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

CATHOLIC BENEFITS ASSOCIATION, DIOCESE OF FARGO, and CATHOLIC CHARITIES NORTH DAKOTA Plaintiffs, v. SYLVIA M. BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JENNY R. YANG, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Defendants.	Civil Case No. _____

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

> The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elected may justly be pronounced the very definition of tyranny.
>
> –James Madison, The Federalist No. 47 (February 1, 1788)

> [W]e hold it a fundamental and undeniable truth, that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.
>
> –James Madison, *Memorial and Remonstrance* (c. June 20, 1785)

This fall, two Catholic dioceses, both members of the Catholic Benefits Association ("CBA"), received notice from their insurance companies stating that, beginning on January 1, 2017, their sponsored employee health plans would include the "Gender Dysphoria" policies attached to the Verified Complaint ("VC") as Exhibits E and F.[1] These policies inform diocesan employees that the dioceses' plans will now cover a "penectomy" (removal of penis), "orchiectomy" (removal of testicles), and "metoidioplasty" (creation of penis from removed clitoris), among other procedures. Shocked, the dioceses called their insurers and demanded the policies be removed. The insurers refused due to the new HHS regulation under Affordable Care Act Section 1557. ***How is this possible?***

Last summer, HHS took Section 1557 of the Affordable Care Act ("ACA") and spun it into a coercive mandate that is putting Catholic health care providers and employers to an impossible choice. It has "interpreted" Congress's reference to Title IX, a 1972 law barring sex discrimination, as a ban on discrimination based on "gender identity" and "termination of pregnancy." Although the 1557 Rule on its terms only binds "health programs and activities" that receive HHS funds, this includes not only Catholic health care facilities but also the insurers and third party administrators

[1] *See* VC, Ex. E, United Healthcare, Gender Dysphoria Rider; VC, Ex. F, Blue Cross Blue Shield of Kansas City, Treatment of Gender Dysphoria Policy.

("TPAs") that Catholic ministries engage to provide their employees with health insurance.

But the HHS Mandate reaches even further. HHS has announced that where it finds it lacks jurisdiction over a recalcitrant employer, it will hand that employer over to the EEOC, which will enforce a similarly expansive notion of "sex" discrimination under Title VII. Together, HHS and EEOC have announced an Abortion and Comprehensive Transgender Services, or "ACTS," Mandate. They have done so despite Congress's repeated refusal to expand Title IX and Title VII to cover sexual orientation and gender identity. And they have done so without taking into account the substantial burden the Mandate places on religious organizations.

It is not remotely plausible that Congress authorized HHS and the EEOC to coerce Catholic employers in this manner. The agencies' expansive definition of "sex" discrimination and their refusal to honor Congress's accommodations for religious exercise render the ACTS Mandate illegal under the Administrative Procedure Act ("APA") and the Religious Freedom Restoration Act ("RFRA"). Plaintiffs ask the Court to enter a temporary restraining order ("TRO") now to protect the CBA and its members, and their respective insurers and TPAs, from the government's coercive and unlawful mandate.

II. BACKGROUND

Plaintiffs and other CBA members are Catholic institutions that adhere to the teachings of the Catholic Church on issues such as abortion, sterilization, and the nature of the human person. Some operate health care programs or activities as part of their ministry. All seek to offer their employees generous health benefits. Plaintiff CBA exists to help Catholic institutions carry out their calling and operate in a manner that complies with their Catholic convictions.

Defendants have promulgated a series of rules and policies that force Plaintiffs and other CBA members to perform or provide coverage for gender transitions and abortions. If CBA members refuse to comply with the administration's new and expansive definition of "sex"

discrimination, Defendants threaten them with financial ruin: health care institutions will be cut off from Medicare and Medicaid; all employers are threatened with federal enforcement actions, loss of government contracts, punitive damages, and even criminal penalties. Because their Catholic faith teaches that gender transition and abortion services are immoral and harmful, Plaintiffs and other CBA members cannot comply with the ACTS Mandate. The Mandate also infringes on the religious practices of the CBA because it effectively bars its mission—enabling Catholic organizations to serve their patients and provide employee benefits in a manner that reflects their Catholic faith.

A. The ACTS Mandate

On May 18, 2016, HHS issued a final rule that purports to "implement" Section 1557 of the ACA. 81 Fed. Reg. 31,376 (May 18, 2016) (the "1557 Rule"). Section 1557 of the ACA prohibits discrimination in various health activities "on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*)." 42 U.S.C. § 18116(a). Title IX prohibits discrimination in certain education programs on the basis of "sex." 20 U.S.C. § 1681(a).

