither Section 1557 nor Title IX

define “sex” as encompassing gender identity and Congress intended “sex” to mean only the biological difference between male and female when it passed the ACA and Title IX.

274. The HHS rules are not in accordance with, and exceed the authority of, Title IX because they fail to include Title IX’s religious exemption. *See* 20 U.S.C. § 1681(a)(3).

275. HHS’s Gender Identity Mandate is contrary to the ACA’s provision that “[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection.” 42 U.S.C. § 18023(c)(2); *see* Executive Order 13535, Enforcement and Implementation of Abortion Restrictions in [ACA], 75 Fed. Reg. 15599 (Mar. 29, 2010).

276. The HHS rules are not in accordance with and contrary to Section 1554 of the ACA, 42 U.S.C. § 18114, specifically: parts (1)–(2) and (6) because it pressures CEA Healthcare Members out of federally funded health programs and the practice of healthcare; parts (3)–(4) because it requires CEA Healthcare Members to speak in affirmance of gender identity and refrain from speaking in accordance with a patient’s biological sex and related medical needs; part (5) because it requires CEA Healthcare Members to deprive patients of informed consent by preventing them from warning patients of the dangers of gender transition interventions; and also part (5) because it forces CEA Healthcare Members to violate their ethical and conscientious standards as healthcare professionals.

277. The HHS rules are not in accordance with 42 U.S.C. § 300a-7(d) because that section states that a healthcare provider shall not be required, within health service programs funded by HHS, to perform gender transition services if they are contrary to the provider’s religious beliefs or moral convictions.

278. The HHS rules are not in accordance with, and are contrary to 42 U.S.C. § 1395y(a)(1)(A).

279. The HHS rules also violate constitutional protections for free speech, association, and assembly, free exercise of religion, as described above, as well as structural protections of federalism, the Spending Clause, the clear notice canon, and the Tenth Amendment. When the government “intrudes into an area that is the particular domain of state law” because Congress must “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government.” *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (cleaned up). Congress provided no such unmistakable notice here.

280. Alternatively, to the extent the 2016 Rule is not in effect despite the court injunctions in *Whitman-Walker Clinic* and *Walker*, HHS lacked authority to promulgate the 2021 Notice of Enforcement because the 2020 Rule repealed the gender identity language from the 2016 Rule and thus the 2021 Notice of Enforcement would have needed to undergo notice and comment under the APA to restore such gender identity language and render them enforceable. HHS thus acted without observance of procedure required by law.

281. The agency rules are also arbitrary and capricious for many reasons. Neither EEOC nor HHS accounted that sex is a biological reality and those agencies only relied on facts and considered studies from one side of the hotly-contested debate on sex and gender. HHS ignored other experts who said there is not enough evidence to require the provision of gender transition procedures.

282. Requiring healthcare providers to perform—and employers to pay for in insurance coverage—gender transition services without allowing healthcare providers to exercise their sound medical judgment and without considering religious objections is arbitrary and capricious.

283. EEOC and HHS failed to adequately consider the reliance, privacy, liberty, and religious-freedom interests of these religious employers and healthcare

providers. For example, HHS failed to adequately consider the harm to patients who want to continue receiving care from providers like the CEA Healthcare Members but who will not be able to do so when the mandate drives these providers out of their jobs, specific health programs, and healthcare generally.

284. HHS failed to acknowledge and to adequately explain its changes in positions from 2016 to 2020 to 2021 in its enforcement, and HHS failed to consider alternative policies, such as exempting religious organizations or respecting providers' medical judgment and conscience rights.

285. HHS's May 20, 2021 notice is internally contradictory by promising both to abide judicial opinions holding that Section 1557 does not prohibit gender identity discrimination, and to abide by other judicial opinions holding that it does.

286. HHS's enforcement of the Gender Identity Mandate is without observance of procedure required by law because, although the 2016 Rule occurred through notice and comment rulemaking, the 2020 Rule reversed HHS's positions concerning the legality and justifications for the Gender Identity Mandate.

287. Yet HHS did not undertake a new rulemaking process to reconsider the positions HHS took in the 2020 Rule reversing HHS's views on and justifications for the 2016 Gender Identity Mandate.

288. Therefore, HHS cannot enforce the 2016 Rule's Gender Identity Mandate without being arbitrary and capricious, and without undertaking notice and comment rulemaking as required by the APA. *See* 5 U.S.C. § 553.

289. Congress has not delegated to Defendants the authority to impose either the EEOC Coverage Mandate or HHS Gender Identity Mandate under Title VII and Section 1557, respectively, and thus the Mandates exceed the authority Congress conferred to HHS and the EEOC.

290. The EEOC lacks authority to issue binding rules, regulations, or guidance, such as the guidance that creates the EEOC Coverage Mandate.

291. The EEOC only has “authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.” 42 U.S.C. § 2000e-12(a).

292. The EEOC does not have authority to issue substantive regulations or guidance that creates new mandates on employers, such as the EEOC Coverage Mandate, let alone do so without the full vote of the EEOC.

293. The EEOC Coverage Mandate thus exceeds EEOC’s statutory authority and must be set aside.

294. Accordingly, the agency rules (and their resulting EEOC Coverage Mandate and HHS Gender Identity Mandate) and the enforcement mechanisms discussed above are unlawful under the APA and must be declared unlawful and set aside.

295. If Section 1557 of the ACA or Title VII is deemed to prohibit discrimination on the basis of sexual orientation or gender identity as set forth in the agency action, enforcement of these statutes in this way is unlawful for the same reasons set forth in this claim.

296. CEA requests that this Court vacate and enjoin Defendants’ enforcement of the EEOC Coverage Mandate and HHS Gender Identity Mandate, and it asks this Court to enjoin and declare the EEOC Coverage Mandate and HHS Gender Identity Mandate unenforceable. CEA also request an injunction pending review by this Court in order to preserve the status and rights of CEA members. *See* 5 U.S.C. § 705.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff CEA respectfully requests that this Court enter judgment against Defendants, and provide Plaintiff, including its present and future members, with the following relief:

- A. Declare that the EEOC Coverage Mandate and HHS Gender Identity Mandate violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, because they substantially burden CEA members' (both present and future) sincerely held religious beliefs without satisfying the government's obligations under RFRA;
- B. Declare that the EEOC Coverage Mandate and HHS Gender Identity Mandate violate the Free Exercise Clause;
- C. Declare that the HHS Gender Identity Mandate violates the Free Speech Clause;
- D. Issue a preliminary and permanent injunction, prohibiting Defendants EEOC and Chair Charlotte Burrows, and their officers, agents, and successors, from:
 - 1. enforcing the EEOC Coverage Mandate against CEA and its present and future members,
 - 2. interpreting or enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, or any implementing regulations thereto against the CEA members in a manner that would require them to provide insurance coverage for gender transition services,
 - 3. applying or enforcing the EEOC Coverage Mandate against the insurers and third-party administrators of CEA's present and future members,
 - 4. interfering with CEA's present and future members' relationships with their insurers or third-party administrators and with those members' attempts to contract for morally

compliant health plans or health insurance coverage for their employees;

E. Issue a preliminary and permanent injunction, prohibiting Defendants HHS, Secretary Xavier Becerra, OCR, and Director Melanie Fontes Rainer, and their officers, agents, and successors, from:

1. enforcing the HHS Gender Identity Mandate against CEA and its present and future members,
2. applying or enforcing the HHS Gender Identity Mandate against the insurers and third-party administrators of CEA and its present and future members, or interfering with CEA and its members' relationships with their insurers or third-party administrators, in their attempts to contract for morally compliant health plans or health insurance coverage for their employees;
3. interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and any implementing regulations thereto against CEA members in a manner that would require them to provide, offer, perform, facilitate, or refer for gender transition services,
4. interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and any implementing regulations thereto against CEA members in a manner that would require them to use preferred pronouns in

speaking, charting, and any other medical use, or otherwise compelling speech on gender identity issues,

5. interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and any implementing regulations thereto against CEA members in a manner that prevents or restricts CEA members' speech on gender identity issues;
- F. Hold unlawful, set aside, vacate, and enjoin enforcement of HHS's 2016 Rule, any relevant portion of the 2020 Rule, and HHS's 2021 Notice of Enforcement and the resulting HHS Gender Identity Mandate, and EEOC's agency guidance and the resulting EEOC Coverage Mandate, under 5 U.S.C. §§ 701, 706;
- G. Enjoin and postpone, pending this proceeding, the effective date 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, under 5 U.S.C. §§ 701, 705;
- H. Award CEA the costs of this action and reasonable attorney's fees as provided by law, including 28 U.S.C. § 2412(d) and 42 U.S.C. § 1988(b);
- I. Grant any other relief this Court deems equitable, just, and proper; and
- J. Retain jurisdiction of this matter as necessary for enforcing this Court's orders.

