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

Christian Employers Alliance, *Plaintiff*, v. United States Equal Employment Opportunity Commission, *et al.*, *Defendants*.	)	Case No. 1:21-cv-195-DMT-CRH

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Health and Human Services (HHS) and its Office for Civil Rights (OCR) enforce laws prohibiting sex discrimination. EEOC enforces Title VII (which prohibits employers from discriminating because of sex) and HHS enforces Section 1557 of the Affordable Care Act (which prohibits sex discrimination in federally funded health programs and activities). In accordance with the Supreme Court's recent ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), a Title VII case, 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 subject to the Religious Freedom Restoration Act (RFRA), which provides that the government shall not substantially burden a person's religious exercise, unless imposing such a burden is the least restrictive means of furthering a compelling government interest. Indeed, EEOC has never brought an enforcement action in court under Title VII to require an employer to provide insurance coverage for gender transition services, much less over the employer's religious objection, and HHS has never enforced Section 1557 to require a healthcare provider to perform gender transition services over the provider's religious objection.

Plaintiff Christian Employers Alliance ("Plaintiff" or "CEA") is an organization that represents its employer members. CEA asserts that all of its members, including two identified members, have religious objections to providing insurance coverage for gender transition services. CEA also asserts that many of its members, including one identified member, are in the business of providing healthcare and have religious objections to performing gender transition services. CEA moves for partial summary judgment on its RFRA claim, arguing that EEOC has a "Coverage Mandate" and HHS has a "Gender Identity Mandate" and that these two "Mandates" substantially burden the religious exercise of CEA's members in violation of RFRA.

But CEA has not submitted any evidence admissible on summary judgment to support these assertions. Instead, it submitted only allegations verified by the President of CEA, who did not (as required) show that she has personal knowledge of the beliefs or activities of CEA's members. *See* Fed. R. Civ. P. 56(c)(4).

The Court should deny CEA's motion. CEA has failed to satisfy two distinct requirements to show that it has associational standing to assert claims on behalf of its members. First, CEA has not shown that any identified members "would otherwise have standing to sue in their own right[.]" *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). CEA identifies two members, but the factual assertions CEA makes to demonstrate those members' standing are supported only by declarations of CEA's President, who fails to show she has personal knowledge of the members' religious beliefs and activities. Second, the Court should reject associational standing because CEA's RFRA claims "require[] the participation of individual members in the lawsuit." *Id.* RFRA requires individualized, fact-specific analysis of the religious beliefs and practices of the claimant, whether the claimant's religious exercise has been substantially burdened, and whether, given the claimant's specific circumstances, the government can "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). This individualized analysis cannot be performed on a blanket basis across all the members of an organization with "numerous members," First Am. Verified Compl. ¶ 54, ECF No. 68 ("Am. Compl.") without their individual participation.

If the Court reaches the merits, it should deny summary judgment to CEA because CEA has not shown that its members' religious exercise has been substantially burdened. CEA cannot

point to any action of either EEOC or HHS imposing the "Mandates" that CEA claims cause substantial burden to its members' religious exercise. EEOC has never brought litigation regarding health insurance coverage for gender transition services, much less over the religious objections of an employer. Similarly, HHS has never brought such an action. CEA does not contend that any members are currently performing or providing insurance coverage for gender transition services in violation of their religious beliefs. Nor does CEA contend or provide evidence that either EEOC or HHS have brought an enforcement action or imposed any penalty on any CEA member for acting in accordance with its religious beliefs, or even threatened to do so. Rather, CEA speculates that EEOC or HHS may burden its members' religious exercise at some unspecified time in the future. But that is insufficient to make the required showing that a person's "religious exercise has been burdened in violation of [RFRA]." 42 U.S.C. § 2000bb-1(c).

STATUTORY AND REGULATORY BACKGROUND

I. Title VII's Prohibition On Sex Discrimination And EEOC

Title VII prohibits employment discrimination "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). EEOC is tasked with enforcing laws prohibiting unlawful employment discrimination, including sex discrimination, under Title VII. *See generally* 42 U.S.C. § 2000e-5. Employees or job applicants who allege that they have been subject to an unlawful employment practice by an employer covered by Title VII may file a charge with EEOC. *Id.* § 2000e-5(b). EEOC will then investigate the claim. An employer can raise relevant defenses to a charge, including possible religious defenses, at any time during the investigation. If, after completing its investigation, EEOC determines that "there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the [employer] of its action." *Id.* The notice to the employee or applicant is typically referred to as a "notice of right to sue" because the employee or applicant can file suit only after they receive the notice. *Id.* §