HHS has taken the ACA's incorporation of Title IX and spun it into a broad mandate that prohibits discrimination based on "gender identity" and "termination of pregnancy." 45 C.F.R. § 92.4. "Gender identity" in turn is defined as an individual's "internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth." *Id.* "Termination of pregnancy," by contrast, is not further defined. Commenters, including the U.S. Conference of Catholic Bishops, urged HHS to clarify that it was not seeking to create an abortion mandate. ***HHS refused***. *See* 81 Fed. Reg. at 31,388.

HHS claims authority to enforce its 1557 Rule against any "entity that operates a health program or activity, any part of which receives Federal financial assistance." 45 C.F.R. § 92.4 (definition of "covered entity"). "Federal financial assistance" is defined broadly to include "any grant, loan, credit, subsidy, contract . . . or any other arrangement" by which the federal government

makes available its property or funds, including Medicaid or Medicare payments. *Id.* HHS believes this definition is so broad that the 1557 Rule covers virtually every health care provider in the country—over 275,000 health care entities, 7.6 million workers, and "almost all licensed physicians." 81 Fed. Reg. at 31,445-46, 31,449-50. And because these health care providers include virtually all insurers and TPAs, the 1557 Rule thereby applies to virtually every employer's group health plan.

HHS's 1557 Rule announces that covered entities will be subject to two sets of nondiscrimination requirements: first, in the medical procedures they perform; and second, in the health coverage they provide their employees.

Medical Procedures. The 1557 Rule requires covered entities to perform gender transition services or else be liable for "discrimination." The 1557 Rule explains: "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." *Id.* at 31,455. In other words, if a gynecologist performs a hysterectomy for a woman with uterine cancer, she must do the same for a woman who wants to remove a healthy uterus to transition to living as a man. Thus, in the latter scenario, if the gynecologist declines to remove a healthy organ, she is guilty of "discrimination." HHS explains that this reasoning applies across the full "range of transition-related services," including "hormone therapy and psychotherapy." *Id.* at 31,435-36.

In addition, because the new 1557 Rule prohibits discrimination on the basis of "termination of pregnancy," and because HHS has refused to state otherwise, the 1557 Rule pressures healthcare providers who perform procedures such as a dilation and curettage for a miscarriage to perform the same procedure for an abortion. *See id.* at 31,388.

Insurance Coverage. The 1557 Rule also requires covered entities to pay for medical transition procedures in their employee health plans. The 1557 Rule states: "A covered entity shall

not, in providing or administering health-related insurance . . . [h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition." 45 C.F.R. § 92.207(b)(4). According to HHS, this means that a plan excluding "coverage for all health services related to gender transition is unlawful on its face." 81 Fed. Reg. at 31,429. In addition, if a doctor concludes that a hysterectomy "is medically necessary to treat gender dysphoria," the patient's employer and group health plan would be required to cover that procedure on the same basis that it would cover a hysterectomy for other conditions (like cancer). *Id.* Also, because the new 1557 Rule prohibits discrimination on the basis of "termination of pregnancy," it pressures employers and group health plans who cover procedures such as a dilation and curettage for a miscarriage to cover the same procedure for an abortion. *See id.* at 31,388.

EEOC. HHS's 1557 Rule announces that where HHS finds it "lacks jurisdiction" over a transgender discrimination claim, it will "transfer the matter to EEOC and allow that agency to address the matter" under Title VII. 81 Fed. Reg. at 31,432; *see id.* at 31,404 (when 1557 Rule does not apply, the same matter can be enforced through Titles VII and Title IX); *id.* at 31,437 (same). "EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity." EEOC, "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers"("EEOC Statement").[2] The EEOC has applied this aggressive interpretation to find that a Catholic hospital violated Title VII because its health plan did not cover phalloplasty (penis construction) for a biologically female employee who wanted to "transition." *See Josef Robinson v. Dignity Health*, No. 3:16-cv-03035 (N.D. Cal. 2016).

Enforcement. The sanctions for failing to comply with the ACTS Mandate are severe. "Covered entities" can lose Medicare, Medicaid, and other federal funding. They can be banned from doing business with the government, and subject to False Claims Act and criminal liability. 81

[2] https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

Fed. Reg. at 31,472; 45 C.F.R. § 92.301; 18 U.S.C. § 1035. HHS and the EEOC can each refer matters to the Department of Justice for enforcement proceedings, and entities may also face private lawsuits for damages, injunctive relief, and attorneys' fees. *Id.* at 31,471; 45 C.F.R. § 92.301.

