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

Christian Employers Alliance, on behalf of itself and its members, *Plaintiff*, v. **United States Equal Employment Opportunity Commission**, et al., *Defendants*.	**1:21-cv-00195-DMT-CRH**

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

CEA showed it should receive summary judgment under the Religious Freedom Restoration Act (RFRA). The government offers three basic objections.

First, the government tries to negate CEA's factual evidence, not with its own evidence, but by claiming CEA's President & CEO Ms. Royce did not attest to her personal knowledge of religious exercise by CEA's members. ECF 80 at 12–16, 25–28. Yet she attested to her personal knowledge of this twice, ECF 68 ¶ 24, & 31-1 ¶ 5, and cited those declarations in ECF 69-1 at 2–6. It is Ms. Royce's official duty to verify CEA's members' religious exercise. ECF 68-1 at 2–6, 11–12.

Second, the government says associations cannot receive relief under RFRA or for their future members. ECF 80 at 25–28, 31–32. But this Court provided exactly that relief in the preliminary injunction. ECF 39 at 18. As cited below, many courts have issued associational relief under RFRA or for future members.

Third, the government says forcing CEA's members into case-by-case review of their religious beliefs somehow satisfies RFRA. ECF 80 at 28–31. This Court already held the opposite: "[r]eligious freedom cannot be encumbered on a case-by-case basis." ECF 39 at 16. The government's only exhibit proves the Court's point: under this same gender identity mandate, HHS subjected a religious entity to years of investigations, document demands, and back-and-forth letters by attorneys. ECF 80-1 at 2–3. The government is unlawfully threatening religious entities with a choice between penalties and investigative burdens or a violation of their faith.

ARGUMENT

I. The government fails to rebut CEA's evidence.

A. Ms. Royce testified to CEA's members' beliefs and actions.

"Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the

organization operates." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201 (2023).

Rather than present evidence contradicting CEA's facts, the government makes a broad argument that CEA's declarations from its President and CEO, Ms. Shannon O. Royce, "do[ ] not assert or show that Ms. Royce has personal knowledge" of the facts of CEA's members' beliefs and actions. ECF 80 at 12; *see also id*. at 25. This is incorrect. Ms. Royce twice testified that she has "personal knowledge" of the facts of CEA's members' beliefs and behavior relevant here. In the amended verified complaint, Ms. Royce testified that she "is the President of Christian Employers Alliance, and has personal knowledge of the facts about CEA and its members asserted herein." ECF 68 ¶ 24. And in her supplemental declaration supporting CEA's preliminary injunction motion, Ms. Royce stated:

> I have knowledge of the operations and circumstances of CEA's members with respect to their commitment to operating consistent with the Christian Values of CEA, and to the impact of the laws and policies challenged in this case on CEA's members.

ECF 31-1 ¶ 5. CEA cited both documents in its motion. ECF 69-1 at 2–6.

CEA submitted other evidence showing Ms. Royce's testimony is trustworthy. CEA's membership criteria specify in great detail that its members shall religiously object and take steps to prevent providing, affirming, or paying for insurance coverage of gender transition actions. ECF 68-1 at 2–4. It is Ms. Royce's job as President & CEO to have "active" and general supervision of the "Alliance," defined to include CEA's members; no member can be admitted unless the President accepts it and ensures it adheres to CEA's standards. *Id.* at 2, 4–5, 11. This shows Ms. Royce "is competent to testify to" CEA's members' religious exercise, and that the Court may "infer personal knowledge from the content or context" of her role. *Brooks v. Tri-Sys., Inc.*, 425 F.3d 1109, 1111–12 (8th Cir. 2005) (cleaned up).

The government contends CEA's evidence *might* be based on hearsay. ECF 80 at 13, 25. But the Court was right to rely on this evidence in granting the preliminary injunction, and the amended complaint now summarizes that same evidence for summary judgment. Ms. Royce testified about actions she sees, namely, members joining and maintaining status in CEA. These actions show a member exercises religion as described in CEA's bylaws and associates with CEA for protection. This is the reason to join CEA. CEA conditions membership on members' engaging in this religious exercise. ECF 68-1 at 2–4. CEA's purpose is to protect its members' religious exercise by, among other things, protecting them from being forced to provide or pay for gender transition procedures, ECF 68 ¶¶ 31–61, and it is Ms. Royce's job to approve applications and ensure ongoing compliance, ECF 68-1 at 4–5, 11. Further, joining CEA can be considered a non-hearsay "verbal act" of exercising religion. *See Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992). Members' applications show their motive, intent, and plan to exercise religion in that way. Fed. R. Evid. 803(3); *see, e.g., United States v. Hyles*, 521 F.3d 946, 959 (8th Cir. 2008). In addition, attached are declarations from Trinity Bible College and The Children's Center to affirm that the testimony Ms. Royce provided about them is accurate. Exs. 1 & 2. Because CEA has identified members with standing, it has standing to obtain relief for all its members.