This 16th day of October, 2023.

/s/ Julie Marie Blake

Julie Marie Blake

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Counsel for Plaintiff Christian Employers Alliance

DECLARATION UNDER PENALTY OF PERJURY

I, Shannon O. Royce, a citizen of the United States and a resident of the Commonwealth of Virginia, 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 10th day of October, 2023.

A handwritten signature in cursive script, appearing to read "Shannon Royce".

Shannon O. Royce, President
Christian Employers Alliance

EXHIBIT 1

FOURTH AMENDED AND RESTATED BYLAWS OF CHRISTIAN EMPLOYERS ALLIANCE

August 5, 2022

ARTICLE I STATEMENT OF FAITH AND CHRISTIAN ETHICAL CONVICTIONS

Section 1.1. Statement of Faith. The Christian Employers Alliance, a North Dakota corporation (“Alliance”), its officers, Directors, Employees, and its Members shall subscribe to this Statement of Faith:

1.1.1. We believe the Bible is inspired, infallible, and the authoritative Word of God. It is the source of all we believe concerning truth and morality.

1.1.2. We believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.

1.1.3. We believe in the deity of our Lord Jesus Christ, His virgin birth, His sinless life, His miracles, His vicarious and atoning death through His shed blood, His bodily resurrection, His ascension to the right hand of the Father, and His personal return in power and glory.

1.1.4. We believe that for the salvation of lost and sinful people, regeneration by the Holy Spirit is essential.

1.1.5. We believe in the present ministry of the Holy Spirit by whose indwelling the Christian is enabled to live a godly life.

1.1.6. We believe in the resurrection of both the saved and the lost--they that are saved unto the resurrection of life and they that are lost unto the resurrection of damnation.

1.1.7. We believe in the spiritual unity of believers in our Lord Jesus Christ.

1.1.8. We believe every person is created in the image of God and has inherent dignity, regardless of situation, brokenness, or sin.

1.1.9. We believe a person’s work and business, when informed and motivated by Christian Values, constitutes religious exercise and worship.

Section 1.2. “Christian Values,” “Christian”. The Statement of Faith and Christian Ethical Convictions or the Nicene Creed for the purpose of membership only; and the Christian Ethical Convictions, together with such other determinations of faith and values as determined by the Board of Directors, after consultation with the Ethics Committee, are collectively referred

to as “Christian Values.” One who lives his or her life according to Christian Values is “Christian.”

Section 1.3. Christian Ethical Convictions. The Alliance, its officers, Directors, and Members shall subscribe to these Christian Ethical Convictions:

1.3.1. Human life, from the moment of conception to natural death, is sacred. Human life should be honored and protected at all stages of life.

1.3.2. Abortion is the intentional taking of human life or termination of pregnancy at any time from the moment of conception through birth. Abortion is contrary to Christian Values.

1.3.3. The use of human embryonic stem cells acquired from destruction of nascent human life and the use of fetal tissue acquired from abortion is contrary to Christian Values.

1.3.4. Suicide and assisted suicide are contrary to Christian Values.

1.3.5. Male and female are immutable realities defined by biological sex. Gender reassignment is contrary to Christian Values.

1.3.6. Marriage is a lifelong, permanent, and monogamous heterosexual union.

1.3.7. Unless a Member has exhausted all alternatives that do not create a greater transgression of Christian Values, and such Member has taken all reasonable steps to avoid all such transgressions, a Member cannot—consistent with Christian Values—provide services for, healthcare coverage of, reimbursement for, or access to:

- A. Abortions and abortion inducing drugs and devices.
- B. Treatments derived from human embryonic stem cells acquired from destruction of a fertilized ovum, or from fetal tissue acquired from an abortion.
- C. Assisted suicide.
- D. Gender reassignment therapies and surgery.
- E. Counseling affirming or encouraging any acts or behavior violating Christian Values, or
- F. Any medical treatments, procedures, or medication contrary to Christian Values.

1.3.8. All people have the God-given right to exercise their faith freely, without interference from the government.

1.3.9. Christians are called to exercise their faith in every area of their lives — their homes, schools, ministries, businesses, and communities.

Section 1.4. Application of Christian Values. Christian Values are fundamental to the operations of the Alliance. Its actions must be consistent with Christian Values.

ARTICLE II OFFICES

Section 2.1. Principal Office. The principal office shall be at the address stated in the Alliance's most recent filing with the North Dakota Secretary of State. The initial principal office of the Alliance is 6101 Associated Boulevard, Everett, Washington, 98203.

Section 2.2. Registered Office. The registered office shall be at the address stated in the Alliance's most recent filing with the North Dakota Secretary of State.

ARTICLE III MEMBERS

Section 3.1. Membership Qualifications. When an employer satisfies the following qualifications established by the Board, and is accepted by the President in accordance with Section 3.2.2, below, the employer shall become a Member of the Alliance ("Member"):

3.1.1. Members shall be employers that commit to provide health care benefits consistent with Christian Ethical Convictions and to support the right and freedom of Christian employers to do so.

3.1.2. Non-profit Members shall: (i) subscribe to the Alliance's Statement of Faith or Nicene Creed; (ii) affirm that either its highest executive officer or a majority of its governing body is Christian, and (iii) either have Section 501(c)(3) status or be specially approved by the President as being non-profit.

3.1.3. For-profit Members shall affirm that (i) Christians (or trusts or other entities wholly controlled by Christians) own 51% or more of the Member, and (ii) 51% or more of those persons comprising the Member's governing body, if any, are Christians.

3.1.4. Members shall pay dues to the Alliance on a timely basis.

Section 3.2. Admission.

3.2.1. Potential Members must complete and sign the application for membership.

3.2.2. The President, or the President's designee, shall, in his or her sole discretion, determine whether to accept applicants for membership.

Section 3.3. Single Class; Limited Powers; Limited Liability. The Alliance shall have a single class of Members. All Members shall be nonvoting under NDCC § 10-33-57. No Member shall have power or authority to elect Directors, to act on behalf of the Alliance, to extend its credit, or to bind it contractually. The Alliance's debts, obligations, and liabilities are solely those of the Alliance and are not the debts, obligations, or liabilities of a Member, an officer, or a Director solely by reason of being a Member, an officer, or a Director.

Section 3.4. Dues. The Board may assess nonrefundable dues for Members payable at such times as it determines.

Section 3.5. Suspension or Termination. The president may, in his or her sole discretion, suspend a Member's rights or terminate a membership for any reason, including without limitation, nonpayment of dues or violation of Christian Values. If suspension or termination of membership is based upon a violation of Christian Values, the final determination of suspension or termination must be voted on and approved by a majority of the Board of Directors before such suspension or termination is effective. Upon termination of membership, all rights and interests of such Member in the Alliance shall cease. The Board may, in its sole discretion, overrule or amend any decision by the president to terminate membership.

ARTICLE IV BOARD OF DIRECTORS

Section 4.1. General Powers. The business and affairs of the Alliance shall be managed by its Board, except as otherwise provided in Title 10 Chapter 33 of the North Dakota Century Code (the "**Act**"), as may be amended, the articles of incorporation, or these bylaws.

Section 4.2. Number and Qualifications. The Board shall have not less than five nor more than fifteen Directors, a majority of which shall be neither Alliance employees nor family members of any officer or Director. Directors shall be at least eighteen years of age. All Board members shall be Christian and known by their respective pastors.

Section 4.3. Nomination, Election, and Tenure. Directors shall be elected by vote of the Board for terms of three years. No Director, other than Directors also serving as officers, shall serve more than three full consecutive terms. Any such term limited Director may serve again on the Board after a twelve-month absence from the Board.

Section 4.4. Chair. The Chair shall be elected by the Board. He or she shall, subject to the direction and supervision of the Board: (a) determine the agenda for Board meetings, (b) preside at Board meetings, (c) be responsible for seeing that all resolutions of the Board are carried out, and (d) perform all duties incident to the office of Chair and as assigned by the Board.