2000e-5(f)(1). If, however, EEOC concludes that there is reasonable cause to believe that an employer violated Title VII, it initiates conciliation, a process by which the agency attempts to facilitate a settlement agreement between the charging party, EEOC, and the employer. *Id.* A finding by the EEOC of reasonable cause does not result in any penalty for the employer. If conciliation fails, EEOC "may" bring its own enforcement action against a private employer or issue a right to sue notice allowing the claimant to sue. *Id.* In either event, the ensuing judicial review is *de novo*. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 325 (1980). Thus, the only way that an employer could face litigation by the EEOC is after the EEOC completed its investigation process, found reasonable cause, and conciliation failed. And even then, the employer would be entitled to its defenses being reviewed *de novo* by a court. Thus, any finding of liability, award of damages, or equitable remedy imposed on an employer would only occur if a court disagreed with the employer's defenses.

In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court held that Title VII's prohibition on sex discrimination extends to discrimination based on gender identity, explaining that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *id.* at 1741. While the EEOC has brought cases regarding discrimination based on gender identity, it has not brought any litigation regarding the denial of coverage for gender transition services, much less over the religious objections of an employer. EEOC has issued a compliance manual stating that the "applicability and scope of . . . defenses based on Title VII's interaction with the First Amendment or . . . RFRA[] is an evolving area of the law." EEOC's Compliance Manual on Religious Discrimination, Directive 915.063, § 12-1-C (Jan. 15, 2021) *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination ("EEOC Compliance

Manual"). The EEOC Compliance Manual counsels EEOC investigators to "take great care" in situations involving RFRA, directs EEOC personnel to "seek the advice of the EEOC Legal Counsel in such a situation," and notes that "on occasion, the [EEOC] Legal Counsel may consult as needed with the U.S. Department of Justice." *Id.*

II. Section 1557 and HHS

Section 1557 of the Affordable Care Act states that no individual shall be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a covered federally funded health program or activity on the grounds in several long-standing civil rights laws, including Title IX of the Education Amendments of 1972. 42 U.S.C. § 18116(a) (citing 20 U.S.C. § 1681). Title IX, in turn, prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Section 1557 thus provides that "an individual shall not [on the basis of sex] be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in covered federally funded health programs or activities. 42 U.S.C. § 18116(a).

Section 1557 also incorporates the "enforcement mechanisms provided for and available under" the civil rights laws it cites, including Title IX. 42 U.S.C. § 18116(a); *see also* 45 C.F.R. § 92.5(a). These enforcement mechanisms, including Title IX's, permit an enforcing agency—here, HHS and its Office for Civil Rights—to terminate, or refuse to grant, federal funds to entities that discriminate on the basis of sex. *See, e.g.*, 20 U.S.C. § 1682; *see also* 45 C.F.R. § 80.6-80.8. But the enforcing agency must take several steps before withholding federal funds. First, it must "advise[] the appropriate person or persons of the failure to comply with the requirement" not to discriminate because of sex and "determine[] that compliance cannot be secured by voluntary means." 20 U.S.C. § 1682. If the party does not voluntarily comply, HHS may withhold funding only after "there has been an express finding on the record, after opportunity for hearing, of a failure to comply" with Title IX. *Id.* The agency then must inform the appropriate Congressional

committees of the grounds for its action, and any withholding of funding does not take effect until thirty days after the agency provides such notice. *Id.* A party aggrieved by this administrative process may obtain "judicial review as may otherwise be provided by law." *Id.* § 1683; *see id.* § 1682 (further providing for enforcement "by any other means authorized by law[,]" including referral to the Department of Justice with a recommendation for proceedings under 45 C.F.R. § 80.8); *id.* § 1234g(a) (providing judicial review of funding decision in the court of appeals where recipient located).

III. HHS's Prior Rulemaking Under Section 1557

A. The 2016 Rule and Related Litigation

In 2016, HHS promulgated a rule prohibiting discrimination on the basis of sex in covered health care programs or activities. *See Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376 (May 18, 2016) ("2016 Rule"). The rule defined sex discrimination to include, as relevant here, gender-identity discrimination. *Id.* at 31,467. It explained, for example, that a covered provider could not refuse to offer medical services for gender transitions if the provider offered comparable services to those not seeking gender transition. *Id.* at 31,471. Thus, a "provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." *Id.* at 31,455.