B. *Religious Sisters* already held these mandates cause injury.

The rest of the government's response to CEA's allegations rehashes its disagreement with CEA's position on "the legal effects" of Title VII and Section 1557, EEOC and HHS guidance documents or regulations, and EEOC and HHS enforcement and other actions. ECF 80 at 16–23. It contends that, even though both EEOC and HHS are imposing gender identity nondiscrimination mandates, ECF 80

at 1, it is unclear what those mandates might mean specifically, or whether the government will exempt CEA's members after case-by-case scrutiny of their beliefs.

This argument cannot defeat summary judgment for CEA. First, having presented merely its different views of "legal effects," the government fails to raise a genuine issue of material *fact*. Second, the government is simply restating the position it lost at the Eighth Circuit, that there is no concrete injury from the government's gender identity mandates. But EEOC and HHS concede that they impose and enforce gender identity mandates under Title VII and Section 1557. ECF 80 at 1 ("EEOC and HHS interpret the prohibitions on sex discrimination in Title VII and Section 1557, respectively, to prohibit discrimination on the basis of gender identity. EEOC and HHS conduct their enforcement of these statutes . . . ."). The government has made repeated promises of "robust" and "vigorous[]" enforcement, alongside EEOC's history of enforcement and coordination with HHS. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 605 (8th Cir. 2022). *Religious Sisters* held that employers with religious objections to compliance with the government's Title VII and Section 1557 gender identity mandates have concrete injury, suffer irreparable harm, and therefore have standing to sue. *Id.* at 602–09.

The government claims uncertainty about how its mandates will apply, but *Religious Sisters* rejected this purported agnosticism. "[The government] argues that the district court erred in concluding that (1) 'Section 1557 arguably proscribes the [p]laintiffs' refusal to perform or cover gender-transition procedures,' and (2) a credible threat of enforcement exists." *Id.* at 603 (quoting government brief) (alteration in original). But the Eighth Circuit followed *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368 (5th Cir. 2022), in holding that (1) HHS's gender identity mandate "threaten[s] Franciscan Alliance in the same way that the challenged portions of the 2016 Rule did," (2) HHS publicly reaffirmed in 2022 that it will enforce this mandate, and (3) HHS repeatedly refuses to disavow enforcement (just

like HHS and EEOC refused to disavow in their opposition brief here). *Id.* at 603–04 (discussing *Franciscan All.*, 47 F.4th at 376, 379) (cleaned up).

As for the government's claim that HHS's existing gender identity mandate is somehow different or less specific than the 2016 version and might not have the same implications (ECF 80 at 21–22), *Religious Sisters* also rejected this argument. The court said that even though the government's interests in a particular mandate may "'subtly evolve over time,'" "'[c]ourts have issued permanent injunctions in these contexts countless times.'" *Id.* at 603 (quoting *Franciscan All.*, 47 F.4th at 379) (alteration in original). The court added, "[w]e also reject the government's argument that the plaintiffs lack injury because it 'has not to date taken a position on whether plaintiffs' conduct violates the relevant statutes . . . .'" *Id.* at 605 (quoting the government's brief). Instead, the court agreed with *Franciscan Alliance* that the government's agnosticism "is actually a "conce[ssion] that it may" enforce. *Id.* (quoting *Franciscan All.*, 47 F.4th at 376). "While the government argues that the plaintiffs lack standing because the 2020 Rule 'rescinded' the 2016 Rule, the Fifth Circuit expressly rejected this argument in *Franciscan Alliance*. We agree . . . the plaintiffs' conduct—their refusal to perform or cover gender-transition procedures—is 'arguably proscribed' by Section 1557." *Id.* (citations omitted).

