UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; SISTERS OF ST. FRANCIS OF THE IMMACULATE HEART OF MARY; ST. ANNE'S GUEST HOME; and ST. GERARD'S COMMUNITY OF CARE,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 3:23-cv-203-PDW-ARS

CBA PLAINTIFFS' VERIFIED AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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Plaintiffs, the Catholic Benefits Association, on behalf of its members, The Sisters of St. Francis of the Immaculate Heart of Mary, St. Anne's Guest Home, and St. Gerard's Community of Care (collectively, either "Plaintiffs" or "CBA Plaintiffs"), through their attorneys, First & Fourteenth PLLC, and pursuant to the Court's order, Doc. 43, allege:

I. INTRODUCTION AND SUMMARY OF THE ACTION

1. Since its promulgation of its May 2016 rule ("2016 Rule"), the U.S. Department of Health and Human Services ("HHS"), in coordination with the Equal Employment Opportunity Commission ("EEOC"), has interpreted the prohibitions on "sex" discrimination in Section 1557 of the Affordable Care Act ("ACA") and Title VII of the Civil Rights Act to require Catholic healthcare providers and employers, as well as their respective insurers, third-party administrators ("TPAs"), pharmacy benefit managers ("PBMs"), and other service providers to cover gender-transition services or "gender affirming care," in violation of CBA members' Catholic faith. By defining "sex" as including "termination of pregnancy," HHS also has imposed an abortion-

coverage-and-performance mandate, requiring healthcare providers to actually perform all of these services themselves in total disregard of their Catholic values. HHS recently doubled down on its mandate, issuing a 2024 Rule interpreting Section 1557 (the "2024 Rule") that restates and amplifies the 2016 Rule. Plaintiffs refer to these continuous and coordinated interpretations of Section 1557 and Title VII challenged by this suit as the "Mandate."

2. In 2019, a federal district court found that HHS's 2016 Rule violated the Religious Freedom Restoration Act and the Administrative Procedure Act, vacated portions of the rule, and ordered HHS to reconsider. In June 2020, HHS published a new final rule, the "2020 Rule," that would have repealed much of the 2016 Rule, including its (i) rejection of Title IX's abortion-neutrality provision and (ii) its categorical exemption for religious organizations. But the new rule never became operative. Two district courts enjoined it and ordered that the 2016 Rule remain in effect.

3. In 2021, this Court permanently enjoined the Government's enforcement of the Mandate as it applied to the Catholic Benefits Association ("CBA"), its unnamed members, and three of its members who were named plaintiffs, the Roman Catholic Diocese of Fargo North Dakota, Catholic Charities of North Dakota, and the Catholic Medical Association because the Mandate violated of the Religious Freedom Restoration Act. *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1153 (D.N.D. 2021). This Court found that the CBA and its members faced a credible threat of enforcement of the Mandate. *Id.* at 1143, 1147-49. This Court also concluded that the CBA had associational standing to sue on behalf of its members and granted them a permanent injunction. *Id.* at 1141. The Court's injunction extended not only to the plaintiffs and CBA's members, but also to "their respective health plans and any insurers or TPAs in connection with such

health plans." *Id.* at 1153-54. The Eighth Circuit affirmed this Court's determination that the CBA and its member-plaintiffs faced a credible threat of enforcement of the Mandate. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 607, 609 (8th Cir. 2022). The Eighth Circuit reversed on the narrow ground that the CBA lacked associational standing because it had not identified a member other than a named plaintiff who had suffered the requisite harm under Title VII and Section 1557. *Id.* at 602. On remand, this Court dismissed CBA's claims to the extent they sought associational relief and ruled that the CBA could refile suit to properly establish associational standing: "Importantly, the dismissal is without prejudice, and nothing prevents the CBA from filing a new action, where associational standing is properly established." *Religious Sisters of Mercy v. Becerra*, 16-cv-00386, slip op. at 3 (D.N.D. Sept. 15, 2023). This Court accordingly entered an amended judgment in *Religious Sisters of Mercy v. Becerra*, 16-cv-00386, on October 11, 2023.

4. Plaintiffs, the CBA, the Sisters of St. Francis, St. Anne's Guest Home, and St. Gerard's Community of Care refiled this follow-on action to *Religious Sisters of Mercy* on October 13, 2023, which "properly establishe[s]" associational standing, and seeks a declaration for the named plaintiffs and for the CBA's unnamed members that the Mandate cannot lawfully be applied to them, as well as an injunction barring enforcement of the Mandate against them, their members, and any third parties contracting or acting in concert with them for the delivery of health coverage and services, including the unnamed members' and Plaintiffs' respective insurers, TPAs, and other service providers.

5. Almost eight years to the day after HHS issued the 2016 Rule, HHS, on May 6, 2024, HHS issued the 2024 Rule. The 2024 Rule is identical to the 2016 Rule in all material respects for purposes of this challenge: it expands Section 1557's prohibition on sex discrimination

in healthcare to require Catholic healthcare organizations and employers to cover and provide "gender-affirming care," sterilization, abortion, and infertility treatments such as IVF, surrogacy, and gamete donation contrary to their faith and medical judgment; it refuses to incorporate a categorical religious exemption as required by the rulings of this Court in *Religious Sisters of Mercy* and *Christian Employer's Alliance*, the Eighth Circuit in *Religious Sisters of Mercy*, and the North District of Texas and the Fifth Circuit in *Franciscan Alliance*; it strains the definition of "covered entity" beyond any faithful reading of Section 1557; and it targets the Ethical and Religious Directives ("ERD") and Doctrinal Note on care for those with gender dysphoria guiding Catholic healthcare organizations by forbidding such organizations from adopting policies consistent with that guidance.

6. The 2024 Rule, like the 2016 Rule, applies directly to a "covered entity," *i.e.*, an entity that operates a federally funded health program or activity. This encompasses virtually all healthcare providers and health insurers in the United States. And because the Mandate affects nearly every insurer including those that contract with CBA members, it also affects Catholic employers that are not "covered entities." As a result of the Mandate, some members of the CBA have received notices from their insurers that their health plans had begun covering gender-transition services, including "[m]ale to female surgeries," "female to male surgeries," and "cross-sex hormone therapy." And at least one CBA member has been subject to an enforcement action by EEOC pursuant to the Mandate during the *Religious Sisters of Mercy* case.

7. Catholic employers cannot avoid the Mandate by adopting a self-insured health plan and contracting with a TPA to administer benefits because the 2024 Rule, like the 2016 Rule, subjects TPAs to its requirements and because many TPAs providing services are themselves

health insurers or affiliates of health insurers. And the 2024 Rule, like the 2016 Rule, says that HHS may refer any violations of the Mandate over which HHS lacks jurisdiction to EEOC. As a result of the 2016 Rule, Catholic employers that excluded gender-transition services from their self-insured health plans have been required to indemnify their TPAs, or otherwise accept their TPAs' liability, for violating the Mandate.

8. HHS could have included a *per se* religious exemption in its new 2024 Rule. There was ample reason to do so. Section 1557 prohibits sex discrimination by incorporating Title IX, and Title IX expressly provides that it "shall not apply" to religious organizations, 20 U.S.C. § 1681(a)(3). Numerous other federal laws, including the ACA itself, the Religious Freedom Restoration Act, and the First Amendment, likewise protect rights of conscience and religious exercise. And this Court, the Eighth Circuit, the Northern District of Texas, and the Fifth Circuit have all ruled that a religious exemption is required.

9. Failure to comply with the Mandate exposes Catholic entities to severe penalties. Covered entities can be fined, barred from millions of dollars of Medicaid and Medicare funding, subjected to treble damages under the False Claims Act, and incur civil and criminal liability. Responsible persons may face prison time. Because the EEOC similarly interprets Title VII to require employer health plans to cover gender-transition services, employers ("EEOC Statement")—even for employers that are not covered entities under the 2016 Rule—may face civil lawsuits and agency enforcement actions that expose them to compensatory damages, punitive damages, and attorneys' fees.

10. The Court ordered CBA to amend its Complaint to address the effect of the 2024 Rule on the CBA's claims. Doc. 43. In this amended complaint, CBA seeks declaratory relief on

behalf of the named plaintiffs and CBA's members that the Mandate, including the 2024 Rule, is contrary to law. CBA seeks injunctive relief on behalf of the named plaintiffs and CBA's members prohibiting any interpretation of Section 1557 or Title VII to require CBA members to cover or provide gender-affirming care, abortion, and immoral infertility treatments.

II. JURISDICTION AND VENUE

11. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361 because this action arises under the Constitution and laws of the United States. The Court has jurisdiction to render declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-1.

12. Venue lies in this district under 28 U.S.C. § 1391(e)(1). Plaintiffs, the Sisters of St. Francis, St. Anne's, and St. Gerard's reside in this district and this division because their principal places of business are either in Hankinson or Grand Forks, North Dakota.

III. PARTIES

A. Plaintiffs

1. The Sisters of St. Francis

13. The Sisters of St. Francis of the Immaculate Heart of Mary dba Franciscan Sisters of Dillingen ("Sisters of St. Francis"), located in Hankinson, North Dakota, is a congregation of religious women of the Third Order Regular of St. Francis. Its ecclesiastical lineage begins generally with St. Francis of Assisi and institutionally with the Congregation of Franciscan Sisters in Dillingen founded in Bavaria in 1241.

14. The Sisters of St. Francis began in the United States in 1913 when twenty-four sisters relocated from the motherhouse in Germany to Collegeville, Minnesota.

15. The Sisters of St. Francis are, to this day, governed by The Rule and Constitutions of the Congregation of the Franciscan Sisters of Dillingen as supplemented by Provincial Directives specific to their Immaculate Heart of Mary Province. Under this Rule, the Sisters of St. Francis seek "to observe the Holy Gospel of Our Lord Jesus Christ in Obedience, in Poverty, and in Chastity." They also "promise obedience and reverence to the Pope and the Holy Catholic Church." They "seek[] to witness to God's love by [their] Franciscan way of life."

16. The calling of the Sisters of St. Francis is to serve where the Catholic Church needs them and to do so consistently with Catholic values. Over the years, the Sisters of St. Francis have staffed Catholic schools, and founded and/or administered five rural Catholic hospitals, and two long term care facilities: St. Anne's Guest Home, and St. Gerard's Community of Care. Their work today, in addition to their common life of prayer and study, includes spiritual direction, operating a retreat center, and supporting St. Anne's and St. Gerard's.

17. The Sisters of St. Francis relocated to Hankinson in 1928. They civilly incorporated in August 1950.

18. Under Roman Catholic canon law, the Sisters of St. Francis are a type of public juridic person called a religious institute. Under civil law, they are a North Dakota nonprofit corporation. They are listed in *The Official Catholic Directory* and, therefore, enjoy § 501(c)(3) status under the group ruling held by the United States Conference of Catholic Bishops ("USCCB").

19. Sister Donna Marie Welder OSF is the superior or provincial of the Sisters of St. Francis. She is president and chair of the board of directors for their corporation, and also for Plaintiffs St. Anne's Guest Home ("St. Anne's) and St. Gerard's Community of Care ("St.

Gerard's"). Sister Welder has verified the allegations in this complaint related to these three entities.

20. In addition to the twelve sisters who are members of the Sisters of St. Francis, the Sisters of St. Francis have around 30 lay employees. They, therefore, are an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b).

21. The Sisters of St. Francis sponsor a group health insurance plan for their employees. St. Anne's and St. Gerard's are participating employers on that plan and provide health insurance for their employees through that plan. Consistent with Catholic values, the Sisters of St. Francis' health plan categorically excludes gender transition procedures and abortion services.

22. If the Sisters of St. Francis or its health plan insurer were required to provide coverage for gender transition services, abortion, or infertility treatments such as IVF, surrogacy, or gamete donation, it would violate its Catholic values, give scandal to its employees and supporters, and otherwise compromise its religious mission.

23. The Sisters of St. Francis are a member of The Catholic Benefits Association.

2. St. Anne's Guest House

24. St. Anne's Guest Home is a Catholic health care facility and senior residence located in Grand Forks, North Dakota. It began its work in the 1940s when the Most Rev. Aloisius Muench, Bishop of Fargo, asked the Sisters of St. Francis to help homeless and other indigent people living on the streets.

25. St. Anne's provides senior residences for low-income individuals and for couples. It also provides senior residences for people capable of living independently if supported with basic care. St. Anne's nurses assist residents with management of medications and other basic care.

26. St. Anne's website describes its purpose and values:

> Our mission at St. Anne's is to provide a safe, caring, and family-like home for our residents. Inspired by St. Francis, we strive to serve each person who comes to us as we would Christ. We welcome those who come to us from various backgrounds, treating them with love and dignity while providing for their physical, emotional, and spiritual needs.
>
> St. Anne's strives to embody the gospel message in accord with the "Ethical and Religious Directives for Catholic Health Care Services" given by the U.S. Co[nference] of Catholic Bishops.

Our Story, St. Anne's Living Center, https://www.stannesguesthome.org/about-us/ (last visited May 28, 2024).

27. St. Anne's bylaws describe its purpose is to serve as a "a Catholic health care facility in an environment of living and sharing the Gospel for the healing of the spiritual and physical, as well as the psychological, social, and emotional needs of the people . . . the Corporation serves, in accordance with the Ethical, Moral, and Religious Directives" of the United States Conference of Catholic Bishops and with the USCCB's 2023 Doctrinal Note.[1]

28. St. Anne's is careful to try to inculcate its Catholic and Franciscan values in its employees to ensure that St. Anne's is a loving home for seniors. Its residents include a Catholic priest who offers Mass and is available for confessions daily at St. Anne's. A weekly ecumenical Bible study is offered. Protestant services are provided on Sunday. The Sisters live in their convent next door to St. Anne's; they work with the staff and residents of St. Anne's every day and are available around the clock.

[1] *See infra* ¶ 88.

29. St. Anne's is a Catholic ministry. It is listed in *The Official Catholic Directory* and, therefore, enjoys § 501(c)(3) status under the USCCB group ruling. It seeks to align all of its work with Catholic values including those in opposition to abortion and transgender services.

30. St. Anne's is also a North Dakota nonprofit corporation.

31. St. Anne's receives over 85% of its funding from Medicaid.

32. St. Anne's has around 30 employees and, therefore, is an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b).

33. If St. Anne's or its health plan insurer were required to provide coverage for gender transition services, abortion, or infertility treatments contrary to Catholic teaching such as IVF, gamete donation, and surrogacy; if St. Anne's were required to help perform or otherwise accommodate gender transition services, abortion, or infertility treatments contrary to Catholic teaching such as IVF, gamete donation, and surrogacy; or if St. Anne's became ineligible for Medicare or Medicaid, it would violate its Catholic values, threaten its survival, give scandal to its employees and supporters, and otherwise compromise its religious mission.

34. St. Anne's is a member of the Catholic Benefits Association.

3. St. Gerard's Community of Care

35. St. Gerard's Community of Care aka St. Gerard's Community Nursing Home is a Catholic ministry in Hankinson, North Dakota that provides independent living and skilled nursing care for seniors. At the same location, it also provides childcare for infants and toddlers, a preschool, and before and after school supervision for older grade school children.

36. St. Gerard's vision, as stated on its website is "to provide those we serve with loving and caring service based on Christ's mission of love and compassion." Its mission, as stated in its bylaws, is "to provide the residents with loving and caring service based on Christ's mission

of love and compassion in accordance Gospel values and" with the Ethical and Religious Directives promulgated by the USCCB and with the USCCB's Doctrinal Note.

37. St. Gerard's also supports the spiritual needs of its residents and patients. It provides a daily communion service and a weekly Mass for Catholics. A weekend worship service for Protestants is offered on Sundays.

38. St. Gerard's has thirty-three beds for residents in need of skilled nursing. Its nursing services include rehabilitation services, IV therapy, physical therapy, speech therapy, occupational therapy, dementia and memory care, restorative care, tracheostomy care, feeding tubes, wound care, and end of life care.

39. St. Gerard's is a Catholic ministry. It is listed in *The Official Catholic Directory* and, therefore, enjoys § 501(c)(3) status under the USCCB group ruling. It seeks to align all of its work with Catholic values including those values in opposition to abortion and transgender services.

40. St. Gerard's is a North Dakota nonprofit corporation.

41. It receives 14% to 17% of its funding from Medicare and 43% to 56% of its funding from Medicaid.

42. St. Gerard's has around 60 employees and, therefore, is an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b).

43. If St. Gerard's or its health plan insurer were required to provide coverage for gender transition services abortion, or infertility treatments contrary to Catholic teaching such as IVF, gamete donation, and surrogacy; if St. Gerard's were required to help perform or otherwise accommodate gender transition services abortion, or infertility treatments contrary to Catholic teaching such as IVF, gamete donation, and surrogacy; or if St. Gerard's became ineligible for

Medicare or Medicaid, it would violate its Catholic values, threaten its survival, give scandal to its employees and supporters, and otherwise compromise its religious mission.

44. St. Gerard's is a member of The Catholic Benefits Association.

4. The Catholic Benefits Association

45. The CBA is a § 501(c)(3) nonprofit, non-stock corporation and Catholic ministry. Its certificate of incorporation states that it is "organized for charitable purposes" that are "consistent with Catholic values, doctrine, and canon law." Specifically, it states that the CBA is organized "[t]o support Catholic employers . . . that, as part of their religious witness and exercise, provide health or other benefits to their respective employees in a manner that is consistent with Catholic values"; and "[t]o work and advocate for religious freedom of Catholic and other employers seeking to conduct their ministries and businesses according to their religious values". *See* Ex. A, Amended and Restated Certificate of Incorporation of the Catholic Benefits Association ("CBA Articles"), art. IV.

46. Archbishop William E. Lori of Baltimore is chairman of the CBA's board of directors.

47. Nine of the CBA's directors are Catholic archbishops or bishops. They are Archbishop Gregory M. Aymond of New Orleans, Archbishop Paul S. Coakley of Oklahoma City, Archbishop Salvatore Cordileone of San Francisco, Bishop John T. Folda of Fargo, Archbishop Bernard A. Hebda of Saint Paul and Minneapolis, Archbishop Jerome E. Listecki of Milwaukee, Archbishop William E. Lori of Baltimore, Archbishop Joseph F. Naumann of Kansas City in Kansas, and Archbishop Thomas G. Wenski of Miami. Three of its directors are religious women, Mother Agnes Mary Donovan, S.V., Superior General of the Sisters of Life; Sister Diane Marie McGrew, President of OSF Healthcare; and Sister Mary Peter Muehlenkamp, O.P., J.D., In House Counsel for

the St. Cecilia Congregation of the Dominican Sisters of Nashville. Five of its directors are Catholic lay persons, including: Professor Helen Alvaré, J.D.; Thomas M. Buckley, General Counsel for the Archdiocese of St. Louis; Beth Elfrey, Deputy General Counsel for the Knights of Columbus; Nancy Matthews, J.D., Carla K. Mills, Chief Financial Officer of the Archdiocese of Kansas City in Kansas; and Doug Wilson, Chief Executive Officer, of the CBA.

48. All of the CBA's officers are Catholic.

49. All of its employees are Catholic.

50. The CBA has a standing Ethics Committee, comprised exclusively of the archbishops and bishops on its board. The CBA's bylaws state:

> The Ethics Committee shall have exclusive authority to review all benefits, products, and services provided by the Ministry, its affiliates or subsidiaries, or their respective contractors to ensure such conform with Catholic values and doctrine. If they do not, the committee shall determine the necessary corrections to bring such benefits, products, and services into conformity with Catholic values and doctrine. The decision of the committee shall be final and binding on the Ministry, its board, and its officers . . . .

Ex. B, CBA Bylaws, art. 5.14.2.

51. To be a member of the CBA, an organization must meet these criteria, among others: (1) it shall be a Catholic employer, and (2) with regard to the benefits it provides to its employees, independent contractors, or students, or with regard to the health care services it provides to its patients, the employer shall, as part of its religious witness and exercise, be committed to providing no benefits or services inconsistent with Catholic values. Ex. B, CBA Bylaws art. 3.1.2; *see also* Ex. A, CBA Articles, art. VI, Members; Ex. C, CBA Nonprofit Employer Application for Membership; Ex. D, CBA For-Profit Employer Application for Membership.

52. The Bylaws of the CBA provide that an employer "shall satisfy the requirement of being Catholic if either the employer is listed in the current edition of *The Official Catholic Directory*

or the secretary or his or her designee makes such a determination." Ex. B, CBA Bylaws, art. § 3.1.1.1.

53. The Bylaws further provide that a for-profit employer seeking membership in the CBA "shall be deemed Catholic only if (i) Catholics (or trusts or other entities wholly controlled by such Catholic individuals) own 51% or more of employer, (ii) 51% or more of the members of the employer's governing body, if any, is comprised of Catholics, and (iii) either the employer's owners or governing body has adopted a written policy stating that the employer is committed to providing no benefits to the employer's employees or independent contractors inconsistent with Catholic values." Ex. B, CBA Bylaws, art. § 3.1.1.2.

54. All members of the CBA meet its criteria for being Catholic.

55. CBA members include 85 Catholic dioceses and archdioceses. Its members total over 1,471 Catholic employers, plus 7,100 Catholic parishes, and 1900 parochial schools. Together, they provide health care benefits to approximately 161,500 employees and their families.

56. CBA members also include schools, colleges, religious orders, and other Catholic ministries and Catholic-owned businesses.

57. CBA members include hospitals, medical clinics, physician medical practice groups, skilled nursing facilities, and other healthcare entities. Most of these receive Medicaid and Medicare payments and thus are covered entities under the 2016 and 2024 rules.

58. CBA members include Catholic Charities and other social service organizations that offer counseling and other mental health services, in individual and group settings. Many of these also receive Medicaid and Medicare payments and participate in HHS-funded programs and thus are covered entities under the 2016 and 2024 rules.

59. CBA members provide employee health benefits by contracting with health insurers and TPAs. These insurers and TPAs participate in federally funded marketplaces and thus are covered entities under the 2024 Rule.

60. A substantial portion of its members have fifteen or employees and, thus, are "employers" within the meaning of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b).

61. The Mandate thus constrains CBA members' ability to arrange for and secure health plans that reflect their Catholic values.

5. The CBA's associational standing

62. The CBA has associational standing to represent its present and future members.

63. To have associational standing, the Eighth Circuit clarified that the CBA must, through testimony other than "the organizations' self-description of their membership," identify at least one member who would have standing to sue in its own right. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022); *see also id.* at 601-02 ("[P]laintiff-organizations [must] make specific allegations establishing that **at least one** identified member had suffered or would suffer harm." (Emphasis added) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)).

64. This complaint is verified not only by the CBA's Chief Executive Officer and the Chairman of its board, but by the Sisters of St. Francis, St. Anne's, and St. Gerard's. These three members are specifically named and have suffered the requisite harm from the Mandate.

65. In addition, CBA Plaintiffs attaches to this complaint, four declarations from nine non-plaintiff members of the CBA that specifically identify the following CBA members and that would have standing in their own right and have suffered the requisite harm. These include:

a. Exhibit E: Declaration of Chris Baechle for Cardinal Ritter Senior Services, Mary Queen and Mother Center, Our Lady of Life Apartments, Mother of Perpetual Help Residences, St. Elizabeth Hall, and Affordable Senior Living;

b. Exhibit F: Declaration of Dr. Michael Sherman for Holy Family Catholic Clinic;

c. Exhibit G: Declaration of Dr. Michelle Stanford for Centennial Pediatrics;. And

d. Exhibit H: Declaration of Deacon Anthony Ternes for Catholic Charities North Dakota.

66. Each of these CBA members receives HHS funding (standing for purposes of Section 1557), employs more than 15 individuals (standing for purposes of Title VII), and oppose providing or covering gender-transitions services, abortion, and certain infertility treatments because of their adherence to Catholic social teaching. Exh. E at ¶¶ 7, 9-14, 17-18, 20; Exh. F at ¶¶ 4, 6, 9, 12, 14-15; Exh. G at ¶¶ 4-5, 10, 12-14; Exh. H at ¶¶ 3-4, 9-10, 12-13.

67. Many of these members also contract with private insurers and/or TPAs who are themselves bound by the Mandate. Exh. E at ¶ 14; Exh. F at ¶ 5; Exh. H at ¶ 4.

68. Thus, between the three plaintiff verifications of this complaint, plus the four declarations of nine non-plaintiff CBA members, the CBA Plaintiffs have, through sworn testimony, identified to this Court twelve CBA members by name each of whom has over fifteen employees, each of whom receive Medicare or Medicaid, and each of whom are, because of their Catholic values morally opposed to covering transgender services in its health plan each of whom is morally opposed to performing such services. Accordingly, they have suffered suffer the requisite harm and satisfied other requirements for standing.

69. The Mandate harms the CBA's members.

70. The CBA seeks to protect its members' ability to operate in accordance with Catholic values and to access morally compliant health coverage for their respective employees or agents. It additionally seeks, for members that are covered entities, protection from being required to provide medical services and drugs, and to perform surgeries contrary to Catholic values.

71. The CBA can adequately represent its members' interests. CBA members are similarly situated in that the Defendants' Mandate coerces CBA members to cover, provide, pay for, or otherwise directly or indirectly facilitate access to gender transition services, abortions, and infertility treatments for their patients or for their employees in violation of members' sincerely held Catholic beliefs. The Mandate also deprives or will deprive certain CBA members of the option to purchase group insurance or to arrange self-funded plans without gender transition, abortion, and/or infertility coverage.

72. The CBA brings this action on behalf of its members who themselves have suffered and will suffer concrete harm as a result of Defendants' actions.

B. Defendants

73. Defendants are appointed officials of the federal government and federal government agencies responsible for promulgating, administering, and enforcing the Mandate.

74. Defendant United States Department of Health and Human Services is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the 2016, 2020, and 2024 Rules.

75. Defendant Xavier Becerra is the Secretary of HHS. He is sued only in his official capacity.

76. Defendant Equal Employment Opportunity Commission 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.

77. Defendant Charlotte 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.

IV. PLAINTIFFS' BELIEFS AND PRACTICES RELATED TO THE MANDATE

78. All Plaintiffs and all CBA members are Catholic ministries or Catholic-owned businesses that believe and practice the teachings of the Catholic Church on the nature of the human person, the dignity of humankind, the right to life, the right of conscience and religious freedom, and related ethical issues. *See generally* Exhs. E, F, G, H; and *supra* at ¶¶ 13-44.

A. Catholic teaching on the duty to treat all persons with dignity

79. The Catholic Church teaches that all people are created in the image and likeness of God and are thus imbued with human dignity. Catechism of the Catholic Church ("CCC") 1701. All persons are therefore to be loved and respected in their human freedom, CCC 1738, even if they reject the Church's teaching on matters of sexual identity and sexual morality, CCC 2358.

80. The United States Conference of Catholic Bishops ("USCCB") has applied this teaching to transgender persons and those afflicted with gender dysphoria. In response to the U.S. Department of Education's guidance letter asserting that Title IX bars discrimination based on "gender identity," the USCCB stressed that the 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." The USCCB statement affirms that people who struggle with their gender identity "deserve compassion, sensitivity, and respect."[2]

81. The comments the USCCB filed along with other Christian bodies in response to HHS's 2016 rule under Section 1557 likewise affirmed that "[e]veryone should have access to health care and health coverage,"[3] as did their comments on HHS's 2024 rule.[4]

82. HHS has previously acknowledged that every religious group that submitted comments in response to 2016 proposed rule shared similar sentiments. The 2016 Rule notes, "None 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." Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,379 (May 18, 2016).

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[2] *USCCB Chairmen Respond to Administration's New Guidance Letter on Title IX Application*, USCCB (May 16, 2016), https://www.usccb.org/news/2016/usccb-chairmen-respond-administrations-new-guidance-letter-title-ix-application (last visited Sept. 26, 2023).

[3] Comments from USCCB et al. to U.S. Dept. of Health and Human Services Re: Nondiscrimination in Health Programs and Activities RIN 0945-AA-2, at 2 (Nov. 6, 2015), http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf (last visited Sept. 26, 2023).

[4] Comments from USCCB et al. to U.S. Dept. of Health and Human Services Re: Nondiscrimination in Health Programs and Activities RIN 0945-AA17, at 2 (Sept. 7, 2022), https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/2022.comments.1557.regulations.final_.pdf (last visited May 21, 2024) ("Ensuring access to health coverage and health care, and removing barriers to these, is without question a laudable goal. Concern for the health of its citizens requires that society help in the attainment of living conditions that allow them to grow and reach maturity which . . . [includes] health care." (Cleaned up).).

B. Catholic teaching on gender identity

83. Catholic teaching on the nature of the human person begins with the Book of Genesis, which teaches that "God created man in his own image . . . male and female he created them." CCC 2331 (quoting Genesis 1:27).

84. The Catechism further teaches that "[e]veryone, man and woman, should acknowledge and accept his sexual identity." CCC 2333 (emphasis omitted). "By creating the human being man and woman, God gives personal dignity equally to the one and the other. Each of them, man and woman, should acknowledge and accept his sexual identity." CCC 2393.

85. Pope Francis has reiterated this Catholic teaching in recent years, affirming that "'man too has a nature that he must respect and that he cannot manipulate at will.' . . . The acceptance of our bodies as God's gift is vital for welcoming and accepting the entire world as a gift from the Father. . . . Learning to accept our body, to care for it and to respect its fullest meaning, is an essential element of any genuine human ecology." *Laudato Si*, No. 155 (2015) (quoting Pope Benedict XVI, Address from His Visit to the Bundestag (Sept. 22, 2011)).

86. This bedrock Church teaching on the dignity of all human persons is intertwined with all Catholic Social Teaching—not only on sex and sexuality, but also poverty, genocide, euthanasia, unjust war, the travail of migrants, human trafficking, the marginalization of people with disabilities, and other matters. *See* Declaration of the Dicastery for the Doctrine of the Faith, *Dignitas Infinita*, *on Human Dignity* (April 4, 2024), *available at* https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2024/04/08/240408c.html (last visited May 28, 2024).

87. As for youth who are struggling with their gender identity, Pope Francis has taught that "the young need to be helped to accept their own body as it was created." *Amoris Laetitia*, No. 285 (2016).

88. On March 20, 2023, the USCCB's Committee on Doctrine issued a "Doctrinal Note on the Moral Limits to Technological Manipulation of the Human Body" (the "Doctrinal Note"). Paragraphs 14 and 15 of the Doctrinal Note explain that "the use of surgical or chemical techniques that aim to exchange the sex characteristics of a patient's body for those of the opposite sex or for simulations thereof" and, "[i]n the case of children, the exchange of sex characteristics . . . prepared by the administration of chemical puberty blockers, which arrest the natural course of puberty and prevent the development of some sex characteristics in the first place" to treat "gender dysphoria" and "gender incongruence" are not "morally justified either as attempts to repair a defect in the body or as attempts to sacrifice a part of the body for the sake of the whole." "First, they do not repair a defect in the body: there is no disorder in the body that needs to be addressed; the bodily organs are normal and healthy." "Second, the interventions do not sacrifice one part of the body for the good of the whole." The Doctrinal Note continues at Paragraph 18:

> Such interventions, thus, do not respect the fundamental order of the human person as an intrinsic unity of body and soul, with a body that is sexually differentiated. Bodliness is a fundamental aspect of human existence, and so is the sexual differentiation of the body. Catholic health care services must not perform interventions, whether surgical or chemical, that aim to transform the sexual characteristics of a human body into those of the opposite sex or take part in the development of such procedures. They must employ all appropriate resources to mitigate the suffering of those who struggle with gender incongruence, but the means used must respect the fundamental order of the human body. Only by using morally appropriate means do healthcare providers show full respect for the dignity of each human person.

89. "Sexual reassignment surgery requires the destruction of healthy sexual and reproductive organs."[5]

90. The Catholic Church teaches that intentionally removing healthy organs that identify as a person as male or female is a type of amputation or mutilation that is not morally licit.

91. Some gender transition surgeries also involve sterilization. The Catholic Church teaches that all forms of sterilization are contrary to the moral law. CCC 2370.

92. The Catholic Church teaches that "[e]xcept when performed for strictly therapeutic medical reasons, directly intended amputations, mutilations, and sterilizations performed on innocent persons are against the moral law." CCC 2297.

C. Catholic teaching on abortion

93. The Catechism of the Catholic Church teaches that life begins at conception and that "[h]uman life must be respected and protected absolutely from the moment of conception." CCC 2270. Thus, "[d]irect abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law." CCC 2271.

94. While "[a]bortion . . . (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted" for Catholic individuals and organizations, "[o]perations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable," are, "even if they

[5] Richard P. Fitzgibbons, M.D., et al., *The Psychopathology of "Sex Reassignment" Surgery: Assessing its Medical, Psychological and Ethical Appropriateness*, 9 Nat'l Catholic Bioethics Q. 97, 100 (2009), https://repository.library.georgetown.edu/handle/10822/1029434.

will result in the death of the unborn child." *See* United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, p. 18-19, ¶¶ 45, 47 (6th ed. 2018).

D. Catholic teaching on artificial reproductive technology

95. The Catechism of the Catholic Church, which is the universal teaching of the Catholic Church, expresses that the sexual relationship between spouses is more than mere biology (*Familiaris Consortio*, Pope John Paul II, Paragraph 11 (1981)), and the conception of a child is the most serious role of spouses, involving co-creation with God, and holding that each child is to be received as a gift from the Creator (CCC 2367, 2378). The Catechism acknowledges the sorrow caused by infertility and supports the use reproductive technologies that restore normal fertility to marital intercourse (CCC 2375), preserving its unitive and procreative purposes (United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, pg. 17, ¶ 38 (6th ed. 2018)). However, methods that involve third parties (medical technicians, donor gametes, or surrogate wombs) or separate fertilization from the conjugal act, are a violation of the dignity of the persons involved and are gravely immoral. Thus, Catholics commit grave sin if they participate in these technologies, either financially or through performance, (CCC 2376-77) Catholic teaching permits infertility treatment "that does not separate the unitive and procreative ends of" a "marital act of sexual intercourse." United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, p. 17, ¶ 38 (6th ed. 2018). Accordingly, infertility treatments that support the procreative and unitive nature of marriage, for example hormonal support, are permissible. By contrast, Catholic healthcare providers and health plans may not provide or cover procedures such as IVF, surrogacy, or gamete donation that separate the procreative and unitive ends of the marital union, *id.* at p. 17, ¶¶ 39-43, or provide

any fertility treatments to individuals and couples in relationships not recognized as marriage by the Catholic church. *Id.* at p. 17, ¶ 38.

E. Catholic teaching on scandal

96. Catholic moral also theology prohibits acts that may give rise to "scandal." The Catechism defines scandal as "an attitude or behavior which leads another to do evil." CCC 2284. The Catechism teaches that "[a]nyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged." CCC 2287. Avoiding scandal is particularly important for Catholic entities that seek to inculcate Catholic faith and values.

F. The USCCB's Ethical and Religious Directives governing Catholic healthcare

97. These teachings are reflected in the Ethical and Religious Directives for Catholic Health Care Services ("Ethical and Religious Directives" or "ERDs"), a document issued by the United States Conference of Catholic Bishops in order "to reaffirm the ethical standards of behavior in health care that flow from the Church's teaching about the dignity of the human person" and "to provide authoritative guidance on certain moral issues that face Catholic health care today." United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* 4 (6th ed. 2018), https://www.usccb.org/resources/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06_0.pdf (last visited May 28, 2024).

98. The ERDs teach that "[d]irect sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." *Id.* at p. 19, ¶ 53.

99. The ERDs teach that "Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization." *Id.* at p. 25, ¶ 70.

G. The Catholic Benefits Association's Ethics Committee

100. As noted above, the CBA's Ethics Committee, comprised exclusively of Catholic archbishops, has the duty and responsibility to define Catholic values and doctrine on relevant issues for CBA members.

101. In November 2016, the CBA's Ethics Committee convened to address doctrinal and ethical issues related to the Mandate. After consultation, it unanimously adopted the following resolutions:

> **RESOLVED**: that treatments and services designed to alter a person's biological sex are contrary to Catholic values. A Catholic employer, therefore, cannot, consistent with Catholic values, comply with the government's mandate to include coverage in its employee health plan for treatments services designed to alter a person's biological sex.
>
> **RESOLVED**: that treatments and services designed to alter a person's biological sex are contrary to Catholic values. A Catholic hospital, clinic, physicians practice group, or other medical provider, therefore, cannot, consistent with Catholic values, comply with the government's mandate to provide or deliver treatments or services designed to alter a person's biological sex.
>
> **RESOLVED**: that abortion is contrary to Catholic values. A Catholic employer, therefore, cannot, consistent with Catholic values, comply with any government mandate to include coverage in its employee health plan for abortion.
>
> **RESOLVED**: that abortion is contrary to Catholic values. A Catholic health care insurer or third party administrator, therefore, cannot, consistent with Catholic values, comply with any government abortion mandate by operating or administering a plan that provides coverage for abortion.
>
> **RESOLVED**: that abortion is contrary to Catholic values. A Catholic hospital, clinic, physicians practice group, or other medical provider, therefore, cannot, consistent with Catholic values, comply with any government abortion mandate that requires the provision and delivery of abortion services.

102. Consistent with the Ethics Committee's guidance, all CBA members believe they must adhere to the above teachings as matters of religious faith and doctrine. Consequently, CBA members believe that gender-transition procedures, sterilization, abortion, immoral infertility treatments, and related drugs or counseling are categorically contrary to the Catholic faith. CBA members further believe, as part of their faith, that they must not provide, pay for, or directly or indirectly facilitate access to such services and, therefore, that they must not perform gender transition services, sterilization, abortion, certain infertility treatments, and/or related counseling and must not include coverage for such procedures in their group health plans.

H. The Mandate is bad medicine[6]

103. In addition to the religious and ethical convictions described above, Plaintiffs and all CBA members also believe that the Mandate constitutes bad medicine. As the Supreme Court has observed, "sex . . . is an immutable characteristic." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)); *see also* Expert Report of Stephen B. Levine 8 (Feb. 23, 2022), *in* Attachments to Comments of Alliance Defending Freedom, *Factual Evidence*, HHS-OS-2022-0012-68192.

