

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

CATHOLIC BENEFITS ASSOCIATION, )  
DIOCESE OF FARGO, and CATHOLIC )  
CHARITIES NORTH AMERICA )

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 No. \_\_\_\_\_

**PLAINTIFFS' EMERGENCY MOTION  
FOR TEMPORARY RESTRAINING ORDER**

PLEASE TAKE NOTICE that at the earliest possible time for the Court to hear this motion, Plaintiffs move the Court for a Temporary Restraining Order pursuant to Fed. R. Civ. P. 65(b) in order to prevent immediate irreparable injury to Catholic healthcare providers and Catholic employers that are members of Plaintiff Catholic Benefits Association (“CBA”). Many of the CBA’s members will become subject to penalties, liability, and potential loss of federal funds on January 1, 2017, when their health plans renew.

## BACKGROUND

Plaintiff Catholic Benefits Association is a nonprofit membership organization whose religious mission includes helping Catholic healthcare providers and employers exercise their right to practice their faith in their professions and workplaces, including the right to practice medicine and secure healthcare benefits for their employees consistent with their medical judgment and religious beliefs. *See* Pls.’ Opening Br. in Support of Emerg. Mot. for Temp. Restraining Order (“O.B.”) at 7. But rules promulgated by Defendants purport to interpret the term “sex” in Section 1557 of the Affordable Care Act and Title VII to include both “gender identity” and “termination of pregnancy.” Defendants try to disguise these rules as mere nondiscrimination provisions, but the rules establish a full-throated mandate that coerces Plaintiffs and other CBA members into performing, providing, paying for, covering, and facilitating access to health services for gender transition and abortion—services that violate CBA members’ considered medical judgment and sincerely held religious beliefs. Plaintiffs refer to these rules as the Abortion and Comprehensive Transgender Services (“ACTS”) Mandate. *See* Verified Compl. (“VC”) ¶ 12.

Plaintiffs have filed this lawsuit and this motion seeking an emergency temporary restraining order (“TRO”) on behalf of all CBA members, including those who will become subject to penalties, liability, and potential loss of federal funds when their health plans renew on January 1, 2017. The CBA seeks a temporary restraining order for itself and its present and future members.

## GROUNDS FOR PLAINTIFFS’ MOTION

In support of their Emergency Motion for Temporary Restraining Order, Plaintiffs state the following:

1. As explained in Plaintiffs’ Opening Brief in Support of Emergency Motion for Temporary Restraining Order, the ACTS Mandate violates the Administrative Procedure Act (“APA”) and Plaintiffs’ rights under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to

2000bb-4 (“RFRA”), and will cause Plaintiffs and other present and future CBA members irreparable harm if not enjoined. The balance of harms favors Plaintiffs, and a temporary restraining order is in the public interest. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc) (outlining preliminary injunction and temporary restraining order factors); *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927, 937 (8th Cir. 2015) (upholding preliminary injunction in action against the government’s abortifacient mandate), *vacated on grounds unrelated to merits*, 136 S. Ct. 1557 (2016).

2. Plaintiff Catholic Benefits Association is a Catholic organization whose religious mission is to help Catholic organizations carry out their callings and operate their ministries and businesses in a way that complies with their Catholic convictions. O.B. at 7.

3. To be a member of the CBA, an organization, at a minimum, must be a “Catholic employer” as defined in the CBA’s bylaws, and must commit “to providing no benefits inconsistent with Catholic values.” VC, Ex. A, art. VI. CBA members sponsor or participate in health plans providing medical benefits to their employees, and some CBA members operated federally funded health programs or activities affected by the ACTS Mandate. O.B. at 6.