II. RFRA relief is available for associational members.

A. Associations can obtain injunctive relief under RFRA.

The government advances a novel position that RFRA precludes associational standing. ECF 80 at 26–28. It cites zero cases reaching this holding, and fails to discuss the numerous cases granting associational relief under RFRA.

This Court was correct in awarding preliminary injunctive relief on an associational basis. The same "general rules of standing principles" apply to RFRA as to other claims. 42 U.S.C. § 2000bb-1(c). "Normally individual member

participation is not necessary when an association seeks prospective or injunctive relief." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.9.5 at n.80 (3d ed. 2023).

Courts often find associational standing under RFRA for injunctive relief against federal agencies. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 839 (9th Cir. 2012) ("the prospective relief that Plaintiffs seek does not require that individual Oklevueha members participate in this action."); *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1153–54 (D. N.D. 2021) (Catholic plaintiffs); *Christian Emps. All. v. Azar*, No. 3:16-cv-309, 2019 WL 2130142, at *6 (D. N.D. May 15, 2019); *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 378 (N.D. Tex. 2021) ("CMDA is not required to detail the specific religious views of each member."); *Ariz. Yage Assembly v. Garland*, No. CV-20-02373-PHX-ROS, 2023 WL 3246927, at *4 (D. Ariz. May 4, 2023) ("There is no need for the kind of individualized inquiry Defendants suggest."); *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1203–04 (D. Nev. 2009), *aff'd in part, rev'd in part on other grounds sub nom. S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009) (same). Courts also find associational standing under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). *Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 79 (2d Cir. 2021); *Word Seed Church v. Vill. of Hazel Crest*, 533 F. Supp. 3d 637, 649 (N.D. Ill. 2021).

Religious Sisters did not even mention the idea that RFRA excludes associational standing. Instead, the court applied ordinary associational standing precedent, under which an organization identifies at least one non-plaintiff member with injury. *Religious Sisters*, 55 F.4th at 601–02. As explained in CEA's motion, it satisfies this test. ECF 69-1 at 32–33. And as discussed above, Ms. Royce's unrebutted testimony establishes the needed facts about CEA's members. Trinity

Bible College is similarly situated to the employer "CBA plaintiffs" in *Religious Sisters*—employers subject to Title VII—because "the EEOC's interpretation of Title VII requiring the CBA members to provide insurance coverage for gender-transition procedures violates their sincerely held religious beliefs." 55 F.4th at 598; *see also id.* at 593 (listing the CBA plaintiffs). The Children's Center is similarly situated to the "RSM plaintiffs"—employers that provide healthcare—because "HHS's interpretation of Section 1557 requiring the plaintiffs to perform or provide insurance coverage for gender-transition procedures violates the plaintiffs' sincerely held religious beliefs." *Id.* at 598; *see also id.* at 592–93 (listing the RSM plaintiffs).

The government cites cases that are not about RFRA. ECF 80 at 26. And those cases limit associational standing when the association does not really represent a coherent members' view. In the government's primary case, *Harris v. McRae*, 448 U.S. 297 (1980), the association admitted that its members' views differ on the relevant issue of whether they want the federal government to pay for abortions, and it failed to identify an injured member, so the court said the claim required individual participation. *Id.* at 321. Here, all CEA members by definition hold the beliefs providing standing in this case. ECF 69-1 at 2–4.

Far from excluding associational standing claims under the Free Exercise Clause, the Supreme Court held that a religious foundation "has standing to raise the free exercise claims of the associates, who are members of the religious organization as well as employees under the Act." *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 303 n.26 (1985); *see also Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1280 (5th Cir. 1981) (distinguishing the *McRae* decision and finding that a church could represent its members in a religious exercise case); *Christian Med. & Dental Ass'n v. Bonta*, 625 F. Supp. 3d 1018, 1031 (C.D. Cal. 2022) (finding associational standing for Free Exercise Clause claims). Courts also find associational standing under state laws like RFRA. *Big Hart Ministries Ass'n v.*

City of Dallas, No. 3:07-CV-0216-P, 2013 WL 12304552, at *10 (N.D. Tex. Mar. 25, 2013); *Students & Parents for Priv. v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 899 (N.D. Ill. 2019) (finding "[i]t is not clear that plaintiff would need the testimony of every member" for an association to bring state law RFRA claims.).

