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

| | |
|---|---|
| THE RELIGIOUS SISTERS OF MERCY, *et al.*,<br><br>*Plaintiffs,*<br>v.<br><br>XAVIER BECERRA, *et al.,*<br><br>*Defendants.* | No. 3:16-cv-386 |
| THE CATHOLIC BENEFITS ASSOCIATION; DIOCESE OF FARGO; CATHOLIC CHARITIES NORTH DAKOTA; and CATHOLIC MEDICAL ASSOCIATION,<br><br>*Plaintiffs,*<br>v.<br><br>XAVIER BECERRA, *et al.,*<br><br>*Defendants.* | No. 3:16-cv-432 |

**CATHOLIC BENEFITS ASSOCIATION'S REPLY IN SUPPORT OF MOTION TO SEAL DECLARATIONS ESTABLISHING THE CBA'S ASSOCIATIONAL STANDING**

The primary thrust of the Government's response in opposition to the CBA's motion to seal is that the CBA's members do not face legal threat or cultural reprisal if their identities are made public. Resp. at 4-5. But the second-to-last paragraph of the Government's response brief betrays this argument. There, the Government ominously contends that unsealing is necessary so "third parties . . . know[] that the CBA members seek exemption from otherwise generally applicable anti-discrimination laws." Resp. at 9. This is *precisely* why sealing is urgently needed. What reason do

"third parties" need to know of CBA member identities other than to subject them to legal and cultural sanction for their beliefs?

Indeed, the Government's argument is contrary to its own conduct during the pendency of this litigation. As the CBA explained to the Eighth Circuit, while the Government's appeal was pending the CBA was notified by one of its members, a Catholic ministry, that the EEOC had begun an enforcement action based on a third-party complaint for the member's refusal to provide gender-transition coverage. The EEOC demanded reams of information from this CBA member (hereafter "Catholic Ministry"), including "all contracts" with insurers and third party administrators, "all benefits and/or health plans," "all hard copy and/or electronic communications and/or notes" regarding health plans, "all medically necessary reason(s) for which [Catholic Ministry] has covered hysterectomy procedures," and "the software and/or additional data systems" used by Catholic Ministry to manage health benefits. *See* **Exhibit 1**, Excerpts from CBA Petition for Rehearing at PDF pgs. 2-5 (correspondence with EEOC regarding enforcement action). The CBA's members will undoubtedly be subject to greater and more such actions if their identities are made public to "third-parties."[1]

[1] The threat of similar enforcement actions is also why this Court should maintain jurisdiction over the case to accept the additional declarations of CBA members establishing the CBA's associational standing. The Government has offered no justification for the massive judicial inefficiency entailed in requiring the CBA to start over after six-and-a-half years of litigation by refiling a materially identical lawsuit, identifying the same non-named-plaintiff members currently before the Court. This is especially telling given that the Eighth Circuit's instructions to this Court did not vacate the Court's injunction protecting members and did not direct dismissal of the CBA from the suit. To the contrary, the Eighth Circuit entered a general remand, which, consistent with decisions like *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 270-71 (2015), permits an associational plaintiff to identify evidence of its associational standing on remand. Indeed, *Alabama Legislative Black Caucus* holds that "elementary principles of procedural fairness require[] that the District Court" consider such evidence. *Id.*

The Government next disputes that long-standing federal practice permits a similar procedure, allowing associations to proceed on the basis of a "John Doe" member declaration for purposes of associational standing. Resp. at 7. Although the CBA cited an older Fifth Circuit decision in its motion to establish that the practice is in fact longstanding, *National Treasury Employees Union v. U.S. Department of Treasury*, 25 F.3d 237, 242 (5th Cir. 1994), permitting an association to proceed with a "John Doe" member is also the long-established law of the Eighth Circuit. *See ACLU Nebraska Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc) (affirming the panel opinion's determination that the ACLU had associational standing based on a "John Doe" affidavit and citing the panel opinion at 358 F.3d 1020, 1026-31).[2] Nowhere in the Eighth Circuit's decision in *ACLU Nebraska Foundation* did the *en banc* court require an association to establish "threats" to members to file a John Doe declaration that the Government now says are required. Resp. at 8. But even if that were a requirement of Eighth Circuit caselaw, the CBA has done so through Mr. Wilson's declaration.