Section 4.5. Vice-Chair. The Vice-Chair shall assist the Chair and shall perform such duties assigned by the Chair or by the Board. The Vice-Chair shall, at the request of the Chair, or in the Chair's absence or inability or refusal to act, perform the duties of the Chair and, when so acting, shall have all the powers of and be subject to all the restrictions on the Chair.

Section 4.6. Staggered Terms. If the respective terms of the Directors are not staggered so that the terms of approximately one-third of the Directors expire each year, the Board shall divide the total number of Directors into three groups, with each group containing one-third of the total, as near as may be. The Directors shall assign a one year term to the first group; a two year term to the second, and a three year term to the third.

Section 4.7. Vacancy. Any Director may resign by giving written notice to the Chair. Such a resignation shall take effect upon receipt of notice thereof or at such later time as shall be specified in such notice. Any vacancy of a Director's position shall be filled by vote of the remaining Directors for the unexpired term.

Section 4.8. Removal. Directors may be removed, with or without cause, by a two-thirds vote of the Board. The Board shall give written notice of the removal to the Director and the Chair. Removal is effective when the notice is received by the Director, unless the notice states a later effective date.

Section 4.9. Performance of Duties. A Director shall perform his or her duties in good faith, in a manner he or she reasonably believes to be in the best interests of the Alliance, and with such judgment as an ordinarily prudent person in a like position would use under similar circumstances. A Director shall be entitled to rely on information; legal, tax, or accounting opinions; Biblical or Christian doctrinal or ethical opinions; reports; or statements, including financial statements and other financial data; in each case prepared or presented by persons and groups listed in the subparagraphs of this Section 4.9; but he or she shall not be considered to be acting in good faith if he or she has knowledge that would cause such reliance to be unwarranted. A person, who so performs his or her duties, shall not have any liability by reason of being or having been a Director. Those persons and groups on whose information, opinions, reports, and statements a Director is entitled to rely upon are:

- i. The Ethics Committee;
- ii. A committee of the Board upon which he or she does not serve, as to matters within its designated authority, which committee the Director reasonably believes to merit confidence;
- iii. Legal counsel, public accountants, or other persons as to matters which the Director reasonably believes to be within such persons' professional or expert competence; or
- iv. One or more officers or employees of the Alliance whom the Director reasonably believes to be reliable and competent in the matters presented.

Section 4.10. Regular Meetings. The Board shall meet not less than twice a year, including a regular annual meeting during the first four months of each fiscal year to elect officers and to transact other business. The Board may provide, by resolution, the time and place for the holding of additional regular meetings. No notice shall be required other than such resolution. Pursuant to NDCC § 10-3339(1)(a), failure for the Board to meet once per year shall work a forfeiture.

Section 4.11. Special Meetings. Special meetings of the Board may be called by or at the request of the Chair or two or more Directors for the purpose of electing officers and for the transaction of other business.

Section 4.12. Notice. Except as allowed by Section 4.2, notice of a meeting of the Board stating the date, time, and place shall be given to each Director at the person's address at least three business days prior thereto by mail, email, personal delivery of written notice, or verbal notice (and the method of notice need not be the same as to each such person). If mailed, such notice shall be deemed to be given when deposited in the United States mail, with proper postage thereon. If transmitted by email, such notice shall be deemed to be given when the transmission is completed. Neither the business to be transacted at, nor the purpose of, any meeting of the Board need be specified in the notice or waiver of notice of such meeting other than the substance of any proposed amendment to the articles of incorporation.

Section 4.13. Waiver of Notice. Any Director may waive notice of any meeting before, at, or after such meeting. The attendance of a Director at a meeting shall constitute a waiver of notice, except when the Director objects at the beginning of the meeting to the transaction of business because the meeting is not lawfully called or convened and does not participate in the meeting after the objection.

Section 4.14. Presumption of Assent. A Director, who is present at a meeting, shall be presumed to have assented to the action taken unless such Director's dissent is entered in the minutes of the meeting or unless the Director files a written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by certified mail to the secretary of the Alliance within one business day after the adjournment of the meeting. Such right to dissent shall not apply to a Director who voted in favor of such action.

Section 4.15. Quorum and Voting. A majority of the Directors shall constitute a quorum. Unless indicated otherwise in the articles or these bylaws, the majority vote of the Directors present in person at a meeting at which a quorum is present shall be the act of the Board. Less than a quorum may adjourn without further notice until a quorum is secured. No Director may vote or act by proxy at any meeting of Directors.

Section 4.16. Compensation.

4.16.1. Directors shall serve without compensation for their service as Directors. They may be reimbursed their reasonable expenses incurred in connection with their service on the Board or its committees, subject to

Section 4.16.2. Directors shall not be disqualified to receive reasonable compensation for services rendered to or for the benefit of the Alliance in any other capacity, subject to the articles, the Internal Revenue Code, and the Alliance's conflict of interest policy.

4.16.2. In no event shall reimbursement or payment of expenses actually incurred by a Director as a result of providing his or her services to the Corporation as a Director, exceed \$2,000 per year. This limit on reimbursement applies both to compensation and to any transfers given to the Director in lieu of compensation as payment for services.

Section 4.17. Meetings by Telephone. Members of the Board or any committee thereof may participate in meetings by means of telephone conference or similar communications equipment by which all persons participating in the meeting can hear each other at the same time. Such participation shall constitute presence in person at the meeting.

Section 4.18. Action Without a Meeting. Any action required or permitted to be taken at a meeting of the Directors or any committee thereof may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed, or consented to by electronic communication, by the number of Directors that would be required to take the same action at a meeting of the Board at which all Directors were present. Such action will be effective when signed or consented to by electronic communication unless a different effective time is provided in the written action. When written action is taken by less than all Directors, all Directors must be notified immediately of its text and effective date. Failure to provide the notice does not invalidate the written action. A Director, who does not sign or consent to the written action, has no liability for the action or actions taken thereby.

ARTICLE V COMMITTEES

Section 5.1. Ethics Committee.

5.1.1. Designation. The Board shall appoint an Ethics Committee consisting of not less than three nor more than seven persons. At least one shall be a Director. The majority shall be persons other than Directors. None of the Ethics Committee members may be employees of the Alliance. The majority shall have substantial knowledge of Scripture, medicine, or Christian ethics. All committee members shall be Christian and known to their respective pastors. The Ethics Committee is elected for a term of three years. The Board shall stagger the committee members' terms so that approximately one third of the committee members' terms expire each year. The Board may re-elect members of the committee to one or more additional terms. The Board may elect one of the members of the Ethics Committee as Chair. The term of the Chair shall be one year. In lieu of an Ethics Committee being appointed, the Board will serve this purpose.

5.1.2. Powers.

5.1.2.1 Upon request of the Board, its Chair, or the president, the Ethics Committee shall evaluate medical ethical issues and advise the Board of its analysis and recommendation; it may similarly advise the Board regarding all benefits, products, and services provided by the Alliance, its affiliates or subsidiaries, or their respective contractors. The purpose of the committee's advice is to help the Board determine whether certain health care coverage, medical services, practices, or medications conform to Christian Values. If they do not, the committee shall recommend to the Board the necessary corrections to achieve conformity with Christian Values.

5.1.2.2 The Board may consult with the Ethics Committee as to whether any Member or potential Member is operating with Christian Values, or other issues relevant to assessing qualifications for membership.

5.1.2.3 The Board shall consult with the Ethics Committee as to any amendments to the Alliance's Statement of Faith and Christian Ethical Convictions.

5.1.2.4 The decision of the Board, after consulting with its Ethics Committee, shall be final and binding on the Alliance, its officers, and its Members, and also upon the Alliance's affiliates or subsidiaries with regard to subject matters identified in sections 5.1.2.1 and 5.1.2.3 of these bylaws.

5.1.2.5 The governing documents of any affiliate or subsidiary formed by the Alliance shall expressly accede to the authority of the Alliance's Ethics Committee over the subject matters described in this section 5.1.2.

