IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

VITA NUOVA, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:19-cv-00532-O**
	§	
ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Before the Court are Plaintiff's Motion for Class Certification, ECF No. 33, filed June 30, 2020; Defendants' Memorandum in Opposition ("Defendants' Response"), ECF No. 38, filed July 30, 2020; and Plaintiff's Reply, ECF No. 40, filed August 13, 2020. Having reviewed the motion, briefing, and applicable law, the Court finds the Motion for Class Certification, ECF No. 33, should be and is hereby **GRANTED**.

I. BACKGROUND

This case involves the Title X Family Planning Program ("Title X"), a federal grant program designed to provide individuals with family planning and related preventive health services. *See* 42 U.S.C. §§ 300–300a-8. Entities may apply for funding through Title X and, if they receive it, must abide by the program's regulations. *See id.* On July 3, 2019, Plaintiff Vita Nuova filed this putative class action on behalf of itself and others similarly situated against Defendants Secretary of Health and Human Services Alex M. Azar II and the United States of America (collectively, "HHS"). *See* Compl., ECF No. 1. Vita Nuova seeks declaratory and injunctive relief to bar HHS's enforcement of a provision of Title X, 42 U.S.C. § 300a-7(c) ("the Anti-

Discrimination Provision"), which prohibits Title X recipients from discriminating against employees who perform or assist in abortions.[1] *See* Compl. 17–18, ECF No. 1. Vita Nuova, a Texas nonprofit health care entity, has stated an intention to apply for Title X funding and objects to abortion services for religious reasons. *See id.* at 3, 17–18. Vita Nuova will not allow its employees to perform or assist in elective abortions and seeks protection from the Anti-Discrimination Provision under the Religious Freedom Restoration Act ("RFRA"). *See id.* at 17–18.

II. LEGAL STANDARD

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)) (internal quotation marks omitted). The party seeking class certification "bear[s] the burden of proof to establish that the proposed class satisfies the requirements of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). "The decision to certify is within the broad discretion of the court, but that discretion must be exercised within the framework of rule 23." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)). A district court must "look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination'" of the certification issues. *Stukenberg*, 675 F.3d at 837 (quoting *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003)).

[1] In addition to Title X, the Anti-Discrimination Provision applies to any "grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act," and any "grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health, Education and Welfare." 42 U.S.C. § 300a-7(c)(1)–(2).

Federal Rule of Civil Procedure 23 governs whether a proposed class falls within this limited exception. "To obtain class certification, parties must satisfy Rule 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007). Rule 23(a)'s four threshold requirements are

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four threshold conditions are "commonly known as numerosity, commonality, typicality, and adequacy of representation." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020) (citing Fed. R. Civ. P. 23(a)) (additional citation and internal quotation marks omitted). Additionally, the Fifth Circuit has articulated an "ascertainability" doctrine implicit in Rule 23. *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). "To maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (citations omitted).

Rule 23(b)(2) applies where the four threshold requirements are met and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This requirement is satisfied "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360.

III. ANALYSIS

Vita Nuova moves to certify the following class: "Every present and future health-care provider in the United States that opposes abortion for sincere religious reasons." *See* Pl.'s Mot. 4, ECF No. 33-1. For the class to be certified, Vita Nuova must satisfy the requirements of Rule 23(a) and one of the conditions of Rule 23(b). *See Maldonado*, 493 F.3d at 523. Vita Nuova contends that the class is ascertainable as a clearly identifiable group and that all the requirements of Rule 23(a) are met. *See* Pl.'s Mot. 4–8, ECF No. 33-1; Pl.'s Reply 4–9, ECF No. 40. HHS does not challenge numerosity but argues that Vita Nuova has not satisfied Rule 23's requirements of ascertainability, commonality, typicality, and adequacy. *See* Defs.' Resp. 10, ECF No. 38. Regarding Rule 23(b), Vita Nuova moves for class certification under Rule 23(b)(2) and argues that a single injunction in this class would stop HHS from enforcing section 300a-7(c) against each of the class members, an argument unrebutted by HHS. *See* Pl.'s Mot. 8–9, ECF No. 33-1; Defs.' Resp., ECF No. 38. The Court takes each issue in turn.