104. Because Defendants' Mandate has no age limit, it requires covered entities to provide gender transition services for adolescents diagnosed with gender dysphoria.

105. Placing adolescents on puberty blockers or cross-sex hormones may cause permanent infertility and increased health risks.

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[6] With regard to the facts stated in this section, *see* Ex. F, Declaration of Dr. Michael Sherman, ¶¶ 16-17; Ex. G, Declaration of Dr. Michelle Stanford, ¶¶ 11-13.

106. For example, male adolescents on cross-sex hormones are at a higher risk for thrombosis, cardiovascular disease, weight gain, elevated blood pressure, decreased glucose tolerance, gallbladder disease, and breast cancer.

107. Similarly, female adolescents on cross-sex hormones are at a higher risk for hepatotoxicity, polycythemia, increased risk of sleep apnea, insulin resistance, and unknown effects on breast, endometrial, and ovarian tissues.

108. These consequences are even more serious given that the overwhelming majority of adolescents who are formally diagnosed with gender dysphoria naturally come to accept their sex and enjoy emotional health by late adolescence.

109. Even where gender transition surgeries are effective in helping patients' physical bodies match their gender identity, post-surgical individuals have substantially higher rates of overall mortality, death from cardiovascular disease and suicide, suicide attempts, and hospitalizations compared to a healthy control population, especially as the years progress.

110. Plaintiffs believe that Defendants' Mandate also declares as "medically necessary" a radical course of treatment that the medical profession properly rejects when it comes to other psychological conditions where people experience emotional distress because of a discrepancy between their self-image and the physical reality. According to Defendants' logic, it would be "medically necessary" to perform liposuction on someone with anorexia nervosa (belief that one is obese), cosmetic surgery on someone with body dysmorphic disorder (belief that one is disfigured), or amputations for someone with body integrity identity disorder (belief that one is meant to be disabled).

111. Plaintiffs also believe that optimal patient care—including patient education, diagnosis, and treatment—requires taking account of the biological differences between men and women. To cite but one example, optimal prevention of and treatment for heart disease in women requires monitoring for different warning signs, accounting for different risk factors, and providing different counseling than it would for men.

112. For all these reasons, the CBA and its members believe that providing gender transition services constitutes bad medicine and, therefore, is contrary to their religious and professional obligations.

V. THE MANDATE

A. Statutory and regulatory overview

1. Section 1557 of the Affordable Care Act, and its incorporation of Title IX of the Education Amendments of 1972 and section 794 of title 29

113. Together, the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (Mar. 23, 2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (Mar. 30, 2010), make up and are known as the Affordable Care Act ("ACA").

114. Section 1557(a) of the ACA prohibits discrimination in federally funded healthcare programs and activities on the basis of (1) race, color, and national origin, (2) sex, (3) age, and (4) disability. *See* 42 U.S.C. § 18116(a). The statute does not do this directly. Instead, it incorporates by reference, and bars discrimination "on the ground prohibited" by four other federal laws: (1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), (2) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.); (3) the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.); and (4) section 794 of Title 29 (the Rehabilitation Act).

115. Section 1557(b) of the ACA provides that nothing in the statute "shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of Title 29, or the Age Discrimination Act of 1975." 42 U.S.C. § 18116(b).

116. Section 1554 of the ACA provides that "notwithstanding any other provision of [the ACA, HHS] shall not promulgate any regulation that— . . . violates the principles of informed consent and the ethical standards of health care professionals." 42 U.S.C. § 18114(5).

117. Title IX was enacted in 1972. Public Law No. 92-318, 86 Stat. 235 (June 23, 1972). It states that no person "shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

118. Title IX's prohibition, however, "shall not apply" to an institution "controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3).

119. Nor does Title IX's prohibition on sex discrimination require a "public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688.

120. The Rehabilitation Act prohibits certain forms of disability discrimination.

121. The Rehabilitation Act's prohibition, however, specifically excludes "transsexualism" and "gender identity disorder" "not resulting from physical impairments." 42 U.S.C.

§ 18116(a)(pointing to section 794 of title 29 as providing substantive content of protection). 29 U.S.C. § 705(20)(F)(i) (providing that "transsexualism" and "gender identity disorders not resulting from physical impairments" are not a "disability" under section 794). Those terms at the time were synonymous with having a transgender identity, so transgender persons that do not have a disorder of sex development—a physical impairment—do not have a "disability" and are excluded from "section 792 of title 29." 42 U.S.C. § 18116(a). The specific exclusion of transgender identity governs the general prohibitions of Section 1557, so the general term "based on sex" cannot be read to include discriminating based on transgender identity in Section 1557.

2. Title VII of the Civil Rights Act of 1964

122. Congress enacted Title VII in 1964. Public Law 88-352, 78 Stat. 241 (July 2, 1964).

123. Title VII makes it unlawful for an employer to discriminate against an employee or prospective employee "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

124. Title VII defines an "employer" subject to its provisions 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).

125. The U.S. Census Bureau estimates that there are over 875,000 employers in the United States with 15 or more employees.[7]

[7] *See 2017 SUSB Annual Data Tables by Establishment Industry*, U.S. Census Bureau (Mar. 2020), https://web.archive.org/web/20200307131234/https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html (select "U.S. and states, NAICS sectors, small employment sizes less than 500" for statistics on firm size measured by number of employees).

126. Title VII has a broad religious exemption. It states that Title VII "shall not apply" to a religious organization's "employment of individuals of a particular religion." *See* 42 U.S.C. § 2000e-1(a). The statute defines "religion" broadly to include "all aspects of *religious observance and practice*, as well as belief." 42 U.S.C. § 2000e(j) (emphasis added).

127. 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).

B. The 2016 Rule

128. The regulatory background to this dispute begins with the 2016 Rule that HHS issued interpreting Section 1557. On May 18, 2016, HHS finalized a rule pursuant to Section 1557 stating that impermissible discrimination "on the basis of sex" "includes . . . discrimination on the basis of . . . termination of pregnancy, . . . sex stereotyping, and gender identity." Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,467 (May 18, 2016). Plaintiffs refer to this as the "2016 Rule."

129. The 2016 Rule defined "gender identity" to include a person's "internal sense of gender, which may be male, female, neither, or a combination of male and female." *Id.*; *see also id.* at 31,392 (stating that the "gender identity spectrum includes an array of possible gender identities beyond male and female"); *id.* at 31,384 (stating that individuals with "non-binary gender identities are protected under the rule").

130. The 2016 Rule defined "sex stereotypes" to mean "stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their

gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics." *Id.* at 31,468.

131. The 2016 Rule applied to a "covered entity," defined to mean "any entity that has a health program or activity, any part of which receives Federal financial assistance from [HHS]." *Id.* at 31,445. HHS estimated that the 2016 Rule covered "almost all licensed physicians because they accept Federal financial assistance," including payments from Medicare and Medicaid. *Id.* Other observers estimate that 2016 Rule applies "to over 133,000 (virtually all) hospitals, nursing homes, home health agencies, and similar provider facilities, about 445,000 clinical laboratories, 1,200 community health centers, 171 health-related schools, state Medicaid and CHIP programs, state public health agencies, federally facilitated and state-based marketplaces, at least 180 health insurers that market policies through the [federally facilitated marketplace] and state-based marketplaces, and up to 900,000 physicians." Timothy Jost, Implementing Health Reform: HHS Proposes Rule Implementing Anti-Discrimination ACA Provisions (Contraceptive Coverage Litigation Update), *Health Affairs Blog* (Sept. 4, 2015), http://healthaffairs.org/blog/2015/09/04/implementing-health-reform-hhs-proposes-rule-implementing-anti-discrimination-aca-provisions/.

132. The 2016 Rule's extension of Section 1557 to "gender identity" and "termination of pregnancy," coupled with its expansive definition of a "covered entity," meant that (1) healthcare providers were required to perform or refer for gender transition procedures and abortions, (2) healthcare providers were required to alter their speech and medical advice, (3) covered employers, insurance providers and TPAs were required to offer employee benefits covering gender transition procedures, and (4) sex-specific healthcare facilities and programs, including

shower facilities and hospital wards, must be opened to individuals based on gender identity, among other requirements.

133. As explained below, the gender-identity portions of the 2016 Rule have been in continuous effect since its issuance. The recently promulgated 2024 Rule merely restates and amplifies the 2016 Rule's provisions objected to by the CBA and its members.

C. HHS'S unsuccessful effort to repeal the mandate

1. Litigation against the 2016 Rule

134. On December 31, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction prohibiting HHS from "enforcing the [2016] Rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy." *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016) (order granting nationwide preliminary injunction). The court concluded that the 2016 Rule's "expanded definition of sex discrimination" exceeded HHS's statutory authority under Section 1557, and that the 2016 Rule's failure to incorporate the religious and abortion exemptions in Title IX "renders the Rule contrary to law" in violation of the APA. *Id.* at 689, 691. The court also found that that the rule violated RFRA because it placed "substantial pressure on Plaintiffs to perform and cover [gender] transition and abortion procedures" in violation of their religious beliefs, and HHS could not show that the rule satisfied RFRA's requirement of strict scrutiny. *Id.* at 692-93.

135. On October 15, 2019, as clarified in the order of November 21, 2019, the same court entered summary judgment vacating the 2016 Rule "insofar as the Rule defines 'On the basis of sex' to include gender identity and termination of pregnancy," and remanded to HHS for further consideration. *See Franciscan All. v. Azar*, 414 F.3d 928, 946–47 (N.D. Tex. 2019); *Franciscan All., Inc. v. Azar*, No. 16-00108-O, slip op. at 2 (N.D. Tex. Nov. 21, 2019) (emphasis omitted).

136. On December 30, 2016, this Court in the *Religious Sisters of Mercy* case issued an order temporarily staying enforcement of the 2016 Rule against Plaintiffs. On January 23, 2017, the Court amended its December 30, 2016 order "to make clear that it temporarily stays enforcement, as to the named Plaintiffs, of Section 1557's prohibitions against discrimination on the bases of gender identity and termination of pregnancy."

2. The 2020 Rule

137. In May 2019, HHS issued a Notice of Proposed Rulemaking, and in June 2019 it published a proposed rule, to amend the 2016 Rule. *See* Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019). Citing the *Franciscan Alliance* court's preliminary-injunction decision, the proposed rule stated that the Rule's definition of "sex" "exceeded [HHS's] authority under Section 1557." *Id.* at 27,849. The proposed rule sought to address this issue by repealing the 2016 Rule's definition of "sex" in its entirety, which, HHS said, would "allow the Federal courts, in particular, the U.S. Supreme Court . . . to resolve any dispute about the proper legal interpretation of" the term "sex" in Section 1557. *Id.* at 27,873. As the proposed rule noted, *see id.* at 27,855, the Supreme Court had recently granted certiorari to decide whether sex discrimination under Title VII included discrimination on the basis of sexual orientation and gender identity, in three cases that would later be decided together as *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

138. On June 12, 2020, HHS finalized its new rule, the "2020 Rule." *See* Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160 (June 19, 2020).

139. The 2020 Rule would have taken effect on August 18, 2020. *Id.* at 37,160.

140. The 2020 Rule sought to repeal certain portions of the 2016 Rule, and in particular, "omit[] the vacated language concerning gender identity and termination of pregnancy." *Id.* at

37,162; *see also id.* at 32,236 ("[T]his final rule removes . . . the expansive inclusion of gender identity and sex stereotyping in the definition of sex discrimination."). But HHS declined to replace the 2016 Rule's definition of "sex" with a new definition, reasoning instead that the Supreme Court's then-forthcoming decision in *Bostock* would "likely have ramifications for the definition of 'on the basis of sex' under Title IX." *Id.* at 37,168. Thus, simply repealing the prior definition would permit "application of the [*Bostock*] Court's construction." *Id.*

141. Responding to the *Franciscan Alliance* court's vacatur order, HHS said that, under the 2020 Rule, it "will interpret Section 1557's prohibition on sex-based discrimination consistent with Title IX and its implementing regulations," *id.* at 37,192, and that it was amending its Title IX regulations "to explicitly incorporate relevant statutory exemptions from Title IX, including abortion neutrality and the religious exemption," *id.* at 37,162.

Gender identity

142. The 2020 Rule sought to clarify that Section 1557 does not require healthcare professionals to perform gender transition procedures. *Id.* at 37,188. HHS "believes providers should be generally free to use their best medical judgment, consistent with their understanding of medical ethics, in providing healthcare to Americans." *Id.* at 37,187. "[T]he 2016 Rule inappropriately interfered with the ethical and medical judgment of health professionals." *Id.* The 2020 Rule "does not presume to dictate to medical providers the degree to which sex matters in medical decision making, nor does it impose the 2016 Rule's vague and overbroad mandate that they 'treat individuals consistent with their gender identity.'" *Id.* at 37,188.

143. The 2020 Rule sought to "clarif[y] that sex, according to the Title IX's plain meaning, may be taken into account in the provision of healthcare, insurance (including insurance coverage), and health research, as was the practice before the 2016 Rule." *Id.* at 37,189. At the same

time, the 2020 Rule did not "prohibi[t] a healthcare provider from offering or performing sex-reassignment treatments and surgeries, or an insurer from covering such treatments and procedures, either as a general matter or on a case-by-case basis." *Id.* at 37,188.

144. While the 2016 Rule prohibited health insurers from "hav[ing] or implement[ing] a categorical coverage exclusion or limitation for all health services related to gender transition," *id.* at 37,196 (quotation omitted), the 2020 Rule sought to repeal this prohibition, noting that there is a lack of "medical consensus to support one or another form of treatment for gender dysphoria," *id.* at 37,198. In HHS's view, "the 2016 Rule did not give sufficient evidence to justify, as a matter of policy, its prohibition on blanket exclusions of coverage for sex-reassignment procedures." *Id.* Even if it were appropriate policy to mandate the provision and coverage of gender transition procedures, HHS could not do so "through application of Section 1557 and Title IX" because "[t]here is no statutory authority to require the provision or coverage of such procedures under Title IX protections from discrimination on the basis of sex." *Id.*

Protections for religious freedom and conscience

145. The 2020 Rule "d[id] not craft a religious exemption to Section 1557." *Id.* at 37,207. Rather, it "simply state[d] that the Section 1557 regulation will be implemented consistent with" various religious and conscience protections already present in federal law, "including RFRA, healthcare conscience statutes, and the religious organization exception in Title IX." *Id.*

146. Accordingly, the 2020 Rule stated that "[i]nsofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by" Title IX, RFRA, and numerous other federal laws protecting conscience, "such application shall not be imposed or required." 45 C.F.R. § 92.6(b).

147. HHS stated that it "agrees with the court in *Franciscan Alliance* that particular provisions in the 2016 Rule violated RFRA as applied to private plaintiffs." 85 Fed. Reg. at 32,707. Regarding the 2016 Rule's gender identity provisions, HHS conceded that it "sees no compelling interest in forcing the provision, or coverage, of . . . medically controversial [gender transition] services by covered entities, much less in doing so without a statutory basis." *Id.* at 37,188.

148. Like the 2016 Rule, the 2020 Rule sought to make Section 1557 applicable to "any entity that has a health program or activity, any part of which receives Federal financial assistance from [HHS]." *Id.* at 37,226. If an entity receives HHS funds and is "principally engaged in the business of providing healthcare," then Section 1557 applies to the entity as a whole. *Id.* at 37,244. Otherwise, Section 1557 applies only to the "health program or activity" of the entity that receives HHS funds. *See id.*

149. But the 2020 Rule sought to narrow the application of Section 1557 to health insurance issuers. While the 2016 Rule declares that health insurance issuers are entities "principally engaged in the business of providing healthcare," the 2020 Rule seeks to repeal this aspect of the 2016 Rule and clarify that the provision of health insurance coverage is not *per se* the provision of "healthcare." Under the new rule, "an entity principally or otherwise engaged in the business of providing health insurance shall not, by virtue of such provision, be considered to be principally engaged in the business of providing healthcare." *Id.* at 37,244-45 (45 C.F.R. § 92.3(c)). Thus, a health insurance issuer not principally engaged in the business of healthcare would be subject to Section 1557 only to the extent of any federally funded health program or activity of the issuer.

150. The 2020 Rule stated that employer-sponsored (i.e., self-insured) health plans are not covered entities "[t]o the extent that [they] do not receive Federal financial assistance and are not principally engaged in the business of providing healthcare." *Id.* at 37,173.

Enforcement mechanisms

151. The 2020 Rule sought to repeal the "patchwork" of enforcement mechanisms contained in the 2016 Rule, and to adopt the enforcement mechanisms of the four statutes which Section 1557 incorporates along with "their implementing regulations respectively, each for its own statute." *Id.* at 37,202; *see also Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 240 (6th Cir. 2019) (stating that the 2016 Rule's blending of different enforcement mechanisms under Section 1557 "failed to respect" the plain language of Section 1557); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 738 (N.D. Ill. 2017) (language of Section 1557 "unambiguously demonstrate[s] Congress's intent to import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue" (quotation omitted)).

152. Because the incorporated statutes and their implementing regulations contain their own enforcement mechanisms, the enforcement mechanisms described above for the 2016 Rule continued to apply, in substantial part, under the 2020 Rule.

153. In the 2020 Rule, HHS declined to "to take a position in its regulations on the issue of whether Section 1557 provides a private right of action." *Id.* at 37,203. HHS stated that, "[t]o the extent that Section 1557 permits private rights of action, plaintiffs can assert claims under Section 1557 itself rather than under the Department's Section 1557 regulation." *Id.*

154. Courts have held that Section 1557 authorizes a private right of action to the extent that the incorporated statutes do. *See Doe*, 926 F.3d at 239; *Briscoe*, 281 F. Supp. 3d at 737.

D. *Bostock v. Clayton County*

155. On June 15, 2020, the Supreme Court decided *Bostock*. The Court held that when "an employer . . . fires someone simply for being homosexual or transgender," the employer has "discriminated against that individual 'because of such individual's sex'" within the meaning of Title VII. 140 S. Ct. at 1753.

156. *Bostock* did not hold that the term "sex" in Title VII equates to gender identity. Rather, the *Bostock* Court "assum[ed]" that "sex" means biological sex. *Id.* at 1739. But the Court reasoned that if an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," while "retain[ing] an otherwise identical employee who was identified as female at birth," then "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.* at 1741-42.

157. The Court cautioned, however, that its opinion did not "prejudge" the proper interpretation of "other federal . . . laws that prohibit sex discrimination," *id.* at 1753, including Section 1557 and Title IX, *see id.* at 1779-82 & n.57 (Alito, J., dissenting).

158. The Court further said it was "deeply concerned with preserving the promise of the free exercise of religion," and emphasized that the First Amendment and RFRA, among other laws, protect religious employers against being forced to "violate their religious convictions." *Id.* at 1754. Religious liberty protections, the Court explained, may "supersede Title VII's commands in appropriate cases." *Id.*

159. *Bostock* also instructs courts to read statutes "in accord with the[ir] ordinary public meaning." *Id.* at 1738.

E. Legal challenges to, and preliminary injunctions against, the 2020 Rule

160. Before the 2020 Rule could take effect, on August 17, 2020, the U.S. District Court for the Eastern District of New York entered "a stay and preliminary injunction to preclude the [2020 Rule] from becoming operative." *Walker v. Azar*, 2020 WL 4749859, at *1 (E.D.N.Y. 2020). The court concluded that the 2020 Rule is "contrary to *Bostock,*" that HHS's attempt to repeal the 2016 Rule was "contrary to law," and that the plaintiffs were likely to succeed on the merits of their APA claim. *Id.* at *1, *9. The court acknowledged that the *Franciscan Alliance* court had vacated the 2016 Rule in part and "agree[d] that it has no power to revive a rule vacated by another district court." *Id.* at *7. The court nonetheless thought that "*Franciscan Alliance* did not address the concept of 'sex stereotyping' embodied in the 2016 Rule." *Id.* The court entered the following order:

> [T]he Court stays the repeal of the 2016 definition of discrimination on the basis of sex. As a result, the definitions of "on the basis of sex," "gender identity," and "sex stereotyping" currently set forth in 45 C.F.R. § 92.4 [sic] will remain in effect. In addition, the Court preliminarily enjoins the defendants from enforcing the repeal.

161. The *Walker* court's preliminary injunction reinstated the 2016 Rule and the Mandate.

162. On September 2, 2020, the U.S. District Court for the District of Columbia entered a nationwide preliminary injunction against aspects of the 2020 Rule. *See Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 2020 WL 5232076, at *45 (D.D.C. 2020).

163. Citing the *Franciscan Alliance* vacatur, the court acknowledged that it had "no authority . . . to disregard the final order of a district court vacating part of a regulation." *Id.* at *13. But the court distinguished between what it called the "'gender identity' portion" of the 2016 Rule and that rule's "prohibition on discrimination based on sex stereotyping." *Id.* at *14.

Believing that *Franciscan Alliance* vacated only the former "portion," the court enjoined the 2020 Rule to the extent that it "eliminated 'sex stereotyping' from the [2016] Rule's definition of 'discrimination on the basis of sex." *Id.* at *1, *45.

164. The court also held that HHS erroneously incorporated Title IX's religious exemption into its new rule without considering "the potential negative consequences that importing a blanket religious exemption into Section 1557 might have for access to health care." *Id.* at *28. The court stated, however, that "nothing in this decision renders religiously affiliated providers devoid of protection" and identified two "statutory safeguards": the ACA's explicit conscience and abortion protections, 42 U.S.C. § 18023(c)(2), and RFRA, *Id.* at *29.

165. The court refused to invalidate the provision of the 2020 Rule that repealed the 2016 Rule's prohibition on categorical coverage exclusions for gender-transition services. The court was satisfied that HHS had "thoroughly considered the evidence" on this issue and that it was "not this Court's place to resolve this scientific debate." *Id.* at *31.

166. The court concluded that HHS is "preliminarily enjoined from enforcing the repeal of the 2016 Rule's definition of discrimination '[o]n the basis of sex' insofar as it includes 'discrimination on the basis of . . . sex stereotyping'" and "from enforcing its incorporation of the religious exemption contained in Title IX." *Id.* at *45.

167. The effect of these two overlapping injunctions is that the 2016 Rule remained in place and that the 2020 rule never took effect. *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1138 (D.N.D. 2021).

F. This Court's injunction of the Mandate and the Eighth Circuit's affirmance

168. On January 19, 2021, this Court granted the Religious Sisters of Mercy Plaintiffs' and the CBA's and its member plaintiffs' motions for summary judgment. *Religious Sisters of Mercy*,

513 F. Supp. 3d at 1137 (subsequent history omitted). The Court first held that the Plaintiffs had standing to challenge the Mandate to the extent it requires Plaintiffs to "perform or cover gender-transition procedures" under Section 1557. *Id.* at 1138. The Court ruled that Plaintiffs' claims implicate constitutional interests; Section 1557 arguably requires such coverage; and Plaintiffs are under a credible threat of enforcement. *Id.* The Court next held that the CBA Plaintiffs has standing to "pursue RFRA claims against the EEOC's interpretation of Title VII" that Title VII requires CBA members to "cover gender-transition procedures in their health plans." *Id.* at 1141. Finally, the Court concluded that the Mandate substantially burdens the Plaintiffs' sincerely held religious beliefs without satisfying strict scrutiny. *Id.* at 1147-49.

169. For both Section 1557 and Title VII, the Court also ruled that the CBA had associational standing to sue on behalf of its members. *Id.* at 1137. The Court explained that "[a]n organizational plaintiff 'need not establish that all of its members would have standing to sue individually so long as it can show that 'any one of them' would have standing.'" *Id.* at 1137 (quoting *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013)). The CBA satisfied this test because its "verified second amended complaint confirms that its membership includes Catholic hospitals and other healthcare entities 'that receive Medicaid and Medicare payments and participate in HHS-funded programs'" and the named-CBA-member Plaintiffs had standing to challenge the Defendants' interpretation "in their own right." *Id.* at 1137, 1141. The Court entered a permanent injunction on February 19, 2021. *Religious Sisters of Mercy*, 2021 WL 1574628, at *1 (D.N.D. Feb. 19, 2021).

170. The Government appealed only the Court's rulings as to justiciability. The Eighth Circuit affirmed this Court's injunction in full, with one exception. *Religious Sisters of Mercy v.*

Becerra, 55 F.4th 583, 609 (8th Cir. 2022). The Eighth Circuit held that the CBA itself and the individual CBA members had standing to challenge the Defendants' interpretations of Section 1557 and Title VII. *Id.* at 602-07. Yet the Circuit reversed this Court's holding that the CBA had associational standing to sue on behalf of its unnamed members. The Eighth Circuit held that the CBA had to identify, through testimony from someone other than the "organization's self-descriptions of their membership", an additional, non-named-plaintiff member who had standing to sue in its own right in order to have associational standing. *Id.* at 601-02.

171. On remand, this Court dismissed without prejudice the CBA's claims to the extent they sought relief for the CBA's unnamed members, but invited the CBA to refile a suit in "properly establish[ed]" associational standing. *Religious Sisters of Mercy v. Becerra*, 16-cv-00386, slip op. at 3, (D.N.D. Sept. 15, 2023) ("Importantly, the dismissal is without prejudice, and nothing prevents the CBA from filing a new action, where associational standing us properly established."). This Court entered a corresponding amended judgment on October 11, 2023.

172. This suit was filed the next day, and docketed by the clerk on October 13.

G. The 2021 and 2022 Notices

173. The day he was sworn into office, President Biden issued an executive order asserting that "laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021).

174. On May 25, 2021, pursuant to this executive order, HHS published a document titled "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972." 86 Fed. Reg. 27,984 (May 25, 2021). The May 2021 notice announced that "consistent with the Supreme Court's decision in *Bostock* and

Title IX," HHS would "interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity." *Id.* at 27,984.

175. Shortly thereafter a group of physicians challenged the notification on the grounds that it would force them to treat youth suffering from gender dysphoria in a manner that violated their clinical judgment and conscience. *Neese v. Becerra*, 640 F. Supp. 3d 668, 668–70 (N.D. Tex. 2022). The U.S. District Court for the Northern District of Texas found the Notification to be "not in accordance with the law." *Id.* at 3. The Court entered a declaratory judgment declaring that "Section 1557 of the ACA does not prohibit discrimination on account of sexual orientation and gender identity, and the interpretation of 'sex' discrimination that the Supreme Court of the United States adopted in [*Bostock*] is inapplicable to the prohibitions on 'sex' discrimination in Title IX of the Education Amendments of 1972 and in Section 1557 of the ACA." Final Judgment, *Neese*, 2:21-cv-163-Z (N.D. Tex. Nov. 22, 2022), ECF No. 71.

H. The 2024 Rule

176. On May 6, 2024, HHS published a rule interpreting Section 1557, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024). Plaintiffs refer this rule as the "2024 Rule."

177. The 2024 Rule repeals the never-in-effect 2020 Rule and reiterates the commands of the 2016 Rule, including the Mandate.

178. With some exceptions, the 2024 Rules will be effective on Friday, July 5, 2024. 89 Fed. Reg. at 37,522.

179. The 2024 Rule applies to a "health program or activity operated by a covered entity." 89 Fed. Reg. at 37,699, to be codified at 45 C.F.R. § 92.101(a)(1). The 2024 Rule defines "covered entity" as, *inter alia*, a "recipient of Federal financial assistance." 89 Fed. Reg. at 37,694, to be codified at 45 C.F.R. § 92.4. The 2024 Rule defines "health program or activity" to cover virtually all healthcare providers and facilities, as well as health insurers, third-party administrators, pharmacy benefits managers, and other health service providers in the United States: Health program or activity means: "(1) Any project, enterprise, venture, or undertaking to: (i) Provide or administer health-related services, health insurance coverage, or other health-related coverage; (ii) Provide assistance to persons in obtaining health-related services, health insurance coverage, or other health-related coverage; (iii) Provide clinical, pharmaceutical, or medical care; (iv) Engage in health or clinical research; or (v) Provide health education for health care professionals or others." 89 Fed. Reg. at 37,694, to be codified at 45 C.F.R. § 92.4; *see also* 89 Fed. Reg. at 37,538 ("OCR agrees with commenters' assessment that the Proposed Rule's approach to the inclusion of health insurance coverage and other health-related coverage in the definition of 'health program or activity' is most consistent with section 1557's statutory text and Congressional intent."); *id.* (noting that the 2024 Rule applies to all the operations of a health program or activity if any part receives federal financial assistance).

180. The 2024 Rule provides: "Discrimination on the basis of sex includes, but is not limited to, discrimination on the basis of: (i) Sex characteristics, including intersex traits; (ii) Pregnancy or related conditions; (iii) Sexual orientation; (iv) Gender identity; and (v) Sex stereotypes." 89 Fed. Reg. at 37,699, to be codified at 45 C.F.R. § 92.101(a)(2).The 2024 Rule does not provide definitions of these terms.

181. HHS previously defined "gender identity" in the 2022 Notice of Proposed Rulemaking to include the terms "transgender," "nonbinary," "gender nonconforming," "genderqueer," or "genderfluid." Notice of Proposed Rulemaking, Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,867 (Aug. 4, 2022) ("2022 NPRM").

182. The 2022 NPRM defines the Rule's prohibition on "gender identity" discrimination to require coverage and performance of "gender affirming care." "'[G]ender-affirming care' refers to care for transgender individuals (including those who identify using other terms, for example, nonbinary or gender nonconforming) that may include, but is not necessarily limited to, counseling, hormone therapy, surgery, and other services designed to treat gender dysphoria or support gender affirmation or transition." 87 Fed. Reg. at 47,834 n. 139. HHS has apparently adopted the standards of the World Professional Association for Transgender Health ("WPATH") as governing its interpretation of Section 1557. *See id.*; *see also id.* at 47,867 n. 416, 47,868 n. 423, 47,870 n. 448.

183. Guidance from HHS's Office of Population Affairs defines "gender affirming care" to include:

Affirming Care	**What is it?**	**When is it used?**	**Reversible or not**
Social Affirmation	Adopting gender-affirming hairstyles, clothing, name, gender pronouns, and restrooms and other facilities.	At any age or stage.	Reversible.
Puberty Blockers	Using certain types of hormones to pause pubertal development.	During puberty.	Reversible.
Hormone Therapy	Testosterone hormones for those who were assigned female at birth Estrogen hormones for those who were assigned male at birth.	Early adolescence onward.	Partially reversible.

Gender-Affirming Surgeries	"Top" surgery – to create male-typical chest shape or enhance breasts. "Bottom" surgery – surgery on genitals or reproductive organs Facial feminization or other procedures.	Typically used in adulthood or case by-case in adolescence.	Not reversible.

HHS Office of Population Affairs, Gender-Affirming Care and Young People, available at https://opa.hhs.gov/sites/default/files/2023-08/gender-affirming-care-young-people.pdf (last visited May 22, 2024).

184. The 2024 Rule defines "[p]regnancy or related conditions" to include "termination of pregnancy," *i.e.* abortion. 89 Fed. Reg. at 37,576; *see also id.* ("A covered entity that chooses to provide abortion care but refuses to provide an abortion for a particular individual on the basis of a protected ground—such as race—would violate section 1557."); *id.* at 37,556 ("We clarify that a Nondiscrimination Policy's prohibition of sex discrimination encompasses protections afforded for various types of sex discrimination such as pregnancy, including termination of pregnancy or related conditions."); *id.* at 37,556 ("OCR has concluded as a matter of statutory interpretation that section 1557 does not require the Department to incorporate the language of title IX's abortion neutrality provision."); *id.* at 37,557 ("We note also that, as commenters suggested, this provision protects patients from discrimination on the basis of actual or perceived prior abortions."); *id.* at 37,606 ("To the extent plans offer coverage for termination of pregnancies and related services, they must do so on a nondiscriminatory basis."). The Fifth Circuit has previously explained that defining sex discrimination to include "termination of pregnancy" "require[s] that hospitals perform . . . abortions." *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374 (5th Cir. 2022). This

interpretation of Section 1557 follows, *inter alia*, HHS's recent guidance to pharmacies, requiring pharmacies to stock abortion-inducing drugs pursuant to Section 1557.[8]

185. The 2024 Rule also defines sex discrimination and sexual-orientation discrimination to include "fertility care," including procedures like IVF, surrogacy, and gamete donation. 89 Fed. Reg. at 37,577 (defining "fertility care" to include "IVF"). The Rule also requires covered entities to provide infertility treatments to non-married couples. *Id.* (stating that "if a covered entity elects to provide or cover fertility services but categorically denies them to same-sex couples, it may violate section 1557's prohibition on sex discrimination."). In other words, a Catholic covered entity or employer must provide or cover IVF, surrogacy for all individuals, and must provide fertility treatments that are otherwise in line with Catholic belief for a non-married individual or a couple in a non-traditional relationship.

186. The 2024 Rule's extension of Section 1557 to "gender identity," abortion, and fertility, coupled with its expansive definition of a "covered entity," means that (1) healthcare providers are required to perform or refer for gender transition procedures, abortion, and infertility procedures; (2) healthcare providers are required to alter their speech and medical advice; (3) covered employers, insurance providers and TPAs are required to offer employee benefits covering

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[8] *See* Dep't of Health and Hum. Servs., Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Nondiscriminatory Access to Health Care at Pharmacies (Sept. 29, 2023) ("An individual experiences an early pregnancy loss (first-trimester miscarriage) and their health care provider prescribes medication to assist with the passing of the miscarriage. If a pharmacy refuses to fill the individual's prescription—which is prescribed to manage a miscarriage or complications from pregnancy loss, because this medication can also be used to terminate a pregnancy—the pharmacy may be discriminating on the basis of sex."), *available at* https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html (last visited May 22, 2024).

gender transition procedures and abortions; and (4) sex-specific healthcare facilities and programs, including shower facilities and hospital wards, must be opened to individuals based on gender identity, among other requirements.

1. Healthcare professionals are required to perform or refer for gender transition procedures, abortion, and immoral infertility treatments.

187. The 2024 Rule, like the 2016 Rule, requires healthcare providers to cover, perform, or refer for; and insurers, PBMs, and TPAs to cover, gender transition procedures if they offer analogous services in other contexts. *See* 89 Fed. Reg. at 37,700-01, to be codified at 45 C.F.R. § 92.206. Section 206 of the 2024 Rule specifically prohibits denying or limiting "health services sought for purpose of gender transition or other" so-called "gender-affirming care that the covered entity would provide to an individual for other purposes if the denial or limitation is based on an individual's sex assigned at birth, gender identity, or gender otherwise recorded." 89 Fed. Reg. at 37,701, to be codified at 45 C.F.R. § 92.206(b)(4). That includes, according to HHS, "counseling, hormone therapy surgery, and other services designed to treat gender dysphoria or support gender affirmation or transition." NPRM, 87 Fed. Reg. at 47,834 n.139; *see* 89 Fed. Reg. at 37,596 ("gender-affirming care" includes "hormone therapy, surgery, and other related services").

188. For example, if a provider specializing in reconstructive surgery would perform a mastectomy for a woman suffering from breast cancer, the 2024 Rule requires that provider to perform a mastectomy for a minor who for a transgender man. *See* 87 Fed. Reg. at 47,867 ("By contrast, a gynecological surgeon may be in violation of the rule if they accept a referral for a hysterectomy but later refuse to perform the surgery upon learning the patient is a transgender man."). It would similarly be discriminatory under the 2024 Rule for a clinic to prescribe and administer puberty blockers to treat precocious puberty—an FDA-approved use—but not a

"gender transition"—a non- FDA-approved use. It would also be presumptively discriminatory for a hospital to provide an orchidectomy to treat testicular cancer but refuse to remove healthy testicles for a "gender transition."

189. Although HHS disclaims an attempt to mandate standards of care for gender-transition services in the final rule, the proposed rule mentioned the clinical "guidelines" it expects covered entities will follow: the guidelines of the WPATH and Endocrine Society. 2022 NPRM, 87 Fed. Reg. at 47,868 (asserting that covered entities "should follow clinical practice guidelines and professional standards of care," and citing WPATH Standards of Care ("SOC") 7 & Endocrine Society Guideline). HHS does not disavow that endorsement in the final rule or provide any examples of competing guidelines that would not require covered entities to support a "gender-transition."

190. According to WPATH SOC 8, the purportedly medically necessary drug interventions for a gender transition include:

a. Prescribing and administering puberty blockers off-label, and.

b. Prescribing supraphysiological levels of cross-sex hormones off-label and related visits and tests.

191. According to WPATH SOC 8, the purportedly "medically necessary" so- called "gender-affirming surgical procedures," WPATH SOC 8, *supra*, at S18, S128, include the following:

a. "Hysterectomy" (removal of healthy uterus);

b. "Mastectomy" (removal of healthy breasts);

c. "Salpingo-oophorectomy" (removal of healthy ovaries and fallopian tubes);

d. "Orchiectomy" (removal of healthy testicles);

e. "Phalloplasty" (constructing penis-like structure using tissue from skin), including "urethral lengthening," "prosthesis," "colpectomy" (closure of healthy vagina), "colpoclesis" (shortening of healthy vagina), and "scrotoplasty" (creating new scrotums);

f. "Metoidioplasty" (constructing penis-like structure using tissue from a hormone-enlarged clitoris), including "urethral lengthening," "prosthesis," "colpectomy" (closure of healthy vagina), "colpoclesis" (shortening of healthy vagina), and "scrotoplasty" (creating new scrotums);

g. "Vaginoplasty" (constructing vagina-like structure), including methods of "[penile] inversion" (using combination of skin surrounding penis and scrotal skin), "peritoneal [flaps pull-through]" (pulling down peritoneum (inner lining of abdominal wall) into space between rectum and urethra/prostate), and "intestinal" technique (using section of terminal large intestine);

h. "Vulvoplasty" (constructing vulva-like structures)

i. "Hair line advancement and/or hair transplant;"

j. Facelift/mid-face lift (following alteration of the underlying skeletal structures);

k. "Platysmaplasty" (neck lift);

l. "Blepharoplasty" (eye and lid modification);

m. "Rhinoplasty" (nose reshaping);

n. "Cheek" surgery, including "implant[s]" and "lipofilling;"

o. "Lip" surgery, including "augmentation" and "upper lip shortening;"

p. "Lower jaw" surgery, including "augmentation" and "reduction of the mandibular angle" (cutting or shaving the corner of the lower jaw);

q. "Chin reshaping" surgery.

r. "Chondrolaryngoplasty" (shaving down Adam's apple);

s. "Vocal cord surgery;"

t. "Breast reconstruction" and "augmentation" (mammoplasty);

u. "Body contouring" surgeries, including "liposuction," "lipofilling," and "implants" (such as "pectoral, hip, gluteal, [and] calf");

v. "Monsplasty" (reduction of mons pubis tissue around the public bone, which is more pronounced in biological females);

w. "Nipple-areola tattoo;"

x. "Uterine transplantation" (uterus from donor);

y. "Penile transplantation" (penis from donor);

z. "Hair removal," including "laser epilation" (laser removal) or "electrolysis" (permanent removal by destroying hair follicles).