Section 5.2. Advisory Council. The Board shall appoint an advisory council. It shall have a Chair and rules of procedure as the Board designates. The advisory council shall provide advice and assistance to the Alliance as requested by the Chair. If a majority of the advisory council has concern that the Alliance is deviating from Christian Values, it may, by letter, advise the Board of Directors regarding the same. The Board, upon receiving such a letter, shall convene a special meeting to address the matter. Those on the advisory council, by serving on the council, consent that their name and primary work and position (solely for the purposes of identification) may be published on the Alliance's website, letterhead, and marketing materials. The advisory council may not exercise any power or authority reserved to the Board by Chapter 10-33 of the NDCC, the articles, these bylaws, or any power or authority reserved to the Ethics Committee. The advisory council has no authority to incur any corporate expense or to make any representation or commitment on behalf of the Alliance without the written approval of the Board or the president.

Section 5.3. Finance Committee.

5.3.1. Designation. There shall be a finance committee of the Board which shall consist of not less than two Directors of the Alliance. No finance committee member may be an employee of the Alliance. The finance committee is elected for a term of one year. The Board may elect one of the members of the finance committee as Chair. The term of the Chair shall be one year.

5.3.2. Powers.

5.3.2.1 The finance committee shall ensure that the Alliance prepares a budget and annual financial statements and that the Alliance complies with the conflict of interest policy.

5.3.2.2 The committee shall approve the engagement of an independent certified public accountant to serve as auditor. It shall review the financial statements and the budget; maintain appropriate communications with the auditor; and inform the Board of any material weaknesses in internal controls or other significant risks or concerns.

5.3.2.3 It shall ensure the Alliance's compliance with its conflict of interest policy.

5.3.2.4 It shall undertake other activities as requested by the Board.

Section 5.4. Other Committees. The Board may designate additional committees and shall appoint the members of such committees in the manner and for the terms as may be prescribed by the Board. Any such committee shall have such authority in the management of the Alliance as the Board designates and as prescribed by the Act.

Section 5.5. Meetings. Each committee shall meet on the call of its Chair, the Chair of the Board, or any two or more members of the committee, such meetings to be held at the date, time, and place as may be designated in the notice of the meeting. Notice of each meeting shall be given to each member of the committee either in person, by mail, email, personal delivery, or verbal communication no later than two business days prior to the meeting; such notice need not state the purpose or purposes of the meeting. The committee shall keep regular minutes of its meetings.

Section 5.6. Quorum. At any meeting of a committee, a majority of members thereof shall constitute a quorum. The acts of a majority of the members of the committee at a meeting at which a quorum is present shall be the acts of the committee.

Section 5.7. Vacancies. Vacancies on any committee shall be filled by the Board of Directors.

Section 5.8. Dissolution. The Board may dissolve any committee other than the Ethics Committee.

ARTICLE VI OFFICERS

Section 6.1. Number and Qualifications. The officers of the Alliance shall be a president, secretary, treasurer, and other officers and assistant officers appointed by the Board. Each officer shall be a Christian and be known by his or her pastor.

Section 6.2. Election and Term of Office. The officers of the Alliance shall be elected by the Board at each regular annual meeting of the Board. If the election of officers shall not be held at such meeting, such election shall be held as soon as convenient thereafter. Each officer shall hold office until the officer's successor shall have been duly elected, or until the officer's earlier death, resignation, or removal. Notwithstanding anything in this provision to the contrary, officer employees shall serve at will.

Section 6.3. Compensation. The Board shall fix the compensation of the officers. No officer shall be prevented from receiving a salary or other compensation because such officer is also a Director.

Section 6.4. Removal. Any officer or agent may be removed by the Board whenever in its judgment the best interests of the Alliance will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed. Election or appointment of an officer or agent shall not in itself create contract rights.

Section 6.5. Vacancies. Any officer may resign at any time, subject to any rights or obligations under any existing contracts between the officer and the Alliance, by giving written notice to the Chair. An officer's resignation shall take effect at the time specified in such notice. A vacancy may be filled by the Board for the unexpired portion of the term.

Section 6.6. Authority and Duties of Officers. The officers of the Alliance shall have the authority and shall exercise the powers and perform the duties required by law, specified below, and as specified by the Chair, the Board, the articles, or these bylaws.

Section 6.7. President.

6.7.1. Duties. The president shall be the chief executive officer of the Alliance in accordance with NDCC § 10-33-49(3), and shall, subject to the general direction and control of the Board, have the general and active supervision, direction, and control over the Alliance, its agents, and employees. The president shall see that all orders and resolutions of the Board are carried into effect. The president shall also perform all duties incident to the office of president and such other duties as may be assigned by the Board. The president shall be an *ex*

officio, non-voting member of all committees other than the Ethics Committee (unless the Board appoints the president to serve on the Ethics Committee).

6.7.2. Qualification. The president must be Christian as defined in Section 1.3 and must be known to his or her pastor.

6.7.3. Compensation. The compensation of the president, if any, shall be fixed by the Board.

6.7.4. Resignation and Removal. The president may resign at any time by giving written notice of resignation to the Chair. The Board may terminate the president at any time without notice or cause.

Section 6.8. Secretary. The secretary must be Christian as defined in Section 1.3 and must be known to his or her pastor. The secretary or his or her designees shall (a) keep, or cause to be kept, accurate minutes of the proceedings of the Board and all committees of the Board; (b) ensure that all notices are duly given in accordance with law and the provisions of these bylaws; (c) oversee the safekeeping of the corporate records; and (d) perform all duties incident to the office of secretary and such other duties as may be assigned by the Chair.

Section 6.9. Treasurer. The treasurer must be Christian as defined in Section 1.3 and must be known to his or her pastor. The treasurer shall be the chief financial officer of the Alliance in accordance with NDCC § 10-33-49(3). He or she (a) shall oversee the care and custody of all its funds, securities, evidences of indebtedness and other personal property; (b) unless there is a controller, serve as the principal accounting officer of the Alliance and prescribe and oversee the methods and systems of accounting, cause to be kept complete books and records of account, oversee the preparation and filing of all local, state, and federal tax returns and related documents, prescribe and oversee an adequate system of internal audit, and prepare and furnish or cause to be prepared and furnished, to the Chair and the Board, statements of account showing the financial position of the Alliance and the results of its operations; (c) upon request of the Board or Chair, make such reports to it as may be required; and (d) perform all other duties incident to the office of treasurer or assigned by the Chair. Assistant treasurers, if any, shall have the same powers and duties, subject to supervision by the treasurer.

ARTICLE VII INDEMNIFICATION

Section 7.1. Scope of Indemnification. The Alliance shall indemnify each person who is or was its incorporator, its Director, or its uncompensated officer to the fullest extent permissible under the Act, and may, in its discretion, purchase insurance insuring its obligations hereunder, or otherwise protect such persons. The Alliance shall not indemnify any person for criminal conduct, willful misconduct, improper receipt of personal benefit, intentional torts, bad faith, or self-dealing. Any repeal or modification of this Section 7.1 shall be prospective only and shall not adversely affect any right or indemnification of any person who is a Director or uncompensated officer, employee, or volunteer of the Alliance existing at the time of such repeal or modification.

Section 7.2. Right to Impose Conditions to Indemnification. The Alliance shall have the right to impose such reasonable requirements and conditions as may appear appropriate to the Board in each specific case and circumstances, including, but not limited to, any one or more of the following: (a) that any counsel representing the party to be indemnified in connection with the defense or settlement of any proceeding shall be counsel mutually agreeable to the party and to the Alliance; (b) that the Alliance shall have the right to assume and control the defense or settlement of any claim or proceeding made, initiated or threatened against the party to be indemnified; and (c) that the Alliance shall be subrogated, to the extent of any payments made by way of indemnification, to all of the indemnified party's right of recovery, and that the party to be indemnified shall execute all writings and do everything necessary to assure such rights of subrogation to the Alliance.

Section 7.3. Indemnification of Agents. The Alliance shall have the right, but shall not be obligated, to indemnify any agent of the Alliance not otherwise covered by this article to the fullest extent permissible by the laws of North Dakota.

Section 7.4. Savings Clause; Limitation. If this article or any section or provision hereof shall be invalidated by any court on any ground, then the Alliance shall nevertheless indemnify each party otherwise entitled to indemnification hereunder to the fullest extent permitted by law or any applicable provision of this article that shall not have been invalidated. Notwithstanding any other provision of these bylaws, the Alliance shall neither indemnify any person nor purchase any insurance in any manner or to any extent that would jeopardize or be inconsistent with the qualification of the Alliance as an organization described in Code § 501(c)(3), or that would result in the imposition of any liability under Code § 4941.