A. Rule 23(a)

i. Ascertainability

HHS argues first that the proposed class is overly broad and will include health-care providers who do not (1) currently receive or plan to receive Title-X funding; or (2) wish to hire or employ physicians or other health-care personnel who perform or assist in abortions, or both. *See* Defs.' Resp. 12–13, ECF No. 38. For that reason, HHS argues, the class will necessarily include a great number of individuals who have suffered no Article-III injury. *See id.* Additionally, HHS argues that the class definition fails because it depends on subjective criteria, such as class members' states of mind. *See id.* at 15. Vita Nuova argues in reply that its proposed class easily satisfies the Fifth Circuit's test for ascertainability, contending that "health-care provider" in its

proposed class definition is not vague or imprecise and alternatively offers a proposed definition for the Court.[2] *See* Pl.'s Reply at 4–5. Vita Nuova also asserts that "the class members will be easy to identify because their subjective beliefs will produce actions that are taken in plain sight for all to see." *Id.* at 5. Lastly, Vita Nuova submits that the ascertainability standard is greatly relaxed for Rule 23(b)(2) classes. *See id.* at 8–9.

While not a requirement of Rule 23, courts only certify classes ascertainable under objective criteria. *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (citations omitted).[3] "There can be no class action if the proposed class is amorphous or imprecise." *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 n.5 (5th Cir. 2007). "[T]he court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding." *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015) (citations omitted). The Fifth Circuit has upheld the ascertainability of a class even when a definition necessitates individualized membership assessments that might *follow* litigation, so long as the class definition is sufficiently clear. *See,*

---

[2] Vita Nuova proposes the following definition of "health-care provider":

> The term "health-care provider" shall include but is not limited to any person, corporation, facility, entity, or institution that provides health care, including a physician, dentist, pharmacist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or physical therapy assistant, clinical psychologist, hospital, health clinic, dental office, or pharmacy. The term "health-care provider" shall not extend to entities that merely provide health insurance or payment for health care.

Pl.'s Reply 4–5, ECF No. 40.

[3] Ascertainability may not be applicable in the Rule 23(b)(2) context. *See, e.g.*, *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3rd Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief."); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context."); *Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004) ("[W]hile the lack of identifiability [of class members] is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2)."). However, the Fifth Circuit has yet to endorse this view shared by other circuit courts. The Court need not decide whether it applies here, because the class is ascertainable.

e.g., *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 624 (5th Cir. 1999). The Court finds Vita Nuova's proposed class is sufficiently ascertainable. Contrary to HHS's assertions, "health-care provider" is not overly vague; rather, it is easily defined under the plain meaning of its composite terms.[4]

Likewise, even if a proposed class definition might include some who do not avail themselves of the benefits of class, the definition may still be sufficiently defined for two reasons. First, the Court accepts Vita Nuova's argument that, in being denied the choice to both receive Title-X funding and make hiring decisions in accordance with their sincere religious belief, a sufficient injury has been shown for the class to be ascertainable.[5] *See DeOtte v. Azar*, 332 F.R.D. 188, 199 (N.D. Tex. March 30, 2019) (describing, for purposes of certification, the common harm attributed with each choice class members faced under the ACA's Contraceptive Mandate). However, even if the Court disagreed on that point, "district courts do not err by failing to ascertain