The rule did not permit enforcement that "would violate applicable Federal statutory protections for religious freedom and conscience," *id.* at 31,466, and it further explained that RFRA "is the proper means to evaluate any religious concerns about the application of Section 1557 requirements," *id.* at 31,380. The 2016 Rule stated that HHS would evaluate "individualized and fact specific" RFRA claims "on a case-by-case basis[.]" *Id.* The 2016 Rule's prohibition on

gender-identity discrimination was preliminarily enjoined on a nationwide basis later in 2016. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 (N.D. Tex. 2016).[1] Prior to this litigation, the same court granted summary judgment to the plaintiffs and vacated, as relevant here, the 2016 Rule's prohibition on gender-identity discrimination. *See Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).[2]

B. The 2020 Rule and Related Litigation

In 2019, while the 2016 Rule remained preliminarily enjoined, HHS issued a Notice of Proposed Rulemaking indicating that it intended to revise the 2016 Rule. *See Nondiscrimination in Health and Health Education Programs or Activities*, 84 Fed. Reg. 27,846 (proposed June 14, 2019) ("2019 NPRM"). The 2019 NPRM indicated that HHS intended to repeal the 2016 Rule's definition of discrimination "on the basis of sex" altogether. But the notice also observed that the Supreme Court had granted several petitions for certiorari to determine whether Title VII's bar on sex discrimination included gender identity and sexual orientation discrimination. *Id.* at 27,855. HHS acknowledged the likely consequence of the Supreme Court's decision to its own

[1] Several similar challenges to the 2016 rule were also filed in this district. *See Religious Sisters of Mercy v. Burwell*, No. 3:16-cv-386, Compl., ECF No. 1 (D.N.D. Nov. 7, 2016); *Catholic Benefits Ass'n v. Burwell*, No. 3:16-cv-432, Compl., ECF No. 1 (D.N.D. Dec. 28, 2016). The district court consolidated those cases and stayed enforcement of the 2016 rule against the named plaintiffs. *See Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1127 (D.N.D. 2021). The district court later entered final judgment in favor of plaintiffs. *Religious Sisters of Mercy v. Cochran*, No. 3:16-cv-00386, 2021 WL 1574628 (D.N.D. Feb. 19, 2021). The Eighth Circuit affirmed in part and remanded, holding that the Catholic Benefits Association had not shown associational standing but otherwise affirming. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 609 (8th Cir. 2022).

[2] More recently, and as relevant here, the court that originally preliminarily enjoined the gender-identity discrimination provision of 2016 Rule entered a permanent injunction prohibiting HHS "from interpreting or enforcing Section 1557 . . . or any implementing regulation thereto against Plaintiffs . . . in a manner that would require them to perform or provide insurance coverage for gender-transition procedures or abortions[.]" *See generally Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 367 (N.D. Tex. 2021). The Fifth Circuit held that the plaintiffs' claim under the Administrative Procedure Act was moot, but otherwise affirmed. *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 380 (5th Cir. 2022).

interpretation of Title IX because "Title IX adopts the substantive and legal standards of Title VII[.]" *Id.* Rather than propose a new definition of discrimination "on the basis of sex," HHS indicated it would permit the federal courts to supply the term's "proper legal interpretation." *Id.* at 27,873.

Shortly before the Supreme Court's decision in *Bostock*, HHS released its new rule. *See Nondiscrimination in Health and Health Education Programs or Activities*, 85 Fed. Reg. 37,160 (June 19, 2020) ("2020 Rule"). Consistent with the 2019 NPRM, the 2020 Rule rescinded the 2016 Rule's definition of "on the basis of sex." *Id.* at 37,167. The 2020 Rule gave no supplemental definition for that term beyond Title IX's statutory text. The rule's preamble further omitted the specific examples of discriminatory conduct supplied by the 2016 Rule's preamble, including its example about gender-transition services. *Id.* at 37,201. And it further explained that HHS did not believe either § 1557 or Title IX prohibited gender-identity discrimination. *Id.* at 37,168. The 2020 Rule also expressly incorporated Title IX's existing statutory exemption for educational institutions controlled by religious organizations, in addition to acknowledging that RFRA and any similar laws would apply under § 1557. *Id.* at 37,204.

The Supreme Court issued its decision in *Bostock* three days after HHS published the 2020 Rule, holding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. Shortly thereafter, several courts concluded that the 2020 Rule likely violated the Administrative Procedure Act because it did not appropriately consider *Bostock* prior to issuance. As relevant here, one district court enjoined the repeal of the 2016 Rule's definition of sex discrimination, but stated that it could not overturn the earlier vacatur of the gender identity language by the *Franciscan Alliance* district court. *See Walker v. Azar*, 480 F. Supp. 3d 417, 427

(E.D.N.Y. 2020). A second district court issued a preliminary injunction enjoining the repeal of "sex stereotyping" language in the 2016 definition of sex discrimination, and further enjoining the 2020 Rule's incorporation of Title IX's statutory religious exemption. *See Whitman-Walker Clinic, Inc. v. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, 64-65 (D.D.C. Sept. 2, 2020). Both district courts acknowledged that their orders did not disturb the *Franciscan Alliance* district court's 2019 vacatur of the 2016 Rule's definition of sex discrimination that incorporated gender-identity discrimination. *See Whitman-Walker*, 485 F. Supp. 3d at 14 (acknowledging *Franciscan Alliance* vacatur); *Walker*, 480 F. Supp. 3d at 427 (same). The 2020 Rule remains in effect subject to these two preliminary injunctions.[3]