ARTICLE VIII CONTRIBUTIONS, SPECIAL FUNDS

The Alliance may accept contributions, grants, bequests, or devises designated to and consistent with its purposes and the requirements of Code §501(c)(3). The Alliance may only accept donor-restricted funds upon the approval or ratification of the Board of Directors.

ARTICLE IX MISCELLANEOUS

Section 9.1. Account Books, Minutes. The Alliance shall keep correct and complete books, records of account, and minutes of the proceedings of its Board and committees. All such documents and information may be inspected by any Director for any proper purpose at any reasonable time.

Section 9.2. Public Accountability. The Alliance shall provide for all financial reports necessary or desirable for a charitable organization exempt from tax under Code §501(c)(3). The Alliance shall provide for an annual independent audit of its financial affairs. The Alliance shall publish and make available to the general public all tax applications and returns, as appropriate, for a charitable organization exempt from tax under Code § 501(c)(3).

Section 9.3. Fiscal Year. The fiscal year of the Alliance shall end on December 31.

Section 9.4. Conveyances and Encumbrances. Property of the Alliance may be assigned, conveyed, or encumbered as authorized by the Board and permitted by the articles, these bylaws, and applicable North Dakota or federal statutes or regulations.

Section 9.5. Prohibited Loans. No loans shall be made by the Alliance to its Directors, officers, employees, or committee members. Any Director or officer who assents to or participates in the making of any such loan or advance shall, in addition to the person receiving such loan or advance, be liable to the Alliance for the amount of such loan or advance until it is repaid.

Section 9.6. Controlling Law. The interpretation and performance of these bylaws shall be governed by North Dakota law and Christian Values. If North Dakota law conflicts with Christian Values, Christian Values shall control.

Section 9.7. Severability. The invalidity of any provision of these bylaws shall not affect the other provisions hereof, and in such event these bylaws shall be construed in all respects as if such invalid provision were omitted.

ARTICLE X AMENDMENTS

These Bylaws may be amended, restated or repealed by a two-thirds vote of all the members of the Board of Directors at any stated or special meeting of the Board. No amendment, restatement, or repeal of the Bylaws shall take effect in contravention of the Articles or the Act.

Approved and ratified by the Board of Directors as of August 5, 2022.

Executed this 5th day of August, 2022.

A handwritten signature in blue ink, appearing to read 'James Mischel', is written over a faint, circular embossed seal or watermark.

James Mischel, Chairman of the Board

EXHIBIT 2

ARTICLES OF INCORPORATION OF CHRISTIAN EMPLOYER ALLIANCE

Pursuant to Title 10 Chapter 33 of the North Dakota Century Code (the "Act"), the incorporator designated in Article IV hereby establishes a North Dakota nonprofit corporation pursuant to these articles of incorporation and effective upon their filing with the North Dakota Secretary of State.

ARTICLE I NAME AND OFFICE

The name of the corporation is **Christian Employer Alliance** ("Ministry"). The Ministry's principal place of business is 6101 Associated Boulevard, Everett, WA 98203.

ARTICLE II PURPOSES

The Ministry is a Christian ministry organized solely for nonprofit purposes consistent with Christian Values. The terms "Christian," "Christian Values," and "Christian Ethical Convictions," are defined in the bylaws. The Ministry's purposes are exclusively religious, charitable, educational, and consistent with § 501(c)(3) of the Internal Revenue Code ("Code"). Among others, its purposes include:

- 2.1 To define and state Christian Ethical Convictions as they relate to religious exercise in the workplace;
- 2.2 To support Christian employers and develop strategies for them, so that they, as part of their religious witness and exercise, may provide health or other employment related benefits to their respective employees and engage in other employment practices in a manner that is consistent with Christian Values;
- 2.3 To work and advocate for religious freedom of Christian and other religious employers seeking to conduct their ministries and businesses according to their religious values;
- 2.4 To support Christian employers in responding to changes in civil law that threaten their ability to conduct their affairs consistent with their Christian Values; and
- 2.4 To make charitable donations to Christian ministries qualifying as religious or charitable organizations under Code § 501(c)(3) from the Ministry's surplus.

ARTICLE III POWERS

3.1 **General Powers.** The Ministry has, without limitation, full power to sue and be sued for itself or on behalf of its members, to hold title to real property, and to do all other things necessary or convenient to carry out its purposes and mission.

3.2 **Restrictions on Powers.**

3.2.1 Neither the Ministry, its board, directors, or officers shall have any power to act contrary to its purposes or Christian Values.

3.2.2 No part of the net earnings shall inure to the benefit of or be distributable to its members, directors, officers, or persons (except that reasonable compensation may be paid for services rendered to or for the benefit of the Ministry). No director or officer, any individual or any entity not constituting a Qualifying Charitable Organization shall be entitled to share in any distribution of any of the corporate assets on dissolution or otherwise. “**Qualifying Charitable Organization**” is a Christian ministry that is also an organization exempt from federal income taxation and described in Code § 501(c)(3).

3.2.3 The Ministry shall not contribute any part of its assets to any organization whose net earnings or any part thereof inure to the benefit of any private shareholder or other individual or any substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation.

3.2.4 The Ministry shall make no grants or loans to any of its officers or directors.

3.2.5 No more than a non-substantial portion of the Ministry’s activities shall consist of attempting to influence legislation. The Ministry shall not participate or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.

3.2.6 The Ministry shall not carry on any activities not permitted to be carried on by a corporation exempt from federal income taxation as an organization described in Code § 501(c)(3).

ARTICLE IV INCORPORATOR

The name and address of the incorporator is:

L. Martin Nussbaum, Esq.
90 South Cascade Avenue, Suite 1100
Colorado Springs, CO 80903

The personal liability of the incorporator by virtue of being or serving as the incorporator

shall be limited to the fullest extent of the law.

ARTICLE V MEMBERS

5.1 **Members.** The members of the Ministry shall be Christian employers as defined in the bylaws. All members shall be non-voting members under NDCC § 10-33-57. No member shall have power or authority to elect directors, to act on behalf of the Ministry, to extend its credit, or to bind it contractually.

ARTICLE VI BOARD OF DIRECTORS

6.1 **General.** The management of the Ministry's affairs shall be vested in a board of directors, except as otherwise provided in the Act, these articles, or the bylaws.

6.2 **Initial Appointment.** Until his resignation as such, the incorporator shall have the exclusive authority to appoint and remove members of the board of directors pursuant to NDCC § 10-33-25.

6.3 **Regularly Constituted Board of Directors.** Subject to the preceding section, the identity and number of directors, their classifications, if any, their terms of office, and the manner of their election or appointment shall be determined according to the bylaws.

6.4 **Director Action by Written Consent.** Pursuant to NDCC § 10-33-43, any action by the board may be taken by written action signed, or consented to by authenticated electronic communication, by the number of directors that would be required to take the same action at a meeting of the board at which all directors were present.

6.5 **Meetings.** Meetings of the board may be held in any location and need not be held at the principal business address of the Ministry set forth in these articles.

6.6 **Ethics Committee.** The Ministry shall establish an ethics committee that shall advise the board regarding the interpretation and application of Christian Values as set forth in the bylaws.

ARTICLE VII REGISTERED AGENT AND ADDRESS

The registered agent is National Registered Agents, Inc.

ARTICLE VIII DURATION

The Ministry shall have perpetual existence.

ARTICLE IX
LIMITATION OF LIABILITY OF DIRECTORS
FOR BREACH OF FIDUCIARY DUTIES

No director shall have liability to the Ministry or any of its members for breach of fiduciary duties as a director; provided, however, the forgoing limitation shall not eliminate a director's liability for:

- (a) Breach of the duty of loyalty to the Ministry;
- (b) Any acts or omissions of the director not taken in good faith;
- (c) Any acts or omissions of the director involving intentional misconduct or knowing violation of the law;
- (d) Any other transaction from which the director derived an improper personal benefit; or
- (e) Any other act for which indemnification of directors is prohibited under the provisions of the Act.