[4] *Healthcare*, *The Oxford American English Dictionary* (2009) ("the maintenance and improvement of physical and mental health through the provision of medical services"); *provider*, *The Oxford American English Dictionary* (2009) ("a person or thing that provides something"); *provide*, *The Oxford American English Dictionary* (2009) ("equip or supply someone with something useful or necessary"). Neither these illustrative definitions, nor any definitions provided by HHS, would include insurers. *See* Defs.' Resp. 11, ECF No. 38. Even under these literal meanings when the phrase is parsed, insurers do not provide *medical services* but provide *payment for*, among other things, medical services. However, judges are interested not in literal meaning, but in the ordinary or commonsense meaning of terms. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 76 (2012) ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."). This is even more true when considering the meaning of *phrases*. *See Bostock*, 140 S. Ct. at 1826 ("That is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase."). The ordinary meaning of the phrase "health-care provider" is sufficiently definite and does not include insurers. For these reasons, the Court does not find it necessary at this stage to define "health-care provider" any more precisely; however, Vita Nuova has provided language that resolves any question over it, and that definition will apply. *See* Pl.'s Reply 4–5, ECF No. 40.

[5] Assessing the alleged injury for class certification ensures the propriety of resolving the claims on a class-wide basis. Indeed, the history of the class action itself is founded on remedying injuries that otherwise would be impractical or uneconomical for an individual plaintiff to bring. *See* Brian T. Fitzpatrick, *The Conservative Case for Class Actions* 3, 28 (2019); *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 (5th Cir. 2004) ("A 'negative value' suit is one in which class members' claims 'would be uneconomical to litigate individually.'") (quoting *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985)).

at the Rule 23 stage whether the class members include persons and entities who have suffered 'no injury at all.'" *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014). The class is no less ascertainable because of the existence of health-care providers who oppose abortion but, nevertheless, either (1) do not seek Title-X funding or (2) seek it but choose to comply with the mandates of the Anti-Discrimination Provision anyway.

For similar reasons, defining the class based on the religious belief of the class members does not render the class unable to be ascertained. "As the Supreme Court explained, a 'contention' regarding the class members' injury is sufficient to satisfy Rule 23 . . . ." *Id.* (quoting *Wal-Mart*, 564 U.S. at 350). So long as those health-care providers who opt into the proposed class contend that compliance with the Anti-Discrimination Provision violates their sincerely held religious belief, the Court must accept those contentions. *United States v. Lee*, 455 U.S. 252, 257 (1982 ("We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith."); *see also Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1212 (5th Cir. 1991), *on reh'g*, 959 F.2d 1283 (5th Cir. 1992) ("[T]he plaintiff's sincere belief that an affirmation has a religious nature is sufficient to implicate free exercise concerns."). Vita Nuova's proposed class here is identifiable and is not an "amorphous" or "imprecise" definition that the ascertainability doctrine was meant to preclude. *See Nat'l Sec. Fire & Cas. Co.*, 501 F.3d at 445.

Accordingly, the Court finds that the class is ascertainable.

ii. Numerosity

Vita Nuova contends that the "number of health-care providers who object to abortion on religious grounds easily exceeds the numerosity threshold." Pl.'s Mot. 4, ECF No. 33-1. The Catholic Church opposes abortion, and its health-care providers are prohibited from performance of and cooperation with abortion. *See* Pl.'s Mot. 4, ECF No. 33-1; Affidavit of E. Christian Brugger

at 4–6, ECF No. 33-3. Vita Nuova presents evidence that the number of Catholic health-care providers in the United States alone exceeds 2,000. *See* Pl.'s Mot. 4, ECF No. 33-1; Affidavit of E. Christian Brugger at 7, ECF No. 33-3. Therefore, Vita Nuova suggests, at least 2,000 health-care providers are prohibited from performing or assisting in abortion. *See* Pl.'s Mot. 5, ECF No. 33-1. Vita Nuova argues that, while this number alone would satisfy the numerosity requirement, it does not include the numerous other non-Catholic health-care providers who object to abortion for sincere religious reasons. *See id.* As proposed, the class includes both present-day and future health-care providers that oppose abortion for sincere religious reasons and wish to avail themselves of Title X funding. *See id.* HHS does not contest the numerosity of the proposed class. *See* Defs.' Resp., ECF No. 38.