WPATH 8, supra, at S128.

192. The 2024 Rule, like the 2016 Rule, requires healthcare providers to perform (or refer for), and insurers and TPAs to cover abortions if they offer analogous services in other contexts. For example, the 2024 Rule states: "A covered provider that generally offered abortion care could violate that prohibition if, for example, it refused to provide an abortion to a particular patient because of that patient's race or disability." 89 Fed. Reg. at 37,576. Thus, if a Catholic healthcare provider would perform a surgery to save the life of the mother, the unintended effect of which is

an abortion (*e.g.*, in the case of ectopic pregnancies[9]), or would provide procedures to treat miscarriage that could also be used for abortion, *see Religious Sisters of Mercy,* 513 F. Supp. 3d at 1124 ("The same concept theoretically applied for abortions. So if an obstetrician performed dilation and curettage procedures for miscarriages, then the 2016 Rule barred a later refusal to perform those procedures for abortions."), the 2024 Rule would require that healthcare provider to offer abortion in violation of the providers' faith.

193. The 2024 Rule also requires healthcare providers to perform (or refer for), and insurers, PBMs, other service providers, and TPAs to cover artificial reproductive technologies such as IVF, surrogacy, and gamete donation for any individual, regardless of marital status. 89 Fed. Reg. at 37,577 ("OCR acknowledges the unique challenges faced by LGBTQI+ individuals seeking fertility treatment. Individuals are protected from discrimination regardless of the type of health care they seek.").

194. In crafting the 2024 Rule, HHS and EEOC disregarded the commenters that asked HHS to make clear that health services need only be covered if they are deemed to be "medically necessary" or "medically appropriate" in the professional opinion of those charged with the care of the patient. For example, the 2024 Rule prohibits any categorical exclusion of "gender affirming care." 89 Fed. Reg. at 37,701, to be codified at 45 C.F.R. § 92.207(b)(4). "When medically necessary treatments are categorically excluded when sought by transgender enrollees for purposes of

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[9] *See* United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, p. 18, ¶ 47 (6th ed. 2009) ("Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.").

gender-affirming care, but the same such treatments are covered for cisgender enrollees, such exclusions may deny transgender individuals access to coverage based on their sex." 89 Fed. Reg. at 37,671.

2. Catholic healthcare organizations cannot adopt the Ethical and Religious Directives or the Doctrinal Note.

195. The 2024 Rule prohibits Catholic healthcare organizations from adopting policies, such as the Ethical and Religious Directives or Doctrinal Note, that would prohibit the organizations' constituents or agents from providing abortions, gender-affirming care, or immoral artificial reproductive procedures. The 2024 Rule "prohibits covered entities from . . . limiting a health care professional's ability to provide health services on the basis of a patient's . . . gender identity." 89 Fed. Reg. at 37,591; *see also id.* at 37,700 (same), to be codified at 45 C.F.R. § 92.206(b)(1). Indeed, this appears to be HHS's intent in adopting this provision. Although it was aware of commenters concerned that §§ 92.206(b)(1) 92.207(b)(4) would eliminate the ability of Catholic healthcare organizations to adopt the Ethical and Religious Directives, the Department declared that it harbored no anti-Catholic animus, 89 Fed. Reg. at 37,593, *and promulgated this provision regardless*, *id.*

3. Healthcare providers are required to alter their speech and medical advice.

196. The 2024 Rule, like the 2016 Rule, continues to compel the speech of healthcare institutions and professionals in several ways. For example, the Rule mandates revisions to healthcare program and activity's written policies, requiring express affirmations that gender transition-related procedures would be provided, 89 Fed. Reg. at 37,697, to be codified at 45 C.F.R. § 92.10(a)(1)(i), even if such revisions do not reflect the entity's medical judgment, values, or beliefs. The 2024 Rule also prohibits healthcare programs and activities from stating their view that "gender-affirming care" is not medically necessary. Thus, to avoid liability, healthcare providers

are compelled to speak by revising their policy to endorse gender transition-related services, to express language that is "affirming" of gender transition, and to express a non-binary view of gender. Further, by treating as discriminatory a medical view of transition-related treatment as experimental, the 2024 Rule coerces healthcare providers to speak about these procedures the way the government wants them to, even though they disagree and even though they believe they would disserve patients in so doing.

197. Like the 2016 Rule, 81 Fed. Reg. at 31,452, 31,458-59, the 2024 Rule requires covered entities to train their employees regarding the non-discrimination requirements in the Rule related to gender-affirming care, abortion, and artificial reproductive technology. 89 Fed. Reg. at 37,697, to be codified at 45 C.F.R. § 92.9.

198. In response to First Amendment concerns about "what would be required of providers in terms of expressing support of transgender people who wish to access gender-affirming care, using the name and pronouns requested by patients, and speaking about gender-affirming care," HHS simply noted that whether "discrimination is unlawful or considered harassment is necessarily fact-specific" and that "conduct, including verbal harassment, that is so severe or pervasive that it creates a hostile environment on the basis of sex is a form of sex discrimination." 89 Fed. Reg. at 37,596.

199. Under the 2024 Rule, covered entities must tell patients that males can get pregnant, give birth, and breastfeed. As HHS explains in the 2022 NPRM, healthcare providers are responsible for "'discrimination, stigma, and erasure'" if they speak or act in way that treats "pregnancy and childbirth . . . as something exclusively experienced by . . . women." 87 Fed. Reg. at 47,865.

4. Covered employers and insurance providers are required to offer employee benefits covering gender transition procedures and immoral infertility treatments.

200. The 2024 Rule, like the 2016 Rule, prohibits certain employers, health programs, and insurance plans from exercising judgment as to what they cover. HHS stated, "When medically necessary treatments are categorically excluded when sought by transgender enrollees for purposes of gender-affirming care, but the same such treatments are covered for cisgender enrollees, such exclusions may deny transgender individuals access to coverage based on their sex." *Id.* at 37,671. And so Section 92.207(b)(4) and (5) of the 2024 Rule prohibits a covered entity from "[h]av[ing] or implement[ing] a categorical coverage exclusion or limitation for all health services related to gender transition or other gender-affirming care" or "[o]therwise deny[ing] or limit[ing] coverage, deny[ing] or limit[ing] coverage of a claim, or impos[ing] additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition or other gender-affirming care if such denial, limitation, or restriction results in discrimination on the basis of sex." 89 Fed. at 37,701.

201. This conflict with religious employers extends beyond treatment related to gender dysphoria because some required procedures (such as elective hysterectomies) result in sterilization, and the 2024 Rule also extends to "termination of pregnancy." 89 Fed. Reg. at 37,576.

202. As a result of the 2016 Rule's materially identical requirement, some CBA members received notices from their insurance companies that their health plans were changing. These changes were not requested by these members. They were imposed involuntarily by the insurers on the ground that the changes were mandated by the 2016 Rule. Exhibits K and L hereto are, respectively, the gender dysphoria policies that United Healthcare and Blue Cross Blue Shield of

Kansas City delivered to CBA member dioceses – even those these dioceses are not themselves "covered entities" under the 2016 Rule.

203. The United Healthcare "Gender Dysphoria Rider" informed the diocese that its plan would now cover "[b]enefits for the treatment of Gender Dysphoria" and that any "exclusion for sex transformation operations and related services . . . is deleted." Ex. K at 1, 3. "Benefits for the treatment of Gender Dysphoria" include psychotherapy, "[c]ross-sex hormone therapy," and "[s]urgery for the treatment of Gender Dysphoria." *Id.* The latter category of surgery includes "Male to female surgeries" such as orchiectomy and penectomy (removal of testicles and penis) and clitoroplasty, labiaplasty, and vaginoplasty (creation of a clitoris, labia, and vagina). It also includes "Female to male surgeries" such as mastectomy, hysterectomy, vulvectomy and vaginectomy (removal of vulva and vagina), and metoidioplasty and phalloplasty (creation of penis).

204. After receiving notice of the United Healthcare rider in the mail, the CBA member diocese called the insurance company to demand the rider be removed from its plan. The insurer refused, informing the diocese that its plan must include the rider a result of the 2016 Rule.

205. The Blue Cross Blue Shield of Kansas City "Treatment of Gender Dysphoria" Policy informed the covered diocese that "[i]f coverage for gender reassignment surgery is available per the member's benefit, Blue Cross and Blue Shield of Kansas City (Blue KC) will provide coverage for treatment of gender dysphoria including gender reassignment surgery when it is determined to be medically necessary." Ex. L at 1. Under the policy, the diocesan plan covers "[p]sychotherapy for gender dysphoria"; "Continuous Hormone Replacement Therapy" with "[h]ormones of the desired gender," and surgeries for a "medically necessary initial gender reassignment," such as those identified above.

206. After receiving notice of the Blue Cross Blue Shield policy, the CBA member diocese called the insurer and was informed that the policy applied to the diocese's plan as a result of HHS's interpretation of Section 1557.

5. Sex-specific healthcare facilities or programs, including shower facilities or hospital wards, must be opened to individuals based on gender identity.

207. With regard to facilities, the 2024 Rule, like the 2016 Rule, prohibits sex-specific facilities. The 2024 Rule states, "A covered entity must not deny a nonbinary individual access to a health program or facility on the basis that the program or facility separates patients based on sex or offers separate male and female programs or facilities." 89 Fed. Reg. at 37,593. "For example, a hospital that assigns patients to dual-occupancy rooms based on sex would be prohibited from requiring a transgender woman to share a room with a cisgender man, regardless of how [that person's] sex is recorded in [their] insurance or medical records." 87 Fed. Reg. at 47,866-67.

208. When Title IX—the foundation for the 2016 and 2024 rules—was enacted, Congress ensured that it protected and preserved the privacy rights of individuals in intimate areas. *See* 20 U.S.C. § 1686; 117 Cong. Rec. 30407 (1971); 117 Cong. Rec. 39260 (1971); 117 Cong. Rec. 39263 (1971); 118 Cong. Rec. 5807 (1972). HHS's predecessor, the Department of Health, Education, and Welfare, promulgated regulations guaranteeing the privacy of individuals in intimate areas. *See* 34 C.F.R. § 106.32(b); 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex . . . ."). But in the 2016 and 2024 rules, HHS disregarded any right to "privacy" that could be violated "simply by permitting another person access to a sex-specific program or facility which corresponds to their gender identity." 81 Fed. Reg. at 31,389, 31,409; *see also* 89 Fed. Reg. at 37,593 (explaining that any policy protecting patient privacy must

be implement "consistent with the requirements of this rule" that non-binary individuals cannot be excluded from sex-specific facilities).

209. With regard to other health programs, HHS stated that sex-specific health programs or activities are permissible only when they do not cause more than *de minimis* harm. 89 Fed. Reg. at 37,594-95; *see also id.* at 37,701, to be codified at 45 C.F.R. 92.206(b)(3) ("In providing access to health programs and activities, a covered entity must not adopt or apply any policy or practice of treating individuals differently or separating them on the basis of sex in a manner that subjects any individual to more than de minimis harm, including by adopting a policy or engaging in a practice that prevents an individual from participating in a health program or activity consistent with the individual's gender identity.").

6. Other requirements of the 2024 Rule

210. Like the 2016 Rule, 81 Fed. Reg. at 31,468, the 2024 Rule requires that covered entities applying for federal financial assistance affirm up front that they will comply with the rule, 89 Fed. Reg. at 37,596, to be codified at 45 C.F.R. 92.5(a).

211. Like the 2016 rule, 81 Fed. Reg. at 31,472, the 2024 Rule requires covered entities to post notices regarding compliance with the 2024 Rule in conspicuous locations, 89 Fed. Reg. at 37,597-98, to be codified at 45 C.F.R. 92.10.

7. HHS rejects calls to accommodate religious exercise consistent with the Eighth Circuit's ruling in *Religious Sisters of Mercy*.

212. Like the 2016 Rule, 81 Fed. Reg. at 31,378, HHS was aware that the 2024 Rule would substantially burden the religious exercise of religious hospitals, churches, ministries, and other employers, 89 Fed. Reg. at 37,674.

213. During the comment period, many religious organizations voiced their alarm at the scope of the earlier proposed rule and explained why it was essential for HHS to include categorical protections for religious employers and healthcare organizations. For example, the United States Conference of Catholic Bishops joined with the National Association of Evangelicals, the Christian Medical Association, the National Catholic Bioethics Center, and other religious organizations to submit comments explaining how HHS's proposed rules would affect religious employers and urging HHS to protect religious exercise. Comments from USCCB et al. to U.S. Dept. of Health and Human Services Re: Nondiscrimination in Health Programs and Activities RIN 0945-AA17, at 2 (Sept. 7, 2022), https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/2022.comments.1557.regulations.final_.pdf (last visited May 21, 2024).

214. HHS and EEOC ignored the calls to accommodate religious exercise as required by law in at least two ways.

215. *First*, like the 2016 Rule, 81 Fed. Reg. at 31,380, the 2024 Rule refuses to incorporate Title IX's categorical religious exception, 89 Fed. Reg. at 37,530-32. In doing so, HHS expressly rejected commenters' calls to follow the decision in *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660, 691 (N.D. Tex. 2016) that failure to incorporate Title IX's religious exemption is "contrary to law." 89 Fed. Reg. at 37,532.

216. The 2024 Rule also refuses to incorporate Title IX's abortion-neutrality provision. 89 Fed. Reg. at 37,532 ("OCR has concluded as a matter of statutory interpretation that section 1557 does not require the Department to incorporate the language of title IX's abortion neutrality provision."). And although HHS gestures toward other federal laws that prohibit the Department from imposing an abortion mandate, *id.*, it refuses to provide a categorical exemption for religious

covered entity from the 2024 Rule's inclusion of "termination of pregnancy" in the definition of "sex" for purposes of Section 1557.

217. The 2024 Rule, like the 2016 Rule, is, in this regard, even more extreme and unyielding than the contraceptive/abortifacient mandate that HHS created based on another section of the Affordable Care Act. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 933-35 (8th Cir. 2015) (describing HHS's contraceptive and abortifacient mandate). While HHS reluctantly decided to exempt a narrowly defined group of "religious employers" from its abortifacient and contraception mandate, *id*. at 933, it refused to categorically exempt *any* religious employers from the 2024 Rule. And while many non-exempt religious employers could avoid the contraceptive/abortifacient mandate (though at substantial cost) by maintaining a grandfathered group health plan, there is no grandfather exemption from the requirements of Section 1557 or the 2024 Rule.

218. Even while refusing to exempt religious organizations from its Mandate, the government has exempted its own insurance programs. TRICARE, the military's insurance program, generally does not cover "surgery for the treatment of gender dysphoria." Covered Services, Gender Dysphoria Services, TRICARE. A TRICARE guidance memo states that in the context of gender dysphoria treatment, "[i]n no circumstance will a provider be required to deliver care that he or she feels unprepared to provide either by lack of clinical skill or due to ethical, moral, or religious beliefs." Yet no similar protections for providers' medical judgment or religious beliefs are offered under the 2024 Rule.

219. Further, 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. Ctrs. for Medicare & Medicaid Servs., Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (Aug. 30, 2016).[10] The Centers for Medicare & Medicaid Services, which is part of HHS, concluded that "there is not enough evidence to determine whether gender reassignment surgery improves health outcomes" because while some studies "reported benefits," "others reported harms." Ctrs. for Medicare & Medicaid Servs., Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (June 2, 2016).[11]

220. *Second*, the 2024 Rule fails to follow this Court's and the Eighth Circuit's decisions in *Religious Sisters of Mercy*, holding that the Religious Freedom Restoration Act requires an exemption for Catholic employers and healthcare providers who object to performing and providing the immoral procedures mandated by the 2024 Rule. *See Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1149 (D.N.D. 2021) ("As applied, the challenged interpretations of Section 1557 and Title VII violate the RFRA."); *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022) (affirming judgment that requiring Catholic employers and healthcare providers to cover and provide gender-affirming care violates RFRA). Notably, HHS refused to even acknowledge the existence of these rulings in the 2024 Rule or its preamble.

I. EEOC, invoking Title VII, has imposed on non-covered entities the Mandate's requirement of gender-transition coverage.

221. Although the 2024 Rule directly applies only to "covered entities," it announces, like the 2016 Rule did, 81 Fed. Reg. at 31,432, that the EEOC will enforce a similar rule against

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[10] Available at https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282.

[11] Available at https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=Y&NCAId=282.

employers under Title VII. The 2024 Rule declares that although HHS lacks jurisdiction over "employment practices," 89 Fed. Reg. at 37,552, it will "transfer matters to the EEOC or DOJ where OCR lacks jurisdiction over an employer," *id.* at 37,624, 37,627; *see also* 87 Fed. Reg. at 47,877 ("For example, OCR will transfer matters to the EEOC where OCR lacks jurisdiction over an employer responsible for the benefit design of an employer-sponsored group health plan."). HHS has decided that, for non-healthcare entities, Title VII is better suited to "address claims that an employer has discriminated in the provision of benefits, including health benefits, to its employees." *Id.* at 31,437.

222. In the context of Title VII, the EEOC has adopted similar substantive standards as HHS. For eight years, the EEOC has interpreted Title VII as prohibiting discrimination against employees on the basis of "transgender status." EEOC, What You Should Know About EEOC and the Enforcement Protections for LGBT Workers.[12] The EEOC maintains this interpretation today. *See* EEOC, What You Should Know: The EEOC and Protections for LGBT Workers ("EEOC Statement").[13]

223. The EEOC has specifically enforced this interpretation by requiring employer health plans to cover "medically necessary care based on transgender status." EEOC, Deluxe Financial to Settle Sex Discrimination 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

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[12] This EEOC Statement was previously available at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm. The version of this page, as accessed and preserved on December 15, 2016 by the Internet Archive, is attached hereto as Exhibit J.

[13] Available at https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-protections-lgbt-workers.

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"); *see also Darin B. v. U.S. Office of Personnel Mgmt.*, EEOC Appeal No. 0120161068, 2017 WL 1103712 (Mar. 6, 2017) (a transgender male complainant stated a cognizable claim of sex discrimination when he alleged that his Federal Employee Health Benefits insurance plan denied pre-authorization for nipple-areola reconstruction; the failure to use or exhaust the process for Agency review of an insurance carrier's decision does not preclude an employee from asserting a viable claim in the EEO process).

224. Dignity Health is one of the largest healthcare systems in the United States and includes many Catholic hospitals. It has now merged with Catholic Health Initiatives to form Common Spirit Health, the largest Catholic Hospital network in the world. In June 2016, Josef Robinson, a transgender male, sued Dignity Health for maintaining an employee health plan that categorically excluded coverage for gender transition services. Robinson'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," and that the hospital's exclusion of transgender surgery constituted a violation of Section 1557 of the Affordable Care Act. EEOC filed an amicus brief in the case in support of Robinson, arguing that the employer's transgender exclusion violated Title VII by denying Robinson "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, *Robinson v. Dignity Health*, 16-cv-03035 YGR (N.D. Cal.) (filed Aug. 22, 2016).[14]

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[14] Available at https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/litigation/briefs/robinson.html.

225. The EEOC has taken enforcement action against other employers for the "categorical exclusion" from their health plans of "services related to transgender treatment/sex therapy." Soc'y for Human Res. Mgmt., Wal-Mart Loses Perfect LGBTQ Rating Because of Transgender Harassment, Nov. 30, 2017.[15]

226. The EEOC has attempted to enforce the Mandate against at least one CBA member. While the appeal in *Religious Sisters of Mercy* was pending before the Eighth Circuit, in October 2022, the CBA was notified by one of its members, a Catholic ministry with "Catholic" in its name, that the EEOC had begun an enforcement action for its 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. The injunction previously entered by this Court was the only thing protecting this CBA member. However, when the Court vacated its injunction to the extent it protected CBA on an associational basis, the CBA's members are currently under threat of similar enforcement actions. *See* Ex. I, incorporated by reference herein.

227. Since promulgating the guidance and taking the positions and enforcement actions described above, the EEOC has never changed its interpretation or application of Title VII.

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[15] Available at https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wal-mart-lgbtq-rating.aspx.

228. Courts have recently interpreted Title VII consistent with the EEOC position that health insurance coverage cannot exclude care for transgender services, such as vaginoplasty could not be excluded from coverage. See *Lange v. Houston Cnty., Georgia*, No. 22-13626, 2024 WL 2126748, at *1 (11th Cir. May 13, 2024) ("a health insurance provider can be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for denying coverage for gender-affirming care to a transgender employee *because* the employee is transgender. We hold that it can.").

229. Indeed, in *Lange*, the United States filed an *amicus* brief in support of the plaintiff in that case, who alleged discrimination under Title VII by her employer for its categorical exclusion of "gender-affirming care" from the employer's health plan. Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance on the Issues Addressed Herein, *Lange v. Houston Cnty., Georgia*, No. 22-13626, (Mar. 17, 2023), attached here as Exhibit N. In that brief, the United States argued that an employer-sponsored health insurance plan violates Title VII if it excludes coverage for medical treatments only when they are needed to provide gender-affirming care." *Id.* at 10. The United States filed this brief because of its "substantial interest . . . [in] the proper application of the prohibition on sex discrimination in Title VII . . . to an employer's denial of health insurance benefits to a transgender worker" in light of EEOC's and DOJ's "enforcement authority under Title VII." *Id.* at 1-2.

230. Accordingly, it is the policy and official position of the EEOC, based on the EEOC's statements and the agency's actual enforcement actions, that exclusion of gender-transition coverage in employer health plans constitutes a violation of Title VII's ban on "sex" discrimination.

J. Enforcement Mechanisms

231. CBA members that do not comply with the Mandate may face enforcement actions initiated by federal agencies or by individuals who allege they have been discriminated against.

232. The 2024 Rule, like the 2016 Rule, Fed. Reg. at 31,467-68, 31,472, 31,439, subjects "covered entities" to enforcement actions brought by HHS's Office of Civil Rights ("OCR"). If the Director of OCR concludes that a covered entity had discriminated on the basis of "gender identity," "sexual orientation," or "termination of pregnancy," the entity would have to take "remedial action . . . to overcome the effects of the discrimination." 89 Fed. Reg. at 37,696, to be codified at 45 C.F.R. § 92.6(a)(1). If it refuses, OCR could initiate an administrative procedure to terminate the entity's HHS funding. 89 Fed. Reg. at 37,664.

233. The 2024 Rule, like the 2016 Rule, *see* 81 Fed. Reg. at 31,439, 31,472, also empowers OCR to compel covered entities to record and submit compliance reports under Section 1557, 89 Fed. Reg. at 37,664.

234. Under the 2024 Rule, like the 2016 Rule, where HHS does not have jurisdiction over an alleged discriminatory act, it said it would refer the matter to the EEOC for enforcement under Title VII. 89 Fed. Reg. at 37,626. Similar to HHS's authority under Section 1557, the EEOC has authority to investigate alleged Title VII violations and will ask violators to voluntarily take corrective action for the discriminatory behavior. 42 U.S.C. § 2000e-5(a).

235. If HHS or the EEOC are dissatisfied with an entity's corrective remedial actions, the 2024 Rule permits referral of the matter to the Department of Justice to bring a federal lawsuit to enforce federal civil rights laws. *See, e.g.*, 89 Fed. Reg. at 37,664.

236. Title VII creates a private right of action. In the 2016 and 2024 rules, HHS interpreted Section 1557 as authorizing a private right of action. *See* 81 Fed. Reg. at 31,440; 89 Fed. Reg. at 37,654. This means that individuals who believe they have been discriminated against on the basis of gender identity may bring their own federal lawsuits. These laws can also be enforced by class action suits.

237. Sanctions for failing to comply with the 2024 Rule are severe. They include compensatory damages, punitive damages, treble damages, civil penalties, attorney fees, injunctive relief, and even loss of federal funding.

238. *Loss of federal funding*: Catholic healthcare entities subject to the 2024 Rule risk the denial or discontinuance of federal funding if they do not comply. 89 Fed. Reg. at 37,664. HHS Form 690 makes compliance "a condition of continued receipt of Federal financial assistance" and authorizes the government "to seek judicial enforcement of this assurance." *Assurance of Compliance*, U.S. Dep't of Health and Hum. Servs., https://www.hhs.gov/sites/default/files/form-hhs690.pdf. (last visited May 22, 2024).

239. *Civil and criminal penalties and treble damages*: Covered entities that submit HHS Form 690 but do not comply with the 2024 Rule could be liable under the False Claims Act, which authorizes a civil penalty of up to $11,000 for each false claim, "plus 3 times the amount of damages which the Government sustains because of" the false claim. 31 U.S.C. § 3729(a)(1). False claims related to a health program may also subject responsible persons to fines and up to five years imprisonment under 18 U.S.C. § 1035(a).

240. *Compensatory damages*: Catholic employers that violate the 2024 Rule may be subject to compensatory damages under Section 1557 or under Title VII. 89 Fed. Reg. at 37,654 ("The

enforcement mechanisms available for and provided under . . . Title IX . . . shall apply for purposes of Section 1557."); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992) (compensatory damages available under Title IX); 42 U.S.C. § 1981a(b)(3) (compensatory damages available under Title VII). Compensatory damages may include pecuniary losses and even nonpecuniary losses such as "emotional pain" and "mental anguish." 42 U.S.C. § 1981a(b)(3); *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 954 (7th Cir. 1998).

241. *Punitive damages*: Punitive damages are available under Title VII if the employer acted "with malice or with reckless indifference to the federally protected rights" of an employee. 42 U.S.C. § 1981a(b)(1). Punitive damages are subject to the same statutory caps that are imposed for nonpecuniary losses. *See id.* § 1981a(b)(3).

242. *Injunctive relief*: Courts may order broad forms of injunctive relief under Title VII, *see* 42 U.S.C. §2000e-5(g)(1); *United States v. Criminal Sheriff, Parish of Orleans*, 19 F.3d 238, 239 (5th Cir. 1994), and may even mandate that employers adopt certain policies, *see, e.g.*, *Morris v. Am. Nat'l Can Corp.*, 730 F. Supp. 1489, 1498 (E.D. Mo. 1989), *aff'd in part, rev'd in part on other grounds*, 952 F.2d 710 (8th Cir. 1991); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1541 (M.D. Fla. 1991). Title IX, and hence Section 1557, also permit broad injunctive relief. *See Roberts v. Colo. State Bd. of Agriculture*, 998 F.2d 824, 833 (10th Cir. 1993).

243. *Attorney's fees*: Under Title VII and Section 1557, a prevailing party is entitled to costs and attorney's fees. *See* 42 U.S.C. § 2000e-5(k); *id.* § 1988(b).

VI. THE MANDATE AND THE EEOC'S INTERPRETATION CONTINUE TO BURDEN THE RELIGIOUS EXERCISE OF CBA'S MEMBERS

244. The Mandate continues to burden the religious exercise of the CBA's members.

245. The EEOC's interpretation of Title VII applies to all employers with 15 or more employees.

246. The decisions of CBA members to refuse to cooperate in their patients', employees', or plan beneficiaries' efforts to undergo gender transition procedures qualify as the exercise of religion.

A. The Mandate's effects on CBA members that are covered entities – medical services

247. The Mandate's regulatory scheme makes it virtually impossible for CBA members that qualify as a "covered entity" to continue their healthcare and ministries. Their options are: (1) provide gender transition services, abortion, and/or immoral infertility treatments; (2) cease providing any services that HHS may correlate with gender transition, abortion, and/or immoral infertility treatments; (3) continue to meet patients' needs but refuse to provide gender transition, abortion, and/or immoral infertility treatments; (4) stop participating in all HHS-related programs, including Medicaid and Medicare; and (5) cease providing health services and activities.

248. Option 1, directly providing gender transition, abortion, and/or immoral infertility treatments, is contrary to Catholic values and would give rise to scandal. Directly providing gender transition, abortion, and/or immoral infertility treatments is contrary to Catholic teaching and belief. This situation gives rise to scandal and the loss of members' reputation because patients, employees, and the larger community would perceive that CBA-member healthcare providers profess one thing but do another. Such scandal devastates ministry.

249. Option 2, ceasing providing any services that HHS may correlate with gender transition, abortion, and/or immoral infertility treatments, would be ruinous for covered-entity CBA members and their patients. To avoid the Mandate, CBA members could refuse to perform any

procedure that might be used as part of a gender transition, such as hysterectomies, mastectomies, hormone treatments, and plastic surgery; abortion, such as treatment for miscarriage or surgeries to save a mother's life; or fertility treatments such as hormonal therapy or surgeries. Doing so would prevent these CBA members from being able to use such procedures to address medical illnesses or conditions—such as uterine cancer, breast cancer, menopause, miscarriage, and polycystic ovarian syndrome—thus injuring their healing ministries. Artificially restricting their medical services in this manner would cause these CBA members to incur financial losses, lose valuable employees, and suffer other injuries.

250. Absent injunctive relief from this Court, option 2 is ruinous because it would expose covered entity CBA members to HHS and EEOC enforcement actions and other penalties as described above.

251. Option 3, stopping participation in HHS-related programs, including Medicaid and Medicare, would severely penalize CBA members for maintaining their religious convictions. This would also require them to severely curtail their services to the poor, disabled, and the elderly, thus injuring their healing ministries.

252. Option 4, ceasing their health services and activities, would burden CBA members' religious exercise, because they are called by their Catholic values to engage in the healing ministry of Christ.

B. The Mandate's effects on CBA members that are covered entities – insurance coverage

253. The Mandate also affects CBA members' ability to offer their employees health benefits that reflect their Catholic values. Their options are: (1) provide a group health plan that includes coverage for gender transition, abortion, and/or immoral infertility treatments; (2)

provide a group health plan that excludes coverage for gender transition, abortion, and/or immoral infertility treatments; or (3) cease providing health coverage.

254. Option 1, providing a group health plan that covers gender transition, abortion, and/or immoral infertility treatments, is contrary to Catholic values and would give rise to scandal.

255. Absent injunctive relief from this Court, option 2 is ruinous because it would expose covered entity CBA members to HHS and EEOC enforcement actions and other penalties as described above.

256. Option 3, dropping health benefits, would burden CBA members' exercise of religion because: (a) Catholic values commend providing just compensation and benefits supportive of family values, including, whenever possible, health care; (b) eliminating health insurance for employees subjects CBA members to annual excise taxes of $2,000 per employee after the first 30 employees, 26 U.S.C. § 4980H(a), (c)(1); and (c) eliminating health insurance would put CBA members at a significant disadvantage in the market for recruiting the best workers and thereby harm the operation of their ministries.

C. The Mandate's effects on insured CBA members

257. The Mandate also injures CBA members who are not covered entities, and are thus not directly regulated by the 2024 Rule. Regardless of whether a CBA member is a covered entity, the Mandate restricts its ability to acquire a group health plan that reflects Catholic values. This is because group insurers are covered entities that are required, under the 2024 Rule, to cover gender transition, abortion, and/or immoral infertility treatments.

258. For CBA members that sponsor an insured group plan, their options are: (1) provide a group health plan that includes coverage for gender transition, abortion, and/or immoral

infertility treatments; (2) provide a group health plan that excludes coverage for gender transition, abortion, and/or immoral infertility treatments; or (3) cease providing health coverage.

259. Option 1, providing a group health plan that covers gender transition, abortion, and/or immoral infertility treatments is contrary to Catholic values and would give rise to scandal.

260. The Mandate has made option 2, providing a group health plan that excludes gender transition, abortion, and/or immoral infertility treatments, either impossible or unduly burdensome. Insured CBA members have been told by their insurers that, as a direct result of the Mandate, their plans must include gender-transition coverage. Absent injunctive relief from this Court, even if a non-covered entity CBA member were able to secure a morally compliant insured plan, option 2 is ruinous because it would expose CBA members to EEOC enforcement actions and other penalties as described above.

261. Option 3, dropping health benefits, would burden CBA members' exercise of religion as described above.

D. The Mandate's effects on self-insured CBA members

262. The Mandate also injures CBA members who have a self-insured group health plan. For CBA members that sponsor a self-insured group health plan, their options are: (1) provide a group health plan that includes coverage for gender transition, abortion, and/or immoral infertility treatments; (2) provide a group health plan that excludes coverage for gender transition, abortion, and/or immoral infertility treatments; or (3) cease providing health coverage.

263. Option 1, providing a group health plan that covers gender transition, abortion, and/or immoral infertility treatments is contrary to Catholic values and would give rise to scandal.

264. The Mandate has made option 2, providing a group health plan that excludes gender transition, abortion, and/or immoral infertility treatment coverage, either impossible or unduly burdensome. Absent injunctive relief from this Court, even if a non-covered entity CBA member were able to secure a morally compliant self-insured plan, option 2 is ruinous because it would expose members to EEOC enforcement actions and other penalties as described above.

265. Option 3, dropping healthcare benefits, would burden CBA members' exercise of religion as described above.

VII. NEED FOR RELIEF

266. The 2024 Rule continues and amplifies the Mandate. As a result, absent relief from this Court, CBA members are presently subject to the Mandate and are required to perform, or include in their health plans, gender-transition services or else risk enforcement actions, civil lawsuits, and other penalties.

267. As a direct result of the Mandate, self-insured CBA members have been notified by their TPAs that they must indemnify their TPA or accept their TPA's liability in order to maintain their exclusion of all gender transition coverage.

268. Absent relief from this Court, CBA members that are covered entities are currently threatened by the Mandate with administrative investigations, civil lawsuits, and various penalties if they continue to offer health services in a manner that reflect their Catholic convictions.

269. Absent relief from this Court, all CBA members are currently threatened by the Mandate with administrative investigations, civil lawsuits, and various penalties if they continue to offer employee health benefits in a manner that reflects their Catholic convictions.

VIII. CAUSES OF ACTION

COUNT I

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law

270. Plaintiffs incorporate by reference all preceding paragraphs.

271. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the 2016 Rule, along with the EEOC Statement complained of herein, constitute "rules" under the APA, *id.* § 551(4), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court," *id.* § 704.

272. The 2024 Rules are a "rule" under the APA. 5 U.S.C. § 551.

273. The 2024 Rules are a "final agency action" subject to judicial review. 5 U.S.C. § 704.

274. The APA prohibits agency actions that are "not in accordance with law, in excess of statutory authority, or limitation, or short of statutory right." *Id.* § 706(2)(A), (C). The 2024 Rule and the EEOC Statement are not in accordance with law for a number of independent reasons.

275. The 2024 Rule will require physicians to perform gender transition procedures, abortion, and/or fertility treatments regardless of whether those procedures are "medically necessary" or "medically appropriate." It is not in accordance with law for HHS to require medical professionals to perform procedures that may not be necessary or appropriate and may in fact be harmful to the patients.

276. The 2024 Rule is not in accordance with Section 1557 of the Affordable Care Act (42 U.S.C. § 18116), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., or the Rehabilitation Act, 29 U.S.C. § 705(20)(F)(i). The 2024 Rule define discriminating "on the

basis sex" in a manner that is contrary to Section 1557, Title IX, and the Rehabilitation Act. *See* 89 Fed. Reg. at 37,699. Neither Section 1557, the Rehabilitation Act, nor Title IX requires performance of abortion or fertility treatments, nor prohibit consideration of the real biological differences between the sexes in the context of healthcare and health coverage. HHS's attempt to expand the definition is not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A).

277. The Mandate is not in accordance with Title VII. Title VII does not require coverage of fertility treatments or sterilization, or prohibit consideration of the real biological differences between the sexes in the context of healthcare and health coverage. EEOC's attempt to expand the definition is not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A).

278. HHS's failure to include in the 2024 Rule a religious exemption and abortion neutrality provisions that parallels the religious exemption and abortion neutrality provisions in Title IX is also not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A).

279. HHS's failure to include an exclusion for gender identity and/or transgender status from the 2024 Rule as required by 42 U.S.C. § 18116(a) and 29 U.S.C. § 705(20)(F)(i) is not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A).

280. HHS's failure to include an exclusion for sterilization and sterilization-related services is not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A) because it is inconsistent with the Church Amendments, 42 U.S.C. § 300a-7(b), which protect the right of healthcare entities who receive federal funding to refuse to participate in or assist with sterilizations.

281. The 2024 Rule violates the Church Amendments, 42 U.S.C. § 300a-7, which protect the right of healthcare entities that receive federal funding to refuse to participate, perform, or

assist with gender-transition procedures, including when it would be contrary to his religious beliefs or moral convictions.

282. The 2024 Rule also forces physicians to provide medical services related to gender transition, abortion, and infertility treatments. This is not in accordance with substantive due process rights protecting a medical professional's right to not perform a procedure he or she believes to be experimental, ethically questionable, and potentially harmful.

283. The 2024 Rule is not in accordance with law because it violates the First Amendment, Fifth Amendment, and the Religious Freedom Restoration Act, as hereafter described.