4. Plaintiff Diocese of Fargo is a North Dakota nonprofit corporation and a CBA member.

5. Plaintiff Catholic Charities North Dakota is a North Dakota nonprofit corporation and a CBA member.

6. Plaintiffs’ case for an emergency TRO is strong. The statutory history underlying Section 1557 of the Affordable Care Act and Title VII makes clear that Congress never intended “sex” refer to gender identity or termination of pregnancy, nor did Congress intend for these statutes to become broad mandates on healthcare providers and health plans in contravention of both medical science and rights of conscience. *See* O.B. at 9-12. In any event, controlling Eighth

Circuit precedent forecloses Defendants' novel interpretation of these statutes. *Id.* at 9. Finally, the government cannot prove, as it must, that forcing the CBA and its members to comply with the ACTS Mandate satisfies the "exceptionally demanding" strict scrutiny standards of RFRA. See *id.* at 12-19 (quoting *Sharpe Holdings*, 801 F.3d at 943) (internal quotation marks omitted).

7. Insofar as the rule under Section 1557 mandates performance of health services for gender transition and abortion, the rule has already taken effect against CBA members who are deemed to be "covered entities." Insofar as the rule requires group health plans and insurers to cover such services, the rule will take effect against CBA members on their first plan anniversary date in 2017, which for some CBA members is **January 1, 2017**. That portion of the ACTS Mandate that applies through Title VII has already taken effect against CBA members and their health plans.

8. Because the ACTS Mandate has already taken effect or, for some CBA members, will take effect within the next few days, Plaintiffs have no choice but to seek this emergency relief from the Court.

9. Plaintiffs' counsel will provide notice of this TRO request by sending a copy of the complaint and motion and related brief to the Department of Justice via email to Elizabeth L. Kade at [Elizabeth.L.Kade@usdoj.gov](mailto:Elizabeth.L.Kade@usdoj.gov) and Julie Saltman at [Julie.Saltman@usdoj.gov](mailto:Julie.Saltman@usdoj.gov). The phone number for the Department of Justice is (202) 514-3367.

10. Plaintiff CBA seeks a temporary restraining order on behalf of itself and its present and future members.

11. Plaintiffs Diocese of Fargo and Catholic Charities North Dakota seek a temporary restraining order on behalf of themselves and all similarly situated CBA members.

### RELIEF REQUESTED

In light of the above, Plaintiffs request that the Court enter a temporary restraining order that:

- a. **Declares** that neither the Affordable Care Act nor Title VII, nor any regulations or other executive actions promulgated thereunder, shall infringe on the CBA's and its members' right and power to request, design, contract for, adopt, and implement health plans and insurance policies that exclude coverage of health services for gender transition and abortion consistent with their religious convictions.
- b. **Prohibits** Defendants from all of the following:
  - i. Enforcing the ACTS Mandate against Plaintiffs and the CBA's present and future members;
  - ii. Charging or assessing fines, taxes, penalties, or other burdens against the CBA and its present and future members for failure to provide, perform, pay for, cover, or facilitate access to health services for gender transition and abortion;
  - iii. Removing or threatening to remove federal funding, reimbursements, payments, or benefits of any kind from the CBA's present and future members for failure to provide, perform, pay for, cover, or facilitate access to health services for gender transition and abortion;
  - iv. Removing or threatening to remove access to federal contracts, grants, and programs from the CBA's present and future members for failure to provide, perform, pay for, cover, or facilitate access to health services for gender transition and abortion;

- v. Applying or enforcing the ACTS Mandate against the insurers and TPAs of the CBA's present and future members; and
- vi. Interfering with CBA members' relationships with their insurers or TPAs and with members' attempts to contract for morally compliant health coverage for their employees.

For the reasons set forth herein and in Plaintiffs' Opening Brief in Support of Motion for Temporary Restraining Order filed contemporaneously herewith, Plaintiffs respectfully request that the Court enter a temporary restraining order as described above.

DATED: December 28, 2016.

Respectfully submitted,



L. Martin Nussbaum (Colo. Bar #15370)  
Eric N. Kniffin (Colo. Bar #48016)  
Ian 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**

sdg