Courts have regularly certified classes far fewer in number than the minimum of 2,000 alleged here by Vita Nuova. *See, e.g.*, *Mullen*, 186 F.3d at 625 ("[T]he size of the class in this case—100 to 150 members—is within the range that generally satisfies the numerosity requirement."). However, the actual number of class members is not necessarily "the determinative question, for '(t)he proper focus (under Rule 23(a)(1)) is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors.'" *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (quoting *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981)). "[A] number of facts other than the actual or estimated number of purported class members may be relevant to the 'numerosity' question; these include, for example, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *Zeidman*, 651 F.2d at 1038 (citing *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)). Here, Vita Nuova's unchallenged evidence

demonstrates a class of plaintiffs sufficiently large and for whom joinder would be impracticable, if not impossible, due to size, geographic dispersion across the nation, and the inclusion of future members. Accordingly, the Court finds that Vita Nuova has satisfied the numerosity requirement for class certification.

iii. Commonality

Vita Nuova argues that the following questions of law are common to all employers in the class:

- Does 42 U.S.C. § 300a-7(c) violate the [RFRA] by disqualifying religious health-care providers from federal funds if they "discriminate in the employment, promotion, or termination of employment of any physician or other health care professional" who performs or assists elective abortions?
- Does 42 U.S.C. § 300a-7(c) substantially burden the religious freedom of health-care providers who object to abortion for sincere religious reasons?
- Is there a "compelling governmental interest" in enforcing 42 U.S.C. § 300a-7(c) against health-care providers who object to abortion for sincere religious reasons?
- Is 42 U.S.C. § 300a-7(c) the "least restrictive means" of advancing those "compelling governmental interests"?

Pl.'s Mot. 6, ECF No. 33-1. Vita Nuova contends that the Anti-Discrimination Provision currently presents all proposed class members two undesirable alternatives: (1) violating their religious convictions or (2) foregoing funding under Title X. *See* Pl.'s Mot. 2, ECF No. 33. In opposition, HHS argues that Vita Nuova cannot show commonality because RFRA claims must be assessed on a case-by-case basis, including the sincerity of each plaintiff's religious beliefs. *See* Defs.' Resp. 19, ECF No. 38.

"In order to satisfy commonality under *Wal-Mart*, a proposed class must prove that the claims of every class member 'depend upon a common contention . . . that is capable of classwide resolution.'" *Stukenberg*, 675 F.3d at 838 (quoting *Wal-Mart*, 564 U.S. at 350). This occurs where

"the contention is 'of such a nature . . . that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Stukenberg*, 675 F.3d at 838 (quoting *Wal-Mart*, 564 U.S. at 350). Put plainly, "Rule 23(a)(2) requires that all of the class member[s'] claims depend on a common issue of law or fact whose resolution 'will *resolve* an issue that *is central to the validity* of each one of the [class member's] claims in one stroke.'" *Stukenberg*, 675 F.3d at 840 (quoting *Wal–Mart*, 564 U.S. at 350). And a court's "obligation to perform a 'rigorous analysis'" of the commonality prong may "entail some overlap with the merits of the plaintiff's underlying claim." *Stukenberg*, 675 F.3d at 840 (quoting *Wal-Mart*, 564 U.S. at 350).

The Court concludes that the proposed class satisfies the commonality requirement. Title X predicates funding on compliance with the Anti-Discrimination Provision. *See* 42 U.S.C. § 300a-7(c). As such, the proposed class here must forego funding or potentially violate their sincere religious beliefs by complying with the Anti-Discrimination Provision. Such a predicament constitutes more than a common grievance with a particular legal provision, deemed insufficient for commonality by the Supreme Court in *Wal-Mart*. *See* 564 U.S. at 350 ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." (citation and internal quotation marks omitted)). Answering Vita Nuova's substantive legal question will provide a common answer for all class members regarding a common issue of law: the availability to them of Title X funding in spite of the Anti-Discrimination Provision. *See DeOtte*, 332 F.R.D. at 198 (distinguishing its facts from *Stukenberg*, in which plaintiffs asserted "various harms, the risk of experiencing those harms, and the violation of constitutional rights in various ways" (internal quotation marks omitted)). Resolution of the alleged conflict between the Anti-

Discrimination Provision and the RFRA's protections provides a common answer to a narrow question of law based in a specific alleged injury "in one stroke" and, thus, establishes commonality for the proposed class here. *Wal-Mart*, 564 U.S. at 350.