284. Further, Congress must "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2022) (cleaned up). Section 1557 doesn't clearly authorize the 2024 Rule.

285. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

286. Plaintiffs have no adequate remedy at law.

287. Absent injunctive and declaratory relief against the Mandate, the CBA Plaintiffs have been and will continue to be harmed.

COUNT II

Violation of the Administrative Procedure Act
Agency Action In Excess of Statutory Authority and Limitations

288. Plaintiffs incorporate by reference all preceding paragraphs.

289. The APA prohibits agency actions that are "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). The 2024 Rule and the EEOC Statement are in excess of statutory jurisdiction, authority, and limitations for a number of reasons.

290. For the reasons described above, there is no statutory authority or jurisdiction for HHS to require medical professionals and facilities to perform procedures (or refer for the same) that may not be necessary or appropriate, and may in fact be harmful to the patients.

291. For the reasons described above, HHS's decision to interpret Section 1557 to ban "gender identity" and "termination of pregnancy" discrimination in the context of healthcare and health coverage is in excess of statutory jurisdiction, authority, and limitations within the meaning of 5 U.S.C. § 706(2)(C).

292. For the reasons described above, EEOC's decision to interpret Title VII to ban "gender identity" discrimination in the context of healthcare and health coverage is in excess of statutory jurisdiction, authority, and limitations within the meaning of 5 U.S.C. § 706(2)(C).

293. For the reasons described above, HHS's failure to include a religious exemption or an abortion-neutrality provision in the 2024 Rule that parallels the religious exemption in Title IX is in excess of statutory jurisdiction, authority, and limitations within the meaning of 5 U.S.C. § 706(2)(C).

294. For the reasons discussed above, HHS's failure to include an exclusion for sterilization and sterilization-related services is in excess of statutory jurisdiction, authority, and limitations within the meaning of 5 U.S.C. § 706(2)(C) because it is inconsistent with the Church Amendments, 42 U.S.C. § 300a-7(b).

295. For the reasons described above, EEOC's decision to require CBA members to act in violation of Title VII by not accommodating their employees' religious and conscientious objections to participating in (or referring for) gender transition services and/or infertility treatments is

in excess of statutory jurisdiction, authority, and limitations within the meaning of 5 U.S.C. § 706(2)(C).

296. For the reasons discussed above, the 2024 Rule is in excess of statutory jurisdiction, authority, and limitations within the meaning of 5 U.S.C. § 706(2)(C) as it violates the First Amendment, Fifth Amendment, and the Religious Freedom Restoration Act, as hereafter described.

297. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

298. Plaintiffs have no adequate remedy at law.

299. Absent injunctive and declaratory relief against the Mandate, the CBA Plaintiffs have been and will continue to be harmed.

COUNT III

Violation of the Administrative Procedure Act
Agency Action that is Arbitrary, Capricious and an Abuse of Discretion

300. Plaintiffs incorporate by reference all preceding paragraphs.

301. The APA prohibits agency actions that are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The 2016 Rule is arbitrary and capricious agency action for a number of reasons.

302. For the reasons discussed above, HHS's prohibition on "gender identity" discrimination in the context of healthcare and health coverage is an arbitrary and capricious interpretation of Section 1557 of the Affordable Care Act (42 U.S.C. § 18116) and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

303. For the reasons discussed above, HHS's prohibition on "termination of pregnancy" discrimination in the context of healthcare and health coverage is an arbitrary and capricious interpretation of Section 1557 of the Affordable Care Act (42 U.S.C. § 18116) and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

304. For the reasons discussed above, EEOC's prohibition on "gender identity" discrimination in the context of healthcare and health coverage is an arbitrary and capricious interpretation of Title VII.

305. For the reasons discussed above, HHS's failure to include a religious exemption in the 2024 Rule that parallels the religious exemption and abortion neutrality provision in Title IX is arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A).

306. For the reasons discussed above, HHS's failure to include an exclusion for sterilization and sterilization-related services is arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because it is inconsistent with the Church Amendments, 42 U.S.C. § 300a-7(b), the Religious Freedom Restoration Act, the prior decisions of this Court, and the Weldon Amendment.

307. For the reasons described above, HHS's decision to require Plaintiffs to act in violation of Title VII by not accommodating their employees' religious objections to participating in gender transition procedures, abortion, and/or infertility treatments is arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A).

308. For the reasons discussed above, the 2024 Rule is arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) as it violates the First Amendment, Fifth Amendment, and Religious Freedom Restoration Act as hereafter described.

309. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

310. Plaintiffs have no adequate remedy at law.

311. Absent injunctive and declaratory relief against the 2024 Rule, the CBA Plaintiffs have been and will continue to be harmed.

COUNT IV

Violation of the First Amendment of the United States Constitution
Freedom of Speech
Compelled Speech and Compelled Silence

312. Plaintiffs incorporate by reference all preceding paragraphs.

313. CBA members plan to continue using their best medical and ethical judgment in treating and advising patients. Performing (or referring for) gender transition procedures is contrary to their best medical and/or ethical judgment.

314. The 2024 Rule prohibits CBA members from expressing their professional opinions that gender transition procedures, abortion, and certain infertility treatments are not the best standard of care, immoral, and/or are experimental.

315. The 2024 Rule also requires CBA members to amend their written policies to expressly endorse gender transition procedures, abortion, and certain infertility treatments, even if such revisions do not reflect the medical judgment, values, or beliefs of CBA members. The 2024 Rule also requires CBA members to use gender-transition affirming language in all situations, regardless of circumstance.

316. Performing (or referring for) gender transition procedures, abortion, and certain infertility treatments is also contrary to the religious and conscientious beliefs of CBA members, and their beliefs prohibit them from conducting, participating in, or referring for such procedures.

317. The 2024 Rule compels CBA members to conduct, participate in, refer for, or otherwise facilitate gender transition procedures abortion, and certain infertility treatments.

318. The 2024 Rule prohibits CBA members from expressing their religious views that gender transition procedures, abortion, and certain infertility treatments are not the best standard of care or are experimental.

319. The 2024 Rule compels CBA members to speak in ways that they would not otherwise speak.

320. The 2024 Rule thus violates CBA members' right to be free from compelled speech as secured to them by the First Amendment of the United States Constitution.

321. The 2024 Rule's compelled speech requirement is not justified by a compelling governmental interest.

322. Even if HHS has a compelling government interest, the 2024 Rule is not narrowly tailored to achieve that interest.

323. Absent injunctive and declaratory relief against the 2024 Rule, the CBA Plaintiffs have been and will continue to be harmed.

COUNT V

Violation of the First Amendment of the United States Constitution Freedom of Speech and Free Exercise Clause Viewpoint Discrimination

324. Plaintiffs incorporate by reference all preceding paragraphs.

325. CBA members' sincere religious and conscientious beliefs prohibit them from covering, facilitating, or participating in gender transition procedures, abortion, and/or certain infertility treatments.

326. CBA members' medical judgment is that it is harmful and unethical to encourage a patient to undergo gender transition procedures, gender transition procedures, abortion, and/or certain infertility treatment.

327. The 2024 Rule would prohibit CBA members from expressing their religious or conscientious viewpoint that gender transition procedures, abortion, and/or certain infertility treatments are not the best standard of care. The 2024 Rule also requires CBA members to affirm their provision of such services and to train their staff members regarding their willingness to cover and provide such services.

328. The 2024 Rule withholds funding based on an intent to restrict CBA members' speech.

329. The 2024 Rule's viewpoint discrimination is not justified by a compelling governmental interest.

330. Even if HHS has a compelling government interest, the 2024 Rule is not narrowly tailored to achieve that interest.

331. Defendants' actions thus violate CBA members' rights as secured to them by the First Amendment of the United States Constitution.

332. Absent injunctive and declaratory relief against the 2024 Rule, the CBA Plaintiffs have been and will continue to be harmed.

COUNT VI

Violation of the First and Fifth Amendments of the United States Constitution
Freedom of Speech and Due Process
Overbreadth

333. Plaintiffs incorporate by reference all preceding paragraphs.

334. The 2024 Rule regulates protected speech. The 2024 Rule states, in the context of covered entities offering health services, that a "categorical" belief that gender-affirming care is never warranted "impermissibly single[s] out an entire category of services based on an individual's transgender status and [is] presumptively discriminatory." 89 Fed. Reg. at 37,602.

335. This exposes CBA members to penalties for expressing their medical and moral views of gender transition procedures. It also prohibits CBA members from using their medical judgment to determine the appropriate standard of care for interactions with their patients.

336. CBA members believe that the 2024 Rule restricts their speech regarding the best standard of care for patients.

337. The 2024 Rule states, the "determination of whether a challenged action is discriminatory is necessarily a fact-specific, case-by-case analysis dependent on the facts of the particular situation." *Id.* at 37,616.

338. The 2024 Rule chills CBA members' speech.

339. The 2024 Rule's overbreadth is not justified by a compelling governmental interest.

340. Even if HHS has a compelling government interest, the 2024 Rule is not narrowly tailored to achieve that interest.

341. Defendants have therefore violated CBA members' rights secured to them by the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment by prohibiting speech that would otherwise be protected.

342. Absent injunctive and declaratory relief against the 2024 Rule, the CBA Plaintiffs have been and will continue to be harmed.

COUNT VII

Violation of the First Amendment of the United States Constitution Free Exercise Clause and Freedom of Speech Unbridled Discretion

343. Plaintiffs incorporate by reference all preceding paragraphs.

344. The 2024 Rule "appl[ies] to every health program or activity, any part of which receives Federal financial assistance, directly or indirectly from the Department; every health program or activity administered by the Department; and every health program or activity administered by a Title I entity." 89 Fed. Reg. at 37,693, to be codified at 45 C.F.R. § 92.2(a).

345. The 2024 Rule also states, "A fact-specific analysis is necessary to determine whether prohibited discrimination has occurred." 89 Fed. Reg. at 37,597.

346. The 2024 Rule also says: "Insofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required." 89 Fed. Reg. at 37,893, to be codified at 45 C.F.R. 92.3(c).

347. Because the Defendants have sole discretion over financial assistance provided or made available, and because Defendants have sole discretion over the application of the 2024 Rule and any religious freedom protection that applies, the 2024 Rule vests unbridled discretion over which organizations will have their First Amendment interests accommodated.

348. In Title IX of the Education Amendments of 1972, Congress precluded discrimination on the basis of "sex" in federally funded education programs, "except that . . . this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)-(a)(3). Defendants have exercised unbridled discretion by declining to apply the clear religious freedom protections of Title IX.

349. Defendants' actions therefore violate CBA members' rights not to be subjected to a system of unbridled discretion when engaging in speech or when engaging in religious exercise, as secured to them by the First Amendment of the United States Constitution.

350. Absent injunctive and declaratory relief against the 2016 Rule, the CBA Plaintiffs have been and will continue to be harmed.

COUNT VIII

Violation of the First Amendment to the United States Constitution
Free Speech Clause
Unconstitutional Conditions

351. Plaintiffs incorporate by reference all preceding paragraphs.

352. The 2024 Rule imposes an unconstitutional condition on Plaintiffs' receipt of federal funding.

353. The 2024 Rule applies to any healthcare provider who accepts federal funding from any source for any program.

354. The 2024 Rule requires CBA members to adopt policies regarding standards of care for patients that violate Plaintiffs' religious and conscientious beliefs, as well as their medical judgment, and also interfere with CBA members' practice of medicine.

355. Defendants' actions therefore impose an unconstitutional condition on CBA members' receipt of federal funding and violate Plaintiffs' rights as secured to them by the First and Fourteenth Amendments of the United States Constitution.

356. Absent injunctive and declaratory relief against the 2024 Rule, the CBA Plaintiffs have been and will continue to be harmed.

COUNT IX

Violation of the First Amendment
Freedom of Speech
Expressive Association

357. Plaintiffs incorporate by reference all preceding paragraphs.

358. CBA members believe and teach that participating in actions, procedures, and services with the goal of transitioning from one sex to another violate their religious beliefs.

359. CBA members believe and teach that participating in actions, procedures, and services with the goal of procuring an abortion violate their religious beliefs.

360. CBA members believe and teach that participating in actions, procedures, and services that separate the unitive and procreative nature of a marital union violate their religious beliefs.

361. CBA members believe and teach that participating in actions, procedures, and services that result in elective sterilizations violate their religious beliefs.

362. The Mandate compels CBA members to participate in procedures, services, and activities that contradict their religious beliefs and message.

363. The Mandate compels CBA members to offer health coverage for procedures, services, and activities that violate their religious beliefs and message.

364. The Mandate refuses to allow CBA to assert the rights of its members on an associational basis.

365. Defendants' actions thus violate CBA members' rights of expressive association as secured to them by the First Amendment of the United States Constitution.

366. Absent injunctive and declaratory relief against the Mandate, the CBA and its members have been and will continue to be harmed.

367. The Mandate exposes CBA members to civil suits that would hold them liable for practicing and expressing their sincerely held religious beliefs.

368. The Mandate furthers no compelling governmental interest.

369. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

370. Absent injunctive and declaratory relief against the Mandate, the CBA Plaintiffs have been and will continue to be harmed.

COUNT X

Violation of the Religious Freedom Restoration Act
Compelled Medical Services

371. Plaintiffs incorporate by reference all preceding paragraphs.

372. CBA members' sincerely held religious beliefs prohibit them from deliberately offering services and performing (or referring for) operations or other procedures required by the the Mandate. CBA members' compliance with these beliefs is a religious exercise.

373. CBA members sincerely held religious beliefs prohibit them facilitating gender transition procedures. CBA members' compliance with these beliefs is a religious exercise.

374. CBA members' sincerely held religious beliefs prohibit them facilitating sterilization procedures. CBA members' compliance with these beliefs is a religious exercise.

375. CBA members' sincerely held religious beliefs prohibit them facilitating procedures intended to procure an abortion. CBA members' compliance with these beliefs is a religious exercise.

376. CBA members' sincerely held religious beliefs prohibit them facilitating procedures that separate that separate the unitive and procreative nature of a marital union. CBA members' compliance with these beliefs is a religious exercise.

377. The Mandate creates government-imposed coercive pressure on CBA members to change or violate their religious beliefs.

378. The Mandate chills CBA members' religious exercise.

379. The Mandate exposes CBA members to the loss of substantial government funding as a result of their religious exercise.

380. The Mandate exposes CBA members to substantial penalties under the False Claims Act, 31 U.S.C. § 3729 et seq.

381. The Mandate exposes CBA members to criminal penalties under 18 U.S.C. § 1035.

382. The Mandate exposes CBA members to civil suits that would hold them liable for practicing their sincerely held religious beliefs.

383. The Mandate thus imposes a substantial burden on the CBA's and its members' religious exercise.

384. The Mandate furthers no compelling governmental interest.

385. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

386. The Mandate violates the CBA's and its members' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

387. Absent injunctive and declaratory relief against the Mandate, the CBA Plaintiffs have been and will continue to be harmed.

COUNT XI

Violation of the Religious Freedom Restoration Act
Compelled Coverage

388. Plaintiffs incorporate by reference all preceding paragraphs.

389. For the same reasons discussed above, CBA members' sincerely held religious beliefs prohibit them from deliberately covering or offering health insurance or other benefits that would cover or facilitate services related to gender transition, sterilization, abortion, and certain infertility treatments.

390. CBA members specifically exclude coverage of any services related to gender transition, abortion, sterilization, and certain infertility treatments in their group health plans.

391. CBA members' compliance with these beliefs by maintaining these exclusions is a religious exercise.

392. Under the Mandate, such health-plan exclusions are facially invalid.

393. The Mandate exposes CBA members to the loss of substantial government funding as a result of their religious exercise.

394. The Mandate also makes it more expensive for CBA members to do business with a third-party administrator for a health benefits plan. The Mandate subjects third party

administrators to potential liability for administering plans that reflect Catholic teachings, and thus CBA members will be forced to indemnify, or accept liability for, any TPA. This constitutes an additional substantial burden on the CBA's and its members' religious exercise.

395. The Mandate exposes CBA members to substantial penalties under the False Claims Act, 31 U.S.C. § 3729 et seq.

396. The Mandate exposes CBA members to criminal penalties under 18 U.S.C. § 1035.

397. The Mandate exposes CBA members to civil suits that would hold them liable for practicing their sincerely held religious beliefs.

398. The Mandate thus imposes a substantial burden on the CBA's and its members' religious exercise.

399. The Mandate furthers no compelling governmental interest.

400. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

401. The Mandate violates the CBA's and its members' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

402. Absent injunctive and declaratory relief against the Mandate, the CBA Plaintiffs have been and will continue to be harmed.

COUNT XII

Violation of the First Amendment to the United States Constitution Free Exercise Clause

403. Plaintiffs incorporate by reference all preceding paragraphs.

404. Plaintiffs and CBA members object to providing, facilitating, covering, or otherwise participating in gender transition procedures, abortions, and certain infertility treatments.

405. The Mandate imposes substantial burdens on CBA members by forcing them to choose between their exercise of religion and the avoidance of fines, penalties, liability, and other adverse consequences.

406. The Mandate seeks to suppress the religious practice of individuals and organizations such as CBA members, while allowing exemptions for similar conduct based on secular and non-religious reasons. Thus, the Mandate is neither neutral nor generally applicable.

407. The 2024 Rule repeatedly states that any request for a religious or conscience exemption must be evaluated on an individualized, case-by-case basis. *E.g.*, 89 Fed Reg. at 37,656. Thus, the mandate imposes a system of individualized assessments in violation of the First Amendment.

408. None of the statutes pursuant to which the Mandate is promulgated is generally applicable. Section 1557, Title IX, and Title VII are not generally applicable. For example, Title VII is not generally applicable because it exempts or does not cover employers that employ fewer than 15 employees and, as a result, does not apply to millions of employers that together employ hundreds of millions of people.

409. The Mandate is not justified by a compelling governmental interest.

410. Even if the Mandate is justified by a compelling government interest, it is not the least restrictive means of achieving that interest.

411. Defendants' actions thus violate the CBA's and its members' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

412. Absent injunctive and declaratory relief against the Mandate, the CBA Plaintiffs have been and will continue to be harmed.

COUNT XIII

Violation of the Fifth Amendment to the United States Constitution
Due Process Clause
Substantive Due Process

413. Plaintiffs incorporate by reference all preceding paragraphs.

414. The United States has a deeply rooted tradition of honoring physicians' and healthcare institutions' rights to provide medical treatment in accordance with their moral and religious beliefs.

415. CBA members possess a fundamental right of liberty of conscience.

416. CBA members possess a fundamental right not to be coerced to provide medical procedures and services in violation of their conscience.

417. The Mandate coerces CBA members to provide medical services and coverage in violation of their conscience.

418. Defendants' conduct cannot be justified by a compelling governmental interest.

419. The Mandate is not justified by a compelling governmental interest.

420. Even if Defendants have a compelling government interest, the Mandate is not narrowly tailored to achieve that interest.

421. Defendants' actions therefore violate CBA members' rights to substantive due process.

422. Absent injunctive and declaratory relief against the Mandate, the CBA and its members have been and will continue to be harmed.

COUNT XIV

Violation of the Fifth Amendment to the United States Constitution Due Process and Equal Protection

423. Plaintiffs incorporate by reference all preceding paragraphs.

424. The Due Process Clause of the Fifth Amendment mandates the equal treatment of all religious faiths and institutions without discrimination or preference.

425. The Mandate discriminates on the basis of religious views or religious status by refusing to recognize religious exemptions that exist in the law.

426. The Mandate discriminates on the basis of religious views or religious status by refusing to recognize valid medical views of religious healthcare professionals on gender transition procedures.

427. The Defendants' actions thus violate Plaintiffs' rights secured to them by the Fifth Amendment of the United States Constitution.

428. Absent injunctive and declaratory relief against the Mandate, CBA and its members have been and will continue to be harmed.

COUNT XV

Violation of Title VII, 42 U.S.C. §§ 2000e-1(a) and 2000e(j)

429. Plaintiffs incorporate by reference all preceding paragraphs.

430. Title VII does not apply to religious entities or societies "with respect to the employment of individuals of a particular religion." 42 U.S.C. § 2000e-1(a).

431. The term "religion" includes all aspects of religious observance and practice. 42 U.S.C. § 2000e(j).

432. The health plan coverage portion of the EEOC Statement is contrary to the Catholic values and to the observance and practice of the CBA Plaintiffs.

433. Applying the health plan coverage portion of the EEOC Statement to the CBA Plaintiffs violates the religious exemption within Title VII.

434. Absent injunctive and declaratory relief against the EEOC Statement, the CBA Plaintiffs have been and will continue to be harmed.

IX. PRAYER FOR RELIEF

Wherefore Plaintiffs request that the Court:

A. Declare Section 1557 does not require Plaintiffs to perform, facilitate, refer for, provide insurance coverage for, or a self-funded plan for: gender-transition procedures, including surgery, counseling, provision of pharmaceuticals, or other treatments sought in furtherance of a gender transition; abortion; and artificial reproductive technologies that violate Catholic beliefs, including without limitation IVF, surrogacy, and gamete donation; violates their sincerely held religious beliefs without satisfying strict scrutiny under the RFRA;

B. Declare that Title VII does not require the CBA and its members to provide insurance coverage for: gender-transition procedures, including surgery, counseling, provision of pharmaceuticals, or other treatments sought in furtherance of a gender transition; abortion; and artificial reproductive technologies that violate Catholic beliefs, including without limitation IVF, surrogacy, and gamete donation; violates Plaintiffs' sincerely held religious beliefs without satisfying strict scrutiny under the RFRA and without complying with Title VII's religious exemption that protects employers' religious practices, 42 U.S.C. § 2000e-1(a) and 42 U.S.C. § 2000e(j);

C. Issue a temporary restraining order, preliminary injunction, and permanent injunction prohibiting:

a. The Department of Health and Human Services, Secretary Becerra, their divisions, bureaus, agents, officers, commissioners, employees, and anyone acting in concert or participation with them, including their successors in office, from interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), or any implementing regulations thereto against the CBA Plaintiffs and the CBA members in a manner that would require them to perform gender-transition procedures, abortion, or infertility treatments contrary to Catholic beliefs; or provide insurance coverage or a self-funded plan for the same, including by denying federal financial assistance because of their failure to perform such procedures or provide insurance coverage for such procedures or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement action; and

b. The Equal Employment Opportunity Commission, Chair Burrows, their divisions, bureaus, agents, officers, commissioners, employees, and anyone acting in concert or participation with them, including their successors in office, from 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 CBA Plaintiffs and the CBA members in a manner that would require them to accommodate gender-transition procedures or infertility treatments contrary to Catholic beliefs; or to provide insurance coverage for gender-transition procedures, including by denying federal financial assistance because of their failure to provide insurance coverage for such

procedures or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions;

D. Extend the relief above to: CBA Plaintiffs and the CBA present and future members, anyone acting in concert or participation with them, and their respective health plans any insurers, pharmacy benefit managers ("PBM"), service provider, or third-party administrators ("TPA") in connection with such health plans.

E. Declare that to come within the scope of this order, a CBA member must meet the following criteria: (a) The employer is not yet protected from interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions by any other judicial order; (b) The CBA has determined that the employer meets the CBA's membership criteria; (c) The CBA's membership criteria have not changed since the CBA filed its this complaint on May 30, 2024; and (d) The employer 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.

F. Declare that the Mandate and Defendants' enforcement of the Mandate against the CBA and its members violate the Administrative Procedure Act, and that no taxes, penalties, or other burdens can be charged or assessed against these members for failure to pay for, provide, or directly or indirectly facilitate access to abortion, infertility treatments contrary to Catholic beliefs, or gender transition services;

G. Declare that the Mandate and Defendants' enforcement of the Mandate against the CBA and its members violate the laws and constitutional provisions described in their causes of action and that no taxes, penalties, or other burdens can be charged or assessed against the

CBA and its members for failure to pay for, provide, or directly or indirectly facilitate access to abortion, infertility treatments contrary to Catholic beliefs, or gender transition services;

H. Declare that any interpretation of Title VII and Section 1557 to require coverage or provision of gender-transition procedures, including surgery, counseling, provision of pharmaceuticals, or other treatments sought in furtherance of a gender transition; abortion; and artificial reproductive technologies that violate Catholic beliefs, including IVF, surrogacy, and gamete donation may not be applied against the CBA and its members' insurers, PBM's, service providers, and TPAs of the CBA and its members; may not interfere with members' attempts to arrange or contract for morally compliant health coverage or related services for their employees; and that no taxes, penalties, or other burdens can be charged or assessed against such insurers or TPAs in relation to their work for the CBA and its members;

I. Declare that CBA members have the right to contract with service providers, including insurers and third-party administrators, to secure morally compliant health plans;

J. Award Plaintiffs 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); and

K. Award such other and further relief as the Court deems equitable and just.

DATED: May 30, 2024.

Respectfully submitted,

/s/ L. Martin Nussbaum

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Attorneys for Plaintiffs

VERIFICATION PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing allegations pertaining to The Catholic Benefits Association and its members are true and correct to the best of my knowledge. I further declare under penalty of perjury that Exhibit A attached hereto is a true and ac- curate copy of the Amended and Restated Certificate of Incorporation of The Catholic Benefits Association, that Exhibit B is a true and accurate copy of the Third Amended and Restated Bylaws of The Catholic Benefits Association, that Exhibit C is a true and accurate copy of the CBA Nonprofit Employer Application for Membership, that Exhibit D is a true and accurate copy of the CBA For Profit Employer Application for Membership; Exhibit I are documents related to an EEOC enforcement action brought against a CBA member; and Exhibits K and L are true and accurate copies of insurance riders sent to CBA members.

Executed on May 29, 2024

Douglas Wilson, Jr.
CEO, the Catholic Benefits Association

VERIFICATION PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing allegations pertaining to the teachings of the Catholic Church, Catholic values, and the beliefs and values of The Catholic Benefits Association are true and correct to the best of my knowledge.

Executed on May 29, 2024

+William E. Lori

Most Rev. William E. Lori
Archbishop of Baltimore
Chairman of the Board, The Catholic Benefits Association

VERIFICATION PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing allegations: pertaining to the Sisters of St. Francis of the Immaculate Heart of Mary (described herein as the Sisters of St. Francis), St. Anne's Guest Home, and St. Gerard's Community of Care, including their membership in the CBA and adherence to Catholic teaching regarding human dignity, gender dysphoria, abortion, and infertility are true and correct to the best of my knowledge.

Executed on May 29, 2024

Sister Donna Marie Welder, OSF

Sister Donna Marie Welder, OSF
Provincial, President, and Chair of the Sisters of St. Francis of the Immaculate Heart of Mary
President and Chair of St. Anne's Guest Home
President and Chair of St. Gerard's Community of Care

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF THE CATHOLIC BENEFITS ASSOCIATION

AN OKLAHOMA NONPROFIT, NONSTOCK CORPORATION

Pursuant to the Oklahoma General Corporation Act (Okla. Stat. tit. 18, §§ 1001 *et seq.*) (the "**Act**"), there is hereby established an Oklahoma nonprofit, nonstock corporation pursuant to this Certificate of Incorporation.

In accordance with Okla. Stat. tit. 18 § 441-1604 and the remainder of the Act:

1. The Ministry was converted from The Catholic Benefits Association LCA, an Oklahoma limited cooperative association, effective October 28, 2016;

2. The Ministry is an Oklahoma nonprofit, nonstock corporation;

3. Conversion of the Ministry was approved in a manner that complied with the converting entity's governing statutes; and

4. The filing of this Amended and Restated Certificate of Incorporation of the Ministry has complied with all governing statutes of the Ministry and has been duly authorized.

The Ministry is organized without capital stock.

ARTICLE I
NAME AND OFFICE

The name of the Ministry is **The Catholic Benefits Association** (the "**Ministry**"). The Ministry's principal place of business is 695 Jerry St., Castle Rock, CO 80104.

ARTICLE II
REGISTERED AGENT AND ADDRESS

The registered agent is The Corporation Company, and the address of the registered office is 1833 South Morgan Road, Oklahoma City, OK 73128.

ARTICLE III
PERIOD OF DURATION

The Corporation shall have perpetual existence.

ARTICLE IV
PURPOSES

The Ministry's purposes shall be consistent with Catholic values, doctrine, and canon law. The Ministry is organized for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or the corresponding section of any other federal revenue law hereafter in effect, hereinafter, the "**Code**"), and more particularly including:

4.1 To support Catholic employers—including dioceses, parishes, religious institutes, ministries of the faithful, charities, schools and colleges, health care institutions, fraternal benefit societies, professional groups, for profit businesses, and others—that, as part of their religious witness and exercise, provide health or other benefits to their respective employees in a manner that is consistent with Catholic values;

4.2 To work and advocate for religious freedom of Catholic and other employers seeking to conduct their ministries and businesses according to their religious values;

4.3 To support Catholic employers in responding to changes in civil law that threaten their ability to conduct their affairs consistent with their Catholic values;

4.4 To make charitable donations to Catholic ministries from the Ministry's surplus; and

4.5 To incorporate, support, or serve as a member of one or more Catholic entities, including one or more Catholic insurance companies, in furtherance of the Ministry's purposes.

ARTICLE V
POWERS

5.1 **General Powers**. The Ministry has, without limitation, full power to sue and be sued in its own name, to hold title to real property in its own name, and to do all other things necessary or convenient to carry on its activities.

5.2 **Restrictions on Powers**.

5.2.1 No part of the net earnings shall inure to the benefit of or be distributable to any director or officer or any other individual (except that reasonable compensation may be paid for services rendered to or for the benefit of the Ministry affecting one or more of its purposes), and 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 an organization exempt from federal income taxation and described in Section 501(c)(3) of the Code. Any such Qualifying Charitable Organization shall be a Catholic ministry.

5.2.2 No part of the assets shall be contributed 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.

5.2.3 The Ministry shall make no grants or loans to any member of the board of directors or officer.

5.2.4 No substantial part of the activities shall consist of carrying on propaganda or otherwise 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.

5.2.5 Notwithstanding any other provision of this Certificate, the Ministry shall not carry on any activities not permitted to be carried on by an entity exempt from federal income tax as an organization described in Section 501(c)(3) of the Code.

ARTICLE VI
MEMBERS

6.1 **No Members.** The Ministry shall have no voting members within the meaning of § 1060 of the Act. The Ministry may have such other Catholic members, with such rights, duties and obligations, as may be set forth in the bylaws of the Ministry or as may be set by the board of directors from time to time.

ARTICLE VII
BOARD OF DIRECTORS

7.1 **In General**. The management of the Ministry's affairs shall be vested in a board of directors, except as otherwise provided in the Act, this Certificate, or the Bylaws.

7.2 **Initial Appointment**. Until his resignation as such, the Incorporator shall have the exclusive authority to appoint and remove members of the board of directors.

7.3 **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.

7.4 **Directors as of Incorporation**. The names and address of the Ministry as of the filing of this Certificate of Incorporation are set forth on Exhibit A attached hereto and incorporated herein by reference.

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

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

EXHIBIT A

(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 violation of Okla. Stat. tit. 18, § 1053 (relating to unlawful payment of dividends or unlawful stock purchase or redemption);

(e) Any other transaction from which the director derived an improper personal benefit; or

(f) Any other act for which indemnification of directors is prohibited under the provisions of the Act.

ARTICLE IX
INDEMNIFICATION

9.1 **No Limitation on Indemnification**. Nothing in this Certificate 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 counsel fees 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.

9.2 **Procedures for Indemnification**. Except as set forth in the Act, this Certificate, 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 X
BYLAWS

Except to the extent otherwise provided in the Bylaws, the board of directors shall have the exclusive power to alter, amend, or repeal the Bylaws from time to time in force and to adopt new Bylaws upon the majority vote of the board of directors. Such Bylaws may contain any provisions for the regulation or management of the Ministry's affairs which are not inconsistent with law or this Certificate, as the same may from time to time be amended.

ARTICLE XI
AMENDMENTS

11.1 **Amendments to Certificate of Incorporation and Bylaws**. The power and right to alter, amend, or repeal this Certificate of Incorporation or the Bylaws, and to adopt new, revised, or restated Certificate of Incorporation shall be as stated in the Bylaws.

ARTICLE XII
INCORPORATORS

The names and addresses of the incorporators ("**Incorporator**") are:

Name and Address	Signature
Douglas G. Wilson, Jr. 695 Jerry Street, Suite 306, Castle Rock, Colorado 80104	
L. Martin Nussbaum 90 S. Cascade Ave, Suite 1100 Colorado Springs, CO 80906	
Nicholas N. Dyer 90 S. Cascade Ave, Suite 1100 Colorado Springs, CO 80906	

The Incorporators shall have such rights, powers and duties as may be set forth in this Certificate and the Bylaws, provided however, that following incorporation all . The personal liability of the Incorporator by virtue of being the Incorporator or serving as the Incorporator shall be limited to the fullest extent of the law.

ARTICLE XIII
DISSOLUTION

Upon dissolution of the Ministry, the Ministry's assets remaining after payment of or provision for its liabilities shall be paid over or transferred to one or more Catholic ministries that is a Qualifying Charitable Organization. Any assets not so disposed of shall be disposed of by the District Court of the State of Oklahoma that is located in Oklahoma City, or to one or more Catholic Qualifying Charitable Organizations as said Court shall determine.

ARTICLE XIV
DELIVERY AND PRIMARY CONTACT

The name and contact information of the individual who causes this document to be delivered for filing, and to whom the Secretary of State may deliver notice of filing of this document is refused, is:

L. Martin Nussbaum, Esq.
Lewis Roca Rothgerber Christie LLP
90 S. Cascade Ave., Suite 1100
Colorado Springs, Colorado 80903
mnussbaum@lrrc.com
719.386.3000

[Certification Page Follows]

IN WITNESS WHEREOF, the undersigned Chief Executive Officer, acting on authority and directive of the board of directors, has authorized this Amended and Restated Certificate of incorporation effective as of the date filed with the Oklahoma Secretary of State pursuant to Okla. Stat. tit. 18 § 1007(A)(2)(a). The undersigned certifies that this instrument is the act and deed of the corporation and that the facts stated herein are true.

_____

Douglas G. Wilson, Jr.
Chief Executive Officer

Date: _____

EXHIBIT A

LIST OF DIRECTORS AS OF FILING

Name	Address
Most Rev. Charles Chaput, O.F.M. Cap.	Archdiocese of Philadelphia 222 North 17th Street Philadelphia, PA 19103
Most Rev. Paul S. Coakley	Catholic Archdiocese of Oklahoma City 7501 NW Expressway Oklahoma, OK 73132
Most Rev. William E. Lori	Archdiocese of Baltimore 320 Cathedral Street Baltimore, MD 21201
Most Rev. J. Peter Sartain	Archdiocese of Seattle 710 9th Avenue Seattle, WA 98104
Prof. Helen Alvaré	George Washington University School of Law Room 433G, Hazel Hall, Arlington 3301 Fairfax Drive Arlington, VA 22201
Beth M. Elfrey	Knights of Columbus One Columbus Plaza New Haven, CT 06510
H. Edward Hanway	Faith in the Future 550 American Avenue, Suite 300 King of Prussia, PA 19406
Dr. Carolyn Y. Woo	Catholic Relief Services 228 W. Lexington Street Baltimore, MD 21201-3443

AMENDED AND RESTATED BYLAWS
OF
THE CATHOLIC BENEFITS ASSOCIATION
AN OKLAHOMA NONPROFIT, NONSTOCK CORPORATION

Dated Effective the ___ day of _____, 20__

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ARTICLE I
PURPOSES AND POWERS OF MINISTRY

1.1. Purposes and Power. The purposes and power of The Catholic Benefits Association, an Oklahoma nonstock nonprofit corporation (the "**Ministry**"), formed under the Oklahoma General Corporation Act (Okla. Stat. tit. 18, §§ 1001 *et seq.*) (the "**Act**") are stated in the Amended and Restated Certificate of Incorporation (the "**Certificate**").

ARTICLE II
INCORPORATOR; COMMENCEMENT OF BUSINESS

2.1. Powers of Incorporators. The Ministry was originally incorporated in its first iteration as a limited cooperative association by the Most Rev. William Edward Lori (the "**Incorporator**"), with such powers and obligations as Incorporator prior to his resignation as Incorporator. The initial incorporators of the Ministry as a nonstock nonprofit corporation under the Act were Messrs. Douglas Wilson, Jr., L. Martin Nussbaum, Esq., and Nicholas N. Dyer, Esq. whose resignations following such incorporation are hereby recognized. Any right, power, or duty vested in the Incorporators is vested in the board of directors.

ARTICLE III
MEMBERSHIP

3.1. Members and Qualifications. The Ministry shall have no voting members pursuant to § 1060 of the Act. It shall, however, have members eligible to receive the benefits of membership. The Ministry shall admit as members, Catholic employers that are approved by the Secretary or the Secretary's designee and that complete the membership application and satisfy the following criteria:

3.1.1. Any employer shall satisfy the requirement of being Catholic if either the employer is listed in the current *Official Catholic Directory* or the secretary or his or her designee makes such a determination.

3.1.2. For profit employers seeking membership in the Ministry shall be deemed Catholic only if (i) Catholics (or trusts or other entities wholly controlled by such Catholic individuals) own 51% or more of employer, (ii) 51% or more of the members of the employer's governing body, if any, is comprised of Catholics, and (iii) either the employer's owners or governing body has adopted a written policy stating that the employer is committed to providing no benefits to the employer's employees or independent contractors inconsistent with Catholic values.

3.2. Admission of Members.

3.2.1. The board or such duly appointed and authorized committee thereof or the secretary or the secretary's designee may admit members to the Ministry.

3.2.2. Each organization seeking to be a member shall apply for membership, by providing such information as may be required by the board, the secretary, or the secretary's

designee. No organization qualified to be a member shall, solely by virtue of such qualification or application, be entitled to be admitted as a member.

3.3. No Power to Bind Ministry. A member, solely by reason of being a member, cannot and may not act for or bind the Ministry.

