UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE RELIGIOUS SISTERS OF MERCY, *et al.*, Appellees, v. XAVIER BECERRA, *et al.*, Appellants	Case No. 21-1890 **PLAINTIFF-APPELLEE THE CATHOLIC BENEFITS ASSOCIATION MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR REHEARING**

Plaintiffs-Appellee The Catholic Benefits Association ("CBA") respectfully move for leave to file a reply brief in support of its petition for rehearing or rehearing en banc.

1. On January 23, 2023, the CBA filed a petition for rehearing or rehearing en banc to correct the panel opinion's holding that, to have associational standing, the CBA must identify by name all its members who have standing to challenge the Government's interpretation of Section 1557 and Title VII.

2. On February 7, 2023, the Court requested the Government respond to the CBA's petition. The Government filed its response on February 17, 2023.

3. The Government's response raises new arguments that require the CBA to file a brief reply. Specifically, the Government asserts that the only way for an entity to have standing to challenge the Government's interpretation of Section 1557 is if

the member receives federal funding. The Government further asserts that the CBA has failed to identify any such member. These assertions are not correct as a matter of fact. The CBA presented evidence below that its membership includes entities that receive federal funding. Nor is the Government's argument correct as a matter of law. The CBA's membership includes members like Plaintiff-appellee Diocese of Fargo that has been forced into an indemnification agreement as a result of the Government's interpretation of Section 1557.

4. A copy of the CBA's proposed reply brief is attached here as **Exhibit A**. The reply brief is 1,249 words, no longer than necessary to respond to the Government's response.

5. Federal appellate courts are empowered to permit a reply in support of a petition for rehearing. *See Alfano v. United States*, No. CIVIL 8-252-B-W, 2008 WL 5234350, at *2 (D. Me. Oct. 7, 2008) (quoting unpublished order of the Second Circuit "allow[ing]" a reply to a petition for rehearing "with a motion for leave to do so."). Good cause exists for the CBA's motion, namely to reply to the Government's arguments asserted for the first time in its response.

Accordingly, the CBA respectfully requests that this Court grant its motion for leave to file the reply brief attached as **Exhibit A**.

Respectfully submitted February 24, 2023,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this motion complies with the type-volume limitation in Fed. R. App. P. 27(d)(2), as it contains 355 words.

s/ Andrew Nussbaum
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I hereby certify that on February 24, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Participants who are registered CM/ECF users will be served by the CM/ECF system.

s/ Andrew Nussbaum
Andrew Nussbaum

No. 21-1890

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE CATHOLIC BENEFITS ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, et al.,

Defendants-Appellants.

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

THE CATHOLIC BENEFITS ASSOCIATION'S REPLY IN SUPPORT OF ITS PETITION FOR REHEARING OR REHEARING EN BANC

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The Catholic Benefits Association's ("CBA") petition for rehearing presents two questions of law—both of which have substantial implications for the fundamental rights of association and religious freedom, as well as for the consistency of intra- and inter-circuit precedent. *First*, did the panel opinion err in holding that an association must identify by name all its members affected by a government policy in order for the association to have associational standing under this Court's and the Supreme Court's precedents? *Second*, was the CBA's inclusion of *i)* three named CBA-member plaintiffs in this suit and *ii)* sworn evidence identifying members of the CBA who have suffered the requisite harm sufficient to confer associational standing on the CBA?

I. The panel opinion mistook the CBA's basis for associational standing.

The Government's response in opposition concedes the first question, that the panel erred in its restatement of the law of associational standing. The Government agrees with the CBA that, so long as the association's evidence identifies *a single* member with standing to sue in its own right, this is sufficient to establish associational standing. Resp. at 6. This concession, grounded in well-established caselaw, is fatal to the panel opinion's holding on associational standing. An association must identify only one member with standing, not all members who've

been harmed by the challenged policy. Indeed, the Government further concedes that the Association need not identify any of its members by name under *ACLU Nebraska Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 775 n.4 (8th Cir. 2005). Resp. at 9. *ACLU Nebraska Fund* permits an association to establish standing through a member identified by pseudonym only—"John Doe" in that case. *Id.* If the ACLU has standing to sue on behalf of pseudonymous John Doe, the CBA must have standing to sue on behalf of the named and unnamed members it has identified.

II. The panel opinion correctly held that the CBA member-plaintiffs have standing in their own right.

The Government's response instead asks the Court to reconsider its holding that the named member plaintiffs of the CBA (Diocese of Fargo, Catholic Medical Association, and Catholic Charities of Fargo) as well as those members identified in CBA's complaint have standing to challenge the Government's interpretation of Section 1557 and Title VII regarding gender-transition services. Resp. at 2. This request should be rejected.