HHS asserts that certification should be denied where the proposed class might include "members who do not necessarily share the same sincerely held religious belief." Defs.' Resp. 14, ECF No. 38. However, by definition, the proposed class only includes those whose belief on the issue of abortion *is* the same. Individual class-member distinctions based on the specific religious grounds for opposition, denominational membership, or other underlying factors are irrelevant to analyzing whether the actual class members have suffered "the same injury" based on one belief that is common to all of them. *See Wal-Mart*, 564 U.S. at 350. Whatever religious or belief differences class members may have unrelated to this dispute is of no legal significance because, if they seek funding under Title X, the Anti-Discrimination Provision compels action contrary to a sincerely held religious beliefs. *See DeOtte*, 332 F.R.D. at 200.

Lastly, the Court rejects HHS's contention that the sincerity of each plaintiff must be determined for class certification. *See* Resp. 19, ECF No. 38. A potential plaintiff's sincerity in religious belief is relevant only in assessing whether that individual or entity belongs to the class, not whether the class itself is entitled to certification based on a common question of law or fact under Rule 23. *See infra*; *Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329, 334 (5th Cir. 2019) ("[A] party need only demonstrate—at some stage of the proceeding—that the class is adequately defined and clearly ascertainable.") (citations and internal quotation marks omitted).

Accordingly, Vita Nuova has satisfied the commonality requirement for certification.

iv. Typicality

Vita Nuova seeks to litigate whether the Anti-Discrimination Provision violates the RFRA as applied to health-care providers who object to abortion for sincere religious reasons. *See* Pl.'s Mot. 7, ECF No. 33-1. Vita Nuova asserts that its claim is typical of those of the proposed class, as each class member stands to benefit from a ruling that would allow them to be eligible for Title X funds without violating their sincere religious beliefs. *See id.* HHS contends that typicality is not met because the class necessarily includes some who oppose abortion but may, despite their personal beliefs, choose to hire health-care providers who perform or assist in abortion anyway. *See* Defs.' Resp. 21, ECF No. 38. Additionally, HHS argues that, because the Anti-Discrimination Provision applies to a host of government funding programs under separate pieces of legislation, the Court would need to evaluate whether the Anti-Discrimination Provision "is supported by a compelling governmental interest and is the least restrictive means of achieving that interest in a variety of different applications depending on the specific grant, contract, or loan guarantee at issue." *See id.* 22–23.

"The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). "Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* "[T]he test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen*, 186 F.3d at 625 (citations omitted). "[T]he critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality."

James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001) (quoting 5 James Wm. Moore et al., *Moore's Federal Practice* P 23.24[4] (3d ed. 2000)).

HHS's contention that the proposed class is overly broad does not defeat typicality for the class. Vita Nuova is entitled to assert on behalf of the class an alleged right to avail itself of Title X funding and choose whether to employ individuals who perform or assist abortions. That some class members might make this employment choice differently than Vita Nuova does not render Vita Nuova's claims unrepresentative of the claims of the class as a whole. Courts have certified other classes where the alleged injury includes taking away a meaningful choice, even if some within the class might make that choice differently than others. *See, e.g., J.D. v Azar*, 925 F.3d 1291, 1313 (D.C. Cir. 2019) ("The class members all assert a common entitlement to make that choice on their own . . . . The class representatives are suited to press that interest on the class's behalf, even if various class members might make varying ultimate decisions about how to exercise their choice.").