3.4. No Liability. A debt, obligation, or other liability of the Ministry is solely that of the Ministry and is not the debt, obligation, or liability of a member solely by reason of being a member.

3.5. Membership Assessments for Ongoing Operations. The board may assess dues, fees, or both from members to fund the Ministry. It shall establish the amount, manner, or other method of determining any membership assessments, which shall be payable at such times and in such amounts as it determines. All membership assessments shall be payable in cash and the receipt and acceptance of such must be reflected in the Ministry's records. The proportion of the total membership assessments shall be allocated as determined by the board. Membership assessments under this Section 3.5 are not refundable to any member.

3.6. Temporary Assessments for Litigation Costs. The board may assess additional mandatory contributions from members or seek voluntary contributions from members and non-members to fund litigation costs consistent with the Ministry's purposes.

3.6.1. Such litigation includes, without limitation, litigation in the name of the Ministry, its members, its affiliates, its insurance company, others, or any person or entity providing services to the Ministry, its affiliates, or its insurance company, that is reasonably needed to avoid government mandates contrary to Catholic doctrine or values including without limitation requiring employers or their contractors to provide CASC Benefits, clinical trial services utilizing embryonic stem cells or fetal tissue harvested from aborted fetuses, to the member's employees or independent contractors. "**CASC Benefits**" means medication, medical devices or medical procedures that are used for the purposes of contraception, abortion, sterilization, and related counseling.

3.6.2. The board shall establish the amount, manner, or other method of determining any membership temporary assessments for litigation, which shall be payable at such times and in such amounts as determined by the board. Such assessments shall be made on a temporary basis, until the cost of funding the litigation has, in the opinion of the board, been fully funded. Thereafter, the board may re-commence assessments for the cost of CASC Benefits litigation or other litigation as the circumstances warrant. All such assessments shall be payable in cash and the receipt and acceptance of such must be reflected in the Ministry's records. The proportion of the total membership assessments payable by each member under this Section 3.6 shall be allocated as determined by the board, taking into account such factors as the board deems appropriate.

3.6.3. After paying outstanding litigation costs and establishing such reserves as the board deems prudent for funding other litigation, any remaining funds from litigation assessments and third party contributions to fund litigation costs may be, but shall not be required to be, refunded to such members and contributors in proportion to their relative historic contributions of such funds.

3.7. Suspension or Termination. If the board finds that a member has ceased to be an eligible member, the board shall suspend such member's rights as a member or terminate the member's membership. On termination of membership, all rights and interests of such member in the Ministry shall cease. No action taken under these bylaws shall impair the obligations of a member already accrued under any contract with the Ministry.

3.8. Transferability of Membership Interests. Membership in the Ministry shall not be transferable without the prior written consent of the board in its sole discretion. Any transfer in violation of this section shall be void *ab initio*.

3.9. Voting. Members shall have no voting rights under the Act.

3.10. Dissociation of Members.

3.10.1. A member may withdraw from membership in the Ministry by providing thirty days' notice of intent to withdraw to the president, provided that no member may elect to dissociate from the Ministry when such member has insurance coverage in effect provided by the Ministry's insurance company.

3.10.2. The board may cause any member to dissociate from the Ministry upon a determination by the board that (i) such member does not meet the qualifications for membership or (ii) such member has acted in a manner contrary to the purposes of the Ministry. Such determination shall be made by the board in its sole, absolute, and final determination and discretion and for which no hearing or other administrative procedure shall be required.

ARTICLE IV
FINANCIAL MATTERS

4.1. Non-Profit Purpose. The Ministry shall at all times operate to further the purposes set forth in the Certificate. No profits of the Ministry shall be distributable to or inure to the benefit of the members, nor shall the Ministry operate for the private benefit of any member.

4.2. Allocation of Revenues Exceeding Expenditures. The board may deduct and set aside a part of revenues exceeding costs and expenditures of the Corporation to create or accumulate, in furtherance of its charitable purposes:

4.2.1. An unallocated capital reserve; and

4.2.2. Reasonable reserves allocated for specific purposes, including expansion and replacement of capital assets; education, training, cooperative development; creation and distribution of information relating to moral issues of interest to Catholic employers, and funding for litigation.

4.3. Charitable Contributions. After establishing reasonable reserves for the operation of the Ministry, the board may authorize, and the Ministry may make, contributions to Catholic ministries exempt from federal income taxation and described in Section 501(c)(3) of the Code ("**Qualifying Charitable Organization**").

ARTICLE V
DIRECTORS AND OFFICERS

5.1. **Management of Ministry**. The board shall have general supervision and control of the Ministry's affairs and shall make all rules for the Ministry's management not inconsistent with the articles or these bylaws. It shall have an accounting system adequate to the requirements of its operations, and it shall keep proper records of all business transactions.

5.2. **Number and Qualifications of Directors**. The Ministry shall have a board of no less than three and no more than fifteen members. At least three fourths of the directors shall be Catholic.

5.3. **Election of Directors; Term; Vacancies**. All members of the board of directors shall be elected by the board of directors at the annual meeting of the Ministry. Such elections shall not take effect unless and until the Ethics Committee ratifies them. The notice of annual meeting shall include the list of nominees. The board shall stagger the term of all directors so that approximately one third of the directors have terms of one year, one third have terms of two years, and one third have terms of three years. Newly elected directors shall thereafter serve for a term of three years, provided that each such director shall continue to hold office until the director's successor is elected or until the earlier of the director's death, resignation, or removal. Each director may serve as many as three consecutive terms after which the individual may not serve as director for at least one year. Whenever a vacancy occurs in the board, other than from the expiration of a term of office, the board shall appoint a qualified person to fill the vacancy until the next annual meeting.

5.4. **Removal and Resignation**.

5.4.1. Directors may be removed, with or without cause, unilaterally by action of the Ethics Committee; or

5.4.2. Directors may be removed, with or without cause, by action of the board of directors provided that the Ethics Committee consents to the same.

5.4.3. A director may resign at any time by providing written notice to the board of directors. Such resignation shall take effect on the date specified therein and no acceptance of the written notice shall be necessary to render the same effective.

5.5. **Board Chair**. The chair shall be elected by action of the board. The chair shall preside over all meetings of the board. The chair shall serve as such until his or her successor is elected and qualified by action of the board or until the earlier of such director's death, resignation, or removal.

5.6. **Board Meetings**. In addition to the meetings mentioned above, regular meetings of the board shall be held not less than semi-annually (one of which shall be the annual meeting) or at such other times and places as the board determines. Board meetings may be held telephonically or via other means, including conference calls, video- or web-conferencing, so long as each director may hear and be heard by each other director.

5.7. **Special Meetings**. A special meeting of the board shall be held whenever called by a majority of the directors. Any and all business may be transacted at a special meeting. Each call for a special meeting shall be in writing, signed by the person or persons making the same, addressed and delivered to the secretary, and shall state the time and place of such meeting. Upon the signing of a waiver of notice of a meeting, a meeting of the board may be held at any time.

5.8. **Quorum**. A majority of the board shall constitute a quorum.

5.9. **Notice of Board Meetings**. Oral or written notice of each meeting of the board shall be given to each director by or under the supervision of the secretary not less than forty-eight hours before the time of the meeting, but such notice may be waived by individual directors.

5.10. **Waiver of Notice**. Whenever any notice is required to be given under the provisions of the Act, the Certificate or these Bylaws, a director may waive any notice required to be given to such director by the Colorado Revised Nonprofit Corporation Act or these bylaws (i) whether before or after the date or time stated in the notice as the date or time when any action will occur, by delivering a written waiver to the corporation which is signed by the director entitled to the notice for inclusion in the minutes, but such delivery and filing shall not be conditions of the effectiveness of the waiver; or (2) by a director's attendance at the meeting whereby such director waives objection to lack of notice or defective notice, unless the director at the beginning of the meeting objects to the holding thereof or transacting business at the meeting because of lack of notice or defective notice and the director also does not vote for or assent to action taken at the meeting. Further, even if a director attends or participates in a meeting, the director does not waive any required notice if special notice was required of a particular purpose and the director objects to transacting business with respect to the purpose for which such special notice was required and does not thereafter vote for or assent to action taken at the meeting with respect to such purpose.

5.11. **No Proxies**. No director may vote or act by proxy or power of attorney.

5.12. **Action Without a Meeting**. Any action required or permitted to be taken at a meeting of the directors may be taken without a meeting and without prior notice if a consent in writing, setting forth the action taken, is signed by every director. Such consent (which may be counterparts) has the same effect as a unanimous vote. Unless it specifies a different effective date, it is effective when signed by all. All consents signed pursuant to this section shall be delivered to the secretary for inclusion in the minutes and the Ministry's records.

5.13. **Compensation; Reimbursement**. The compensation, if any, of the directors shall be determined by the members at any annual or special meeting. Proposals for such salary may be made by the board. Nothing contained herein shall serve to bar any director receiving a salary as an officer or employee of the Ministry. Directors may be paid for his or her expenses, if any, of attendance at each meeting of the members, the board, or any committee of which he or she is a member.

5.14. Ethics Committee.

5.14.1. The Ministry shall at all times have an Ethics Committee comprised of the Catholic bishops serving on the board plus any additional number of Catholic bishops as appointed by the committee itself when necessary to bring the total number of bishops on the committee to at least three. Members of the Ethics Committee who are not board members shall serve for a term of one year. Members of the Ethics Committee who are board members shall serve for terms coincident with their board terms.

5.14.2. The Ethics Committee shall have exclusive authority to review all benefits, products, and services provided by the Ministry, its affiliates or subsidiaries, or their respective contractors to ensure such conform with Catholic values and doctrine. If they do not, the committee shall determine the necessary corrections to bring such benefits, products, and services into conformity with Catholic values and doctrine. The decision of the committee shall be final and binding on the Ministry, its board, and its officers, and also upon the board and officers of the Ministry's affiliates or subsidiaries.

5.14.3. The governing documents of any affiliate or subsidiary formed by the Ministry shall expressly acknowledge and accede to the authority of the Ethics Committee as set forth in this section 5.14.

5.15. Other Committees.

5.15.1. The board, by resolution, may designate one or more other committees to exercise authority as designated by the board.

5.15.2. The delegation of authority to any committee shall not operate to relieve the board or any director from any responsibility imposed by law. Subject to the foregoing, the board may provide such powers, limitations, and procedures for such committees as it wishes. Each committee shall keep regular minutes of its meetings, which shall be reported to the board and submitted to the secretary for inclusion in the Ministry's records.

5.16. Bonds and Insurance. The board may require its officers, agents, and employees charged by the Ministry with responsibility for the custody of any of its funds, securities, or commercial paper to give adequate bonds. Such bonds, unless cash security is given, shall be furnished by a responsible bonding company and approved by the board, the cost to be paid by the Ministry. The board shall provide for the adequate insurance of the property of the Ministry, or property in the possession or control of the Ministry, and not otherwise adequately insured, and in addition, adequate insurance covering liability for accidents to all employees and the public.

5.17. Audits. At least once in each year, the board shall secure the services of a competent and disinterested public auditor or accountant, who shall audit the Ministry's books and render a report in writing to the board at their annual meeting. This report shall include at least:

5.17.1. A balance sheet showing the Ministry's assets and liabilities; and

5.17.2. An operating statement for the fiscal period under review.

5.18. Depository. The board shall have power to select one or more banks to act as depositories of the Ministry's funds, and to determine the manner of receiving, depositing, and disbursing such funds, the form of checks, and the person or persons with authority to sign them.

ARTICLE VI
OFFICERS

6.1. Election of Officers; Vacancies. The board shall elect a chief executive officer, president, vice-president, secretary and treasurer, and any other position as may be determined by the board. Each such person shall hold office until the election and qualification of a successor unless removed by death, resignation, or for cause. There shall be no limits on the number of terms any officer may serve as such. Any of the officers may be members of the board, but membership on the board shall not be a required qualification for officers. The board shall fill vacancies in such offices.

6.2. Duties of Chief Executive Officer. The chief executive officer shall:

6.3.1. Have prime responsibility for leading the Ministry and for implementing and carrying out the policies, directives, and goals identified by the board and for performing other duties set forth in his or her job description or employment agreement;

6.3.2. Hire and direct employees consistent with the Ministry's budget approved by the board; and

6.3.3. Sign such other papers of the Ministry as the president may be authorized or directed by the board to sign; provided, however, that the board may authorize any person to sign any or all checks, contracts, and other instruments on behalf of the Ministry.

6.4. Duties of President. The president shall:

6.4.1. Perform all duties usually performed by an executive and presiding officer or as may be prescribed by the board; and

6.5. Duties of Vice President. The vice president shall:

6.5.1. In the absence of the president or in the event of his or her death, inability or refusal to act, perform all duties of the president, and when so acting, shall have all the powers of and be subject to all the restrictions upon the president; and

6.5.2. Perform such other duties as the president or the board shall assign.

6.6. Duties of Secretary. The secretary, personally or through a designee, shall:

6.6.1. Keep a complete record of all meetings of the Ministry and of the board and have general charge of the Ministry's books and records;

6.6.2. Serve all notices required by law, the articles, and these bylaws and make a full report of all matters pertaining to the office to the board at the annual meeting;

6.6.3. Keep complete membership records;

6.6.4. Make all reports required by law and perform such other duties as may be required by the Ministry or the board; and

6.6.5. On the election of a successor, the secretary shall turn over all books and other property belonging to the Ministry in the secretary's possession.

6.7. Duties of Treasurer. The treasurer shall ensure the performance of an annual audit and the preparation of annual financial statements, along with such other duties, with respect to the finances of the Ministry as the board may prescribe.

ARTICLE VII
INDEMNIFICATION OF DIRECTORS, OFFICERS, AND EMPLOYEES

7.1. Mandatory Indemnification.

7.1.1. The Ministry shall indemnify any director, officer, or employee who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative (other than an action of the Ministry) by reason of the fact that he or she is or was, a director, officer, or employee of the Ministry, or is or was serving at the request of the Ministry as a director, officer, employee, agent, administrator, advisor, fiduciary, or member of a corporation, partnership, joint venture, holding company, subsidiary, trust, unincorporated association, retirement or other employee benefit plan, or other enterprise, as well as any committee, subcommittee, or other body of the Ministry existing under authority of statute or otherwise, against expenses (including attorneys' fees), judgments, fines, penalties, and amounts paid in settlement actually and reasonably incurred by him or her in connection with such action, suit, or proceeding if he/she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the interests of the Ministry, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.

7.1.2. The Ministry shall indemnify any director, officer, or employee who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit by, or in the right of, the Ministry to procure a judgment in its favor by reason of the fact that he/she is or was a director, officer, or employee of the Ministry, or is or was serving at the request or direction of the Ministry as a director, officer, employee, agent, administrator, advisor, fiduciary, or member of a corporation, partnership, joint venture, trust, retirement or other employee benefit plan or other enterprise, as well as any committee, subcommittee, or other body of the Ministry existing under authority of statute or otherwise, against expenses (including attorneys' fees) actually and reasonably incurred by him or her in connection with the defense or settlement of such action or suit, as well as amounts paid in settlement, if he/she acted in good faith and in a manner he/she reasonably believed to be in, or not opposed to, the best interests of the Ministry; provided, however, that no indemnification shall be made in respect of any claim, issue, or matter as to which such director, officer, or employee shall have been adjudged to be liable to the Ministry unless, and only to the extent that a court of competent jurisdiction shall determine upon application that, despite the adjudication of liability but in the view of all the

circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper.

7.2. Termination or Abatement of Claim. The termination or abatement of a claim, threatened claim, suit, or other proceeding by way of judgment, order, settlement, or conviction, upon a plea of guilty or nolo contendere or its equivalent is not, of or by itself, determinative that the director, officer, or employee met or did not meet the standard of conduct described in this article.

7.3. Permissive Indemnification. The Ministry may indemnify any agent of the Ministry to the same extent as and under the same provisions applicable to directors and officers of the Ministry, but only by specific action of and to the extent designated by the board.

7.4. Success on the Merits. Notwithstanding any other provision of this article, a director, officer, or employee of the Ministry who has been successful, on the merits or otherwise, in the defense of any suit or proceeding referred to in Section 7.1 *et seq*. above, to which he or she was a party shall be indemnified against expenses (including reasonable attorneys' fees) actually and reasonable incurred by him or her in connection with such suit or proceeding.

7.5. Procedure. Any indemnification under this Article VII (unless ordered by the court) shall be made by the Ministry only as authorized in the specific case upon a determination by the board that indemnification of the director, officer, or employee is proper in the circumstances because he/she has met the applicable standard of conduct set forth in the applicable section of this Article. Such determination shall be made (1) by the board by a majority vote of a quorum consisting of directors who were not parties to such action, suit, or proceeding; or (2) if such quorum is not obtainable, or even if obtainable, by the direction of a quorum of disinterested directors, by independent legal counsel in a written opinion.

7.6. Advancement of Expenses. Notwithstanding the provisions of Section 7.5, reasonable expenses incurred in defending any civil or criminal action, suit or proceeding, shall be paid by the Ministry in advance of the final disposition of such action, suit, or proceeding, if the director, officer, or employee shall undertake to repay such amount in the event that it is ultimately determined, as provided herein, that such person is not entitled to indemnification. Advances of expenses shall be made promptly and, in any event, within ninety days, upon written request of the director, officer, or employee. Notwithstanding the foregoing, no advance shall be made by the Ministry, if a determination is reasonably made at any time by the Ministry board by a majority vote of a quorum of disinterested directors, or (if such a quorum is not obtainable or, even if obtainable, a quorum of disinterested directors so directs) by independent legal counsel in a written opinion, that based upon the facts known to the board or counsel at the time such determination is made, such person acted in bad faith and in a manner opposed to the best interests of the association, or such person deliberately breached his or her duty to the Ministry or its stockholders, or, with respect to any criminal proceeding, that such person believed or had reasonable cause to believe his or her conduct was unlawful.

7.7. Other Rights. The indemnification provided by this article shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any insurance or other agreement, vote of directors, or otherwise, both as to actions in their official

capacity and as to actions in another capacity while holding an office, and shall inure to a person who has ceased to be a director, officer, or employee and shall inure to the benefit of the heirs, executors, and administrators of such person. The Ministry may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the Ministry, or who is or was serving in any of the capacities referred to in Section 7.1 *et seq*. hereof against any liability asserted against him or incurred by him in any such capacity, or arising out of his or her status as such.

ARTICLE VIII
DISSOLUTION

8.1. Required Vote. Voluntary dissolution of the Ministry may only be made upon the affirmative vote of not less than two-thirds of all directors of the board.

8.2. Debts and Liabilities. On the dissolution of the Ministry, all its debts and liabilities shall be paid first according to their respective priorities.

8.3. Remaining Assets. Any remainder of property of the Ministry shall be paid over or transferred to one or more Catholic ministries that is a Qualifying Charitable Organization. Any assets not so disposed of shall be disposed of by the state District Court in Oklahoma City, or to one or more Catholic Qualifying Charitable Organizations as said Court shall determine.

ARTICLE IX
FISCAL YEAR

The fiscal year shall be the calendar year or such other consecutive twelve month period established by the board.

ARTICLE X
INCORPORATION OF ACT

Except as may be modified in the articles or these bylaws, the Act shall control and govern the Ministry.

ARTICLE XI
AMENDMENTS

11.1. Bylaws and Articles. If notice of the character of the amendment proposed is given in the notice of meeting, a majority of all of the directors may amend these bylaws or the articles. The articles or these bylaws may also be amended by unanimous written consent of the directors. Notwithstanding the foregoing, there shall be no amendment to Articles I, IV, V, or XIII of the Certificate of Incorporation or sections 3.1, or 11.1 of these bylaws without the approval of the Ethics Committee. The members may not amend either these bylaws or the articles.

[End of Document]

Catholic Benefits ASSOCIATION

THE POWER OF ASSOCIATION

CHURCH or CHURCH AFFILATE EMPLOYER MEMBERSHIP APPLICATION

Name of Organization: _____

Address: _____

_____

Name of Representative: _____

Position: _____

Phone: _____

Email: _____

The organization hereby applies, for itself and for its related ecclesiastical organizations, and its separately incorporated related ministries and activities ("related employers"), for membership in The Catholic Benefits Association.

The organization hereby represents, for itself and its related employers, that it and its related employers are Catholic employers committed to providing health care benefits consistent with Catholic teaching, and support efforts to preserve the right of Catholic organizations to provide such benefits.

As a condition for membership in the Association, the organization agrees to pay dues and assessments to the Association based on the number of employees enrolled on the employer-sponsored health plan. Dues to be paid, as determined by the Association's Board of Directors, and which, as of the date of this application, are:

NUMBER OF EMPLOYEES	1 – 14 EEs	15 or more EEs
MEMBERSHIP DUES	$300/year	$1.50/month/employee, Capped at $4000/month

If the organization does not offer a health plan or is a sole proprietor, the minimum amount will apply.

The organization hereby represents (i) that it has the authority to apply for membership in the Association for itself and its related employers, and (ii) that its related employers which it intends to be included as members of the Association are identified on Schedule A, except that parishes need not be separately listed.

The total number of covered employees[1] for the organization and the related employers is_____.

_____ _____

(Name of Organization) (Date)

_____ _____

(Representative Signature) (Position)

_____

[1] *A "covered employee" is an employee participating in a health plan sponsored or maintained by the applicant organization or a health plan sponsored or maintained by any related employer. This number is updated annually or with significant changes reported by employer.*

2004662396_1

EXHIBIT C

Catholic Benefits ASSOCIATION

THE POWER OF ASSOCIATION™

Schedule A

RELATED EMPLOYERS TO BE ADMITTED AS MEMBERS [2]

The applicant organization identifies the following separately incorporated related employers (other than parishes, which **need not be** separately identified) and acknowledges that pursuant to this Application for Membership, each of them will be admitted as a member of The Catholic Benefits Association:

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

---

[2] Regardless of whether they are separately incorporated, parishes of an applicant will be members of the Association, and need not be listed on this Schedule A. If a diocese or archdiocese seeks to exclude a parish as a member of the Association, it may provide the Association written direction to that effect.

In the case of a diocese, archdiocese or eparchy, related employers include separately incorporated ministries, such as, by way of example, *Catholic Charities, other Catholic relief organizations, schools, elder care facilities, cemetery associations, housing agencies* and others.

In the case of other religious institute and non-diocesan non-profit entities, separately incorporated related employers should be identified.

If any related employer is a for profit entity, please write "for profit" behind the entity's name.

Catholic Benefits
ASSOCIATION
THE POWER OF ASSOCIATION™

NEW MEMBER BILLING PREFERENCES

New member dues are assessed after the first full month of membership. Membership dues are billed in arears for the preceding month and are sent on the first of each month. You can specify below the billing preference for your organization.

1. How often would you prefer to be billed? (Circle):

   Monthly

   Annually (first billed will be prorated for the remaining months of the current year)

2. Who should we reference when sending your invoice:

   Name: _____

   Position: _____

   Email Address:

   _____

3. Our invoices are typically mailed; however, you can indicate if you would prefer an emailed pdf instead:

   ☐ Please email invoices.

   Name: _____

   Email Address:

   _____

RETURN COMPLETED APPLICATIONS: mandycox@catholicbenefitsassociation.org

OR 695 Jerry Street Suite 306 / Castle Rock / Colorado / 80104

2004662396_1

EXHIBIT C

EXHIBIT C

Catholic Benefits ASSOCIATION

THE POWER OF ASSOCIATION™

PRIVATE EMPLOYER MEMBERSHIP APPLICATION

Name of Organization: _____

Address: _____

_____

Name of Representative: _____

Position: _____

Phone: _____

Email: _____

The organization hereby applies, for itself, its affiliates and its subsidiaries as listed on Schedule A (if applicable), for membership in Catholic Benefits Association.

The organization hereby represents, for itself and its related employers, that (please initial **EACH**):

_____ Catholics (or trusts or other entities wholly owned by Catholics) own 51% or more of the employer;

_____ 51% or more of the employers' governing bodies, if any, are Catholic; and,

_____ Either their respective owners or their respective governing bodies are committed to provide health care benefits to their employees or contractors that are consistent with Catholic values.

_____ The organization understands that should the three qualifications for membership, initialed above, change *in any way*, it is the responsibility of the organization to notify Catholic Benefits Association immediately to determine continued qualification for membership.

As a condition for membership in the Association, the organization agrees to pay dues and assessments to the Association based on the number of employees enrolled on the employer-sponsored health plan. Dues to be paid, as determined by the Association's Board of Directors, and which, as of the date of this application, are:

NUMBER OF EMPLOYEES	1 – 14 EEs	15 or more EEs
MEMBERSHIP DUES	$300/year	$1.50/month/employee, Capped at $4000/month

If the organization does not offer a health plan or is a sole proprietor, the minimum amount will apply.

Catholic Benefits ASSOCIATION

THE POWER OF ASSOCIATION℠

The organization hereby represents (i) that it has the authority to apply for membership in the Association for itself and its related employers, and (ii) that its related employers which it intends to be included as members of the Association are identified on Schedule A,

The total number of covered employees[1] for the organization and the related employers is_____.

_____ _____

(Name of Organization) (Date)

_____ _____

(Representative Signature) (Position)

[1] *A "covered employee" is an employee participating in a health plan sponsored or maintained by the applicant organization or a health plan sponsored or maintained by any related employer. This number is updated annually or with significant changes reported by employer.*

Catholic Benefits ASSOCIATION

THE POWER OF ASSOCIATION™

Schedule A

RELATED EMPLOYERS TO BE ADMITTED AS MEMBERS [2]

The applicant organization identifies the following separately incorporated related employers (other than parishes, which need not be separately identified) and acknowledges that pursuant to this Application for Membership, each of them will be admitted as a member of The Catholic Benefits Association:

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

Name: _____

[2] Regardless of whether they are separately incorporated, parishes of an applicant will be members of the Association, and need not be listed on this Schedule A. If a diocese or archdiocese seeks to exclude a parish as a member of the Association, it may provide the Association written direction to that effect.

In the case of a diocese, archdiocese or eparchy, related employers include separately incorporated ministries, such as, by way of example, Catholic Charities, other Catholic relief organizations, schools, elder care facilities, cemetery associations, housing agencies and others.

In the case of other religious institute and non-diocesan non-profit entities, separately incorporated related employers should be identified.

If any related employer is a for profit entity, please write "for profit" behind the entity's name.

Catholic Benefits ASSOCIATION

THE POWER OF ASSOCIATION™

NEW MEMBER BILLING PREFERENCES

New member dues are assessed after the first full month of membership. Membership dues are billed in arears for the preceding month and are sent on the first of each month. You can specify below the billing preference for your organization.

1. How often would you prefer to be billed? (Circle):

   Monthly

   Annually (first billed will be prorated for the remaining months of the current year)

2. Who should we reference when sending your invoice:

   Name: _____

   Position: _____

   Email Address: _____

3. Our invoices are typically mailed; however, you can indicate if you would prefer an emailed pdf instead:

   ☐ Please email invoices.

   Name: _____

   Email Address: _____

RETURN COMPLETED APPLICATIONS: mandycox@catholicbenefitsassociation.org

OR 695 Jerry Street Suite 306 / Castle Rock / Colorado / 80104

EXHIBIT D

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; SISTERS OF ST. FRANCIS OF THE IMMACULATE HEART OF MARY; ST. ANNE'S GUEST HOME; and ST. GERARD'S COMMUNITY OF CARE,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 3:23-cv-203-PDW-ARS

DECLARATION OF CHRIS BAECHLE

1. My name is Chris Baechle. I am over 21 and capable of making this declaration. I have not been convicted of a felony or crime involving dishonesty. The facts herein are within my personal knowledge. If I were called upon to testify to these facts, I could and would competently do so.

2. I serve as the Chief Executive Officer for Cardinal Ritter Senior Services ("CRSS) and its Affiliates.

3. Cardinal Ritter Senior Services ("CRSS") is a section 501(c)(3) Catholic ministry listed in THE OFFICIAL CATHOLIC DIRECTORY. It seeks to improve the quality of life of the

elderly within the community of St. Louis, Missouri by providing a wide range of social, health care, housing, and pastoral services.

4. CRSS accomplishes this in coordination with a number of affiliates, including: Mary Queen and Mother Center, Our Lady of Life Apartments, Mother of Perpetual Help Residence, St. Elizabeth Hall, and Affordable Senior Living (collectively, the "Affiliates"). I serve as Chief Executive Officer for each of these. Mary Queen and Mother Center, Our Lady of Life Apartments, and Mother of Perpetual Help Residences are separately incorporated, §501(c)(3) Catholic ministries. St. Elizabeth Hall and Affordable Senior Living operate as ministries of CRSS. Mary Queen and Mother Center, Our Lady of Life Apartments, Mother of Perpetual Help Residences, and St. Elizabeth Hall are listed in THE OFFICIAL CATHOLIC DIRECTORY.

5. We do this work out of respect and reverence for the dignity of each person we serve. Respect for human dignity is the core of Catholic social teaching. *See Life and Dignity of the Human Person*, United States Conference of Catholic Bishops ("The Catholic Church proclaims that human life is sacred and that the dignity of the human person is the foundation of a moral vision for society. This belief is the foundation of all the principles of [Catholic] social teaching.") (available at https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/life-and-dignity-of-the-human-person). Similarly, CRSS's purpose, as stated on our website, is "promoting the dignity of human life within a variety of high-quality, specialized communities while providing older adults the programs and community-based services to fully live their best lives." *See* https://cardinalritterseniorservices.org/about/.

6. We describe the ministry of CRSS and its Affiliates on our website like this:

> **Cardinal Ritter Senior Services** . . . is a ministry of Catholic Charities of St. Louis that provides compassionate care through a continuum of high quality

> residential, healthcare, and supportive social services. Inspired by Jesus Christ, its long tradition focuses on providing independence, options, and the highest quality of service to older adults.
>
> CRSS was founded in 1960 to address the growing needs of our community's older adults. Formerly called Cardinal Ritter Institute, CRSS was formed when Catholic Charities of St. Louis – along with the assistance of local and national consultants – conducted a comprehensive survey that generated a study where programs were developed or expanded upon by various Catholic institutions serving older adults. This study led to the Department of Aging, which later became Cardinal Ritter Institute and finally Cardinal Ritter Senior Services.
>
> In 1976, CRSS and a group of 14 St. Louis religious congregations joined forces to solve unmet long-term care issues. Thanks to the study, **Mary, Queen and Mother Center** was built in 1981 as a skilled nursing community.
>
> Founded in 1982, **Our Lady of Life** provides 207 independent apartments for older adults. **Mother of Perpetual Help** assisted living residence opened in 1996 and features 12 apartments to those older adults needing more care. Today, MOPH has 122 apartments including four memory care communities. Named the Cardinal Carberry Senior Living Center, these three communities merged in 1997 to provide a continuum of care and a mission of providing an environment of security, dignity, and independence.
>
> Cardinal Ritter Institute and the Cardinal Carberry Senior Living Center united in 2004 to form Cardinal Ritter Senior Services. CRSS communities promote the dignity of human life and reflect the spirit of Jesus Christ. CRSS impacts nearly 3,750 seniors – with 60% of the 1,711 directly served lacking adequate resources. In addition . . . CRSS has[,through **Affordable Senior Living**] 10 affordable HUD apartment communities throughout the St. Louis Metropolitan area and a robust social services department.

See https://cardinalritterseniorservices.org/about/.

7. CRSS has 285 employees. Mary Queen and Mother Center has 117 employees. Our Lady of Life Apartments has 5 employees. Mother of Perpetual Help Residences has 70 employees. St. Elizabeth Hall has eighteen employees. Affordable Senior Living has 45 employees.

8. CRSS provides a wide range of administrative services for each of its Affiliates.

9. Mary Queen and Mother Center ("MQMC") is a 230-bed skilled nursing center. Inspired by the teachings of Jesus Christ, it specializes in short-term rehabilitation, long-term nursing care, memory care, hospice and palliative care, and respite stays. As our website says, "Mass is offered six days a week in our beautiful chapel, and communion is distributed to those unable to attend. Our Pastoral Care and Social Services staff are available for resident and family support." Its services include memory care, physical speech and occupational therapies. MQMC receives Medicare funding for around 50% of its budget.

10. With 207 apartments for older adults, Our Lady of Life Apartments not only provides homes for its residents, it also promotes friendships and provides many social activities so that they might live as independently as possible. Our Lady of Life Apartments receives Medicare and Medicaid funding for some of the outpatient services it provides.

11. Mother of Perpetual Help Residences ("MOPH") provides 122 assisted living apartments including four memory care communities. Our residents at MOPH are given a wide range of activities, classes, lectures, arts, and games. MOPH receives Medicare funding for some of its outpatient services.

12. St. Elizabeth Hall "is an all-inclusive assisted living home that serves older adults with limited incomes." *See* https://cardinalritterseniorservices.org/communities/st-elizabeth-hall. It has a chapel for Mass and for nondenominational services, and it provides hot meals three times a day. Its nursing staff is available twenty-four hours per day. Its services include a beauty salon and barber shop, mental health and outpatient medical care, and various types of therapy. It often receives Medicaid or Medicare reimbursement for some of its services. Medicare and Medicaid payments constitute 17% of St. Elizabeth Hall's budget.

13. Affordable Senior Living provides affordable housing at ten sites for a total of 700 residents. These sites are the St. John Neumann Apartments, Inc.; St. William Apartments, Inc.; St. William Apartments II, Inc.; St. Clare of Assisi Senior Village, Inc.; St. Joseph Apartments, Inc.; St. Agnes Apartments, Inc.; Pope John Paul II Apartments, Inc.; Holy Infant Apartments, Inc.; Holy Angels Apartments, Inc.; and Holy Angels Apartments II, Inc.; Affordable Senior Living also provides meals, transportation, and outpatients services. The latter is sometimes reimbursed by Medicare or Medicaid constituting 2% of Affordable Senior Livings budget.

14. In accordance with our Catholic identity, CRSS and its Affiliates provide a health plan for their respective full-time employees through a health plan sponsored by the Archdiocese of St. Louis. To do so, CRSS and its Affiliates contract with a third-party private health insurer. Catholic social teaching holds that access to health care, including health insurance, is a basic and universal human right and a demand of the common good. Catechism of the Catholic Church, para. 2288. This is due to the sanctity and dignity that every single human life possesses as made in the image and likeness of God, and as an object of God's particular love. Our health plan excludes abortion, puberty blockers, cross-sex hormones and surgeries intended to provide patients the appearance of the opposite sex, as well as other types of care inconsistent with Catholic values.

15. It would violate our faith and medical judgment to train our employees, post notices, or otherwise make statements inconsistent with our Catholic beliefs on sex, sexuality, abortion, so-called "gender-affirming care," and infertility treatments.

16. CRSS and its Affiliates welcome persons of all faiths and do not discriminate on the grounds of sex, race, color, national origin or disability. *See* CRSS website. Our

nondiscrimination policy is grounded not only upon reason, but also upon the Catholic conviction that every single human being is made in the image and likeness of God and thereby possessed of intrinsic and inalienable dignity. It is further grounded in the Catholic belief that human beings are to love one another in the manner of Jesus Christ, and according to the model of the Good Samaritan who cares for the person in need strewn upon his path (*Lk* 10:29-37.

17. The Catholic Church teaches that "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." Catechism of the Catholic Church, para. 2270. Therefore, the Church instructs that "Formal cooperation in an abortion constitutes a grave offense [and] a crime against human life." *Id.,* para. 2272. Thus, paying for abortion in our health plan would violate our Catholic belief.

18. Catholic teaching opposes transgender medicine because it contradicts God's creative sovereignty and confounds human beings' understanding of their own dignity as well as their development as body-soul unities. Catholics believe that as sovereign Creator, God does not place any human being in the "wrong body." Rather, the Book of Genesis states that after making humankind "male and female," "in his image," God "looked at everything he had made, and found it very good" (*Gen* 1: 27, 31). Thus, Catholics also believe that God makes every human being; we do not make ourselves. Catholicism further teaches that God creates every human being as an inseparable unity of body and soul. Consequently, a human being's failure to accept his or her bodily sex would impede self-understanding and development at the biological, physiological, emotional, mental and spiritual levels, all of which are interrelated.

19. Any governmental regulation or policy requiring CRSS or its Affiliates to cover abortion, infertility treatments contrary to Catholic teaching, sterilization, or gender transition services and cross-sex hormones in their employee health plan violates our deeply-held Catholic values and beliefs. Our ability to care for elderly clients and residents would be devastated if we no longer received Medicare and Medicaid funding because we, in good conscience, chose not to comply with such a regulation or policy. Furthermore, were CRSS or its Affiliates to pay for, cover, or facilitate access to abortion, infertility treatments contrary to Catholic teaching, sterilization, or transgender medicine, it would be powerfully communicating by word and deed to its employees, clients, and the public at large, that it no longer believed in God's creative sovereignty, a central tenet of its faith.

20. The Catechism of the Catholic Church expresses that the sexual relationship between spouses is more than mere biology and the conception of a child is the most serious role of spouses, involving co-creation with God, and holding that each child is to be received as a gift from the Creator. The Catechism acknowledges the sorrow caused by infertility and supports the use of reproductive technologies that restore normal fertility to marital intercourse, preserving its unitive and procreative purposes. However, methods that involve third parties (medical technicians, donor gametes, or surrogate wombs) or separate fertilization from the conjugal act, are a violation of the dignity of the persons involved and are gravely immoral. Thus, Catholics commit grave sin if they participate in these technologies, either financially or through performance.

21. The Archdiocese of St. Louis, CRSS, and its Affiliates have been members of the Catholic Benefits Association, without interruption, since December 23, 2016.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on May 29, 2024, at St. Louis, Missouri.

Chris Baechle

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; SISTERS OF ST. FRANCIS OF THE IMMACULATE HEART OF MARY; ST. ANNE'S GUEST HOME; and ST. GERARD'S COMMUNITY OF CARE,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 3:23-cv-203-PDW-ARS

DECLARATION OF DR. MICHAEL SHERMAN

1. My name is Dr. Michael Sherman. I am over 21 and capable of making this declaration. I have not been convicted of a felony or crime involving dishonesty. The facts herein are within my personal knowledge. If I were called upon to testify to these facts, I could and would competently do so.