ARTICLE X
INDEMNIFICATION

10.1 **No Limitation on Indemnification.** Nothing in these articles shall be construed to limit or restrict the Ministry's ability:

- (a) To indemnify its incorporator, officers, directors, employees, fiduciaries, or agents against liabilities asserted against or incurred by such officers, directors, employees, fiduciaries, or agents for actions taken by (or omissions of) such persons in such capacities; or
- (b) To advance the legal fees and costs of its incorporator, officers, directors, employees, fiduciaries, or agents incurred in defending liabilities asserted against or incurred by such incorporator, officers, directors, employees, fiduciaries, or agents for actions taken by (or omissions of) such persons in such capacities.

10.2 **Procedures for Indemnification.** Except as set forth in the Act, these articles, or the bylaws, indemnification of the incorporator, officers, directors, employees, fiduciaries, or agents shall not be mandatory. Indemnification, when permissive under the Act, shall be granted as set forth in the bylaws.

ARTICLE XI DISSOLUTION

Upon dissolution of the Ministry, the Ministry's assets remaining after payment of or provision for its liabilities shall be transferred to one or more Christian organizations that is a Qualifying Charitable Organization. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction in the State of North Dakota, or to one or more Christian Qualifying Charitable Organizations as said court shall determine.

ARTICLE XII PRINCIPAL EXECUTIVE OFFICER

The name and address of the principal executive officer of the Ministry is:

Jim Mischel, President
6101 Associated Boulevard
Everett, WA 98203

ARTICLE XIII AMENDMENTS

These articles and the bylaws may be amended, restated, or repealed by a two-thirds vote of all the members of the board of directors. In addition, a majority of the ethics committee must also approve all amendments to the articles of incorporation affecting the following provisions: art. 3.2.1, art. II, art. 6.6, art. XIII. No amendment, restatement, or repeal of the bylaws shall take effect in contravention of the articles or the Act. No amendment, restatement or repeal of the articles shall take effect in contravention of the Act.

IN WITNESS WHEREOF, the incorporator executes these articles on December 24, 2015.

Signature: _____

L. Martin Nussbaum
Incorporator

EXHIBIT 3



U.S. Equal Employment Opportunity Commission

Sex-Based Discrimination

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy.

Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII. For more information about LGBTQ+-related sex discrimination claims, see **Sexual Orientation and Gender Identity Discrimination** (<https://www.eeoc.gov/node/133873>).

Sex Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Sex Discrimination Harassment

It is unlawful to harass a person because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy. Harassment can include "sexual harassment" such as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex, including the person's sexual orientation, gender identity, or pregnancy. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both the victim and the harasser may be any sex, and the victim and harasser may be the same sex or a different sex.

Although the law doesn't prohibit minor teasing, offhand comments, or isolated incidents that are not frequent or serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, a subordinate, or someone who is not an employee of the employer, such as a client or customer.

Sex Discrimination & Employment Policies/Practices

An employment policy or practice that applies to everyone, regardless of sex, can be illegal if it has a negative impact on the employment of people of a certain sex and is not job-related or necessary to the operation of the business.

Employer Coverage

15 or more employees

Time Limits

180 days to **file a charge** (<https://www.eeoc.gov/employees/charge.cfm>)
(may be extended by state laws)

Federal employees have 45 days to **contact an EEO Counselor**
(https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm).

For more information, see:

- **Title VII of the Civil Rights Act of 1964**
(<https://www.eeoc.gov/laws/statutes/titlevii.cfm>)
- **Regulations: 29 C.F.R. Part 1604** (<http://www.gpo.gov/fdsys/pkg/CFR-2016-title29-vol4/xml/CFR-2016-title29-vol4-part1604.xml>)
- **Policy & Guidance**
(https://www.eeoc.gov/laws/types/sex_guidance.cfm)
- **Statistics** (<https://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm>)

See also:

- **Equal Pay and Compensation Discrimination**
(<https://www.eeoc.gov/laws/types/equalcompensation.cfm>)
- **Pregnancy Discrimination**
(<https://www.eeoc.gov/laws/types/pregnancy.cfm>)
- **Sexual Harassment**
(https://www.eeoc.gov/laws/types/sexual_harassment.cfm)
- **Employer Best Practices for Workers with Caregiving Responsibilities**
(<https://www.eeoc.gov/policy/docs/caregiver-best-practices.html>)
- **Break Time for Nursing Mothers under the FLSA**
(<http://www.dol.gov/whd/regs/compliance/whdfs73.htm>) (U.S. Dept of Labor, Wage and Hour Division)
- **Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking**
(https://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm)

EXHIBIT 4



U.S. Equal Employment Opportunity Commission

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:

NVTA-2021-1

Concise Display Name:

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

Issue Date:

06-15-2021

General Topics:

Sex Discrimination, Sexual Orientation, Gender Identity, Sex Harassment, Retaliation

Summary:

This document briefly explains the Supreme Court's decision in *Bostock v. Clayton County* and the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues

Citation:

Title VII

Document Applicant:

Applicants for employment, employees, employers covered by Title VII;
related representatives and practitioners

Previous Revision:

No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*,^[1] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn1) which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status.

This fact sheet briefly explains what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country. It also explains the Equal Employment Opportunity Commission's (EEOC or Commission) established legal positions on LGBTQ+-related matters, as voted by the Commission. Before *Bostock*, the Commission decided an array of matters involving employment discrimination based on sexual orientation and gender identity. For example, the EEOC has authority under Title VII to decide employment discrimination appeals by employees of the federal government and, in 2012, decided that discrimination against an applicant for federal employment based on gender identity is discrimination based on sex.^[2] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn2) In 2015, in a federal sector matter involving a decision not to permanently hire an individual, the Commission decided that sexual orientation discrimination states a claim of sex discrimination under Title VII.^[3] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn3) More recently, the Commission also applied the *Bostock* decision in the federal sector.^[4] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn4)

This information is not new policy. This publication in itself does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law.

1. What happened in the *Bostock* case?

The *Bostock* case involved a trio of cases alleging discrimination against LGBTQ+ workers, which the Supreme Court decided together in a single opinion. Gerald Bostock, a child welfare services coordinator, was fired after his employer learned he had joined a gay softball league. Donald Zarda, a skydiving instructor, was fired after his employer learned he was gay. In a case filed by the EEOC, funeral director Aimee Stephens was fired after her employer learned that she was going to transition from male to female. In deciding these cases, the Supreme Court held that employment discrimination based on sexual orientation (Bostock and Zarda) or transgender status (Aimee Stephens) is discrimination “because of sex,” and is therefore unlawful under Title VII.

The Supreme Court in *Bostock* recognized that to discriminate against a person based on sexual orientation or transgender status is to discriminate against that individual based on sex. Therefore, the Supreme Court held that Title VII makes it unlawful for a covered employer to take an employee’s sexual orientation or transgender status into account in making employment-related decisions. The Court explicitly reserved some issues for future cases.

2. Does Title VII protect all workers?

Title VII protects job applicants, current employees (including full-time, part-time, seasonal, and temporary employees), and former employees, if their employer has 15 or more employees. Employers with fewer than 15 total employees are not covered by Title VII.

Title VII protects employees regardless of citizenship or immigration status, in every state, the District of Columbia, and the United States territories.

Title VII generally does not apply to individuals who are found to be independent contractors. Figuring out whether someone is an employee or an independent contractor is a fact-specific inquiry. To find out more, see the EEOC’s guidance on **Threshold Issues** (<https://www.eeoc.gov/laws/guidance/section-2-threshold-issues>).

3. Does Title VII apply to all employers?

Title VII applies to private-sector employers with 15 or more employees, to state and local government employers with 15 or more employees, and to the federal government as an employer. Title VII also applies to unions and employment agencies.

Title VII does not apply to Tribal nations. However, private employers with 15 or more employees are covered by the statute, even if they operate on a Tribal reservation.

Title VII allows “religious organizations” and “religious educational institutions” (those organizations whose purpose and character are primarily religious) to hire and employ people who share their own religion (in other words, it is not unlawful religious discrimination for a qualifying employer to limit hiring in this way). Courts also apply a “ministerial exception” that bars certain employment discrimination claims by the employees of religious institutions because those employees perform vital religious duties at the core of the mission of the religious institution. Courts and the EEOC consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws. For more information on those defenses and other issues related to religious organizations and discrimination based on religion, see **EEOC Compliance Manual, Section 12: Religious Discrimination** (<https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>).

Other defenses might also be available to employers depending on the facts of a particular case.

4. Does Title VII protect employees who work in places where state or local law does not prohibit employment discrimination based on sexual orientation or gender identity?