B. The ACTS Mandate affects Catholic Benefits Association members.

CBA members' exercise of religion is substantially burdened by the ACTS Mandate because it coerces them, under the threat of crushing penalties, to perform, provide, or cover gender transition services and abortions contrary to their Catholic faith. VC ¶¶ 188-218.

CBA members that qualify as "covered entities" are directly subject to HHS's 1557 Rule. They must perform gender transition and abortion services and must support efforts to transition in their counseling and mental health programs. Covered entities must alter their speech and advice to conform with HHS's conclusions about proper care, including agreeing to use a patient's preferred pronouns. Covered entities must also cover gender transition and abortion services in their employee health plans. *Id.* ¶¶ 125-158, 202-205.

CBA members that do not qualify as "covered entities" are also affected by the 1557 Rule. 81 Fed. Reg. at 31,431. Members with group health insurance will be forced to include a gender dysphoria policy in their next plan year, and as noted, at least two CBA members already have been subjected to such policies. VC ¶¶ 141-151. For self-insured members, TPAs have refused to administer plans that reflect members' Catholic beliefs unless members indemnify the TPAs for liability the TPAs may incur as a result of excluding gender transition and/or abortion coverage from the plans. *Id.* ¶¶ 216, 221.

Additionally, due to the coordination between HHS and EEOC, all CBA members are subject to civil enforcement actions and other penalties if they fail to cover gender transition services in their employee health plans. *Id.* ¶¶ 175-187.

C. The ACTS Mandate affects the Catholic Benefits Association itself.

The CBA is a membership organization whose mission is to help its members—Catholic organizations located in North Dakota and elsewhere[3]—exercise their right to practice their faith in their professions and workplaces, including their right to offer health care services and provide employee health benefits consistent with Catholic values. The government's ACTS Mandate makes this aspect of the CBA's religious exercise virtually impossible. *Id.* ¶ 15.

The ACTS Mandate threatens CBA members with crippling penalties for noncompliance, both now and in the future. Thus, Plaintiffs seek a TRO for themselves and for all present and future CBA members to enable them to lawfully offer health care services and sponsor health plans that exclude gender transition and abortion services. In order that their rights be adequately protected, Plaintiffs ask that the Court explicitly prevent the government from interfering with CBA members' relationships with their insurers or TPAs and with these members' attempts to arrange or contract for morally compliant health coverage or related services for their employees and members.

III. ARGUMENT

An application for a TRO, as with a preliminary injunction, is measured against a four-part test,[4] with the "most significant factor" being whether the plaintiffs have shown they are likely to succeed on the merits. *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 945 (8th Cir. 2015), *vacated on grounds unrelated to merits*, 136 S. Ct. 1557 (2016). Here, the CBA and its members are entitled to a TRO because (1) they are likely to succeed on the merits of both their APA and RFRA claims;[5] (2) they will suffer irreparable injury if they do not receive prompt injunctive relief; (3) the present and threatened injury to the CBA and its members outweighs any

[3] CBA members include about 60 Catholic dioceses and archdioceses, hospitals, Catholic Charities, schools, and other Catholic ministries and businesses. *See* VC ¶¶ 40-49 (describing CBA members).

[4] *See Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

[5] Because their APA and RFRA claims are adequate to afford complete relief, Plaintiffs do not now seek a TRO on the other claims outlined in their Verified Complaint.

harm the injury Defendants will suffer; and (4) the TRO is in the public interest.

A. Plaintiffs are likely to succeed on their APA claims.

Congress, through the Administrative Procedure Act ("APA"), has instructed federal courts to "hold unlawful and set aside" executive agency actions that are "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (2)(C). APA claims proceed under "the two-step framework established by *Chevron*." *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 940 (8th Cir. 2014). First, courts use the "traditional tools of statutory construction" to interpret the statute. *Id.* If "the intent of Congress is clear as to the precise question at issue . . . that is the end of the matter." *Id.* at 940. Only if "the statute is silent or ambiguous" will a court consider whether the agency's interpretation is "reasonable . . . in light of the Legislature's design." *Id.* at 940-41 (quotation omitted).