2. I serve as the Executive Director and one of three co-founders of the Holy Family Catholic Clinic, P.S. I earned my M.D. from Creighton University Medical Center in 1999 and my Ph.D. in chemistry from University of California, Irvine in 1986. I completed residencies in

Internal Medicine and Pediatrics at Creighton University Medical Center, and I am board certified both in internal medicine and pediatrics.

3. We founded Holy Family Catholic Clinic, P.S. as a § 501(c)(3) nonprofit corporation to serve patients as a "Christ-centered clinic that is committed to providing superior, compassionate, life-affirming health care to patients of all ages, honoring the sanctity of life from conception to natural death, and supporting the Culture of Life." *See* our website. Our Catholic values provide both the impetus for our service and the guide for how we serve patients.

4. We see patients at its West Linn and Corvallis, Oregon locations. In addition to our volunteers, we have nineteen employees including four medical doctors, an osteopathic doctor, a psychiatric nurse practitioner, three registered nurses, and others.

5. In accordance with our Catholic values, Holy Family Catholic Clinic provides a health plan for our full-time employees. We contract with a private third-party insurer for this plan. Catholic social teaching holds that access to health care, including health insurance, is a basic and universal human right and a demand of the common good. (*Catechism of the Catholic Church*, ¶ 2288). This, too, honors the dignity of every person.

6. Because of these Catholic beliefs and values, Holy Family Catholic Clinic' health plan excludes abortion, cross-sex hormones and surgeries intended to provide patients the appearance of the opposite sex, physician-assisted suicide, infertility treatment inconsistent with Catholic teaching (*e.g.*, IVF, surrogacy, and gamete donation), and other care inconsistent with Catholic values.

7. The Holy Family Catholic Clinic serves low-income individuals. This, too, is part of our Catholic witness. In the November 2022 information sheet ("2022 Information Sheet") regarding the Clinic, we wrote:

> By caring for the sick and placing the sick at the head of the line and in the position of honor, Holy Family Catholic Clinic in Portland and Corvallis Oregon

> is directly aligned with the purpose and mission of the Catholic Church. We offer medical services to the poor and the sick in our communities. Additionally, our coordination with The Father's Heart a Homeless Shelter, demonstrates our alignment with Blessed Fra' Gerard, a Benedictine brother in the 11th century, who saw the misery of poor and sick pilgrims of all faiths in Jerusalem. We too are extending Benedictine hospitality to the streets; we also organize men and women to minister to the poor and sick in Oregon.

8. Holy Family Catholic Clinic provides medical services across the "entire life span," and is "open to all comers." Our nondiscrimination policy is grounded upon reason and the Catholic conviction that every single human being is made in the image and likeness of God and thereby has intrinsic and inalienable dignity. It is further grounded in the Catholic belief that human beings are to love one another in the manner of Jesus Christ, and according to the model of the Good Samaritan who cares for the person in need strewn upon his path (*Lk* 10:29-37).

9. Our Information Sheet also explains:

> Since September 2020, we have 13,000 patient visits with at least 16% uninsured and the majority recipients of Medicaid and Medicare or county health insurance programs. We are adding 100 new patients each month.
>
> We have served approximately 300 homeless by Dr. Mark Mailhot through the Father's Heart Street Ministry suffering from mental health disorders, substance abuse, skin infections, chronic conditions med refills (diabetes, HTN, holdover meds). Dr. Mailhot IS the homeless ministry in our community.

Sixty percent of our revenue is from Medicare and Medicaid funding.

10. Our physicians, each of whom is Catholic, have also made great personal sacrifice so that the Clinic can serve those in need without regard to their financial status and without regard to whether they have insurance. Our updated 2022 Information Sheet explains:

> Each of our providers has personally sown time and resources into this ministry. Dr. Sherman gifted $30,000, Dr. Toffler gifted $270,000 . . ., the Jazrawi's gifted $50,000, [and] Dr. Mailhot gifted $50,000. We provide free services to the uninsured, and we are credentialed with all insurers in our area, including Medicaid and Medicare.
>
> All of our physicians have worked without receiving a salary of any kind for the first year, and only in the past year have we been able to offer them a meager stipend. Our nursing staff, medical assistants, and billing and receptionists are all

> paid at market wages or volunteering their expertise for free. As we have received some insurance payments from services provided in 2021, we began to offer our providers a small monthly stipend. Our physicians have volunteered a market equivalent of over $1.5 million . . .; that's approximately 13,000 hours of physician time. As a whole we are fully invested - our time, our money, and our hearts – into this ministry.

11. Because we see patients of all ages, our medical services are necessarily broad. They include family medicine, pediatrics, internal medicine, and women's health. We provide a wide range of medical services from pre- and post-natal care to accompanying the dying. Our patients include those going through puberty, those who are sexually active (both within and outside marriage); those seeking to become pregnant; those seeking to avoid pregnancy; those with unwanted pregnancies; those with gender dysphoria; those with mental illness; those with fear of dying; and more. There are a growing number of people, including our patients, who seek medical intervention because they do not identify with their biological sex.

12. Because medical issues are often intertwined with moral issues, we routinely turn to our Catholic values for guidance. All of our medical providers and employees agree to serve patients consistently with the *Ethical and Religious Directives for Catholic Health Care* promulgated by the United States Conference of Catholic Bishops including those directives that prohibit abortion, sterilization, and euthanasia. We follow the teaching of the Archbishop of Portland, Most Rev. Alexander Sample, entitled *A Catholic Response to Gender Identity Theory.* Indeed, Archbishop Sample blessed and commended our Clinic and our work. *See* Exhibit A, July 30, 2020 Letter of Archbishop Sample. It would violate our faith and medical judgment to train our employees, post notices, or otherwise make statements inconsistent with our Catholic beliefs on sex, sexuality, abortion, so-called "gender-affirming care," and infertility treatments.

13. We seek to reflect the healing ministry of Christ because we are Catholic. For this reason, we also provide additional services and decline others. We, for example, provide instruction on family planning consistent with Catholic values including the Creighton Model

Fertility Care System and NaPro Technology. We do not prescribe abortion pills or perform abortion. We provide the abortion pill reversal for women who changed their minds after taking the abortion pill. We do not assist with gender transition or facilitate assisted suicide.

14. Catholics oppose transgender medicine because it contradicts God's creative sovereignty and confounds human beings' understanding of their own dignity as well as their development as body-soul unities. Catholics believe that as sovereign Creator, God does not place any human being in the "wrong body." We also believe that God makes every human being; we do not make ourselves. Catholicism further teaches that God creates every human being as an inseparable unity of body and soul. Consequently, a human being's failure to accept his or her bodily sex would impede self-understanding and development at the biological, physiological, emotional, mental and spiritual levels, all of which are interrelated.

15. The Catechism of the Catholic Church expresses that the sexual relationship between spouses is more than mere biology and the conception of a child is the most serious role of spouses, involving co-creation with God, and holding that each child is to be received as a gift from the Creator. The Catechism acknowledges the sorrow caused by infertility and supports the use of reproductive technologies that restore normal fertility to martial intercourse, preserving its unitive and procreative purposes. However, methods that involve third parties (medical technicians, donor gametes, or surrogate wombs) or separate fertilization from the conjugal act, are a violation of the dignity of the persons involved and are gravely immoral. Thus, Catholics commit grave sin if they participate in these technologies, either financially or through performance.

16. Being required to pay for, perform, cover, or facilitate access to immoral infertility treatment, abortion, sterilization, or transgender medicine violates the overlapping professional and Catholic convictions of the Holy Family Catholic Clinic about the proper

medical care patients are owed. Professional and Catholic medical standards provide that healthcare should at the very least do no harm. It should aim to prevent or cure or at least alleviate a medical condition. It should not destroy or make dysfunctional a healthy bodily part, system, or human being, born or unborn.

17. Transgender services do not meet these standards. They are *defined* by their destroying or making dysfunctional human body parts or systems. There does not exist sound evidence that they prevent or cure or alleviate the underlying medical conditions. It is also increasingly evident that it is virtually impossible to obtain genuine informed consent for transgender procedures from pediatric patients, who cannot be expected knowledgeably to agree to permanent future sterility, impotence, continuous medical treatment, and loss of sexual pleasure. There is growing evidence that transgender procedures lead to additional mental, psychological and physical harms. Consequently, transgender medicine cannot be said to meet either professional standards of medical care, or the additional standard observed by Catholic health care providers to embody the healing ministry of Jesus Christ, at the physical, mental and spiritual levels. *Ethical and Religious Directives for Catholic Health Care,* p. 6.

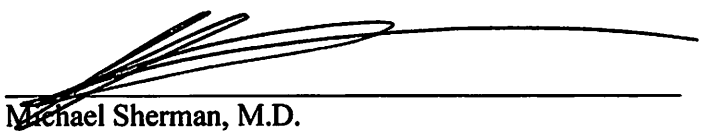
18. Holy Family Catholic Clinic is a member of the Catholic Benefits Association and has been, without interruption, since April 2020.

19. Any governmental regulation or policy requiring Centennial Pediatrics to cover abortion, infertility treatment inconsistent with Catholic teaching, sterilization or gender transition services and cross-sex hormones in its employee health plan or to perform such services or prescribe such drugs when it was competent to do so violates our deeply-held Catholic values and beliefs.

20. Our care for low income and elderly patients would be devastated if we no longer received Medicare and Medicaid funding. Without an exemption from a requirement

to perform, pay for, cover, or speak in favor of, or otherwise facilitate access to immoral infertility treatments, abortion, sterilization, or transgender medicine, Holy Family Catholic Clinic would be undercut in severe, ongoing, immediate, and irreparable manners. Catholics hold and teach that God is the sovereign Creator. This means that the human being is not self-made and that God cannot mistakenly put a person in "the wrong body.: Rather, the Book of Genesis states that after making humankind "male and female," "in his image." God "looked at everything he had made, and found it very good" *(Gen* 1: 27, 31). Were Holy Family Catholic Clinic to perform, pay for, cover, speak in favor of, or facilitate access to immoral infertility treatments, abortion, sterilization, or transgender medicine, it would be powerfully communicating by word and deed to its employees, clients, and the public at large, that it no longer believed in God's creative sovereignty, a central tenet of its faith.

Executed on the 29th day of May 2024, at West Linn, Oregon.



Michael Sherman, M.D.

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; SISTERS OF ST. FRANCIS OF THE IMMACULATE HEART OF MARY; ST. ANNE'S GUEST HOME; and ST. GERARD'S COMMUNITY OF CARE,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 3:23-cv-203-PDW-ARS

DECLARATION OF DR. MICHELLE STANFORD

1. My name is Dr. Michelle Stanford. I am over 21 and capable of making this declaration pursuant. I have not been convicted of a felony or crime involving dishonesty. The facts herein are within my personal knowledge. If I were called upon to testify to these facts, I could and would competently do so.

2. I am a medical doctor and board-certified pediatrician. I earned my M.D. from the University of Colorado Medical School and completed a residency in pediatrics at the Children's Hospital in Denver. I served a year thereafter as the Chief Resident of that program.

3. I am the sole owner of the medical practice called Centennial Pediatrics, P.C. in Centennial, Colorado.

4. Centennial Pediatrics provides a broad range of medical care to pediatric patients through my work and the work of others on our staff including a second pediatrician, two

physician assistants, a family nurse practitioner, and others. Altogether, Centennial Pediatrics has eighteen employees.

5. Centennial Pediatrics receives payment for its services from various medical insurers, from self-funded employee health plans, from Tricare, from Medicaid, and from patients and their families. Our practice's ability to serve low income or indigent patients would be severely impacted if we were unable to receive compensation through Medicaid.

6. Our patients, almost all of whom are minors, come to us with a host of illnesses, injuries, and social and mental health issues. It is not uncommon that some—especially teenaged girls—report symptoms consistent with gender dysphoria. These patients sometimes seek to explore receiving puberty blockers, cross-sex hormones, and even one or more "top" or "bottom" surgeries. In our care of such patients, I have found it critically important to listen carefully to them, to encourage their parents compassionately to stay engaged and know their child's friends and social media practices. We have also had patients come to us with unwanted pregnancies.

7. I am a practicing Catholic. I am active in my parish and have served on the advisory board for our parish school. It is important to me to integrate my faith and Catholic values in all that I do, in my marriage and family, in my civic activities, in my care of patients, and in Centennial Pediatrics. At Centennial Pediatrics, we practice medicine consistently with our Catholic values. I also am active in the Catholic Medical Association and currently serve both as its president and as a member of its board of directors. I do public speaking, often at a parish level, on how parents and families can integrate their Catholic faith into the healthcare they need.

8. Centennial Pediatrics serves patients from birth through college and "does not exclude people or treat them differently because of race, color, national origin, age, disability, or

sex." *See* Centennial Pediatrics website. Its nondiscrimination policy is grounded not only upon reason, but also upon the Catholic conviction that every single human being is made in the image and likeness of God and thereby possessed of intrinsic and inalienable dignity. It is further grounded in the Catholic belief that human beings are to love one another in the manner of Jesus Christ, and according to the model of the Good Samaritan who cares for the person in need strewn upon his path (*Lk* 10:29-37).

9. Catholic teaching opposes abortion because it is the taking of innocent human life.

10. Catholic teaching opposes transgender medicine because it contradicts God's creative sovereignty and confounds human beings' understanding of their own dignity as well as their development as body-soul unities. Catholics believe that as Creator, God does not place any human being in the "wrong body." They also believe that God makes every human being; we do not make ourselves. Catholicism further teaches that God creates every human being as an inseparable unity of body and soul. Consequently, a human being's failure to accept his or her bodily sex would impede self-understanding and development at the biological, physiological, emotional, mental and spiritual levels, all of which are interrelated.

11. Catholic beliefs as stated in the previous paragraph are consistent with scientific evidence that every person is either male or female and the fact that humans—like all mammals—are designed to produce gametes necessary for reproduction with males designed to produce sperm, and females to produce eggs. There is also a growing body of medical evidence concerning the uncertainties and risks associated with transgender medicine, especially when performed upon pediatric patients. That evidence demonstrates how transgender medicine leads to sterilization, impotence, loss of sexual satisfaction, and life-long medicalization. It also

documents: the virtual impossibility of obtaining genuine informed consent from pediatric patients regarding these consequences; how frequently its effects are irreversible and linked with suicidal ideation and suicides; and the growing number of patients requesting "detransitioning" on the grounds of their dissatisfaction with the effects of such medical interventions. Several European countries and medical establishments are currently retrenching their support especially for the performance of transgender procedures upon pediatric patients, on the basis of this evidence. Catholic values thus align with the core Hippocratic value of "first do no harm."

12. Being required to pay for, perform, cover, or facilitate access to abortion, infertility treatments inconsistent with Catholic teaching (*e.g.*, IVF, surrogacy, and gamete donation), sterilization, or transgender medicine violates the overlapping professional and Catholic convictions of Centennial Pediatrics about the proper medical care patients are owed.

13. Professional and Catholic medical standards provide that healthcare should at the very least do no harm. It should aim to prevent or cure or at least alleviate a medical condition. It should not destroy or make dysfunctional a healthy bodily part or system. But transgender services do not meet these standards. They are *defined* by their destroying or making dysfunctional human body parts or systems. There does not exist sound evidence that they prevent or cure or alleviate the underlying medical conditions. It is also increasingly evident that it is virtually impossible to obtain genuine informed consent for transgender procedures from pediatric patients, who cannot be expected knowledgeably to agree to permanent future sterility, impotence, continuous medical treatment, and loss of sexual pleasure. There is growing evidence that transgender procedures lead to additional mental, psychological and physical harms. Consequently, transgender medicine cannot be said to meet either professional standards of medical care, or the additional standard observed by health care providers desiring to observe the

central Catholic norm: to embody the healing ministry of Jesus Christ, at the physical, mental, and spiritual levels. *Ethical and Religious Directives for Catholic Health Care*, p. 6.

14. It would violate our faith and medical judgment to train our employees, post notices, or otherwise make statements inconsistent with our Catholic beliefs on sex, sexuality, abortion, so-called "gender-affirming care," and infertility treatments.

15. Any governmental regulation or policy requiring Centennial Pediatrics to cover gender transition services, cross-sex hormones, abortion, infertility treatments inconsistent with Catholic teaching, or surrogacy in its employee health plan or to perform such services or prescribe such drugs when it was competent to do so violates our deeply-held Catholic values and beliefs.

16. Without an exemption from the requirement to perform, cover, speak in favor of, or facilitate access to abortion and transgender medicine, Centennial Pediatrics' Catholic values would be undercut in severe, ongoing, immediate, and irreparable manners. Catholics hold and teach that God is the sovereign Creator. This means that the human being is not self-made and never in "the wrong body." Rather, the Book of Genesis states that after making humankind "male and female," "in his image," God "looked at everything he had made, and found it very good" (*Gen* 1: 27, 31). Were Centennial Pediatrics to perform, pay for, cover, or facilitate access to, infertility treatments inconsistent with Catholic teaching, sterilization, abortion, or transgender medicine, it would be powerfully communicating by word and deed to its employees, patients, and the public at large, that it no longer believed in God's creative sovereignty, a central tenet of my faith.

17. I have reviewed the Amended Complaint filed in this matter. Part IV of the Amended Complaint regarding Catholic teaching and beliefs on these issues accurately reflects CCND's beliefs, practices, and policies.

18. Centennial Pediatrics has been a member of the Catholic Benefits Association, without interruption, since 2017.

I declare under penalty of perjury that the statements herein are true and correct to the best of my knowledge.

Executed on the 29th day of May 2024, at Centennial, Colorado.

Michelle Stanford

Michelle Stanford, M.D.

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; SISTERS OF ST. FRANCIS OF THE IMMACULATE HEART OF MARY; ST. ANNE'S GUEST HOME; and ST. GERARD'S COMMUNITY OF CARE,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

No. 3:23-cv-203-PDW-ARS

DECLARATION OF ANTHONY TERNES

1. My name is Anthony Ternes. I am over 21 and capable of making this declaration. I have not been convicted of a felony or crime involving dishonesty. The facts herein are within my personal knowledge. If I were called upon to testify to these facts, I could and would competently do so.

2. I serve as Chairman of the Board of Directors for Catholic Charities North Dakota ("CCND").

3. CCND is the social services arm of the Catholic Church throughout North Dakota. Its roots go back 100 years to when Father Vincent Ryan began, in 1923, providing services to working and unmarried mothers in the Fargo area. Its locations, the scope of its services, and the numbers of its employees and volunteers have grown over the years. CCND now has eighty-two employees with offices in Grand Forks, Bismarck, Minot, and Fargo.

4. As part of our observance of our Catholic mission, CCND provides a health plan for our full-time employees. We contract with a private third-party insurer that, upon information and belief, itself receives federal funds. Catholic social teaching holds that access to health care, including health insurance, is a basic and universal human right and a demand of the common good. (*Catechism of the Catholic Church*, para. 2288). This is due to the sanctity and dignity that every single human life possesses as made in the image and likeness of God, and as an object of God's love.

5. CCND's services include Adults Adopting Special Kids that facilitates adoption of children in foster care; Pregnancy, Parenting, and Adoption Services to help place children in permanent homes; Guardianship Services for vulnerable adults and for those with intellectual disabilities; Post-Adoption Search Services; and Disaster Relief.

6. CCND also provides Counseling Services for individuals, couples, and families. Our counseling services assist those struggling with important decisions, those needing extra support or guidance in difficult situations; those seeking to improve their quality of life; and those with marital or other relationship difficulties. Our clients come to us for counseling regarding addiction, relationship, mental health, sexual, financial, and other issues. We have counseled individuals as young as two and as old as ninety-four.

7. At Catholic Charities North Dakota, we provide counseling services that respect the dignity and uniqueness of each human being as a sacred image of God, in accordance with Catholic Social Teaching. We do not offer services that contradict these principles. We listen to our clients' stories and experiences, and help them identify their strengths, goals, and areas for growth. We value feedback from clients on the therapeutic process using Feedback Informed Treatment and tailor our interventions accordingly. We offer evidence-based, and holistic

counseling services for individuals, couples, and families who are facing various mental health challenges, such as anxiety, depression, trauma, grief, and more. We also strive to make our services accessible and affordable by offering sliding scale fees and accepting most insurance plans.

8. As our website says, CCND provides counseling services "regardless of sex, race, color, religion, political view, national origin, social status, financial resources, or inability to pay for services" (Catholic Charities North Dakota website). Our nondiscrimination policy is grounded in the Catholic conviction that every single human being is made in the image and likeness of God and thereby possessed of intrinsic and inalienable dignity. It is also grounded in the Catholic belief that human beings are to love one another in the manner of Jesus Christ, and according to the model of the Good Samaritan who cares for the person in need strewn upon his path (Lk 10:29-37). Furthermore, as the United States Conference of Catholic Bishops' Ethical and Religious Directives for Catholic Health Care Services ("ERD") state: "A Catholic institutional health care service is a community that provides health care to those in need of it." (ERD 1). Likewise, these directives insist that Catholic health care must distinguish itself by its attention to service to those "particularly vulnerable to discrimination." (ERD 3).

9. Catholic Charities receives payment for its counseling services from various medical insurers, from self-funded employee health plans, from Medicare, Medicaid, and from patients and their families. Our ability to serve low income or indigent patients with counseling services would be severely impacted if we were unable to receive compensation through Medicare and Medicaid.

10. All of our services are part of our ministry of charity. It is, as our website says and as Pope Benedict XVI taught, charity is one of the fundamental responsibilities of the

Catholic Church. Thus, in accordance with our Catholic identity, such therapy excludes all assistance, guidance, advice, recommendations, or help inconsistent with Catholic values, including support for or facilitation of abortion, infertility treatments inconsistent with Catholic teaching, or gender transition.

11. Because God is the Creator of all things including human life and because human life made in the image and likeness of God, men and women, girls and boys have a unique dignity. Thus, Catholic teaching has long taught that abortion is sinful as the taking of innocent human life.

12. Catholics oppose transgender medicine because it contradicts God's creative sovereignty and confounds human beings' understanding of their own dignity as well as their development as body-soul unities. Catholics believe that as sovereign Creator, God does not place any human being in the "wrong body." They also believe that God makes every human being; we do not make ourselves. Catholicism further teaches that God creates every human being as an inseparable unity of body and soul. Consequently, a human being's failure to accept his or her bodily sex would impede self-understanding and development at the biological, physiological, emotional, mental and spiritual levels, all of which are interrelated.

13. In 2016, the U.S. Department of Health and Human Services first issued its mandate that required CCND to cover gender transition services, cross-sex hormones , and abortion in its employee health plan. The regulation also required health care providers to perform such services or prescribe such drugs when it was competent to do so. CCND could not do either of these things without violating our deeply held Catholic values and beliefs.

14. Without an exemption from a requirement to cover, or facilitate access to abortion, infertility treatments inconsistent with Catholic teaching, or transgender medicine,

CCND's Catholic identity and values would be undercut in severe, immediate, ongoing, and irreparable manners. Catholics hold and teach that God is the sovereign Creator. This means that the human being is not self-made and that God cannot mistakenly put a person in "the wrong body." Rather, the Book of Genesis states that after making humankind "male and female," "in his image," God "looked at everything he had made, and found it very good" (*Gen* 1: 27, 31). Were Catholic Charities to perform, cover, or facilitate access to abortion or transgender medicine, it would be powerfully communicating by word and deed to our employees and volunteers, clients, and our donors (many of whom are Catholic).

15. I have reviewed the Amended Complaint filed in this matter. Part IV of the Amended Complaint regarding Catholic teaching on these issues accurately reflects CCND's beliefs, practices, and policies.

16. The Catechism of the Catholic Church expresses that the sexual relationship between spouses is more than mere biology and the conception of a child is the most serious role of spouses, involving co-creation with God, and holding that each child is to be received as a gift from the Creator. The Catechism acknowledges the sorrow caused by infertility and supports the use of reproductive technologies that restore normal fertility to martial intercourse, preserving its unitive and procreative purposes. However, methods that involve third parties (medical technicians, donor gametes, or surrogate wombs) or separate fertilization from the conjugal act, are a violation of the dignity of the persons involved and are gravely immoral. Thus, Catholics commit grave sin if they participate in these technologies, either financially or through performance.

17. CCND has been a member of the Catholic Benefits Association, without interruption, since July 1, 2014.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on the 28 day of May 2024, at Fargo, North Dakota.

Deacon Anthony Ternes

NUSSBAUM
SPEIR GLEASON

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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 DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

The Religious Sisters of Mercy, et al., Plaintiffs, vs. Norris Cochran, Acting Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	**ORDER FOR ENTRY OF JUDGMENT** Case No. 3:16-cv-00386

Catholic Benefits Association, et al., Plaintiffs, vs. Norris Cochran, Acting Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	Case No. 3:16-cv-00432

Before the Court is the Plaintiffs' unopposed motion for entry of final judgment and for extension of time to file for fees and costs. Doc. No. 132. On January 19, 2021, the Court granted the Plaintiffs' motions for summary judgment in part, entering a permanent injunction against the Defendants, and granted the Defendants' motion to dismiss in part. Doc. No. 124. On February 18, 2021, the Plaintiffs voluntarily dismissed all claims not previously resolved by the Court's order. Doc. No. 131.

Upon review, the Plaintiffs' motion (Doc. No. 132) is **GRANTED**. Accordingly, the Court **ORDERS** as follows:

The Clerk of Court is directed to enter judgment in favor of Plaintiffs Religious Sisters of Mercy, Sacred Heart Mercy Health Care Center (Alma, MI), SMP Health System, University of Mary, Catholic Benefits Association ("CBA"), Diocese of Fargo, Catholic Charities North Dakota, and Catholic Medical Association (collectively, the "Catholic Plaintiffs") as to their claims under the Religious Freedom Restoration Act ("RFRA") challenging the interpretations of Section 1557 and Title VII that require the Catholic Plaintiffs to perform and provide insurance coverage for gender-transition procedures.

The Clerk of Court is directed to enter judgment in favor of the Defendants as to Plaintiff State of North Dakota's claims under the Spending Clause. See Fed. R. Civ. P. 56(f).

The Court **DECLARES** that Defendant U.S. Department of Health and Human Services' ("HHS") interpretation of Section 1557 that requires the Catholic Plaintiffs to perform and provide insurance coverage for gender-transition procedures[1] violates their sincerely held religious beliefs without satisfying strict scrutiny under the RFRA. Accordingly, the Court **PERMANENTLY ENJOINS AND RESTRAINS** HHS, Acting Secretary Cochran, their divisions, bureaus, agents, officers, commissioners, employees, and anyone acting in concert or participation with them, including their successors in office, from interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), or any implementing regulations thereto against the Catholic Plaintiffs in a manner that would require them to perform or provide insurance coverage for gender-transition procedures, including by denying federal financial assistance because of their failure to perform or provide insurance coverage for such procedures or by otherwise pursuing,

[1] As used in this order, the term "gender-transition procedures" includes surgery, counseling, provision of pharmaceuticals, or other treatments sought in furtherance of a gender transition.

charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions.

The Court further **DECLARES** that Defendant Equal Employment Opportunity Commission's ("EEOC") interpretation of Title VII that requires the CBA and its members to provide insurance coverage for gender-transition procedures violates their sincerely held religious beliefs without satisfying strict scrutiny under the RFRA. Accordingly, the Court **PERMANENTLY ENJOINS AND RESTRAINS** the EEOC, Chair Burrows, their divisions, bureaus, agents, officers, commissioners, employees, and anyone acting in concert or participation with them, including their successors in office, from 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 CBA and its members in a manner that would require them to provide insurance coverage for gender-transition procedures, including by denying federal financial assistance because of their failure to provide insurance coverage for such procedures or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions.

The relief provided in this order shall be restricted to the Catholic Plaintiffs, their present and future members, anyone acting in concert or participation with them, and their respective health plans and any insurers or third-party administrators ("TPA") in connection with such health plans. To come within the scope of this order, a CBA member must meet the following criteria:

(a) The employer is not yet protected from interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions by any other judicial order;

(b) The CBA has determined that the employer meets the CBA's strict membership criteria;

(c) The CBA's membership criteria have not changed since the CBA filed its initial complaint on December 28, 2016; and

(d) The employer 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.

Neither HHS nor the EEOC violates this order by taking any of the above-described actions against any CBA member, anyone acting in concert or participation with a CBA member, or a CBA member's health plans and any insurers or TPAs in connection with such health plans if the agency officials directly responsible for taking these actions are unaware of that entity's status as a CBA member or relevant relationship to a CBA member.

However, if either agency, unaware of an entity's status as a CBA member or relevant relationship to a CBA member, takes any of the above-described actions, 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 the CBA member's satisfaction of the (a)-(d) criteria, described above) or the entity's relevant relationship to a CBA member and its protection under this order. 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 or related entity.

Nothing in this order shall prevent the EEOC from:

(1) taking any action in connection with the acceptance of a charge for filing regardless of the source, including receiving an online inquiry via the agency's Public Portal or requesting or receiving a questionnaire or other correspondence from the charging

party, when the charge concerns an allegation against a CBA member concerning the exclusion of gender-transition procedures from its insurance coverage;

(2) accepting a charge alleging that a CBA member does not provide insurance coverage for gender-transition procedures, and from entering the charge into the EEOC's computer systems;

(3) serving a notice of the charge upon a CBA member within ten days as required by 42 U.S.C. § 2000e-5(b); or

(4) issuing a right-to-sue notice to a charging party who has filed a charge against a CBA member concerning the exclusion of gender-transition procedures from its insurance plan in accordance with the requirements and procedures set forth in 42 U.S.C. § 2000e-5(b) & (f)(1) and 29 C.F.R. § 1601.28(a)(1) & (2).

The injunction contained in this order replaces the injunction issued in the Court's January 19, 2021 order.

Any motion for attorneys' fees and expenses filed by any prevailing Plaintiff shall be filed within 60 days after the expiration of the deadline to appeal or after final resolution of all appeals, whichever is later.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 19th day of February, 2021.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

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

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 I

What You Should Know About EEOC and the Enforcement Protections for LGBT Workers

Overview

EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation.** These protections apply regardless of any contrary state or local laws.

Through investigation, conciliation, and litigation of charges by individuals against private sector employers, as well as hearings and appeals for federal sector workers, the Commission has taken the position that existing sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias. The Commission has obtained approximately $6.4 million in

See Also:

- Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination
- Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII
- Federal Sector Cases Involving LGBT Individuals
- Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities
- Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil

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The information provided below highlights what you should know about EEOC's outreach and enforcement in this area.

Examples of LGBT-Related Sex Discrimination Claims

Some examples of LGBT-related claims that EEOC views as unlawful sex discrimination include:

- Failing to hire an applicant because she is a transgender woman.
- Firing an employee because he is planning or has made a gender transition.
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity.
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees.
- Denying an employee a promotion because he is gay or straight.
- Discriminating in terms, conditions, or privileges of employment, such as providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman.
- Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.
- Discriminating against or harassing an employee because of his or her sexual orientation or gender identity, in combination with another unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability.

See How to File a Charge of Employment Discrimination for information about filing a Title VII charge of sex discrimination in employment related to gender identity or sexual orientation bias. There is a different complaint process for federal employees.

Applicable Federal Law

EEOC is responsible for enforcing federal laws that make it illegal to discriminate in employment against a job applicant, employee, or former employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. These federal laws also prohibit employers from retaliating against workers who oppose discriminatory employment practices - for example, by reporting incidents of sexual harassment to their supervisor or human resources department - or against those who participate in an employment discrimination proceeding - for example by filing an EEOC charge, cooperating with an EEOC investigation, or participating in an employment discrimination lawsuit.

While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with Supreme Court case law holding that employment actions motivated by gender stereotyping are unlawful sex discrimination and other court decisions, interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.

Over the past several years the Commission has set forth its position in several published decisions involving

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considered unlawful. In so ruling, the Commission has not recognized any new protected characteristics under Title VII. Rather, it has applied existing Title VII precedents to sex discrimination claims raised by LGBT individuals. The Commission has reiterated these positions through recent *amicus curiae* briefs and litigation against private companies.

Sex Discrimination - Transgender Status

In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012), the Commission held that intentional discrimination against a transgender individual because that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII.

The *Macy* decision explains that allegations of gender identity/transgender discrimination necessarily involve sex discrimination. Such cases can be viewed as sex discrimination based on non-conformance with gender norms and stereotypes under the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, and based on a plain reading of the statute's "because of . . . sex" language.

Applying *Macy*, the Commission has also held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitutes disparate treatment, *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015), that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment, *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013), and that an employer's failure to revise its records pursuant to changes in gender identity stated a valid Title VII sex discrimination claim, *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014).

Sex Discrimination - Sexual Orientation

In *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015), the Commission held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

The *Baldwin* decision explains that allegations of sexual orientation discrimination necessarily involve sex-based considerations. First, discrimination on the basis of sexual orientation necessarily involves treating an employee differently because of his or her sex. For example, a lesbian employee disciplined for displaying a picture of her female spouse can allege that an employer took a different action against her based on her sex where the employer did not discipline a male employee for displaying a picture of his female spouse. Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that the employer took the employee's sex into account by treating him or her differently for associating with a person of the same sex. Finally, discrimination on the basis of sexual orientation is sex discrimination because it necessarily involves discrimination based on gender stereotypes, including employer beliefs about the person to whom the employee should be attracted.

Charge Data

In FY 2015, EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation and/or gender identity/transgender status. This represents an increase of approximately 28% over the total LGBT charges filed in FY 2014 (1,100). EEOC resolved a total of 1,135 LGBT charges in FY 2015, including through voluntary agreements providing approximately $3.3 million in monetary relief for workers and achieving changes in employer policies so that discrimination would not recur. This reflects increases of 34% in the number of resolutions over FY 2014 (847) and 51% in the amount of monetary relief over FY 2014 ($2.19 million). The chart below shows charges received or resolved during FY 2015.

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	Total LGBT	Sex-Gender Identity/Transgender	Sex-Sexual Orientation
Total Receipts	1,412	271	1,181
Total Resolutions	1,135	184	975
Settlements	96	12	85
	8.5%	6.5%	8.7%
Withdrawals w/Benefits	57	6	53
	5.0%	3.3%	5.4%
Administrative Closures	203	38	168
	17.9%	20.7%	17.2%
No Reasonable Cause	737	110	644
	64.9%	59.8%	66.1%
Reasonable Cause	42	18	25
	3.7%	9.8%	2.6%
Successful Conciliations	13	7	6
	1.1%	3.8%	0.6%
Unsuccessful Conciliations	29	11	19
	2.6%	6.0%	1.9%

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	Total LGBT	Sex-Gender Identity/Transgender	Sex-Sexual Orientation
Merit Resolutions	195	36	163
	17.2%	19.6%	16.7%
Monetary Benefits (Millions)*	$3.3	$0.3	$3.0

Note: Charges may have multiple allegations under multiple statutes, so totals will not tally with breakdowns of specific bases or issues and are subject to updates. Monetary benefits include amounts which have been recovered exclusively or partially on non-LGBT claims included in the charge.

See our table of all charge receipts and resolutions under Title VII.

Conciliation and Litigation

When the Commission finds reasonable cause to believe that discrimination has occurred, it seeks to resolve the matter voluntarily through informal means of conciliation, conference, and persuasion. If the Commission is unable to secure a voluntary resolution, it has authority to file suit in federal court. In several cases, the Commission has filed LGBT-related lawsuits under Title VII challenging alleged sex discrimination. Read about examples of pending and resolved EEOC litigation involving Title VII sex discrimination claims brought on behalf of LGBT individuals, as well as EEOC amicus briefs filed in suits brought by private individuals raising these issues.

Federal Sector Enforcement

In the federal sector, EEOC has implemented its priority for covering LGBT individuals in a variety of ways:

- Tracking gender identity and sexual orientation appeals in the federal sector
- Issuing 20 federal sector decisions in FY 2015, including finding that gender identity-related complaints and sexual orientation discrimination-related complaints can be brought under Title VII through the federal sector EEO complaint process. For example, in *Larita G. v. U.S. Postal Service*, EEOC Appeal No. 0120142154 (Nov. 18, 2015), EEOC reversed the Agency's dismissal of a hostile work environment claim on the basis of sexual orientation because such an allegation is necessarily an allegation of sex discrimination under Title VII.
- Establishing an LGBT workgroup to further EEOC's adjudicatory and oversight responsibilities
- Issuing guidance, including instructions for processing complaints of discrimination by LGBT federal employees and applicants available on EEOC's public web site
- Providing technical assistance to federal agencies in the development of gender transition policies and plans
- Providing LGBT related outreach to federal agencies through briefings, presentations, and case law updates

Training and Outreach

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were approximately 55 presentations delivered to over 4,400 federal sector audience members. These events reached a wide variety of audiences, including employee advocacy groups, small employer groups, students and staff at colleges and universities, staff and managers at federal agencies and human resource professionals. To assist in this outreach, EEOC is distributing a brochure, Preventing Employment Discrimination Against Lesbian, Gay, Bisexual or Transgender Employees.