The fact that courts regularly permit associations to establish their associational standing by means of a "John Doe" declaration makes sense considering the substantial First Amendment interests at stake for compelled disclosure of an expressive association's member identities. The Government argues that expressive associations have little interest in keeping their member's identities private, Resp. at 6, but this is contrary to core First Amendment doctrine: "[i]nviolability

[2] For similar reasons, the cases that the Government relies on page 5 of its response are inapplicable because those cases do not concern associational standing. Rather, they primarily concern whether *a party* may proceed pseudonymously. The identities of all CBA Plaintiffs in this action are public. In the context of associational standing, an association need not identify any member by name to the Court or opposing counsel—"John Doe" is sufficient. Yet here, the CBA is offering to identify members under an attorneys'-eyes-only designation.

of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Where, as here, an association offers evidence that compelled disclosure of member names burdens its constitutional rights to association, speech, and religion, the Government bears the burden to establish a "substantial relation between" disclosure and "a sufficiently important governmental interest." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Yet the only interests offered by the Government are (1) the public's generalized interest in access to the courts and (2) third parties' interest in "knowing that the CBA members seek exemption from otherwise generally applicable anti-discrimination laws." Resp. at 9. The former interest is insufficiently specific to the CBA to satisfy exacting scrutiny. *Bonta*, 141 S. Ct. at 2386 (government must identify specific evidence why disclosure is justified). And the latter interest is precisely why sealing is necessary as explained above. The only possible reason "third parties" should be aware of the CBA members' identities as the government contends is to subject those members to legal and cultural attack for their traditional religious beliefs—as at least one third party has attempted to during the pendency of this litigation. *See NAACP*, 357 U.S. at 462 ("A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature. Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order."). Yet even if the Government's interests were compelling, the Government offers no explanation as to why redaction is insufficient to balance the public's right of access to court pleadings and the substantial First Amendment interests at stake. The Government has not carried its burden regarding compelled disclosure.

Although it is unclear on what basis the Federal Rules of Evidence apply to a request to seal, the Government argues that the declaration of CBA CEO Doug Wilson, which the CBA attached to its motion to seal, is inadmissible hearsay. Resp. at 4. Yet Mr. Wilson's declaration does not repeat the statements of others and is therefore not hearsay. He instead declares based on his firsthand knowledge as the CEO of the CBA that the CBA protects its members' identities from disclosure because members would otherwise be wary of exercising their First Amendment rights. Wilson Decl. at ¶¶ 4-7. This is because CBA members hold "dissident" views on religious, political, and cultural topics—especially those topics that are the subject to this suit. Decreased membership and thus diminished capacity to advocate on behalf of its members' First Amendment rights is one of the concerns the right of association protects. *NAACP*, 357 U.S. at 462 ("The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members."). As the Supreme Court recently reaffirmed, associational privacy "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Bonta*, 141 S. Ct. at 2382 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

At bottom, the Government's response is an extension of its position throughout this case that the CBA's members face no threat of harm for their refusal to cover and provide "transgender services" in violation of their religious beliefs. Because those threats are in fact real and substantial, the CBA respectfully requests the Court grant its motion to seal.

Respectfully submitted August 11, 2023,

/s/ *Andrew Nussbaum*

L. Martin Nussbaum
Andrew Nussbaum
Nussbaum | Gleason PLLC
2 N. Cascade Ave., Suite 1430
Colorado Springs, CO 80903
(719) 428-4937
martin@nussbaumgleason.com
andrew@nussbaumgleason.com
Attorneys for Plaintiffs The Catholic Benefits Association, *et al.*

No. 21-1890

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

THE CATHOLIC BENEFITS ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of North Dakota

# THE CATHOLIC BENEFITS ASSOCIATION'S PETITION FOR REHEARING OR REHEARING EN BANC

Ian Speir
L. Martin Nussbaum
Nussbaum Speir Gleason PLLC
2 N. Cascade Ave., Suite 1430
Colorado Springs, CO 80903
(719) 428-4937
ian@nussbaumspeir.com
martin@nussbaumspeir.com

NUSSBAUM
SPEIR GLEASON

Ian Speir, Partner
719.428.3093 (direct)
719.428.4937 (main)
ian@nussbaumspeir.com

2 N. Cascade Ave., Suite 1430
Colorado Springs, CO 80903
* *Licensed in Colorado*

October 7, 2022

Shannon De Jong, Investigator
Equal Employment Opportunity Commission
[redacted]
SHANNON.DEJONG@EEOC.GOV

Re: Notification regarding [redacted]'s membership in The Catholic Benefits Association and instruction to cease and desist from enforcement in Charge No. 551-2020-[redacted]

Ms. De Jong:

I write on behalf of The Catholic Benefits Association ("CBA") and its member, Catholic [redacted] ("[redacted]").