Yes. As a federal law, Title VII applies nationwide and protects employees from discrimination based on sexual orientation or gender identity regardless of state or local laws.

5. What kind of discriminatory employment actions does Title VII prohibit?

Title VII includes a broad range of protections. Among other things, under Title VII employers cannot discriminate against individuals based on sexual orientation or

gender identity with respect to:

- hiring
- firing, furloughs, or reductions in force
- promotions
- demotions
- discipline
- training
- work assignments
- pay, overtime, or other compensation
- fringe benefits
- other terms, conditions, and privileges of employment.

Discrimination also includes severe or pervasive harassment. It is unlawful for an employer to create or tolerate such harassment based on sexual orientation or gender identity. Further, if an employee reports such harassment by a customer or client, the employer must take steps to stop the harassment and prevent it from happening again. For more information, visit the EEOC's harassment page at <https://www.eeoc.gov/harassment> (<https://www.eeoc.gov/harassment>).

6. Are non-LGBTQ+ job applicants and employees also protected against sexual orientation and gender identity discrimination?

Yes—employers are not allowed to discriminate against job applicants or employees because the applicants or employees are, for example, straight or cisgender (someone whose gender identity corresponds with the sex assigned at birth). Title VII prohibits harassment and other forms of discrimination based on sexual orientation or gender identity.

7. Could an employer's discriminatory action be justified by customer or client preferences?

No. As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a

different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)

8. Is an employer allowed to discriminate against an employee because the employer believes the employee acts or appears in ways that do not conform to stereotypes about the way men or women are expected to behave?

No. Whether or not an employer knows an employee's sexual orientation or gender identity, employers are not allowed to discriminate against an employee because that employee does not conform to a sex-based stereotype about feminine or masculine behavior. For example, employers are not allowed to discriminate against men whom they perceive to act or appear in stereotypically feminine ways, or against women whom they perceive to act or appear in stereotypically masculine ways.

9. May a covered employer require a transgender employee to dress in accordance with the employee's sex assigned at birth?

No. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.^[5]

(https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn5)

10. Does an employer have the right to have separate, sex-segregated bathrooms, locker rooms, or showers for men and women?

Yes. Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.^[6]

(https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn6) In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

11. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?

Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*,^[7] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn7) the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

12. If a job applicant's or an employee's Title VII rights have been violated, what can the applicant or employee do?

For applicants and employees of private sector employers and state and local government employers, the individual can contact the EEOC for help in deciding what to do next. If the individual decides to file a charge of discrimination with the EEOC, the agency will conduct an investigation to determine if applicable Equal Employment Opportunity (EEO) laws have been violated. Because an individual must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early.

For more information about filing a charge, visit <https://www.eeoc.gov/how-file-charge-employment-discrimination> (<https://www.eeoc.gov/how-file-charge-employment-discrimination>). To begin the process of filing a charge of discrimination against a private company or a state or local government employer, go to the EEOC Online Public Portal at <https://publicportal.eeoc.gov> (<https://publicportal.eeoc.gov/>) or visit your local EEOC office (see <https://www.eeoc.gov/field-office> (<https://www.eeoc.gov/field-office>)) for contact information). For general information, visit the EEOC website at <https://www.eeoc.gov> (<https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity>), or call 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces regulations that prohibit certain federal contractors from engaging in employment discrimination based on sexual orientation and gender identity, under Executive Order 11246, as amended. Executive Order 11246 applies to businesses with federal contracts and federally assisted construction contracts totaling more than \$10,000. For more information, see <https://www.dol.gov/agencies/ofccp/faqs/lgbt> (<https://www.dol.gov/agencies/ofccp/faqs/lgbt>) and <https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2> (<https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2>).

For applicants and employees of the federal government, the process for seeking legal redress for Title VII violations is different than the process that individuals in the private sector and state and local governments must use. Federal applicants and employees must first contact the EEO Office at the specific federal agency that they believe committed the unlawful employment discrimination. In general, federal applicants and employees must start this federal sector EEO process by contacting the relevant federal agency's EEO office to request EEO counseling. *Most federal agencies list contact information for their internal EEO offices on their external agency website.*

A federal applicant or employee generally must request EEO counseling from the appropriate agency **within 45 calendar days of the date of the incident(s) the employee or applicant believes to be discriminatory. Failure to adhere to this time limitation could result in an individual forfeiting legal rights and remedies that otherwise would be available. Nevertheless, if a federal applicant or employee alleges that they were subjected to a hostile work environment, and at least one incident occurred within 45 calendar days of contacting an EEO counselor, then incidents occurring outside of the 45-calendar day window may still be considered for investigation.**

Federal applicants and employees can also find out more information on the federal sector process for alleging employment discrimination on the EEOC's website [here](https://www.eeoc.gov/federal-sector/federal-employees-job-applicants) (<https://www.eeoc.gov/federal-sector/federal-employees-job-applicants>).

Other processes may be available for federal applicants and employees seeking relief for sexual orientation or gender identity discrimination, including filing grievances under applicable collective bargaining agreements and/or filing a

prohibited personnel practice complaint under the Civil Service Reform Act of 1978 with the **U.S. Office of Special Counsel** (<http://www.osc.gov/>).

13. If I contact the EEOC or file a charge or complaint of discrimination, could I be fired?

It is unlawful for an employer to retaliate against, harass, or otherwise punish any employee for:

- opposing employment discrimination that the employee reasonably believed was unlawful;
- filing an EEOC charge or complaint;
- or participating in any investigation, hearing, or other proceeding connected to Title VII enforcement.

Retaliation is anything that would be reasonably likely to discourage workers from making or supporting a charge of discrimination. To learn more about retaliation, see <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues> (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>).

[1] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref1). 590 U.S. ___, 140 S. Ct. 1731 (2020).

[2] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref2). In *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), a Commission-voted decision involving an applicant for federal employment, the EEOC determined that transgender discrimination, including discrimination because an employee does not conform to gender norms or stereotypes, is sex discrimination in violation of Title VII based on a plain interpretation of the statutory language prohibiting discrimination because of sex. Specifically, the Commission explained that discrimination based on an employee’s gender identity is sex discrimination “regardless of whether an employer discriminates against an employee [for

expressing the employee's] gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person."

[3] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref3) In *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), a Commission-voted decision involving a failure to permanently hire an individual as an air traffic controller, the Commission concluded that a claim alleging discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

[4] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref4) See *Bart M. v. Dep't of the Interior*, EEOC Appeal No. 0120160543 (Jan. 14, 2021).

[5] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref5) See *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

[6] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref6) See *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity).

[7] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref7) *Id.*

EXHIBIT 5



U.S. Equal Employment Opportunity Commission

Prohibited Employment Policies/Practices

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law forbids discrimination in every aspect of employment.

The laws enforced by EEOC prohibit an **employer or other covered entity** (<https://www.eeoc.gov/employers/coverage-0>) from using neutral employment policies and practices that have a disproportionately negative effect on applicants or employees of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), or national origin, or on an individual with a disability or class of individuals with disabilities, if the policies or practices at issue are not job-related and necessary to the operation of the business. The laws enforced by EEOC also prohibit an employer from using neutral employment policies and practices that have a disproportionately negative impact on applicants or employees age 40 or older, if the policies or practices at issue are not based on a reasonable factor other than age.

Job Advertisements

It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color,

religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law.

Recruitment

It is also illegal for an employer to recruit new employees in a way that discriminates against them because of their race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

For example, an employer's reliance on word-of-mouth recruitment by its mostly Hispanic work force may violate the law if the result is that almost all new hires are Hispanic.

Application & Hiring

It is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not refuse to give employment applications to people of a certain race.

An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires job applicants to take a test, the test must be necessary and related to the job and the employer may not exclude people of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, or individuals with disabilities. In addition, the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

Background Checks

See "**Pre-Employment Inquiries**" below.

Job Referrals

It is illegal for an employer, employment agency or union to take into account a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about job referrals.

Job Assignments & Promotions

It is illegal for an employer to make decisions about job assignments and promotions based on an employee's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not give preference to employees of a certain race when making shift assignments and may not segregate employees of a particular national origin from other employees or from customers.

An employer may not base assignment and promotion decisions on stereotypes and assumptions about a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires employees to take a test before making decisions about assignments or promotions, the test may not exclude people of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), or national origin, or individuals with disabilities, unless the employer can show that

the test is necessary and related to the job. In addition, the employer may not use a test that excludes employees age 40 or older if the test is not based on a reasonable factor other than age.