Here, HHS and the EEOC have violated the APA by asserting "interpretations" of Title IX and Title VII that conflict with those statutes' unambiguous text. First, HHS and EEOC violated the APA when they asserted that Title IX and Title VII bar discrimination on the basis of "gender identity." Second, HHS violated the APA when it refused to incorporate into its 1557 Rule the exemptions for religion and abortion Congress inserted into Title IX.

1. Defendants' attempts to redefine Title IX and Title VII to bar "gender identity" are contrary to law, arbitrary and capricious, and in excess of statutory authority.

The ACTS Mandate stands or falls on HHS's claim that "on the basis of sex" in Title IX means "gender identity" and "an individual's internal sense of gender . . . which may be different from an individual's sex assigned at birth." 81 Fed. Reg. at 31,467. Because HHS has declared its intention to coordinate enforcement efforts with the EEOC, the CBA asks the Court to also review the EEOC's declaration that Title VII bars "gender identity" discrimination. This Court can address both agencies' interpretations simultaneously, as the Eighth Circuit has held that these two laws'

prohibition of sex discrimination must be "treated interchangeably." *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011).

Controlling Eighth Circuit precedent forecloses Defendants' attempts to redefine Title IX and Title VII. In *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982), a male-to-female transsexual asked the court to "expand the coverage of [Title VII] to protect individuals such as herself." *Id.* at 749. The Court examined the original law's text, purpose, and history, and concluded that "'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation." *Id.* at 750. The law uses "biological fact as the basis for determining sex," not "self-identity." *Id.* at 750 & n.2.

But the Eighth Circuit in *Sommers* did not stop there. The court reinforced its reading of the law's original meaning by looking to subsequent congressional action. It noted that from 1975 to 1977, Congress rejected ten separate attempts to expand "sex" beyond "its traditional definition." *Id.* The Eighth Circuit followed the lead of the Ninth Circuit, which declared that "this court will not expand Title VII's application in the absence of Congressional mandate." *Holloway v. Arthur Anderson Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

If congressional intent was clear when the Eight Circuit decided *Sommers* in 1984, it is unmistakable now. Since 1994, Congress has considered and rejected twenty different versions of the Employment Non-Discrimination Act ("ENDA"), which would expand Title VII to cover sexual orientation and, since 2007, gender identity. VC ¶¶ 103-104. The steady refusal of Congress to pass ENDA shows there is an "absence of clear congressional intent" to redefine "sex" in Title VII to mean sexual orientation and gender identity." *Sommers*, 667 F.2d at 750.[6]

Under controlling Eighth Circuit precedent, it is certain that Congress does not intend Title

[6] The executive branch also admits this is the case. President Obama said that passing ENDA was necessary to "end this kind of discrimination in the workplace," while failing to pass ENDA would "enable it." https://www.whitehouse.gov/the-press-office/2013/11/07/statement-president-senate-passage-employment-non-discrimination-act-201.

VII or Title IX to prohibit discrimination on the basis of gender identity. Congress's intent was clear when it passed these laws in 1964 and 1972, and its ***thirty refusals*** to expand Title VII beyond "anatomical classification" conclusively show that Title IX and Title VII do not bar discrimination on the basis of "gender identity."

2. HHS's refusal to incorporate Title IX's exemptions for religion and abortion is contrary to law, arbitrary and capricious, and in excess of its authority.

HHS also acted illegally when it refused to incorporate Title IX's exemptions for religion and abortion. A federal agency "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001). HHS's power under Section 1557 "is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). HHS refused to honor these limits. Its 1557 Rule is therefore infirm and must be stricken under the APA.

Section 1557 of the ACA is an unusual provision. Rather than forbid discrimination on certain bases directly, Section 1557 expressly incorporates other federal nondiscrimination statutes, prohibiting discrimination "on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)," which prohibits race, color, and national origin discrimination; "title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.)," which prohibits sex discrimination; "the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)," which prohibits age discrimination; "or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)," which prohibits disability discrimination. 42 U.S.C. § 18116(a). Congress structured Section 1557 this way not only to ground it in existing federal civil rights law (including the accumulated wisdom and fine-tuning of prior judicial interpretations), but also to incorporate the important exceptions and qualifications inherent in the referenced statutes.

HHS faithfully adhered to Congress's policy choice as to *three* of the four statutes. In the 1557 Rule, HHS recognized and affirmed that "[t]he exceptions applicable to Title VI ***apply*** to

discrimination on the basis of race, color, or national origin under this part. The exceptions applicable to Section 504 ***apply*** to discrimination on the basis of disability under this part. The exceptions applicable to the Age Act ***apply*** to discrimination on the basis of age under this part." 81 Fed. Reg. at 31,378 (emphases added). Note what is missing in this list: the exceptions applicable to sex discrimination under Title IX.