B. Relief may encompass future members.

The government again asks the Court to reconsider a holding from its preliminary injunction when it says relief should not run to future members of CEA. ECF 80 at 31–32. But as Judge Welte explained, "injunctive relief should extend to the Catholic Plaintiffs' present and future members to avoid 'continuous litigation and . . . a waste of judicial resources.'" *Religious Sisters*, 513 F. Supp. 3d at 1153 (quoting *Christian Emps. All.*, 2019 WL 2130142, at *5, which also granted relief, to CEA, for its present and future members) (alteration in original); *accord Franciscan All.*, 553 F. Supp. 3d at 378 (permanent injunction protecting "current and future members").

The scope of equitable relief falls within the Court's discretion. *See Courthouse News Serv. v. Gilmer*, 48 F.4th 908, 913 (8th Cir. 2022). Including present and future CEA members in relief is appropriate here because the members must share the same beliefs on the relevant objection. The government is incorrect that Ms. Royce cannot claim knowledge of the beliefs and practices of CEA's future members. ECF 80 at 27. As President & CEO, Ms. Royce must not admit an organization unless it adheres to CEA's requirements. The requested injunction takes these concerns into consideration, and is worded parallel to the injunction Judge Welte issued: it only covers an entity if it "meets the CEA's membership criteria with respect to its Statement of Faith and Christian Ethical Convictions and Members criteria, and those criteria have not been relaxed from CEA's Fourth Amended and Restated Bylaws." ECF 69 at 5.

Associations commonly receive relief without courts limiting that relief to their current membership rolls. For example, labor union members benefit from injunctive relief even though their employees come and go. The government would not have been able to claim the injunction in *Automobile Workers v. Brock*, 477 U.S. 274, 287 (1986) did not apply to future UAW members after the court said it was not requiring individual employee participation in the case. Similarly, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), a commission represented the "State's apple industry" as a whole, "a specialized segment of the State's economic community." *Id.* at 341 & 344. Who is an apple grower or dealer at any moment changes, so the associational standing the court recognized necessarily encompassed relief for future members.

III. Case-by-case scrutiny of religious beliefs violates RFRA.

The government contends that because it generically promises to comply with RFRA and will apply case-by-case scrutiny of CEA's members' beliefs, its mandates impose no "substantial burden" under RFRA. ECF 80 at 29–31. Although framed as a merits objection, this is a rehash of the government's standing argument that *Religious Sisters* rejected. Following *Franciscan Alliance*, the court held that to "vaguely promise[ ] . . . to 'comply with [RFRA's balancing test]'" does not negate the mandate's injury. *Religious Sisters*, 55 F.4th at 604 (quoting *Franciscan All.*, 47 F.4th at 377) (second alteration in original). Moreover, "the hypothetical chance that the Government could advance a compelling government interest sometime in the future" in case-by-case scrutiny does not defeat requests for RFRA protection against an existing mandate. *Id.* (quoting *Franciscan All.*, 47 F.4th at 380).

Raising another losing argument from *Religious Sisters*, the government argues it has not "taken any action against" particular CEA members or "filed an enforcement action" and therefore no substantial burden exists. ECF 80 at 29. But

pre-lawsuit enforcement is not required for a RFRA injury. There was no enforcement before *Burwell v. Hobby Lobby Stores, Inc.*, yet the court blocked another Affordable Care Act insurance mandate in that case and had "little trouble" finding a substantial burden because of the risk of financial penalties. 573 U.S. 682, 719 (2014). Severe penalties likewise apply here. ECF 68 at 21, 31–32. Enforcement is not a prerequisite for a substantial burden under RFRA, which merely requires "pressure" to violate one's beliefs, or a "condition[on] receipt of an important benefit." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) ($5 fine); 42 U.S.C. § 2000bb(b) (adopting *Sherbert* and *Yoder* under RFRA). These mandates have significant penalties, case-by-case scrutiny of religion, and investigative burdens. They easily impose a substantial burden under RFRA.

The government's one exhibit proves this point. ECF 80-1. In it, HHS refused front-end religious exemptions under Section 1557, then subjected a Catholic hospital to two years of "several correspondences," "data and information requests," and "follow-up requests," causing the hospital to hire "attorneys" to send multiple "responses." ECF 80-1 at 2–3. This exhibit telegraphs the threat imposed on CEA's members: either comply with these gender identity mandates or risk years of investigations with unilateral discovery from bureaucrats, at the end of which you could still be penalized if denied an exemption. This imposes substantial pressure to violate one's beliefs and a substantial burden under RFRA.