The Court likewise disagrees with HHS's claim that there is a need for individualized assessment of potential members claims here that precludes certification. *See* Defs.' Resp. 22–23, ECF No. 38. The sincerity inquiry under the RFRA is generally not an exacting one. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686 (2014) (In evaluating sincerity, the Court's "narrow function . . . is to determine whether the plaintiffs' asserted religious belief reflects an honest conviction.") (internal quotation marks and citations omitted); *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 90 (D.C. Cir. 2017) ("Courts generally handle 'the sincerity inquiry . . . with a light touch, or judicial shyness.'") (quoting *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012)); *Moussazadeh*, 703 F.3d at 791 (While determination of sincerity is fact-specific, "[s]incerity is generally presumed or easily

established."); *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015) (The Court must only look to whether "the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold."); *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 609 (W.D. La. 2019) ("Claims of sincere religious beliefs have been accepted based on 'little more than the plaintiff's credible assertions.'") (quoting *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)).

Given that, any fact-specific inquiries regarding the sincerity of religious belief do not prevent certification of the class itself, as, to the extent they are even necessary, these individualized membership assessments can be made after class certification. *See, e.g.*, *Seeligson*, 761 F. App'x at 334 (requiring only that the plaintiff demonstrate "that the class is adequately defined" and "provide sufficient objective criteria from which to identify class members") (citation and internal quotation marks omitted). Denying certification on this basis would be especially improper in cases like these, where the proposed class seeks only injunctive and declaratory relief regarding enforcement of a statute, and the usual complications of class certification and phased litigation of suits for money damages do not apply. *See, e.g.*, *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974) ("[T]he precise definition of the [Rule 23(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance."); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 431 n.28 (5th Cir. 1998) (citing Hebert B. Newberg & Alba Conte, *Newberg On Class Actions* § 4.41, at 4-51 to 52 (3d ed. 1992) and noting differing approaches to certification and litigation of individual trials for damages).

HHS cites several cases for the proposition that fact-specific inquiries of belief sincerity preclude RFRA adjudication on a class-wide basis. *See* Defs.' Resp. 15–16, ECF No. 38. But the

cases cited are distinguishable from the present one. The first, *Russell v. Pallito*, involved a different statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and questions regarding specific religious dietary beliefs for prison inmates. *See* No. 5:15-cv-126-GWC-JMC, 2019 WL 2125101, at *29 (D. Vt. Jan. 7, 2019), *report and recommendation adopted*, 2019 WL 2125523 (D. Vt. May 15, 2019). The second, *Lindh v. Dir., Fed. Bureau of Prisons*, involved the RFRA in the context of federal prisons, the proposed class was "all male Muslim prisoners confined within the Bureau of Prisons," and the court acknowledged that "not all Muslims hold the same theological views regarding the required length of their pants." No. 2:14-cv-151-JMS-WGH, 2015 WL 179793, at *4–5 (S.D. Ind. Jan. 14, 2015). The third case, *Cejas v. Brown*, involved an RLUIPA claim by prison inmates and was decided on a motion for permissive joinder under Federal Rule of Civil Procedure 20(a)(1). *See* No. 3:18-cv-00543-WQH-JLB, 2018 WL 3532964, at *4 (S.D. Cal. July 20, 2018). Plaintiff there sought to join all involved pro se plaintiffs and would have required individualized analysis of the "specific burdens Defendants allegedly placed on each of their sincerely held religious beliefs and/or practices." *See id.* Finally, in *Tatum v. Misner*, that court denied a class certification for—once again—a prisoner RLUIPA claim that turned on an individualized inquiry into the plaintiff's alleged diet requirement based on his religious beliefs as a practitioner of the Nation of Islam. *See* No. 13-cv-44-WMC, 2017 WL 4271657, at *8 (W.D. Wis. Sept. 26, 2017).