In Title IX, Congress created two important carve-outs from the general prohibition on sex discrimination. First, Title IX does not prohibit a religious organization from acting "consistent with [its] religious tenets." 20 U.S.C. § 1681(a)(3). Pursuant to this exclusion, the U.S. Department of Education (which administers Title IX) has established a formal mechanism by which religious organizations may claim their exemption by writing a letter to the Department's Assistant Secretary for Civil Rights. 34 C.F.R. § 106.12. Second, Title IX does not prohibit any person or entity from refusing "to provide or pay for any benefit or service . . . related to an abortion." 20 U.S.C. § 1688.

Both of these express statutory limits are rooted in Congress's (and the American people's) longstanding respect for rights of conscience. But HHS blew right past them, categorically refusing to incorporate Title IX's religious exemption in the 1557 Rule, even though it had incorporated the exceptions of the other referenced statutes. Responding to commenters' concerns that HHS was treating religion differently, HHS noted ominously that it would subject religious organizations to enforcement and consider their conscientious objections "on a case-by-case basis." 81 Fed. Reg. at 31,380. HHS also refused to incorporate Title IX's exemption for abortion.[7]

HHS's refusal to honor the limits Congress incorporated into Section 1557 though Title IX

[7] HHS rejected comments that urged it to "state explicitly that neither Section 1557 nor the regulation" requires "the provision or coverage of, or referral for, pregnancy termination." *Id.* at 31,388. HHS again referenced other "provisions regarding abortion," but coyly refused to say how they might apply. *Id.* Notably, weeks after publishing the 1557 Rule, HHS ruled that the federal Weldon Amendment did not prohibit California from imposing an abortion mandate on insurance providers as a matter of state law. VC ¶¶ 111, 138. HHS's reference to 42 U.S.C. § 18023(b)(1)(A) is also misleading, for while this provision forbids "requir[ing] a qualified health plan to provide coverage of abortion *as an essential health benefit,*" it does not block HHS from imposing an abortion mandate through Section 1557 directly.

fundamentally confuses the constitutional division of labor between Congress and the executive branch. The question for HHS was not whether it *should* "import Title IX's" exemptions "into Section 1557," 81 Fed. Reg. at 31,380, but whether Congress *already had* done so. As shown above, the answer to that question is a plain yes. Congress said that the prohibitions under Section 1557 were to match those of each of the four statutes referenced therein. HHS's contrary interpretation in the 1557 Rule is arbitrary, capricious, contrary to law, and a blatant violation of the APA.

B. Plaintiffs are likely to succeed on their RFRA claim.

Plaintiffs are also likely to succeed on the merits of their Religious Freedom Restoration Act claim. Under RFRA, the government may not "substantially burden a person's exercise of religion" unless it shows that "application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

A plaintiff makes a prima facie RFRA claim by proving a substantial burden on its exercise of religion. *Sharpe Holdings,* 801 F.3d at 937 (citing *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (2006)). The government then must prove "it has a 'compelling interest' in applying 'the challenged law 'to . . . the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Id.* (quoting *O Centro*, 546 U.S. at 430-31).

1. The Mandate substantially burdens Plaintiffs' sincere exercise of religion.

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) "[A] religious exercise need not be mandatory for it to be protected under RFRA." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). Under RFRA, the government substantially burdens the exercise of religion when it coerces CBA members into violating their religious beliefs by

conditioning receipt of an important benefit upon conduct proscribed by a religious faith or subjects them to penalties for adhering to their beliefs. *Sharpe Holdings*, 801 F.3d at 927.

a. "Exercise of Religion". Plaintiffs exercise religion when they choose to obey their conscience and refrain from performing, encouraging, funding, covering in their health plans, or otherwise participating in gender transition or abortion services. Catholic teaching on the nature of the human person and on abortion is familiar and well-documented, and all CBA members, including Plaintiffs, adhere to those teachings. *See* VC ¶¶ 60-78.[8] Their conscientious decision to refuse to participate in gender transition and abortion, and their efforts to exclude coverage of ACTS services from their health plans, unquestionably qualify as the exercise of religion under RFRA. *See Sharpe Holdings*, 801 F.3d at 927 (refusal to cooperate with HHS's contraception mandate qualifies as exercise of religion).

b. "Substantial Burden". It is likewise unquestionable that the ACTS Mandate substantially burdens the religious exercise of the CBA and its members. "When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, '[t]here has never been a question' that the government 'imposes a substantial burden on the exercise of religion.'" *Sharpe Holdings*, 801 F.3d at 938 (citation omitted). The ACTS Mandate unmistakably forces all CBA members to choose between their faith and substantial financial penalties.