The government has also signaled it will deny exemption requests despite this notice. It insists it has a compelling interest for both mandates. ECF 80 at 31–31. And at oral argument on the preliminary injunction motion, Defendants' counsel said the government could conclude that its mandates satisfy RFRA's least restrictive means test depending on "what other options are there available to get that person care," including due to remote geography. ECF 41 at 47–48, 57–58.

Respectfully submitted this 14th day of December, 2023.

/s/ Matthew S. Bowman

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EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

CHRISTIAN EMPLOYERS ALLIANCE, *Plaintiff*, v. **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.** *Defendants*.	**CIVIL CASE NO. 1:21-cv-00195-DMT-CRH** **JUDGE Daniel M. Traynor**

DECLARATION OF DR. PAUL R. ALEXANDER

I, Paul R. Alexander, Ph.D., hereby declare and state as follows:

1. I am a citizen of the United States, am over 21 years of age, and make this declaration on personal knowledge.

2. I am the President of Trinity Bible College and Graduate School (Trinity), in Ellendale, ND.

3. In my role as President of Trinity, I have personal knowledge of the operations and circumstances of Trinity's membership in Christian Employers Alliance (CEA) (the plaintiff in this case), of Trinity's commitment to operating consistent with CEA's requirements, of Trinity's health insurance coverage, and of the impact on Trinity of the laws and policies challenged in this case.

4. I have reviewed the statements made by Shannon O. Royce about Trinity and its religious exercise in CEA's Amended Complaint in this case, ECF 68 paragraphs 12 and 62–75. Those statements are true and accurate.

5. I have reviewed CEA's Statement of Faith, Christian Values, and Christian Ethical Convictions, as set forth in CEA's Bylaws, ECF 68-1 at pages 2–4. Trinity adheres to those principles.

I declare under penalty of perjury under the laws of the United States of America pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 8th day of December, 2023.

/s/ P. R. Alexander
Dr. Paul R. Alexander, President
Trinity Bible College and Graduate School
Ellendale, ND

(The paper document bears an original signature, and filing counsel has retained the original for future production pursuant to the Court's Administrative Policy Governing Electronic Filing and Service part X.(D) (amended Jan. 14, 2022).)

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

CHRISTIAN EMPLOYERS ALLIANCE, *Plaintiff*, v. **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.** *Defendants*.	**CIVIL CASE NO. 1:21-cv-00195-DMT-CRH** **JUDGE Daniel M. Traynor**

DECLARATION OF ALBERT GRAY

I, Albert Gray, hereby declare and state as follows:

1. I am a citizen of the United States, am over 21 years of age, and make this declaration on personal knowledge.

2. I am the Executive Chairman of the Board of The Children's Center, Inc. d/b/a Bethany Children's Health Center (Bethany), which before February 2022 was named The Children's Center, Inc. d/b/a/ The Children's Center Rehabilitation Hospital, in Bethany, OK, and is the same entity as the one identified in CEA's Amended Complaint in this case, ECF 68 paragraphs 12 and 62–75.

3. In my role as Executive Chairman, and formerly based on my role as Chief Executive Officer of Bethany/The Children's Center, Inc. from 1978 to 2020, I have personal knowledge of the operations and circumstances of Bethany's membership in Christian Employers Alliance (CEA) (the plaintiff in this case), of

Bethany's commitment to operating consistent with CEA's requirements, of Bethany's health insurance coverage and healthcare practices, and of the impact on Bethany of the laws and policies challenged in this case.

4. I have reviewed the statements made by Shannon O. Royce about Bethany/The Children's Center, Inc. and its religious exercise in CEA's Amended Complaint. Those statements are true and accurate.

5. I have reviewed CEA's Statement of Faith, Christian Values, and Christian Ethical Convictions, as set forth in CEA's Bylaws, ECF 68-1 at pages 2–4. Bethany adheres to those principles.

I declare under penalty of perjury under the laws of the United States of America pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 11th day of December, 2023.

/s/ Albert Gray
Albert Gray, Executive Chairman of the Board
The Children's Center, Inc. d/b/a Bethany Children's Health Center, formerly d/b/a The Children's Center Rehabilitation Hospital, Bethany, OK

(The paper document bears an original signature, and filing counsel has retained the original for future production pursuant to the Court's Administrative Policy Governing Electronic Filing and Service part X.(D) (amended Jan. 14, 2022).)