Resources

The Commission has issued various technical assistance publications on LGBT issues, including:

- Fact Sheet on Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination, www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm
- Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII, www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm
- Federal Sector Cases Involving LGBT Individuals, www.eeoc.gov/federal/reports/lgbt_cases.cfm
- Brochure on Preventing Employment Discrimination Against Lesbian, Gay, Bisexual, or Transgender Employees, http://www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm.
- OPM-EEOC-OSC-MSPB Guide: Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment, www.opm.gov/LGBTGuide
- Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964, www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm

Useful resources from other agencies include:

- OPM Guidance on Employment of Transgender Individuals www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/
- U.S. Department of Labor/OSHA Guide to Restroom Access for Transgender Workers, https://www.osha.gov/Publications/OSHA3795.pdf
- U.S. Department of Justice Memorandum on Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964, http://www.justice.gov/file/188671/download

Other Laws

Be aware of other laws that also may apply:

- Federal contractors and sub-contractors are covered by a separate, explicit prohibition on transgender or sexual orientation discrimination in employment pursuant to Executive Order 13672 and implementing regulations issued and enforced by the U.S. Department of Labor's Office of Federal Contract Compliance. For more information, see Frequently Asked Questions on E.O. 13672 Final Rule, www.dol.gov/ofccp/LGBT/LGBT_FAQs.html
- State or local fair employment laws may explicitly prohibit discrimination based on sexual orientation or gender identity. Contact information for state and local fair employment agencies can be found on the page for EEOC's field office covering that state or locality. On the other hand, if a state or local law permits or does not prohibit discrimination based on sexual orientation or gender identity, the EEOC will still enforce Title VII's discrimination prohibitions against covered employers in that jurisdiction because contrary state law is not a

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Exhibit J

[Contract Issuance Note: Rider must be included for all groups.]

Gender Dysphoria Rider

[Name of Entity]

This Rider to the Policy is issued to the Enrolling Group and provides Benefits for the treatment of Gender Dysphoria.

Because this Rider is part of a legal document (the group Policy), we want to give you information about the document that will help you understand it. Certain capitalized words have special meanings. We have defined these words in the *Certificate of Coverage (Certificate)* in *Section 9: Defined Terms* and in this Rider below.

When we use the words "we," "us," and "our" in this document, we are referring to [Name of Entity]. When we use the words "you" and "your" we are referring to people who are Covered Persons, as the term is defined in the *Certificate* in *Section 9: Defined Terms*.

Section 1: Covered Health Services

The following provision is added to the Certificate, Section 1: Covered Health Services:

[#.] Gender Dysphoria

Benefits for the treatment of Gender Dysphoria are limited to the following services:

- Psychotherapy for Gender Dysphoria and associated co-morbid psychiatric diagnoses are provided as described under *Mental Health Services* in your *Certificate*.
- Cross-sex hormone therapy:
  - Cross-sex hormone therapy administered by a medical provider (for example during an office visit) is described under *Pharmaceutical Products - Outpatient* in your *Certificate*.

[Include when group purchases the drug rider.]

  - [Cross-sex hormone therapy dispensed from a pharmacy is provided as described in the *Outpatient Prescription Drug Rider.]*
  - Puberty suppressing medication is not cross-sex hormone therapy.
- Laboratory testing to monitor the safety of continuous cross-sex hormone therapy.
- Surgery for the treatment of Gender Dysphoria, including the surgeries listed below.

  Male to Female:

  - Clitoroplasty (creation of clitoris)
  - Labiaplasty (creation of labia)
  - Orchiectomy (removal of testicles)
  - Penectomy (removal of penis)
  - Urethroplasty (reconstruction of female urethra)
  - Vaginoplasty (creation of vagina)

  Female to Male:

  - Bilateral mastectomy or breast reduction
  - Hysterectomy (removal of uterus)

- Metoidioplasty (creation of penis, using clitoris)
- Penile prosthesis
- Phalloplasty (creation of penis)
- Salpingo-oophorectomy (removal of fallopian tubes and ovaries)
- Scrotoplasty (creation of scrotum)
- Testicular prosthesis
- Urethroplasty (reconstruction of male urethra)
- Vaginectomy (removal of vagina)
- Vulvectomy (removal of vulva)

Genital Surgery and Bilateral Mastectomy or Breast Reduction Surgery Documentation Requirements:

The Covered Person must provide documentation of the following for breast surgery:

- A written psychological assessment from at least one qualified behavioral health provider experienced in treating Gender Dysphoria. The assessment must document that the Covered Person meets all of the following criteria:
  - Persistent, well-documented Gender Dysphoria.
  - Capacity to make a fully informed decision and to consent for treatment.
  - Must be 18 years or older.
  - If significant medical or mental health concerns are present, they must be reasonably well controlled.

The Covered Person must provide documentation of the following for genital surgery:

- A written psychological assessment from at least two qualified behavioral health providers experienced in treating Gender Dysphoria, who have independently assessed the Covered Person. The assessment must document that the Covered Person meets all of the following criteria.
  - Persistent, well-documented Gender Dysphoria.
  - Capacity to make a fully informed decision and to consent for treatment.
  - Must 18 years or older.
  - If significant medical or mental health concerns are present, they must be reasonably well controlled.
  - Complete at least 12 months of successful continuous full-time real-life experience in the desired gender.
  - Complete 12 months of continuous cross-sex hormone therapy appropriate for the desired gender (unless medically contraindicated).

Schedule of Benefits

[1Remove for Network Only products.]

The provision below for Gender Dysphoria is added to the Schedule of Benefits [1and the following bulleted item is added to the Schedule of Benefits as a Covered Health Service which requires prior authorization under Covered Health Services which Require Prior Authorization]:

- [Gender Dysphoria treatment.]

Covered Health Service	**Benefit** *(The Amount We Pay, based on Eligible Expenses)*	**Apply to the Out-of-Pocket Maximum?**	**Must You Meet Annual Deductible?**
[#.] Gender Dysphoria			
Remove prior authorization requirement for Network Only products **[Prior Authorization Requirement]** *[1Include for Products with a Network and Non-Network Benefits, including Options PPO when the member is not responsible for prior authorization for network benefits.]* *[2Include for Non-Differential Product. Include for Options PPO when the member is responsible for prior authorization for network benefits.]* [[1For Non-Network Benefits you] [2You] must obtain prior authorization as soon as the possibility for any of the services listed above for Gender Dysphoria treatment arises. If you fail to obtain prior authorization as required, [Benefits will be reduced to [50 - 95]% of Eligible Expenses.] [you will be responsible for paying all charges and no Benefits will be paid.]] [In addition, [1for Non-Network Benefits] you must contact us 24 hours before admission for an Inpatient Stay.]			
[1Include for Network/Non-Network Products. Remove Network heading and Non-Network row for Network only Products and Non-Differential Product.] *[2Include when group purchases the drug rider.]*	***[1Network]*** [Depending upon where the Covered Health Service is provided, Benefits will be the same as those stated under each Covered Health Service category in the *Schedule of Benefits* [2and in the *Outpatient Prescription Drug Rider]*.] ***[1Non-Network]*** [Depending upon where the Covered Health Service is provided, Benefits will be the same as those stated under each Covered Health Service category in the *Schedule of Benefits* [2and in the *Outpatient Prescription Drug Rider]*.]		

Section 2: Exclusions and Limitations

The exclusion for sex transformation operations and related services in the Certificate under Section 2: Exclusions and Limitations, Procedures and Treatments is deleted. In addition, the following exclusions apply:

- Cosmetic Procedures, including the following:

- Abdominoplasty
- Blepharoplasty
- Breast enlargement, including augmentation mammoplasty and breast implants
- Body contouring, such as lipoplasty
- Brow lift
- Calf implants
- Cheek, chin, and nose implants
- Injection of fillers or neurotoxins
- Face lift, forehead lift, or neck tightening
- Facial bone remodeling for facial feminizations
- Hair removal
- Hair transplantation
- Lip augmentation
- Lip reduction
- Liposuction
- Mastopexy
- Pectoral implants for chest masculinization
- Rhinoplasty
- Skin resurfacing
- Thyroid cartilage reduction; reduction thyroid chondroplasty; trachea shave (removal or reduction of the Adam's Apple)
- Voice modification surgery
- Voice lessons and voice therapy

Section 9: Defined Terms

The following definition of Gender Dysphoria is added to the Certificate under Section 9: Defined Terms:

Gender Dysphoria - a disorder characterized by the following diagnostic criteria classified in the current edition of the *Diagnostic and Statistical Manual of the American Psychiatric Association:*

- *Diagnostic criteria for adults and adolescents:*
  - A marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration, as manifested by at least two of the following:
    - A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
    - A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

- A strong desire for the primary and/or secondary sex characteristics of the other gender.
- A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
- A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
- A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

- The condition is associated with clinically significant distress or impairment in social, occupational or other important areas of functioning.

- *Diagnostic criteria for children:*
  - A marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration, as manifested by at least six of the following (one of which must be criterion as shown in the first bullet below):
    - A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender).
    - In boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing.
    - A strong preference for cross-gender roles in make-believe play or fantasy play.
    - A strong preference for the toys, games or activities stereotypically used or engaged in by the other gender.
    - A strong preference for playmates of the other gender.
    - In boys (assigned gender), a strong rejection of typically masculine toys, games and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of typically feminine toys, games and activities.
    - A strong dislike of ones' sexual anatomy.
    - A strong desire for the primary and/or secondary sex characteristics that match one's experienced gender.
  - The condition is associated with clinically significant distress or impairment in social, school or other important areas of functioning.

[Effective Date of this Rider: _____]

_____

(Name and Title)

Kansas City

An Independent Licensee of the Blue Cross and Blue Shield Association

Treatment of Gender Dysphoria

Policy Number: 7.01.508
Origination: 10/2010
Last Review: 10/2016
Next Review: 10/2017

Policy

If coverage for gender reassignment surgery is available per the member's benefit, Blue Cross and Blue Shield of Kansas City (Blue KC) will provide coverage for treatment of gender dysphoria including gender reassignment surgery when it is determined to be medically necessary because the criteria shown below are met.

Some grandfathered plans may exclude coverage of gender reassignment surgery (sex change surgery, transgender surgery) or any treatment of gender identity disorders. Please verify benefits.

There are three phases to coverage:

1 Phase one is at least 12 consecutive months of living, dressing and working full-time as the preferred gender. During this period coverage will require regular and consistent attendance in a program of counseling and behavior therapy.

2 Phase two begins after phase one and is 12 additional consecutive months of living, dressing and working full-time as the preferred gender with the addition of hormone supplementation consistent with the preferred gender. During this period coverage will require continued regular and consistent attendance in a program of counseling and behavior therapy.

After documented completion of phase one and phase two, the requested surgical alteration will be covered subject to non-discriminatory medical policy.

When Policy Topic is covered

Non-Surgical Treatment of Gender Dysphoria

If a plan covers non-surgical treatment for gender dysphoria, the following non-surgical treatments are covered:

- Psychotherapy for gender dysphoria and associated co-morbid psychiatric diagnoses.
    - Note: If mental health services are covered based on the behavioral health services benefit.
- Continuous Hormone Replacement Therapy – Hormones of the desired gender. Hormones injected by a medical provider (for example hormones injected during an office visit) are covered by the medical plan. Benefits for these injections vary depending on the plan design. Oral and self-injected hormones

from a pharmacy are not covered under the medical plan. Refer to the Outpatient Prescription Drug Rider, or SPD for self-funded plans, or specific prescription drug product coverage and exclusion terms.

- Eligibility Qualifications for Continuous Hormone Replacement Therapy – The covered person must meet all of the following eligibility qualifications for hormone replacement:
- Persistent, well-documented gender dysphoria (see definition of Gender Identity Disorder below); and
- Capacity to make a fully informed decision and to consent for treatment; and
- Age of majority in a given country. Note: WPATH guidelines address age of majority in a given country. For the purposes of this guideline, the age of majority is age 18. However, this refers to chronological age not biological age. Where approval or denial of benefits is based solely on the age of the individual a case-by-case medical director review is necessary; and
- If significant medical or mental health concerns are present, they must be reasonably well-controlled.
- Laboratory testing to monitor the safety of continuous hormone therapy.

Gender reassignment surgery may be considered **medically necessary** when **ALL** of the following criteria are met:

- Age of majority in a given country. Note: WPATH guidelines address age of majority in a given country. For the purposes of this guideline, the age of majority is age 18. However, this refers to chronological age not biological age. Where approval or denial of benefits is based solely on the age of the individual a case-by-case medical director review is necessary.
- The individual is diagnosed as having a gender identity disorder (GID), including a diagnosis of transsexualism that includes **ALL** of the following criteria:
    - The individual has demonstrated the desire to live and be accepted as a member of the opposite sex, in addition to a desire to make his/her body as congruent as possible with the preferred sex through surgery and hormone replacement.
    - The transsexual identity has been present consistently for at least two years.
    - The disorder is not due to another mental disorder or chromosome abnormality.
- The individual is an active participant in a recognized gender identity treatment program and demonstrates **ALL** of the following conditions:
    - The individual has successfully lived and worked within the desired gender role full-time for at least 12 months (real life experience) without returning to the original gender.
    - One qualified health professional recommends initiation of hormonal therapy or breast surgery with written documentation submitted to the physician who will be responsible for the medical treatment.
    - The individual has received at least 12 months of continuous hormonal sex reassignment therapy, unless medically contraindicated.
    - A qualified mental health professional (a psychiatrist or Ph.D. clinical psychologist) recommends sex reassignment surgery with written

documentation submitted to the physician performing the genital surgery (this should be an extensive report). The individual has undergone evaluation by the physician performing the genital surgery.

The following surgeries would be considered **medically necessary** when performed as part of a medically necessary initial gender reassignment:

- initial mastectomy/breast reduction
- hysterectomy
- salpingo-oophorectomy
- colpectomy
- metoidioplasty
- vaginoplasty
- colovaginoplasty
- orchiectomy
- penectomy
- clitoroplasty
- labiaplasty
- scrotoplasty
- urethroplasty
- phalloplasty
- testicular implants
- colovaginoplasty
- cenectomy
- clitoroplasty
- vulvoplasty
- penile skin inversion
- repair of introitus
- construction of vagina with graft, coloproctostomy
- urethromeatoplasty

When Policy Topic is not covered

When non-surgical treatments are not covered. Examples that apply to this exclusion include, but are not limited to:

- Reproduction services including, but not limited to: sperm preservation in advance of hormone treatment or gender dysphoria surgery, cryopreservation of fertilized embyros, oocyte preservation, surrogate parenting, donor eggs, donor sperm and host uterus. (See the Reproduction exclusion in the member specific benefit plan document.)
- Drugs* for hair loss or growth.
- Drugs* for sexual performance for patients that have undergone genital reconstruction.
- Drugs* for cosmetic purposes.
- Hormone therapy except as described in the Covered Services section above. Gender Dysphoria (Gender Identity Disorder)
- Pubertal suppression therapy is considered unsafe in managing children and adolescents with gender identity dysphoria and is, therefore, not covered.
- Voice therapy.

* The drugs exclusions listed above apply to drugs administered by a provider in a medical setting (including, but not limited to: office, outpatient, or inpatient facility). For drugs obtained at a pharmacy, the pharmacy benefit will apply.

The following associated gender reassignment surgeries are considered **cosmetic** in nature and not medically necessary, even in the presence of a benefit for gender reassignment surgery. These surgeries include, but are not limited to:

- breast augmentation/silicone injections of the breast
- blepharoplasty
- facial feminization surgery including facial bone reconstruction
- rhinoplasty
- lip reduction/enhancement
- face/forehead lift
- chin/nose implant or other facial implants
- trachea shave/reduction thyroid chondroplasty
- laryngoplasty
- liposuction
- electrolysis
- jaw shortening/sculpturing/facial bone reduction
- collagen injections
- removal of redundant skin
- voice modification surgery
- hair removal / hair transplantation
- abdominoplasty
- calf implants
- gluteal augmentation
- lipofilling collagen injections
- pectoral implants
- voice therapy
- construction of a clitoral hood
- mastopexy
- neck tightening
- rhytidectomy (face-lift)
- penile implants
- Nipple/areola reconstruction

Considerations

Some grandfathered plans may exclude coverage of gender reassignment surgery (sex change surgery, transgender surgery) or any treatment of gender identity disorders. Please verify benefits.

Description of Procedure or Service

Gender reassignment surgery (also known as genital reconstruction surgery, sex affirmation surgery, or sex-change operation) is a term for the surgical procedures by which a person's physical appearance and function of their existing sexual characteristics are altered to resemble that of the other sex. It is part of a treatment for gender identity disorder/gender dysphoria in transsexual and

transgender people. It may also be performed on intersex people, often in infancy. Other terms for this surgery include sex reassignment surgery, sex reconstruction surgery, genital reconstruction surgery, gender confirmation surgery, and more clinical terms, such as feminizing genitoplasty or penectomy, orchiectomy and vaginoplasty are used medically for trans women, with masculinizing genitoplasty often similarly used for trans men.

Male to Female
In a series of staged procedures, the physician removes portions of the male genitalia and forms female external genitals. The penis is dissected and portions are removed with care to preserve vital nerves and vessels in order to fashion a clitoris-like structure. The urethral opening is moved to a position similar to that of a normal female. A vagina is made by dissecting and opening the perineum. This opening is lined using pedicle or split thickness grafts. Labia are created out of skin from the scrotum and adjacent tissue. A stent or obturator is usually left in place in the newly created vagina for three weeks or longer.

Female to Male
In a series of staged procedures, the physician forms a penis and scrotum using pedicle flap grafts and free skin grafts. Portions of the clitoris are used as well as the adjacent skin. Prostheses are often placed in the penis in order to have a sexually functional organ. Prosthetic testicles are fixed in the scrotum. The vagina is closed or removed.

Gender reassignment surgery is intended to be a permanent change to a patient's sexual identity and is not reversible. Therefore, a careful and accurate diagnosis is essential for treatment and can be made only as part of a long-term diagnostic process involving a multidisciplinary specialty approach that includes an extensive case history; gynecological, endocrinological and urological examination, and a clinical psychiatric/psychological examination. A patient's self-assessment and desire for sex reassignment cannot be viewed as reliable indicators of GID.

Rationale

According to the World Professional Association for Transgender Health (WPATH) (formerly known as the Harry Benjamin International Gender Dysphoria Association [(HBIGDA]), Gender Identity Disorder (GID), more commonly known as transsexualism, is a condition recognized in the Diagnostic and Statistical Manual of Mental Disorders, (DSM-IV, 1994, and DSM-IV-TR, 2000) published by the American Psychiatric Association. Transsexualism is also recognized in the International Statistical Classification of Diseases and Related Health Problems, Ninth Revision, published by the World Health Organization, for which the United States is a signatory. The criteria listed for GID are descriptive of many people who experience dissonance between their sex as assigned at birth and their gender identity, which is developed in early childhood and understood to be firmly established by age 4, though for some transgender individuals, gender identity may remain somewhat fluid for many years. The DSM-IV descriptive criteria were developed to aid in diagnosis and treatment to alleviate the clinically significant

distress and impairment know as gender dysphoria that is often associated with transsexualism.

Two frequently used methods of diagnosing transsexualism are the German Standards for the Treatment and Diagnostic Assessment of Transsexuals (Becker, et al., 1998) and the WPATH SOC (2001). According to these standards of care, transsexualism is identified as follows:

- a persistent and profound identification with the opposite sex
- a persistent feeling of discomfort regarding one's biological sex or feelings of inadequacy in the gender role of that sex
- the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone replacement
- clinically relevant distress and/or impaired ability to function in social, work-related and other situations as a result of preoccupation with non-identification with the gender assigned at birth
- not a symptom of another mental disorder or a chromosomal abnormality
- persistent presence of the transsexual identity for at least two years

Mental health professionals play a strong role in working with individuals with GID, as they need to diagnose the gender disorder and any comorbid psychiatric conditions accurately, counsel the individual regarding treatment options, and provide psychotherapy and assess eligibility and readiness for hormone and surgical therapy. They usually provide documentation and formal recommendations to medical and surgical specialists. Psychiatric care may need to continue for several years after gender reassignment surgery, as major psychological adjustments may continue to be necessary. Other providers of care may include a family physician or internist, endocrinologist, urologist, plastic surgeon, general surgeon and gynecologist. The overall success of the surgery is highly dependent on psychological adjustment and continued support.

After diagnosis, the therapeutic approach usually includes three elements: hormones of the desired gender, real life experience in the desired role, and surgery to change the genitalia and other sex characteristics.

Prior to gender reassignment surgery, patients undergo hormone replacement therapy, which plays an important role in the gender transition process. Biological males can be treated with estrogens and anti-androgens to increase breast size, redistribute body fat, soften skin, decrease body hair, and decrease testicular size and erections. Biological females are treated with testosterone to deepen voice, increase muscle and bone mass, decrease breast size, increase clitoris size, and increase facial and body hair. Hormones must be administered by a physician and require ongoing medical management, including physical examination and lab studies to evaluate dosage, side effects, etc. Lifelong maintenance is usually required. Hormone therapy also limits fertility, and individuals need to be informed of sperm preservation options and cryopreservation of fertilized embryos prior to starting hormone therapy.

The individual identified with GID also undergoes what is called a "real life experience," in which he/she adopts the new or evolving gender role and lives in that role as part of the transition pathway. This process tests the individual's resolve and commitment for change, as well as the adequacy of his/her support system. During this time, a person would be expected to maintain full- or part-time employment, participate in community activities, acquire a legal gender identity appropriate first name, and provide an indication that others are aware of the change in gender role. Mental health professionals continue to play an important role in this individual's continuum of care.

Transmen
Transmen assume male gender identities or strive to present in more male gender roles. Gender reassignment surgery from female to male (FTM) includes surgical procedures that reshape a female body into the appearance of a male body. Procedures often performed as part of gender reassignment surgery of FTM include mastectomy, hysterectomy, salpingo-oophorectomy, colpectomy (i.e., removal of the vagina) and metoidioplasty (i.e., construction of a penis).

Transwomen
Transwomen strive for a female identity. Gender reassignment surgery from male to female (MTF) includes procedures that shape a male body into the appearance of and, to the maximum extent possible, the function of a female body. Procedures often performed as part of gender reassignment surgery of MTF include vaginoplasty, penile inversion to create a vagina and clitoris, penectomy, colovaginoplasty (i.e., creation of vagina from sigmoid colon), breast augmentation, orchiectomy, clitoroplasty and labiaplasty.

Professional Society/Organization
In 2009 the Endocrine Society published a clinical practice guideline for endocrine treatment of transsexual persons (Hembree, et al., 2009). As part of this guideline, the endocrine society recommends that transsexual persons consider genital sex reassignment surgery only after both the physician responsible for endocrine transition therapy and the mental health professional find surgery advisable; that surgery be recommended only after completion of at least one year of consistent and compliant hormone treatment; and that the physician responsible for endocrine treatment medically clear the individual for sex reassignment surgery and collaborate with the surgeon regarding hormone use during and after surgery.

Summary
Sex reassignment surgical procedures for diagnosed cases of GID should be recommended only after a comprehensive evaluation by a qualified mental health professional. The surgeon should have a demonstrated competency and extensive training in sexual reconstructive surgery. Long-term follow-up is highly recommended for the enduringly successful outcome of surgery.

References:
1. Becker S, Bosinski HAG, Clement U, Eicher WM, Goerlich TM, Hartmann U, et al. (1998) German standards for the treatment and diagnostic assessment of transsexuals. IJT 2/4. Available at URL address: http://www.symposion.com/ijt/ijtc0603.htm
2. Day P. Trans-gender Reassignment Surgery. Tech Brief Series. New Zealand Health Technology Assessment. NZHTA Report February 2002, Volume 1, Number 1. Available at URL address: http://nzhta.chmeds.ac.nz/index.htm#tech
3. Diagnostic and Statistical Manual of Mental Disorders Fourth Edition. Text Revision (DSM-IV - TR). American Psychiatric Association. American Psychiatric Association, Incorporated. July 2000.
4. ECRI Institute. Hotline Response [database online]. Plymouth Meeting (PA): ECRI Institute; 2007 October. Sexual reassignment for gender identity disorders. Available at URL address: http://www.ecri.org
5. Hembree WC, Cohen-Kettenis P, Delemarre-van de Waal HA, Gooren LJ, Meyer WJ 3rd, Spack NP, Tangpricha V, Montori VM; Endocrine Society. Endocrine treatment of transsexual persons: an Endocrine Society clinical practice guideline. J Clin Endocrinol Metab. 2009 Sep;94(9):3132-54.
6. Landen M, Walinder J, Hambert G, Lundstrom B. Factors predictive of regret in sex reassignment. Acta Psychiatr Scand. 1998 Apr;97(4):284-9.
7. Lawrence AA. Factors associated with satisfaction or regret following male-to-female sex reassignment surgery. Arch Sex Behav. 2003 Aug;32(4):299-315.
8. Maharaj NR, Dhai A, Wiersma R, Moodley J. Intersex conditions in children and adolescents: surgical, ethical, and legal considerations. J Pediatr Adolesc Gynecol. 2005 Dec;18(6):399-402.
9. Moore E, Wisniewski A, Dobs A. Endocrine treatment of transsexual people: a review of treatment regimens, outcomes, and adverse effects. J Clin Endocrinol Metab. 2003 Aug;88(8):3467-73.
10. Smith YL, van Goozen SH, Cohen-Kettenis PT. Adolescents with gender identity disorder who were accepted or rejected for sex reassignment surgery: a prospective follow-up study. J Am Acad Child Adolesc Psychiatry. 2001 Apr;40(4):472-81.
11. Sutcliffe PA, Dixon S, Akehurst RL, Wilkinson A, Shippam A, White S, Richards R, Caddy CM. Evaluation of surgical procedures for sex reassignment: a systematic review. J Plast Reconstr Aesthet Surg. 2009 Mar;62(3):294-306; discussion 306-8.
12. World Professional Association for Transgender Health. The Harry Benjamin International Gender Dysphoria Association. Standards of Care for Gender Identity Disorders. 6th version. 2001 Feb. Available at URL address: http://www.wpath.org/publications_standards.cfm
13. Zucker KJ. Intersexuality and gender identity disorder. J Pediatr Adolesc Gynecol. 2002 Feb;15(1):3-13.
14. Berry MG, Curtis R, Davies D. Female-to-male transgender chest reconstruction: a large consecutive, single-surgeon experience. J Plast Reconstr Aesthet Surg. 2012. Jun;65(6):711-9.
15. Namba Y, Watanabe T, Kimata Y. Mastectomy in female-to-male transsexuals. Acta Med Okayama. 2009 Oct;63(5):243-7.
16. Monstrey S, Selvaggi G, Ceulemans P, Van Landuyt K, Bowman C, Blondeel P, Hamdi M,De Cuypere G. Chest-wall contouring surgery in female-to-male transsexuals: a new algorithm. Plast Reconstr Surg. 2008 Mar;121(3):849-59.

The following codes for treatments and procedures applicable to this document are included below for informational purposes. Inclusion or exclusion of a procedure, diagnosis or device code(s) does not constitute or imply member coverage or provider reimbursement policy.

Billing Coding/Physician Documentation Information

55970 Intersex surgery; male to female
55980 Intersex surgery; female to male

11950 Subcutaneous injection of filling material (eg, collagen); 1 cc or less

11951 Subcutaneous injection of filling material (eg, collagen); 1.1 to 5.0 cc
11952 Subcutaneous injection of filling material (eg, collagen); 5.1 to 10.0 cc
11954 Subcutaneous injection of filling material (eg, collagen); over 10.0 cc
15775 Punch graft for hair transplant; 1 to 15 punch grafts
15776 Punch graft for hair transplant; more than 15 punch grafts
15819 Cervicoplasty
15820 Blepharoplasty, lower eyelid;
15821 Blepharoplasty, lower eyelid; with extensive herniated fat pad
15822 Blepharoplasty, upper eyelid;
15823 Blepharoplasty, upper eyelid; with excessive skin weighting down lid
15824 Rhytidectomy; forehead
15826 Rhytidectomy; glabellar frown lines
15828 Rhytidectomy; cheek, chin, and neck
15829 Rhytidectomy; superficial musculoaponeurotic system (SMAS) flap
15830 Excision, excessive skin and subcutaneous tissue (includes lipectomy); abdomen, infraumbilical panniculectomy
15832 Excision, excessive skin and subcutaneous tissue (includes lipectomy); thigh
15833 Excision, excessive skin and subcutaneous tissue (includes lipectomy); leg
15834 Excision, excessive skin and subcutaneous tissue (includes lipectomy); hip
15835 Excision, excessive skin and subcutaneous tissue (includes lipectomy); buttock
15836 Excision, excessive skin and subcutaneous tissue (includes lipectomy); arm
15837 Excision, excessive skin and subcutaneous tissue (includes lipectomy); forearm or hand
15838 Excision, excessive skin and subcutaneous tissue (includes lipectomy); submental fat pad
15839 Excision, excessive skin and subcutaneous tissue (includes lipectomy); other area
15847 Excision, excessive skin and subcutaneous tissue (includes lipectomy), abdomen (eg, abdominoplasty) (includes umbilical transposition and fascial plication) (List separately in addition to code for primary procedure)
15877 Suction assisted lipectomy; trunk
15878 Suction assisted lipectomy; upper extremity
15879 Suction assisted lipectomy; lower extremity
17380 Electrolysis epilation, each 30 minutes
19301 Mastectomy, partial (eg, lumpectomy, tylectomy, quadrantectomy, segmentectomy);
19303 Mastectomy, simple, complete
19304 Mastectomy, subcutaneous
19316 Mastopexy
19324 Mammaplasty, augmentation; without prosthetic implant
19325 Mammaplasty, augmentation; with prosthetic implant

19340 Immediate insertion of breast prosthesis following mastopexy, mastectomy or in reconstruction
19342 Delayed insertion of breast prosthesis following mastopexy, mastectomy or in reconstruction
19350 Nipple/areola reconstruction
21120 Genioplasty; augmentation (autograft, allograft, prosthetic material)
21121 Genioplasty; sliding osteotomy, single piece
21122 Genioplasty; sliding osteotomies, 2 or more osteotomies (eg, wedge excision or bone wedge reversal for asymmetrical chin)
21123 Genioplasty; sliding, augmentation with interpositional bone grafts (includes obtaining autografts)
21125 Augmentation, mandibular body or angle; prosthetic material
21127 Augmentation, mandibular body or angle; with bone graft, onlay or interpositional (includes obtaining autograft)
21137 Reduction forehead; contouring only
21138 Reduction forehead; contouring and application of prosthetic material or bone graft (includes obtaining autograft)
21139 Reduction forehead; contouring and setback of anterior frontal sinus wall
21208 Osteoplasty, facial bones; augmentation (autograft, allograft, or prosthetic implant)
21209 Osteoplasty, facial bones; reduction
21210 Graft, bone; nasal, maxillary or malar areas (includes obtaining graft)
21230 Graft; rib cartilage, autogenous, to face, chin, nose or ear (includes obtaining graft)
21245 Reconstruction of mandible or maxilla, subperiosteal implant; partial
21246 Reconstruction of mandible or maxilla, subperiosteal implant; complete
21248 Reconstruction of mandible or maxilla, endosteal implant (eg, blade, cylinder); partial
21249 Reconstruction of mandible or maxilla, endosteal implant (eg, blade, cylinder); complete
21270 Malar augmentation, prosthetic material
21295 Reduction of masseter muscle and bone (eg, for treatment of benign masseteric hypertrophy); extraoral approach
21296 Reduction of masseter muscle and bone (eg, for treatment of benign masseteric hypertrophy); intraoral approach
30400 Rhinoplasty, primary; lateral and alar cartilages and/or elevation of nasal tip
30410 Rhinoplasty, primary; complete, external parts including bony pyramid, lateral and alar cartilages, and/or elevation of nasal tip
30420 Rhinoplasty, primary; including major septal repair
30430 Rhinoplasty, secondary; minor revision (small amount of nasal tip work)
30435 Rhinoplasty, secondary; intermediate revision (bony work with osteotomies)
30450 Rhinoplasty, secondary; major revision (nasal tip work and osteotomies)
31580 Laryngoplasty; for laryngeal web, 2-stage, with keel insertion and removal

31582 Laryngoplasty; for laryngeal stenosis, with graft or core mold, including tracheotomy
31584 Laryngoplasty; with open reduction of fracture
31587 Laryngoplasty, cricoid split
31588 Laryngoplasty, not otherwise specified (eg, for burns, reconstruction after partial laryngectomy)
53400 Urethroplasty; first stage, for fistula, diverticulum, or stricture (eg, Johannsen type)
53405 Urethroplasty; second stage (formation of urethra), including urinary diversion
53410 Urethroplasty, 1-stage reconstruction of male anterior urethra
53415 Urethroplasty, transpubic or perineal, 1-stage, for reconstruction or repair of prostatic or membranous urethra
53420 Urethroplasty, 2-stage reconstruction or repair of prostatic or membranous urethra; first stage
53425 Urethroplasty, 2-stage reconstruction or repair of prostatic or membranous urethra; second stage
53430 Urethroplasty, reconstruction of female urethra
53431 Urethroplasty with tubularization of posterior urethra and/or lower bladder for incontinence (eg, Tenago, Leadbetter procedure)
53450 Urethromeatoplasty, with mucosal advancement
53460 Urethromeatoplasty, with partial excision of distal urethral segment (Richardson type procedure)
54125 Amputation of penis; complete
54520 Orchiectomy, simple (including subcapsular), with or without testicular prosthesis, scrotal or inguinal approach
54660 Insertion of testicular prosthesis (separate procedure)
54690 Laparoscopy, surgical; orchiectomy
55175 Scrotoplasty; simple
55180 Scrotoplasty; complicated
56625 Vulvectomy simple; complete
56800 Plastic repair of introitus
56805 Clitoroplasty for intersex state
56810 Perineoplasty, repair of perineum, nonobstetrical (separate procedure)
57106 Vaginectomy, partial removal of vaginal wall;
57107 Vaginectomy, partial removal of vaginal wall; with removal of paravaginal tissue (radical vaginectomy)
57110 Vaginectomy, complete removal of vaginal wall;
57111 Vaginectomy, complete removal of vaginal wall; with removal of paravaginal tissue (radical vaginectomy)
57291 Construction of artificial vagina; without graft
57292 Construction of artificial vagina; with graft
57335 Vaginoplasty for intersex state
58150 Total abdominal hysterectomy (corpus and cervix), with or without removal of tube(s), with or without removal of ovary(s);
58180 Supracervical abdominal hysterectomy (subtotal hysterectomy), with or without removal of tube(s), with or without removal of ovary(s)
58260 Vaginal hysterectomy, for uterus 250 g or less;

58262 Vaginal hysterectomy, for uterus 250 g or less; with removal of tube(s), and/or ovary(s)
58275 Vaginal hysterectomy, with total or partial vaginectomy;
58280 Vaginal hysterectomy, with total or partial vaginectomy; with repair of enterocele
58285 Vaginal hysterectomy, radical (Schauta type operation)
58290 Vaginal hysterectomy, for uterus greater than 250 g;
58291 Vaginal hysterectomy, for uterus greater than 250 g; with removal of tube(s) and/or ovary(s)
58541 Laparoscopy, surgical, supracervical hysterectomy, for uterus 250 g or less;
58542 Laparoscopy, surgical, supracervical hysterectomy, for uterus 250 g or less; with removal of tube(s) and/or ovary(s)
58543 Laparoscopy, surgical, supracervical hysterectomy, for uterus greater than 250 g;
58544 Laparoscopy, surgical, supracervical hysterectomy, for uterus greater than 250 g; with removal of tube(s) and/or ovary(s)
58550 Laparoscopy, surgical, with vaginal hysterectomy, for uterus 250 g or less;
58552 Laparoscopy, surgical, with vaginal hysterectomy, for uterus 250 g or less; with removal of tube(s) and/or ovary(s)
58553 Laparoscopy, surgical, with vaginal hysterectomy, for uterus greater than 250 g;
58554 Laparoscopy, surgical, with vaginal hysterectomy, for uterus greater than 250 g; with removal of tube(s) and/or ovary(s)
58720 Salpingo-oophorectomy, complete or partial, unilateral or bilateral (separate procedure)
89258 Cryopreservation; embryo(s)
89259 Cryopreservation; sperm
89346 Storage (per year); oocyte(s)
90832 Psychotherapy, 30 minutes with patient and/or family member
90833 Psychotherapy, 30 minutes with patient and/or family member when performed with an evaluation and management service (List separately in addition to the code for primary procedure)
90834 Psychotherapy, 45 minutes with patient and/or family member
90836 Psychotherapy, 45 minutes with patient and/or family member when performed with an evaluation and management service (List separately in addition to the code for primary procedure)
90837 Psychotherapy, 60 minutes with patient and/or family member
90838 Psychotherapy, 60 minutes with patient and/or family member when performed with an evaluation and management service (List separately in addition to the code for primary procedure)
92606 Therapeutic service(s) for the use of non-speech-generating device, including programming and modification
92609 Therapeutic services for the use of speech-generating device, including programming and modification
C1813 Prosthesis, penile, inflatable
D5960 speech aid prosthesis, modification

J1380	Injection, estradiol valerate, up to 10 mg
J1410	Injection, estrogen conjugated, per 25 mg
J1435	Injection, estrone, per 1 mg
J2675	Injection, progesterone, per 50 mg
J3145	Injection, testosterone undecanoate, 1 mg
L8600	Implantable breast prosthesis, silicone or equal
S3650	Saliva test, hormone level; during menopause
S4023	Donor egg cycle, incomplete, case rate
S4025	Donor services for in vitro fertilization (sperm or embryo), case rate
S4026	Procurement of donor sperm from sperm bank

ICD-10 Codes

F64.0	Transsexualism
F64.1	Dual role transvestism
F64.2	Gender identity disorder of childhood
F64.8	Other gender identity disorders
F64.9	Gender identity disorder, unspecified

Additional Policy Key Words

N/A

Policy Implementation/Update Information

10/1/10	New policy; considered medically necessary
10/1/11	No policy statement changes.
10/1/12	No policy statement changes.
10/1/13	No policy statement changes.
10/1/14	No policy statement changes.
10/1/15	No policy statement changes.
10/1/16	Policy title updated and criteria added for hormone therapy.