Covered entities. CBA members who qualify as covered entities are affected most directly by the 1557 Rule. By virtue of their religious convictions, Catholic hospital CBA members cannot participate in gender transitions or abortion procedures. VC ¶ 81. Catholic Charities and other CBA members offering counseling services cannot support their patients' efforts to transition away from their biological sex. *Id.* Nor can they provide employee health coverage for gender transitions and

[8] The CBA Ethics Committee, comprised exclusively of Catholic archbishops, adopted a resolution declaring that compliance with the ACTS Mandate is contrary to Catholic teaching. *See* VC ¶¶ 79-81; *see also id.* ¶ 37 (naming Catholic archbishops on the CBA's Board of Directors).

abortions. *Id.* Adhering to their religious convictions exposes CBA-member covered entities to massive financial penalties, agency and DOJ enforcement actions, private lawsuits, and more. *Id.* ¶¶ 175-187.

Insured CBA members. CBA members who are not covered entities are still affected by the 1557 Rule indirectly. As a direct result of the Rule, all CBA members that sponsor insured health plans for employees will have gender dysphoria riders hoisted onto their plans. For at least two CBA members in particular, this has already occurred. VC ¶¶ 141-151. And even if they were able to find an insurance provider willing to exclude coverage for gender transition procedures, the EEOC still threatens members with enforcement actions and litigation under Title VII for maintaining a health plan that reflects their Catholic beliefs. *Id.* ¶¶ 175-187.

Self-insured CBA members. Those CBA members that are able to self-insure are also burdened by the 1557 Rule. In order to self-insure, an employer must hire a TPA to handle paperwork, communicate with members, and process claims, among other tasks. The 1557 Rule declares that TPA services are "undeniably a health program or activity," and thus may be subject to the 1557 Rule and its nondiscrimination requirements. 81 Fed. Reg. at 31,432. HHS recognizes that this "indirectly subject[s] self-insured group health plans to Section 1557." *Id.* at 31,431. As a result of the 1557 Rule, TPAs have demanded indemnification from CBA members before administering a plan that excludes gender transition and/or abortion coverage. VC ¶¶ 216, 221. The 1557 Rule thus is forcing CBA members to take on a contingent liability in order to secure a morally compliant health plan. This in itself is a substantial burden on their religious exercise because it "negatively affect[s] [members'] ability to earn income, borrow, and plan for their financial future." *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006). Furthermore, like all other CBA members, self-insured members are subject to EEOC enforcement actions and litigation under Title VII for maintaining a health plan that excludes gender transition services.

2. The ACTS Mandate cannot satisfy strict scrutiny.

Because the 1557 Rule imposes a substantial burden on Plaintiffs' religious exercise, it is invalid unless Defendants demonstrate that it passes strict scrutiny. Strict scrutiny under RFRA is "exceptionally demanding." *Sharpe Holdings*, 801 F.3d at 943 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014)). Under that test, the government must demonstrate that the 1557 Rule furthers an interest "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And it "bear[s] the burden of demonstrating that the regulation is the least restrictive means of achieving a compelling interest." *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) (citing 42 U.S.C. § 2000bb-1(b)). Defendants cannot carry either end of their burden.

a. The ACTS Mandate furthers no compelling interest.

Under strict scrutiny, "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). The government's asserted interests fail for several reasons.

Broadly formulated interests are inadequate. The government claims it has "a compelling interest in ensuring that individuals have nondiscriminatory access to health care and health coverage." 81 Fed. Reg. at 31380. But under RFRA, such "'[b]roadly formulated,' or 'sweeping' governmental interests are inadequate." *Sharpe Holdings*, 801 F.3d at 943 (citations omitted). Rather, RFRA requires courts "to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the [ACTS Mandate] in [this case]." *Hobby Lobby*, 134 S. Ct. at 2779.