The CBA and its members, including [redacted], are protected by a permanent injunction issued by the federal court in *Catholic Benefits Ass'n v. Cochran*, No. 3:16-cv-00386, ECF No. 133 (D.N.D. Feb. 19, 2021), attached hereto as Exhibit 1 ("Injunction"). The Injunction prohibits the EEOC "from interpreting or enforcing Title VII . . . against the CBA and its members in a manner that would require them to provide insurance coverage for gender-transition procedures." Ex. 1, p.3. The court's order applies to everyone at the EEOC, including its "agents, officers, commissioners, employees, and anyone acting in concert or participation with them," and bars the EEOC from "pursuing, charging, or assessing any penalties, fines, assessments, *investigations*, or other enforcement actions." *Id.* (emphasis added).

[redacted] is a CBA member in good standing and satisfies the criteria set forth in the Injunction. *See* Exhibit 2 (Decl. of Doug Wilson); Exhibit 3 (Decl. of [redacted]). Because [redacted] is protected by the Injunction, the EEOC is legally barred from pursuing any enforcement action, including an investigation, related to [redacted]'s refusal to provide insurance coverage for gender-transition procedures. Among other things, this means the EEOC must immediately cease its investigation in pending Charge No. 551-2020-[redacted] dismiss that proceeding, and take no further action. [redacted] will not be responding to the EEOC's recent request for information pertaining to that charge.

You may not have been aware that [redacted] is a CBA member. In this situation, the Injunction provides that "the CBA member and the CBA may promptly notify a directly responsible agency official of the fact of the member's membership in the CBA" and its satisfaction of the Injunction's criteria. Ex. 1, p.4. "Once such an official receives such notice from the CBA member and verification of the same by the CBA, *the agency shall promptly comply with this order with respect to*

*such member*." *Id.* (emphasis added). This letter constitutes such notice to the EEOC and to you as a directly responsible agency official.

The Injunction does not prohibit the EEOC from accepting a charge, notifying a CBA member of a charge, or issuing a right-to-sue notice. *See id.* pp.4–5. But these are the *only* actions the EEOC may take where, as here, a charge is predicated on the failure to provide gender-transition coverage. At this point, the only action the EEOC may take in Charge No. 551-2020-[redacted] is the issuance of a right-to-sue notice.

If you have further questions, please contact me and [redacted] ([redacted]).

Sincerely,

Ian Speir
Nussbaum Speir Gleason PLLC

cc: [redacted].
In-House Legal Counsel, [redacted]
[redacted]

**In the United States Equal Employment Opportunity Commission**
**[redacted] *v. Catholic* [redacted]**
**EEOC Charge No. 551-2020-[redacted]**

## DECLARATION OF DOUGLAS G. WILSON, JR.

I, Douglas G. Wilson, Jr., being of sound mind and above the age of 18 years, make the following Declaration based on my personal knowledge and information.

1. I am the Chief Executive Officer of The Catholic Benefits Association ("CBA"), a national membership association of Catholic organizations.

2. The CBA has determined that Catholic [redacted] ([redacted]") meets the CBA's strict membership criteria.

3. [redacted] became a member of the CBA effective *June 30, 2014*

4. As a CBA member, [redacted] is protected by the permanent injunction issued in *Catholic Benefits Ass'n v. Cochran*, No. 3:16-cv-00386, ECF No. 133 (D.N.D. Feb. 19, 2021).

5. The CBA's membership criteria have not changed since December 28, 2016.

I declare under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Douglas G. Wilson, Jr.

6 Oct 22
Date



EXHIBIT 2

**In the United States Equal Employment Opportunity Commission**
**[redacted] *v. Catholic* [redacted]**
**EEOC Charge No. 551-2020-[redacted]**

**DECLARATION OF [redacted], ESQ.**

I, [redacted], being of sound mind and above the age of 18 years, make the following Declaration based on my personal knowledge and information.

1. I am the In-House Legal Counsel for Catholic [redacted] ("[redacted]").

2. [redacted] is a member in good standing of The Catholic Benefits Association.

3. As a CBA member, [redacted] is protected by the permanent injunction issued in *Catholic Benefits Ass'n v. Cochran*, No. 3:16-cv-00386, ECF No. 133 (D.N.D. Feb. 19, 2021) ("Injunction").

4. [redacted] satisfies the criteria set forth in the Injunction, specifically criteria (a) and (d) on pages 3–4 thereof: [redacted] is not protected from interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions by any judicial order other than the Injunction; and [redacted] is not subject to an adverse ruling on the merits in another case involving interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions.

I declare under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

[redacted]
[redacted], Esq.

October 6, 2022
Date

EXHIBIT 3