Pay And Benefits

It is illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the bases of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. Employee benefits include sick and vacation leave, insurance, access to overtime as well as overtime pay, and retirement programs. For example, an employer may not pay Hispanic workers less than African-American workers because of their national origin, and men and women in the same workplace must be given equal pay for equal work.

In some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.

Discipline & Discharge

An employer may not take into account a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about discipline or discharge. For example, if two employees commit a similar offense, an employer may not discipline them differently because of their race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

When deciding which employees will be laid off, an employer may not choose the oldest workers because of their age.

Employers also may not discriminate when deciding which workers to recall after a layoff.

Employment References

It is illegal for an employer to give a negative or false employment reference (or refuse to give a reference) because of a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

Reasonable Accommodation & Disability

The law requires that an employer provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.

A reasonable accommodation is any change in the workplace (or in the ways things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

Reasonable accommodation might include, for example, providing a ramp for a wheelchair user or providing a reader or interpreter for a blind or deaf employee or applicant.

Reasonable Accommodation & Religion

The law requires an employer to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause difficulty or expense for the employer. This means an employer may have to make reasonable adjustments at work that will allow the employee to practice his or her religion, such as allowing an employee to voluntarily swap shifts with a co-worker so that he or she can attend religious services.

Training & Apprenticeship Programs

It is illegal for a training or apprenticeship program to discriminate on the bases of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not deny training opportunities to African-American employees because of their race.

In some situations, an employer may be allowed to set age limits for participation in an apprenticeship program.

Harassment

It is illegal to harass an employee because of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Harassment can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. Sexual harassment (including unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature) is also unlawful. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal if it is so frequent or severe that it creates a hostile or offensive work environment or if it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Harassment outside of the workplace may also be illegal if there is a link with the workplace. For example, if a supervisor harasses an employee while driving the employee to a meeting.

*Read more about **harassment** (<https://www.eeoc.gov/harassment>).*

Terms & Conditions Of Employment

The law makes it illegal for an employer to make any employment decision because of a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. That means an employer may not discriminate when it comes to such things as hiring, firing, promotions, and pay. It also means an employer may not discriminate, for example, when granting breaks, approving leave, assigning work stations, or setting any other term or condition of employment - however small.

Pre-Employment Inquiries (General)

As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

Employers are explicitly prohibited from making pre-offer inquiries about disability.

Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided.

Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.

Pre-Employment Inquiries and:

- **Race (<https://www.eeoc.gov/pre-employment-inquiries-and-race>)**

- **Height & Weight** (<https://www.eeoc.gov/pre-employment-inquiries-and-height-weight>)
- **Financial Information** (<https://www.eeoc.gov/pre-employment-inquiries-and-financial-information>)
- **Unemployed Status** (<https://www.eeoc.gov/pre-employment-inquiries-and-unemployed-status>)
- **Background Checks** (<https://www.eeoc.gov/background-checks>)
- **Religious Affiliation Or Beliefs** (<https://www.eeoc.gov/pre-employment-inquiries-and-religious-affiliation-or-beliefs>)
- **Citizenship** (<https://www.eeoc.gov/pre-employment-inquiries-and-citizenship>)
- **Marital Status, Number Of Children** (<https://www.eeoc.gov/pre-employment-inquiries-and-marital-status-or-number-children>)
- **Gender** (<https://www.eeoc.gov/pre-employment-inquiries-and-gender>)
- **Disability** (<https://www.eeoc.gov/pre-employment-inquiries-and-disability>)
- **Medical Questions & Examinations** (<https://www.eeoc.gov/pre-employment-inquiries-and-medical-questions-examinations>)

Dress Code

In general, an employer may establish a dress code which applies to all employees or employees within certain job categories. However, there are a few possible exceptions.

While an employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices, a dress code must not treat some employees less favorably because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African or East Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin.

Moreover, if the dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer must modify the dress code or permit an exception to the dress code unless doing so would result in undue hardship.

Similarly, if an employee requests an accommodation to the dress code because of his disability, the employer must modify the dress code or permit an exception to the dress code, unless doing so would result in undue hardship.

Constructive Discharge/Forced To Resign

Discriminatory practices under the laws EEOC enforces also include constructive discharge or forcing an employee to resign by making the work environment so intolerable a reasonable person would not be able to stay.

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EXHIBIT 6

Wal-Mart Loses Perfect LGBTQ Rating Because of Transgender Harassment

Suspension of perfect score is based on EEOC determinations against the company

By Allen Smith, J.D.

November 30, 2017

Businesses should root out all forms of illegal harassment, not just sexual harassment, Wal-Mart is learning. That includes discrimination against transgender employees, according to Sarah Warbelow, legal director for the Human Rights Campaign (HRC).

The civil rights organization suspended the company's perfect score on the group's Corporate Equality Index (<http://assets2.hrc.org/files/assets/resources/CEI-2018-FullReport.pdf>) on Nov. 9 because of Equal Employment Opportunity Commission (EEOC) determinations this past summer that the company harassed two transgender employees.

Tricia Moriarty, a spokeswoman for Wal-Mart, said, "We are proud of our work on LGBTQ [lesbian, gay, bisexual, transgender and queer] inclusive and nondiscriminatory policies. We're disappointed with the HRC's decision to temporarily suspend our score, which was going to be rated at 100 percent for the second year in a row. While we respect the HRC's work, we are confident in Wal-Mart's leading practices that support our LGBTQ communities and look forward to further educating them on our policies."

Floridian and North Carolinian Harassed, EEOC Finds

One of the EEOC investigations found that Sam's Club, which Wal-Mart owns, demoted an employee in Miami from a management position to a night-shift line worker job in retaliation for her complaints of discrimination.

The Miami employee also was unlawfully denied medically necessary care through at least 2016 that would have been covered by the group health benefit plan if not for her transgender status, the commission found. Wal-Mart has provided evidence that it has removed the categorical exclusion for services related to transgender treatment/sex therapy from its associate's health plans effective Jan. 1, 2017.

Wal-Mart unlawfully harassed the other employee, who worked for Sam's Club in Kannapolis, N.C., when its employees referred to her with masculine pronouns both verbally and in written correspondence, according to the agency.

It is common to slip up and use the wrong pronoun when someone is first transitioning, said Myrna Maysonet, an attorney with Greenspoon Marder in Orlando, Fla. But to continue to do so may show unlawful discrimination.

The EEOC issues only a few determinations of discrimination each year despite the thousands of charges that are filed. These determinations may be defeated in a court, if conciliation with the EEOC fails and the agency sues. But Maysonet said companies still want to avoid these determinations.

The employee has more leverage during conciliation. With Wal-Mart, "it's difficult to say that a company has a perfect score when there are documented cases of discrimination," Maysonet noted.

"Employers must train their employees about what discrimination against transgender people looks like and set expectations for a fair, respectful and inclusive work environment," Warbelow said. According to the National Transgender Discrimination Survey (https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf), 90 percent of surveyed people who are transgender

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reported being harassed, mistreated or discriminated against on the job or feeling the need to take actions like hiding their gender transition to avoid negative treatment.

Nearly half—47 percent—said they were fired, not hired or denied a promotion because of being transgender.

High Cost of Transition

The cost of transitioning can exceed \$100,000 in the United States, according to a Money magazine article (<http://time.com/money/4092680/transgender-surgery-costs/>). Only 10 percent of employers cover gender reassignment surgery, although this is up from 5 percent in 2015, according to the Society for Human Resource Management's 2017 Employee Benefits survey (www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2017%20Employee%20Benefits%20Report.pdf).

But refusal to provide benefits based on a protected characteristic is a form of employment discrimination, Warbelow said.

A tone must be set from the top that harassment will not be tolerated in the workplace, she said. There should be an additional, objective level of review in place for any action that would alter a complaining employee's status.

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex, which the EEOC and many courts have interpreted to prohibit discrimination based on gender identity. Warbelow said that some courts also have found that the Americans with Disabilities Act (ADA) exclusion for transgender people is unconstitutional, meaning that transgender people also should have recourse under the ADA.

[SHRM members-only toolkit: *Managing Equal Employment Opportunity* (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingequalemploymentopportunity.aspx)]

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