CBA members want to provide transgender persons with excellent health care. Not only is the government's interest too broadly formulated, it also is not at issue here. Although HHS expresses concern with transgender individuals "being refused medical treatment based on bias against them," 81 Fed. Reg. at 31,460, it has acknowledged that "[n]one of the commenters

supporting a religious exemption asserted that there would be a religious basis for generally refusing to treat LGBT individuals for a medical condition, for example, refusing to treat a broken bone or cancer." *Id.* at 31,379. As the USCCB's Chairman recently stated, "[t]he Catholic Church consistently affirms the inherent dignity of each and every human person and advocates for the wellbeing of all people, particularly the most vulnerable." VC ¶ 63. The Catholic Church in general, and CBA member health care providers in particular, are committed to treating people with gender dysphoria with "compassion, sensitivity, and respect." *Id.*

Congress does not treat the ACTS Mandate as a compelling interest. Because the compelling interest test is so demanding, even "important interests" usually fail. *Hobby Lobby*, 134 S. Ct. at 2779 (acknowledging public health and gender equality as "important interests"). The Supreme Court has cautioned that "many laws will not meet the test." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

RFRA requires a compelling "governmental" interest. 42 U.S.C. § 2000bb-1(b). It is important to note that the "government" in this case is in truth only a subsection of the executive branch. The ACTS Mandate is entirely a species of administrative activity. Defendants cannot prove that Congress intended to "remove obstacles to healthcare for transgender individuals," 81 Fed. Reg. at 31,460, especially as Congress has repeatedly refused to expand Title VII and Title IX to ban discrimination based on "gender identity."

This is even more clear as to abortion. Congress has made clear that it does not want Title VII, Title IX, the ACA, or the receipt of federal funds, *see* VC ¶¶ 98, 89, 108-112, to be used to coerce anyone into paying for or performing an abortion.

And if Congress has not agreed to take these more modest steps, it is all the more clear that Congress does not support the specific initiative at issue here: Defendants' efforts to coerce Catholic institutions to perform and cover gender transition and abortion procedures, despite their religious

objections. The ACTS Mandate is therefore "incompatible with the expressed or implied will of Congress," where the executive branch's "power is at its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637-38 (1952). Even if Defendants' efforts to evade Congressional disapproval are not illegal under the APA, they cannot possibly amount to a compelling government interest under the strict scrutiny test.

HHS does not treat the ACTS Mandate as a compelling interest. Like Congress, HHS has also shown that it does not believe that the ACTS Mandate advances a compelling interest. As many courts have recognized, "[a] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014). In this case, HHS cannot have a compelling interest in forcing Catholic institutions to provide and pay for gender transition services when it allows state Medicaid and Medicare programs to decline coverage for the same treatments.

As HHS's medical experts wrote earlier this year: "Based on a thorough review of the clinical evidence available at this time, there is *not enough evidence to determine whether gender reassignment surgery improves health outcomes* for Medicare beneficiaries with gender dysphoria."[9] Instead, "[t]here were conflicting (inconsistent) study results—of the best designed studies, some reported benefits while *others reported harms*." *Id.* (emphasis added). For that reason, Medicare and Medicaid do not require coverage for gender reassignment surgery, but allow states and local administrators to make coverage determinations on a case-by-case basis.[10] Many states forbid coverage entirely—with the full consent of HHS. This creates a bizarre situation—doctors are required under the 1557 Rule to perform and provide coverage for medical transition procedures because they accept Medicare and

[9] Ctrs. for Medicare & Medicaid Servs., *Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery* (June 2, 2016) https://www.cms.gov/medicare-coverage-database/de-tails/nca-proposed-decision-memo.aspx?NCAId=282 (emphasis added).

[10] Ctrs. for Medicare & Medicaid Servs., *Decision Memo for Gender Dysphoria and Gender Reassignment Surgery* (Aug. 30, 2016), https://www.cms.gov/medicare-coverage-database/details/nca-de-cision-memo.aspx?NCAId=282.

Medicaid, but Medicare and Medicaid often do not cover those procedures themselves because they are potentially harmful.

With regard to abortions, Congress has long provided exemptions for medical professionals who cannot participate in abortion. The 1557 Rule itself notes that "the proposed rule would not displace the protections afforded by provider conscience laws," or "provisions in the ACA related to abortion services." 81 Fed. Reg. at 31,378, 31,379. Courts have long held that the right to an abortion does not include the right to an abortion at another's expense. *See Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which restricts government funding for abortions). Congress ensured that insurers would not be required to cover abortions under the ACA. *See* 42 U.S.C. § 18023. Therefore, HHS has no compelling interest in forcing CBA members to perform or provide coverage for abortions.

b. Defendants have numerous less restrictive means of furthering their interests.