None of those prisoner cases closely resembles the present suit. Here, to receive government funding expressly requires violating a religious belief widely shared among the American public.[6] The setting and nature of the religious belief at issue here is far less fact-

[6] Gallup, *Americans' Views of the Morality of Abortion, 2020*, Values and Beliefs Poll, May 1–13, 2020, https://news.gallup.com/poll/244625/morality-abortion-2018-demographic-tables.aspx (finding 47% of respondents believed abortion to be morally wrong).

intensive and, consequently, far more conducive to class-wide resolution than the context of prisoners. The bottom-line question under commonality and typicality is whether the relief the named plaintiffs seek from the Court will resolve all class members' legal claims. The answer here is "yes," because Vita Nuova seeks a declaration that the Anti-Discrimination Provision violates the RFRA. *See* Pl.'s Mot. 6, ECF No. 33. Vita Nuova's claims therefore have the "same essential characteristics as those of the putative class," namely, that the Anti-Discrimination Provision violates the RFRA by requiring Vita Nuova and other class members to do something to which they are opposed due to sincerely held religious beliefs. *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002).

For these reasons, the Court finds that Vita Nuova has satisfied the typicality requirement.

v. Adequacy of Representation

Vita Nuova asserts that it "will fairly and adequately represent the interests of its fellow class members, and there are no conflicts of interest between Vita Nuova and the other members of this class." Pl.'s Mot. 8, ECF No. 33-1. HHS argues in response that Vita Nuova has failed to demonstrate adequacy of representation for the same reasons it has not satisfied the commonality and typicality requirements. *See* Defs.' Resp. 24, ECF No. 38.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "Adequacy encompasses three separate but related inquiries (1) 'the zeal and competence of the representative[s'] counsel'; (2) 'the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees'; and (3) the risk of 'conflicts of interest between the named plaintiffs and the class they seek to represent.'" *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 412 (5th Cir. 2017) (citing

Feder v. Elec. Data Sys. Corp., 429 F.3d 125, 130 (5th Cir. 2005)). "[The] requirements [of commonality and typicality] . . . tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Falcon*, 457 U.S. at 158 n.13. Throughout litigation, the court "must continue carefully to scrutinize the adequacy of representation and withdraw certification if such representation is not furnished." *Grigsby v. N. Miss. Med. Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978).

Here, Vita Nuova has carried its burden to show that, as a Christian entity opposed to abortion, it will adequately represent the interests of class members similarly situated in zealously pursuing the requested relief. All indications are that Vita Nuova is willing and able to control the litigation and to protect the interests of absent class members. *See Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 484 (5th Cir. 1982). Given the Court's conclusion as to the commonality and typicality prongs, *supra*, and because no conflicts of interest, issues with competency of counsel, or other issues suggesting inadequacy of Vita Nuova's representation have been shown, the Court finds that Vita Nuova will adequately represent members of the proposed class.

Accordingly, the Court concludes that Vita Nuova has satisfied the elements for class certification under Rule 23(a) and need only address whether the elements of Rule 23(b) are satisfied.

B. Rule 23(b)

Vita Nuova moves for class certification under Rule 23(b)(2). HHS does not dispute that the requirements of Rule 23(b)(2) are met here. *See* Pl.'s Mot. 8–9, ECF No. 33-1; Defs.' Resp., ECF No. 38. A class action filed pursuant to Rule 23(b)(2) requires that "the party opposing the

class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Vita Nuova seeks an injunction stopping HHS from enforcing the Anti-Discrimination Provision against each of the class members. *See* Pl.'s Mot. 8, ECF No. 33-1. As required, "a single injunction or declaratory judgment" here "would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360. Because granting the requested relief would apply generally to the class as a whole, the Court finds that Rule 23(b)(2) is satisfied.

IV. CONCLUSION

Based on the foregoing reasons, the Court concludes that the elements of Rule 23(a) and 23(b) are satisfied. Thus, class certification is proper, and the Court **GRANTS** the Motion. Vita Nuova may proceed in this case as representative of itself and "[e]very present and future health-care provider in the United States that opposes abortion for sincere religious reasons." Pl.'s Mot. 4, ECF No. 33-1.[7]

Accordingly, Vita Nuova's Motion for Class Certification, ECF No. 33, is **GRANTED**.

SO ORDERED this **2nd day** of **December 2020**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

[7] "Health-care provider" as it is defined in footnote 2.