THE ASSISTANT SECRETARY OF DEFENSE
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HEALTH AFFAIRS

JUL 2 9 2016

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (MANPOWER AND RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE AIR FORCE (MANPOWER AND RESERVE AFFAIRS)
DIRECTOR, DEFENSE HEALTH AGENCY
DIRECTOR, HEALTH, SAFETY AND WORK LIFE, U.S. COAST GUARD

SUBJECT: Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members

In accordance with Department of Defense Instruction (DoDI) 1300.28, "In-Service Transition for Transgender Service Members," June 30, 2016, and Directive-Type Memorandum (DTM)16-005, "Military Service of Transgender Service Members," June 30, 2016, this memorandum provides guidance for the medical care of transgender Service members. This memorandum supplements requirements in those issuances; it does not supersede any such requirements.

General Provisions:

The Military Health System (MHS) will either provide or arrange consultation for medically necessary care for members on active duty for a period of more than 30 days (referred to as Active Duty Service members (ADSMs) throughout the remainder of this document). Such care is based upon the individual's unique health care needs and, following initial evaluation, may include counseling and behavioral health services, medical support, and assistance with establishing a treatment plan for the Service member's submission to the unit commander, followed by any medically necessary treatment.

Until the DoD is able to promulgate specific clinical practice guidelines for the care of transgender personnel, the MHS will adhere to the attached 2009 version of the Endocrine Society's Standards of Care, "Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline," as the primary guideline to provide consistent, evidence based care to transitioning patients. Explanation of any clinically indicated deviation from the guideline should be documented in the patient's health record. Clinical Practice Guidelines from other professional societies may also help inform clinical decision making (e.g., the 2015 American Psychological Association Guidelines for Psychological Practice with Transgender and Gender Nonconforming People and the World Professional Association for Transgender Health Standards of Care). Key components of medical care for the purpose of treating gender dysphoria include initial assessment and, based upon that assessment of the individual's needs,

the establishment of a treatment plan which may include real life experience (RLE) that is provided in a manner consistent with the requirements of DoDI 1300.28 and DTM 16-005 regarding RLE, cross-sex hormone therapy, and surgical transition. Treatment plans must be individualized and approved by a military medical provider. The following guidance addresses various stages of treatment:

1. For Active Duty Service members (ADSMs) seeking initial treatment for gender dysphoria, a diagnosis of gender dysphoria must be established by a privileged behavioral health provider (or similarly qualified civilian provider if unavailable in a military facility), with appropriate referral to other types of providers as indicated or required. The assessment should be comprehensive in nature, including exclusion of other causes for dysphoria, and lead to formulation of an initial treatment plan.

2. For ADSMs who have already received a diagnosis of gender dysphoria and established a treatment plan approved by a military medical provider, and who desire to proceed to or continue cross-sex hormone therapy, an endocrinologist or other physician with appropriate professional expertise should exclude medical conditions making hormone therapy unsafe, may initiate or continue hormone therapy if indicated as medically necessary, and monitor response to hormones in accordance with the Endocrine Society's Standards of Care guidelines, to include periodic screening for hormone associated adverse outcomes.

3. ADSMs with an established treatment plan desiring surgical treatment following a period of RLE and who are compliant with all facets of an approved treatment plan should be referred to an appropriately qualified surgeon for evaluation. The surgeon should fully discuss all surgical options and potential complications in order to provide informed consent before surgery is proposed. Consistent with current DoD policies, purely cosmetic or other non-medically necessary surgery is not authorized.

4. Any Service member for whom the Defense Enrollment Eligibility Reporting System has recorded a gender change, or who is in the process of obtaining such a change, must have an ongoing plan to address needed medical care, including follow up of hormone treatment and any appropriate health screening.

5. Unless and until adequate surgical capabilities have been established in DoD Military Treatment Facilities (MTFs), medically necessary surgical treatment will be evaluated using the existing MHS waiver process for private sector care for Active Duty members under the Supplemental Health Care Program (SHCP). This standardized process requires referral through the Service chain of command and review and approval by the Director, Defense Health Agency (DHA).

6. The expectation is for the MHS to provide an interdisciplinary team approach to transition care in accordance with evidence based guidelines and practices, reinforcing at all times the transgender Service member's right to receive all medical care with dignity and respect. Provision of care may involve multiple facilities and require appropriate care coordination between providers. In no circumstance will a provider be required to

deliver care that he or she feels unprepared to provide either by lack of clinical skill or due to ethical, moral or religious beliefs. However, referral to an appropriate provider or level of care is required under such circumstances.

7. As with all other medical conditions, in the first 180 days of service in the military, all personnel must continue to meet the medical standards associated with accession (DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services"). Ongoing fitness for duty and deployment screening after 180 days shall be assessed in accordance with current Service practices and policies applied to other medical conditions.

Central Coordination:

1. Service Central Coordination Cells (SCCC) established under DoDI 1300.28 shall provide multi-disciplinary (e.g., medical, legal, military personnel management) expert advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military to assist commanders in the execution of DoD, Military Department, and Service policies and procedures.

2. The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) has established a Central Coordination Cell with Office of the Secretary of Defense, DHA, and Service representatives to oversee consistent and uniform implementation of DoDI 1300.28, provide consultation to SCCCs, and receive and analyze data reported by the Services. The Central Coordination Cell is not a substitute for SCCCs, but provides information and advice on policy matters, and assistance with identification and coordination of needed treatment resources, when necessary. DHA has provided a senior representative to facilitate coordination of care and services delivered by the managed care support contractors and the DHA Waiver Authority process.

3. To assist Commanders and Service members until each Service establishes its own SCCC, the DoD Central Coordination Cell has established the following website: https://prext.osd.mil/DoDCCC. This is a Common Access Card-enabled website for secure questions by all Service members. Policy documents and Frequently Asked Questions reside on this website and questions will be answered by policy, legal and medical experts.

Service and DHA Requirements and Responsibilities:

1. Each Service and DHA shall develop and submit an assessment of current Service medical capacity and expertise in providing medical and surgical support for treating gender dysphoria to the USD(P&R) no later than August 31, 2016. This assessment should include a listing of MTFs at which interdisciplinary care and treatment are available or under development for this purpose, and use the attached data reporting template.

2. Each Service and DHA shall develop an education and training plan for both privileged and non-privileged medical personnel no later than November 1, 2016. This plan should detail how the Service will ensure familiarity with applicable Department policies and requirements, evidence-based practice guidelines and standards of care, and any Service-specific policies. To the extent practicable, training plans and requirements, and additional procedural guidance for care and services will be consistent across the MHS, and will be published as DHA procedural guidance.

3. Each Service and DHA shall be prepared to begin supporting transition medical care to transgender ADSMs no later than October 1, 2016. At a minimum, Services will be expected to provide, by referral if necessary, initial assessment, psychological and pharmaceutical support. As directed by the Secretary of Defense, in the period prior to October 1, 2016, the Military Departments and Services will address requests for gender transition from serving transgender Service members on a case-by-case basis, following the spirit and intent of DTM 16-005 and DoDI 1300.28. Until the capability of MHS MTFs to provide surgical transition services has been documented, any proposed genital surgical transition procedures within MTFs shall be prospectively reviewed by the appropriate Surgeon General or, in the case of the National Capital Region facilities, the Director, DHA. Approvals will be reported to the Assistant Secretary of Defense for Health Affairs (ASD(HA)) monthly.

4. The Director, DHA, will ensure that the Managed Care Support Contractors identify appropriate referral resources with providers experienced in care and treatment of transgender persons to ensure availability of care to complement MTF capabilities. An inventory of such resources shall be provided to the ASD(HA) not later than August 31, 2016.

5. The Director, DHA, will evaluate proposed referrals to the TRICARE network for surgical treatment in accordance with the Supplemental Health Care Program (SHCP). MHS care for ADSMs from non-DoD providers is governed by section 1074(c)(2) of title 10, U.S. Code, and section 199.16 of title 32, Code of Federal Regulations. Under these provisions, the SHCP normally follows TRICARE rules, which disallow surgical treatment of gender dysphoria, but the prohibition is subject to waiver for medically necessary care for ADSMs. The Director, DHA, is authorized to grant waivers on a case-by-case basis. Waiver requests will follow existing processes. Each waiver request, with appropriate clinical documentation, should be submitted through the Surgeon General concerned, to the Director, DHA.

6. To the extent a SHCP waiver would be needed to authorize non-surgical care for an ADSM, this memorandum approves such a waiver on a blanket basis if such care is recommended by a military health care provider in accordance with established SHCP procedures and this memorandum.

7. With respect to Reserve Component Service members not on active duty for a period of more than 30 days who initiate or are involved in a gender transition process, the Services shall establish procedures to ensure that a medical diagnosis and treatment plan (or significant revisions to a treatment plan) or a recommendation for a change in a member's gender marker made by a civilian medical provider is reviewed and approved by an appropriate military medical provider and communicated in a timely and efficient manner with the Reserve Component command involved.

ASD(HA) Responsibilities:

1. The ASD(HA) shall establish collaboration with the Veterans Health Administration and academic medical centers to support Service training plans and specialty consultations, including via telemedicine, where necessary and appropriate.

2. The ASD(HA) shall monitor compliance with this memorandum, which may include assessing Service and DHA performance on all provisions contained within this memorandum.

Karen S. Guice, M.D., M.P.P.
Acting

Attachments:
As stated

cc:
Under Secretary of Defense for Personnel and Readiness
Assistant Secretary of Defense (Manpower and Reserve Affairs)
Surgeon General of the Army
Surgeon General of the Navy
Surgeon General of the Air Force
Joint Staff Surgeon
Medical Office of the Marine Corps

No. 22-13626

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANNA LANGE,

Plaintiff-Appellee

v.

HOUSTON COUNTY, GEORGIA, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the briefs filed by defendants-appellants and plaintiff-appellee, the following persons may have an interest in the outcome of this case:

1. Calderon, Tovah R., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Lee, Jason, U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Jason Lee
JASON LEE
Attorney

Date: March 17, 2023

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns the proper application of the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), to an employer's denial of health insurance benefits to a transgender worker, and also the statute's definition of "employer," 42 U.S.C. 2000e(b), as applied to third parties that provide and administer employment benefits. The Attorney General and the Equal Employment Opportunity Commission (EEOC) share enforcement authority under

Title VII. See 42 U.S.C. 2000e-5(a) and (f)(1). The United States has filed other amicus briefs addressing the rights of transgender workers, see, *e.g.*, U.S. Brief as Amicus Curiae, *Copeland* v. *Georgia Dep't of Corr.*, No. 22-13073 (11th Cir. Dec. 8, 2022), and Title VII's definition of "employer," see U.S. Brief as Amicus Curiae, *Davis* v. *Parish of Caddo*, No. 21-30694, 2022 WL 2955156 (5th Cir. July 26, 2022).

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Plaintiff-appellee Anna Lange, a transgender woman and former deputy in the Houston County Sheriff's Office, was denied health insurance coverage for medically necessary care for the treatment of gender dysphoria, based on an exclusion in her health insurance plan for "[s]ervices and supplies for a sex change." Doc. 155-1, at 71.[1] The plan would have covered such care, however, if it were provided for some other medically necessary purpose. Defendant-appellant Houston County provided and administered the plan for Sheriff's Office employees, on behalf of the Sheriff's Office. The United States will address the following questions:

[1] "Doc. __, at __" refers to the docket entry and page number of documents filed on the district court's docket. "Br. __" refers to appellants' opening brief and page number.

1. Whether an employer-sponsored health insurance plan that denies coverage for medically necessary gender-affirming care, but covers that same care when provided for other medically necessary purposes, facially discriminates on the basis of sex in violation of Title VII.

2. Whether a governmental entity that, on behalf of a public employer, provides and administers health insurance benefits to the employer's employees constitutes an "agent" of the employer under Title VII.[2]

STATEMENT OF THE CASE

1. Statutory Background

Title VII bars a covered employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). This prohibition on sex discrimination includes discrimination on the basis of gender identity. See *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020); cf. *Glenn* v. *Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (same principle under the Equal Protection Clause). Title VII defines the term "employer" to include not only state governments, governmental agencies, and political subdivisions, but also "any agent" of such an entity. 42 U.S.C. 2000e(a) and (b).

[2] The United States takes no position on any other issue in this appeal.

2. Factual Background

a. Pursuant to a "long-standing informal intergovernmental arrangement," the Houston County Sheriff's Office offers its employees healthcare coverage by permitting them to enroll in Houston County's health insurance plan. Doc. 137-5, at 2; Doc. 150-23, at 2-3. The plan is "self-funded" (Doc. 205, at 3), meaning that the County's third-party administrator of the plan, Anthem Blue Cross Blue Shield, pays employees' and dependents' medical claims using funds provided by the County and obtained through employee contributions (Doc. 150-1, at 8-9, 16). The plan contains a number of benefit exclusions. As relevant here, it excludes coverage for "[s]ervices and supplies for a sex change and/or the reversal of a sex change" and "[d]rugs for sex change surgery." Doc. 155-1, at 71, 73. Following enactment of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), which, among other things, bars sex discrimination in health programs and activities receiving federal financial assistance, 42 U.S.C. 18116(a), Anthem recommended that the County remove these exclusions from the plan. Doc. 205, at 4. The County rejected Anthem's recommendation and chose to retain the exclusions. Doc. 205, at 4.

b. Lange began working for the Houston County Sheriff's Office in 2006 and was promoted to Sergeant in 2012. Doc. 147, at 2. At that time, Lange presented as male. Doc. 147, at 3. A few years later, Lange was diagnosed with

gender dysphoria and, in 2017, she began presenting as female and changed her legal name to align with her gender identity. Doc. 147, at 3-4.

That same year, Lange met with defendant-appellant Sheriff Talton and the County's personnel director to tell them that she was transgender and inform them of her "transition plans." Doc. 147, at 4. She also requested permission to wear a female uniform at work and present herself as female in the office. Doc. 205, at 5. Sheriff Talton granted Lange's requests but commented that he did not "believe in sex changes." Doc. 205, at 5 (citation omitted). The next day, during a meeting chaired by Sheriff Talton, Lange "came out to her coworkers." Doc. 205, at 5. Sheriff Talton acknowledged that Lange's transition was a "sensitive" and "serious subject" but reiterated that he "didn't believe in all this." Doc. 205, at 5-6 (citation omitted).

As part of her transition, Lange took steps to make her "appearance more female over time." Doc. 147, at 3-4. She began hormone replacement therapy under the care of an endocrinologist. Doc. 147, at 3. And she underwent surgery "to feminize her chest." Doc. 205, at 2. Lange personally paid for the costs of the surgery because she "knew that the County's Health Plan would not cover it." Doc. 147, at 5.

As one of the "next step[s]" in Lange's treatment for gender dysphoria, and on the recommendation of her endocrinologist, two psychologists, and a surgeon,

Lange sought "genital surgery." Doc. 147, at 6. The procedure qualified as "medically necessary" under Anthem's guidelines (Doc. 205, at 4), and thus, Anthem initially told Lange that it would be covered under her health insurance plan (Doc. 147, at 8; see also Doc. 205, at 6). However, the County official responsible for administration of the plan later consulted with the County's insurance broker and "worked with Anthem to ensure" that the exclusion of coverage for gender-affirming care would apply under the plan. Doc. 205, at 4, 6. Consequently, Lange's preauthorization request for her procedure was denied based on the plan's "benefit exclusion" for "[s]ex [r]eassignment [s]urgery." Doc. 150-5, at 85.

3. Procedural History

a. Lange filed suit in the Middle District of Georgia against the County and Sheriff Talton. Doc. 1. As relevant here, she alleged that the exclusion of coverage in the County's health insurance plan for gender-affirming surgery and related medication violates Title VII "by intentionally providing lesser terms of compensation to employees * * * who are seeking a gender transition." Doc. 56, at 28.

b. The parties cross-moved for summary judgment on Lange's Title VII claim, and the district court held that the plan's exclusion of coverage "facially discriminat[es]" on the basis of sex. Doc. 205, at 22. The court found that the

challenged exclusion denies coverage for certain procedures and drugs only when they are related to gender-affirming surgery." Doc. 205, at 23. For example, the plan "pays for mastectomies when medically necessary for cancer treatment," but it denies coverage "when mastectomies are medically necessary for [gender-affirming] surgery." Doc. 205, at 23. Similarly, "the plan pays for hormone replacement therapy medically necessary for the treatment of menopause, but not hormone replacement therapy medically necessary for" an employee's gender-affirming care. Doc. 205, at 23. Thus, given the "undisputed" fact that the challenged provisions of the plan deny coverage "only [for] transgender members," the court held that the plan facially discriminates based on sex. Doc. 205, at 23.

Defendants' arguments to the contrary, the district court held, lacked merit. Doc. 205, at 24-28. For example, the court rejected defendants' contention that the health insurance plan does not discriminate based on transgender status, but rather, based on whether a "transgender individual[] * * * want[s] [gender] transition surgery." Doc. 205, at 24 (emphasis and citation omitted). As the court pointed out, this argument simply confirmed that "[t]ransgender employees cannot get medically necessary treatment" for gender-affirming medical care "because they are transgender." Doc. 205, at 24. The court also found unpersuasive defendants' argument that a plan only facially discriminates "if it completely excludes coverage for transgender care." Doc. 205, at 26 (emphasis and citation omitted).

As the court stated pointedly, "Title VII does not exempt 'partial' violations." Doc. 205, at 28.

The district court also held that Lange had properly named the County as a defendant because it had "acted as the Sheriff's agent" for purposes of Lange's Title VII challenge. Doc. 205, at 10-12. Specifically, the County had performed "function[s] traditionally exercised by an employer"—namely, providing a health insurance plan to employees of the Sheriff's Office, administering the plan, and denying claims based on exclusions in the plan—and it had done so "on behalf of the Sheriff." Doc. 205, at 12.

Accordingly, as defendants had not argued that the exclusion of coverage was otherwise justified under Title VII, the district court entered summary judgment in Lange's favor on the issue of whether defendants' plan violated Title VII. Doc. 205, at 22 n.12, 28. The court later held a two-day jury trial on the question of relief, including damages. The jury awarded Lange $60,000 in compensatory damages for emotional distress, and the court issued a permanent injunction requiring defendants to direct Anthem to process Lange's medical claim

without application of the challenged exclusion. Doc. 258, at 1; Doc. 259, at 236-237.

c. Defendants timely appealed. Doc. 262.

SUMMARY OF ARGUMENT

This Court should affirm two key aspects of the district court's summary-judgment ruling. First, the Court should hold that an employer violates Title VII if it provides a health insurance plan that denies transgender employees coverage for medically necessary gender-affirming care, when the care would otherwise be covered if provided for some other medically necessary reason. Such a plan facially discriminates based on sex because it denies medical care only when the care is provided to align an individual's sex characteristics to match their gender identity, instead of their sex assigned at birth. Indeed, many courts have agreed that materially identical exclusions of coverage for gender-affirming care constitute unlawful sex discrimination, using logic analogous to the district court's in this case. Defendants challenge the court's ruling on a number of grounds, but their arguments misunderstand the Title VII analysis and should be rejected. Similarly, nothing in this Court's recent en banc decision in *Adams* v. *School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022), warrants a contrary conclusion.

Second, the Court should affirm that where a third-party entity, on behalf of an employer, provides and administers health insurance benefits to the employer's employees, the third party may be liable under Title VII as an agent of the employer. Title VII's text, applicable case law, and guidance from EEOC all support this proposition and further confirm that it applies equally to private and public employers. Defendants contest the district court's ruling on policy grounds, arguing that it would represent an "expansive application" of the statute to find that, in providing and administering health insurance benefits for Sheriff's Office employees, the County acted as an agent of the Sheriff's Office. Br. 65 n.31. But such a finding is hardly remarkable and follows from a straightforward application of Title VII's text and ordinary agency principles.

ARGUMENT

I

AN EMPLOYER-SPONSORED HEALTH INSURANCE PLAN VIOLATES TITLE VII IF IT EXCLUDES COVERAGE FOR MEDICAL TREATMENTS ONLY WHEN THEY ARE NEEDED TO PROVIDE GENDER-AFFIRMING CARE

A. Such An Exclusion Facially Discriminates Based On Sex By Making Coverage Contingent On Whether The Care Seeks To Align An Individual's Sex Characteristics With Their Gender Identity

The district court correctly held that where an employer denies healthcare coverage for medical treatment solely when the treatment is needed to align an employee's sex characteristics with their gender identity—even though the same

treatment would be covered if provided for a different medically necessary purpose—that constitutes facial sex discrimination and violates Title VII. Title VII bars an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). As the Supreme Court explained in *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), the term "discriminate" refers to a "difference in treatment or favor" for an employee. *Id.* at 1740 (citation omitted). And the phrase "because of" requires that the employee's sex be a but-for cause of that difference in treatment. *Id.* at 1739.

This prohibition on sex discrimination extends to employer-sponsored health insurance plans. "Health insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'" under Title VII. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 682 (1983); see also Br. 16 (agreeing with this proposition). And there is "no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage." *City of L.A., Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 710 (1978).

Under these principles, where an employer's health insurance plan covers certain medically necessary procedures and medications *except* when they constitute gender-affirming care—for example, medical care that treats a diagnosis

of gender dysphoria—the plan facially discriminates based on sex and violates Title VII. In such a situation, the plan conditions coverage based on whether a procedure or drug is provided to alter an individual's sex characteristics to match their gender identity and not their sex assigned at birth. In doing so, the plan "unavoidably discriminates against persons with one sex identified at birth and another today." *Bostock*, 140 S. Ct. at 1746.

This amounts to unlawful discriminatory treatment based on sex and transgender status. See Br. 17 (agreeing that "discriminat[ion] against an individual for being transgender" constitutes "discriminat[ion] against that individual because of his or her sex in violation of Title VII"). Otherwise eligible medical treatments are excluded from coverage, simply because they are provided to treat a medical diagnosis that is unique to transgender individuals. Cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). The "explicit terms" of such a health insurance plan, therefore, are "not neutral," *Aerospace & Agr. Implement Workers of Am.* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), as they expressly restrict, on the basis of sex, the benefits afforded to transgender employees for medically necessary care.

Many courts agree. Multiple district courts have concluded that exclusions of coverage for gender-affirming care, where such care would otherwise be

covered if provided for other medically necessary reasons, violate Title VII's prohibition on sex discrimination. See *Kadel* v. *Folwell*, No. 19-cv-272, 2022 WL 3226731, at *19-22 (M.D.N.C. Aug. 10, 2022); *Fletcher* v. *Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020); *Boyden* v. *Conlin*, 341 F. Supp. 3d 979, 995-997 (W.D. Wash. 2018). Other courts have reached similar conclusions under Section 1557 of the ACA, which bars sex discrimination in health programs and activities receiving federal financial assistance, 42 U.S.C. 18116(a), and under the Equal Protection Clause of the Fourteenth Amendment. See *Hammons* v. *University of Md. Med. Sys. Corp.*, No. 20-cv-2088, 2023 WL 121741, at *10 (D. Md. Jan. 6, 2023) (ACA claim); *C.P.* v. *Blue Cross Blue Shield of Ill.*, No. 20-cv-6145, 2022 WL 17788148, at *6 (W.D. Wash. Dec. 19, 2022) (same); *Fain* v. *Crouch*, No. 20-cv-740, 2022 WL 3051015, at *2, *8 (S.D. W. Va. Aug. 2, 2022) (equal protection claim), appeal pending, No. 22-1927 (4th Cir. filed Sept. 6, 2022); *Flack* v. *Wisconsin Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951-953 (W.D. Wis. 2018) (ACA and equal protection claims).

Under the reasoning of these cases, which mirrors the logic on which the district court relied here (Doc. 205, at 22-28), excluding coverage for a medical treatment only when it is provided to treat gender dysphoria represents "textbook sex discrimination," *Kadel*, 2022 WL 3226731, at *19; see also *Boyden*, 341 F. Supp. 3d at 995 (concluding that an analogous exclusion of coverage presented a

"straightforward case of discrimination" (citation omitted)). While an employer has discretion to decide which healthcare benefits it offers to enrollees, once it decides to provide certain benefits, it may not dole them out in a discriminatory way. See *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free * * * simply not to provide the benefit at all.").[3]

B. Neither Defendants' Arguments, Nor This Court's Decision In Adams*, Warrant A Contrary Conclusion*

1. Defendants offer a number of arguments for why an exclusion of coverage for gender-affirming care allegedly comports with Title VII, but none has merit. First, defendants suggest that where a plan covers some treatments of gender dysphoria, an exclusion of other gender-affirming treatments does not facially discriminate based on sex. Br. 38-40. But the mere fact that *some* benefits may be provided in a nondiscriminatory manner does not mean that discrimination

[3] Exclusions of health insurance coverage for medically necessary gender-affirming care also discriminate based on sex under a sex-stereotyping theory of liability. As the Supreme Court noted in *Bostock*, an employer violates Title VII if it fires an employee for "failing to fulfill traditional sex stereotypes." *Bostock*, 140 S. Ct. at 1742-1743. The type of exclusion at issue here discriminates on this basis: it denies health insurance benefits because, as a result of the medical care sought by the employee, their sex characteristics will not match those that are traditionally associated with their sex assigned at birth. See *Kadel*, 2022 WL 3226731, at *19; *Boyden*, 341 F. Supp. 3d at 997.

with regard to *other* "compensation, terms, conditions, or privileges of employment" has not occurred. 42 U.S.C. 2000e-2(a)(1). Indeed, defendants' interpretation of Title VII would leave an employer free to discriminate on prohibited grounds in the provision of health insurance benefits, so long as it makes other benefits equally available to all employees. This is simply not the law—as the district court correctly noted, "Title VII does not exempt 'partial' violations." Doc. 205, at 28. Accordingly, other courts have found exclusions of medically necessary gender-affirming surgery, for example, to be facially discriminatory even where the health insurance plans at issue covered some non-surgical treatments of gender dysphoria. See *Kadel*, 2022 WL 3226731, at *3, *19; *Fletcher*, 443 F. Supp. 3d at 1027, 1030; *Boyden*, 341 F. Supp. 3d at 988, 997.

Second, defendants contend that such an exclusion is not facially discriminatory because not all transgender employees will want to undergo gender-affirming surgery. Br. 59-60 & n.27. This argument fails for multiple reasons—most notably, it echoes logic that Congress specifically rejected when it amended Title VII. In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), superseded by statute as stated in *Shaw* v. *Delta Airlines*, 463 U.S. 85 (1983), the Court considered an employer compensation plan that provided disability benefits to employees who could not work due to nonoccupational sickness or an accident, but denied such benefits for an employee's inability to work due to pregnancy. *Id.* at

128-129. Applying the logic of *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), which considered an Equal Protection Clause challenge to a "strikingly similar disability [benefits] plan," the Court held that the exclusion "[was] not a gender-based discrimination" because while "pregnant women" are "exclusively female," "nonpregnant persons * * * include[] members of both sexes." *Gilbert*, 429 U.S. at 133, 135-136 (citation omitted).

Two years later, Congress amended the definition of "because of sex" in Title VII to include pregnancy and related medical conditions. See 42 U.S.C. 2000e(k). Congress's aim in doing so was not merely to "overturn[] the specific holding" of *Gilbert*, but also to categorically "reject[] th[e] reasoning" used in that case. *Newport News*, 462 U.S. at 676, 684. Consequently, following Congress's amendment, "treat[ing] pregnancy-related conditions less favorably than other medical conditions" constitutes sex discrimination under Title VII, even though not all women will want to become pregnant. *Id.* at 684. And by extension, denying health insurance coverage to transgender employees for gender-affirming surgery constitutes sex discrimination under the statute, even though not all transgender individuals will seek out such treatment.

Defendants' argument also fails for two additional reasons. It mistakes a potential lack of *injury* to some members of the protected class (*i.e.*, transgender employees who may be uninterested in pursuing gender-affirming surgery) for a

lack of facial discrimination under the plan. And it ignores the fact that where a transgender employee *does* want to undergo such treatment, the plan impermissibly denies coverage based on the employee's sex. See *Bostock*, 140 S. Ct. at 1742 (explaining that Title VII "makes each instance of discriminating against an individual employee because of that individual's sex an independent violation").

Third, defendants argue that a health insurance plan does not facially discriminate based on sex if it also denies cisgender employees coverage for gender-affirming surgery "when medically necessary to treat gender dysphoria." Br. 56. As an initial matter, cisgender individuals—those whose gender identity aligns with their sex assigned at birth, see *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir.), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878 (2021)—do not suffer gender dysphoria, which involves distress caused by a *discrepancy* between a person's gender identity and their sex assigned at birth, see *Edmo* v. *Corizon, Inc.*, 935 F.3d 757, 768 (9th Cir. 2019), cert. denied, 141 S. Ct. 610 (2020). But regardless, defendants' argument fails because by making coverage contingent on whether a procedure seeks to change a person's sex characteristics to align with their gender identity, "the individual employee's sex plays an unmistakable and impermissible role in the [coverage] decision," thus violating Title VII. *Bostock*, 140 S. Ct. at 1741-1742.

Fourth, defendants suggest that the district court's ruling affords transgender employees "more favorabl[e]" treatment under the plan than cisgender employees receive. Br. 60. Defendants contend that the plan excludes coverage for "[s]ervices or supplies for male or female sexual problems" and "[d]rugs to treat sexual or erectile problems," like infertility. Br. 60 (alterations in original; citation omitted). And they argue that because the vaginoplasty sought by Lange is "comparable" to a "procedure[] to treat a sexual dysfunction," requiring coverage for the former while excluding coverage for the latter discriminates in favor of transgender employees. Br. 60. But even assuming that defendants could show that the two types of care are indeed comparable, the district court's ruling would not treat transgender employees more favorably than cisgender employees. The court simply held that Title VII requires defendants to cover medically necessary gender-affirming care where they *already* cover the same care when provided for other medically necessary purposes. The court's ruling does not extend to medical care that defendants currently exclude for all employees.

2. Nor does this Court's recent en banc decision in *Adams* v. *School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022), undermine the district court's Title VII analysis. *Adams* held that a school policy barring a transgender student from using restrooms consistent with his gender identity did not violate the Equal Protection Clause or Title IX of the Education Amendments of 1972, 20 U.S.C.

1681(a). *Id.* at 800-801. Defendants only passingly refer to *Adams* in their opening brief (Br. 44, 47), and they recently acknowledged in briefing before the district court that *Adams* does not resolve Lange's Title VII claim (see Doc. 288, at 2 (admitting that *Adams* is neither "binding precedent" nor "dispositive" on Lange's claim)). Defendants aptly concede this point because *Adams* is inapposite.

In holding that the school's policy did not discriminate based on transgender status in violation of the Equal Protection Clause, *Adams* distinguished *Bostock* and relied on *Geduldig*. See *Adams*, 57 F.4th at 808-809. The opposite approach is warranted here. *Bostock* is governing Title VII precedent regarding the disparate treatment of transgender employees, and *Geduldig*'s constitutional analysis does not apply under Title VII. See pp. 15-16, *supra* (discussing Congress's amendment of Title VII following *Gilbert*).

Adams further concluded that the school's policy did not violate the Equal Protection Clause because although the policy represented "a sex-based classification," it satisfied intermediate scrutiny. *Adams*, 57 F.4th at 801, 803. However, unlike under the Equal Protection Clause, sex discrimination cannot be justified under Title VII by showing that the challenged action serves an important governmental interest. See 42 U.S.C. 2000e-2(a) and (e); see also *Newport News*, 462 U.S. at 685 n.26; *Glenn* v. *Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011).

Finally, *Adams*' resolution of the student's Title IX claim does not conflict with the district court's holding under Title VII. In concluding that the school's policy did not violate Title IX, the Court relied on the "express statutory and regulatory carve-outs [under the statute] for differentiating between the sexes when it comes to separate living and bathroom facilities." *Adams*, 57 F.4th at 811. By contrast, Title VII contains no statutory or regulatory carve outs permitting employers to deny health insurance benefits for otherwise-covered medical care simply because the care is provided to treat an employee's gender dysphoria. The Court also rejected the student's reading of Title IX because, in its view, recipients of federal funding would have lacked sufficient notice under the Spending Clause that Title IX restricts a school's ability to deny transgender students access to certain restrooms based on their sex assigned at birth. *Id.* at 815-817. But unlike Title IX, Title VII is not Spending Clause legislation. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453 & n.9 (1976); *Davis* v. *Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390, 1399 n.13 (11th Cir. 1997), rev'd on other grounds, 526 U.S. 629 (1999).

II

A GOVERNMENTAL ENTITY ACTS AS A PUBLIC EMPLOYER'S "AGENT" UNDER TITLE VII WHERE THE ENTITY PROVIDES AND ADMINISTERS HEALTH INSURANCE BENEFITS TO THE EMPLOYER'S EMPLOYEES

A. Providing And Administering Health Insurance Benefits Are Functions Traditionally Exercised By An Employer

The district court's conclusion that the County was an "employer" for purposes of Lange's Title VII claim (Doc. 205, at 10-12) correctly recognized that (1) a third party may be subject to suit under Title VII where it acts as an "agent" of a covered employer, 42 U.S.C. 2000e(b); (2) an agency relationship may be found where the third party provides and administers health insurance benefits on behalf of the employer to the employer's employees; and (3) this theory of liability applies in the context of a public employer, just as it does in the context of private employers.

1. Title VII's prohibition on sex discrimination applies to covered "employer[s]," 42 U.S.C. 2000e-2(a), which the statute defines to include "agent[s]," 42 U.S.C. 2000e(b). The term "employer" is "accord[ed] a liberal construction." *Lyes* v. *City of Riviera Beach*, 166 F.3d 1332, 1341 (11th Cir. 1999) (en banc). Determining whether an entity constitutes an employer "requires consideration of the totality of the employment relationship." *Peppers* v. *Cobb Cnty.*, 835 F.3d 1289, 1297 (11th Cir. 2016).

Given the statute's clear instruction that agents of covered employers can themselves constitute an "employer" under Title VII, this Court has identified certain circumstances when a qualifying agency relationship will be found. As relevant here, an agency relationship exists where a third party performs functions "traditionally exercised by an employer" on behalf of the employer. *Williams* v. *City of Montgomery*, 742 F.2d 586, 589 (11th Cir. 1984) (per curiam), cert. denied, 470 U.S. 1053, and 471 U.S. 1005 (1985); see also *Lyes*, 166 F.3d at 1341 (instructing that an agency relationship exists "where an employer delegates sufficient control of some traditional rights over employees to a third party"). These include "establishing a pay plan, formulating minimum standards for jobs, evaluating employees, and transferring, promoting, or demoting employees." *Williams*, 742 F.2d at 589.

2. As multiple courts recognize, such functions also include providing and administering health insurance benefits for the employees of a covered employer. See, *e.g.*, *Jimenez* v. *Laborer's Welfare Fund of the Health & Welfare Dep't of the Constr. & Gen. Laborers' Dist. Council of Chi. & Vicinity*, 493 F. Supp. 3d 671, 679 (N.D. Ill. 2020); *Boyden* v. *Conlin*, 341 F. Supp. 3d 979, 997-998 (W.D. Wash. 2018); see also *Carparts Distrib. Ctr., Inc.* v. *Automotive Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 14 (1st Cir. 1994) (relying on Title VII principles to hold that a third-party entity may be an "employer" under Title I of

the Americans with Disabilities Act (ADA) where it "act[s] on behalf of [a covered employer] in the matter of providing and administering employee health benefits"). Consistent with these holdings, EEOC's Compliance Manual advises that "[i]nsurance providers" and "benefits administrators" may constitute agents of a covered employer under Title VII. EEOC Compliance Manual § 2-III(B)(2)(a); see also *id.* § 2-III(B)(2)(b). This approach makes practical sense, as it prevents an employer from "insulat[ing] a discriminatory [benefits] plan from attack under Title VII," simply by "delegati[ng] * * * responsibility for [the] employee benefits" to a third party. *Carparts Distrib. Ctr.*, 37 F.3d at 17 (citation omitted).

3. An agent that provides and administers health insurance benefits may be held liable as an "employer" under Title VII, even if that agent is a governmental entity. Title VII's text plainly supports such a reading. Congress intended that "Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977); see also *Moore* v. *City of San Jose*, 615 F.2d 1265, 1273 (9th Cir. 1980); *Owens* v. *Rush*, 636 F.2d 283, 287 (10th Cir. 1980). Accordingly, Title VII's definition of "employer," with its reference to a covered employer's "agent," does not distinguish between public and private entities. Rather, it applies equally to, among other things, private "corporations" and "governments, governmental agencies, [and] political subdivisions." 42 U.S.C. 2000e(a) and (b); accord EEOC Compliance Manual § 2-

III(B)(1)(a)(i) ("'Employers' include private sector and state and local government entities.").[4]

This Court also has applied agency principles to public employers. In *Williams*, for example, the Court held that the Personnel Board of Montgomery City-County was an agent of the City for purposes of Title VII. *Williams*, 742 F.2d at 589. In reaching that conclusion, the Court did not question the applicability of Title VII's agency theory of liability to public entities. See *id.* at 588-589.

B. Defendants' Policy-Based Argument Is Unpersuasive

Defendants do not contest on any legal grounds the district court's analysis of agency under Title VII. Rather, they proffer a policy argument, contending that the court's reasoning will result in an "expansive application" of Title VII, under which courts will find an agency relationship any time "a sheriff arranges to provide health insurance coverage for his or her employees" through a health insurance plan offered and administered by a county. Br. 65 n.31. However, under those circumstances, such an unremarkable finding would simply reflect—consistent with Title VII's text and ordinary agency principles—that where a county provides such coverage and administers the plan at the behest and on behalf of a sheriff, the county does so in the capacity of an agent. Cf. *Carparts Distrib.*

[4] Title VII's definition of "employer" excludes the United States and corporations wholly owned by the United States government. 42 U.S.C. 2000e(b).

Ctr., 37 F.3d at 17-18 (explaining that a health insurance provider and its administering trust may constitute "employers" or "agents" of a covered entity under Title I of the ADA).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's summary-judgment ruling on the issues addressed herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,315 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Jason Lee
JASON LEE
Attorney

Date: March 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I further certify that four paper copies identical to the electronically filed brief will be mailed to the Clerk of the Court by Federal Express.

s/ Jason Lee
JASON LEE
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