Even assuming the 1557 Rule furthered a compelling governmental interest—and it does not—the 1557 Rule also fails strict scrutiny because there are numerous less restrictive alternatives. Under RFRA, the government must "come forward with evidence that [its 1557 Rule is] the only feasible means to [accomplish its goal] and that no alternative means would suffice to achieve its compelling interest." *Sharpe Holdings*, 801 F.3d at 943. But numerous alternatives are available here.

If the government wishes to increase access to gender transition services and insurance coverage for those services, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the [procedures] at issue to any [individuals] who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Hobby Lobby*, 134 S. Ct. at 2780. For example, "the government could provide subsidies, reimbursements, tax credits, or tax deductions to employees" or "the government could pay for the distribution of [services] at community health centers, public clinics, and hospitals with income-

based support." *Sharpe Holdings*, 801 F.3d at 945. Here, as in *Hobby Lobby* and *Sharpe Holdings*, "the government has not shown that these alternatives are infeasible." *Id.*

The government could also set up an alternative system for provision of benefits. Indeed, the government has already essentially done so by requiring insurance plans on its own exchanges to offer gender transition coverage. 81 Fed. Reg. 31,428. The government need not coerce religious charities when it has created its own marketplaces to offer this type of care to those who wish to obtain it. The government also offers credits to those who need help affording health care on the exchanges; those same credits could be made available to individuals who do not have this coverage through their employers. The government could also set up an alternative coverage mechanism, as it has done with the preventive services mandate. *See Hobby Lobby*, 134 S. Ct. at 2781-82. As in *Sharpe Holdings*, "we cannot say on this limited record that the government has eliminated the use of [these alternatives] as a viable option." 801 F.3d at 945.

The government also has many alternatives available besides coercing the participation of medical professionals. Many doctors and hospitals provide medical transition services; in fact, many hospitals have established centers of excellence for transgender procedures. *See, e.g.*, Trans Health, *Trans Health Clinics*, http://www.trans-health.com/clinics/ (last updated Aug. 4, 2016) (listing "health clinics that specialize in trans health care"). If the government wants to increase access to gender transition services—and get better care for people who want them—the government could partner with willing professionals to increase access. It could train health care navigators to assist individuals in finding such services, just as it does with assisting individuals to find plans on the exchanges. Such options would not only increase access to health care for transgender individuals, they would focus upon doctors with special expertise in transgender issues, rather than conscripting unwilling doctors who may not have the necessary expertise.

For all these reasons, Plaintiffs are likely to prevail on their RFRA claim.

C. Other preliminary injunction factors established

Once the Court concludes that the Defendants' ACTS Mandate is likely illegal, it should easily find that the other preliminary injunction factors are satisfied. It is well-established that "a likely RFRA violation satisfies the irreparable harm factor." *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944, 958 (E.D. Mo. 2014) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013)). The same result follows if the Court concludes that Plaintiffs are likely to succeed on their APA claims. Absent an injunction, they must either violate their faith and suffer the substantial costs of complying with an invalid rule, *see* 81 Fed. Reg. 31455-57 (estimating costs), or violate the rule and face large financial penalties, 45 C.F.R. § 92.301. Those harms cannot be compensated by damages; they can only be prevented. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (N.D. 2015) (Erickson, J.) (unrecoverable costs of having to comply with likely invalid rule established irreparable injury).

The balance of harms also clearly favors Plaintiffs, given the Mandate's enormous penalties, and "delaying the Rule will cause [Defendants] no appreciable harm." *Id.* Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Smith v. South Dakota*, 781 F. Supp. 2d 879, 888 (D.S.D. 2011) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *see also Hobby Lobby*, 723 F.3d at 1147 (same).

IV. CONCLUSION

For these reasons, Plaintiffs respectfully request the Court grant Plaintiffs' Emergency Motion for Temporary Restraining Order.

Respectfully submitted,

L. Martin Nussbaum (Colo. Bar #15370)
Eric N. Kniffin (Colo. Bar #48016)
Ian S. Speir (Colo. Bar #45777)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
90 S. Cascade Ave., Suite 1100
Colorado Springs, CO 80920
o:719-386-3000; f:719-386-3070
mnussbaum@lrrc.com
ekniffin@lrrc.com
ispeir@lrrc.com
Motions for Admission Pending

ATTORNEYS FOR PLAINTIFFS

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