At the outset, the Government's response misstates the panel opinion's holding. The Government asserts that the Panel did not hold that the CBA member plaintiffs have standing to challenge the Government's interpretations of Section 1557 and Title VII. Resp. at 7. This is incorrect. The panel opinion squarely (and rightly) held that the CBA member plaintiffs have standing in their own right and therefore

affirmed the district court's injunction as to the CBA member plaintiffs. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602, 606, 609 (8th Cir. 2022) ("Accordingly, we affirm the district court's grant of permanent injunctive relief to the plaintiffs except to the extent it recognizes the associational standing of the CBA.").

This holding provides the minor premise for the correct conclusion on associational standing. If an association has standing when it identifies *one* member who has standing in its own right (major premise), and the panel held that the three CBA member plaintiffs have standing in their own right (minor premise), then the panel errantly concluded that the CBA lacks associational standing to sue on behalf of its members (conclusion). The Court need not go further than this syllogism to correct the panel opinion. Unlike the CBA's petition, the Government offers no argument that its disagreement with the panel's conclusions on standing concerns a "question of exceptional importance" or a necessary correction to "secure or maintain uniformity of the court's decisions." Fed. R. App. Proc. 35(a).

III. The CBA has identified members with standing.

Yet the Government's expansive argument for reconsideration that the CBA has not identified members who have suffered the requisite harm to challenge EEOC's interpretation of Title VII and HHS's interpretation of Section 1557 is also wrong on the merits.

First, the CBA's named member plaintiffs each are employers subject to Title VII, as the district court found and the Government does not dispute. A774. And the panel's holding that the threat of enforcement by EEOC was credible, *see Religious Sisters of Mercy*, 55 F.4th at 607, has since transformed into an *actual* threat of enforcement. The Government concedes that it halted its enforcement action against Catholic Ministry discussed in the CBA's petition for rehearing because of the district court's injunction. Resp. at 11 (conceding that the EEOC stopped its enforcement action against Catholic Ministry because of the "injunction in place.").

Second, the Government contends that the CBA has failed to identify a member plaintiff who has standing to challenge HHS's interpretation of Section 1557 because the CBA has failed to identify a member who receives federal funding. Resp. at 6-9. But this assertion is both incorrect on the merits and an incomplete statement of the range of harms that would confer standing on a plaintiff to challenge HHS's interpretation of Section 1557.

On the merits, the CBA provided sworn evidence, verified by, among other individuals, CBA Board Chairman and Archbishop of Baltimore William E. Lori, that its members include: "hospitals and other healthcare entities that receive Medicaid and Medicare payments"; "Catholic charities and other social service organizations that offer counseling and other mental health services … that receive

Medicaid and Medicare payments and participate in HHS-funded programs"; and "employers … that provide employee health benefits in conjunction with health insurers and TPAs. These insurers and TPAs participate in federally funded marketplaces." A145-A146, A214; *see also* A185-89 at ¶¶ 220-41. This is precisely the kind of "individual affidavit[]" required by associational-standing precedents. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Through these sworn statements, which the Government does not contest, the Court is able to "assure itself" that members of the association have standing to sue in their own right. *Id.*

The Government's assertion that receipt of federal funding is the only way a CBA member can establish standing is also incorrect. Actual injury sufficient to confer standing on CBA members to bring this challenge against HHS is further evident from demands by third party administrators (TPAs) for indemnification. The Diocese of Fargo, a named CBA member-plaintiff in this case, has been forced to indemnify its TPA against liability for exclusion of abortion and gender-transition services from its health plan. A139-40, ¶¶ 21-22. This agreement remains in place today. Actual injury sufficient to confer standing arises because of this TPA indemnification agreement. *See Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006) ("[P]laintiffs have standing to challenge the constitutionality of a law that has a

direct negative effect on their borrowing power, financial strength, and fiscal planning." (quotation omitted).

CONCLUSION

In short, this is a nationally-significant religious-freedom and freedom-of-association case. If left uncorrected, the panel's holding on associational standing would conflict with decades of associational-standing precedent, would undermine the right of associations to protect the identities of their membership, and would immediately subject the CBA's unnamed members to adverse government action that targets their core religious beliefs. The fix, fortunately, is simple. Associations may sue on behalf of their members if they identify one member with standing. The CBA has identified three such members by name and numerous others in sworn evidence. Accordingly, the CBA respectfully requests that the Court grant its petition for panel or en banc rehearing.

Respectfully submitted February 24, 2023,

/s/ Andrew Nussbaum

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