C. The 2021 Notification

On May 10, 2021, in response to the President's Executive Order, HHS issued 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*. *See* Compl. ¶ 116, ECF No. 1; *see also* 86 Fed. Reg. 27,984 (May 25, 2021) ("Notification"). The Notification explained that it was intended to "inform the public" that "consistent with the Supreme Court's decision in *Bostock* and Title IX," HHS "will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) [d]iscrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity." 86 Fed. Reg. at 27,984. The Notification did not take any position on the meaning or scope of discrimination on the basis of sexual orientation or gender identity, nor did it provide examples of such impermissible conduct. Instead, it states that while the "interpretation will guide [the Office for Civil Rights (OCR)] in processing complaints and

[3] HHS appealed each of the two preliminary injunctions on the 2020 rule but has since stipulated to dismissal in both appeals. *See Walker v. Becerra*, No. 20-3580 (2d Cir. Oct. 16, 2020); *Whitman-Walker Clinic v. HHS*, No. 20-5331 (D.C. Cir. Nov. 9, 2020).

conducting investigations, [it] does not itself determine the outcome in any particular case or set of facts." *Id.* Indeed, the Notification does not say *anything* about enforcement proceedings in any particular case or set of facts.

The Notification explained that *Bostock* held that "the plain meaning of 'because of sex' in Title VII necessarily included discrimination because of sexual orientation and gender identity." *Id.* at 27,985 (citing *Bostock*, 140 S. Ct. at 1753-1754). It observed that several courts had since concluded that the plain language of Title IX—which bars discrimination "on the basis of sex"—must be read similarly. *Id*. Further, the Notification cited an interagency memorandum from the Civil Rights Division of the Department of Justice concluding that the reasoning of *Bostock* applies with equal force to Title IX. *Id.* Finally, the Notification stated that HHS "will comply with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and all other legal requirements," including "any applicable court orders that have been issued in litigation involving the Section 1557 regulations." *Id*.

A federal district court declared the Notification unlawful under the Administrative Procedure Act. *See Neese v. Becerra*, 640 F. Supp. 3d 668 (N.D. Tex. 2022); Final Judgement, *Neese*, No. 2:21-cv-163-Z, ECF No. 71 (N.D. Tex. Nov. 22, 2022). That ruling is currently on appeal. *Neese v. Becerra*, No. 23-10078 (5th Cir. Jan. 25, 2023).

D. The 2022 NPRM

On August 4, 2022, HHS and OCR promulgated a Notice of Proposed Rulemaking proposing a rule to implement Section 1557, which would supersede the 2020 Rule and any aspects of the 2016 Rule deemed to remain in effect. *See Nondiscrimination in Health Programs and Activities*, 87 Fed. Reg. 47,824 (Aug. 4, 2022) ("2022 NPRM"). That rulemaking is ongoing.

The proposed rule in the 2022 NPRM states that "[d]iscrimination on the basis of sex includes," among other things, "discrimination on the basis of . . . gender identity." *Id.* at 47,916

(proposed 45 C.F.R. § 92.101(a)(2)). The proposed rule also states that it does not "require[] the provision of any health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting that service[.]" 87 Fed. Reg. at 47,918 (proposed 45 C.F.R. § 92.206(c)). The preamble states that under the proposed rule, health care providers may decline "to perform services outside of their normal specialty area" because "a provider that declines to provide services outside its specialty area would have a legitimate, nondiscriminatory reason for its action." 87 Fed. Reg. at 47,867.

The NPRM also proposes instituting a procedure in which a covered entity could assert claims that it is entitled to an exemption from the rule due to the application of federal conscience or religious freedom laws, and OCR would hold any investigation or enforcement activity regarding the covered entity in abeyance until it made a determination on the entity's entitlement to a religious exemption. *Id.* at 47,918-19 (proposed 45 C.F.R. § 92.302). HHS and OCR explained this proposed provision as follows:

> OCR maintains an important civil rights interest in the proper application of Federal conscience and religious freedom protections. In enforcing Section 1557, OCR is thus committed to complying with RFRA and all other legal requirements. The Department believes that the proposed approach in this section will assist the Department in fulfilling that commitment by providing the opportunity for recipients to raise concerns with the Department, such that the Department can determine whether an exemption or modification of the application of certain provisions is appropriate under the corresponding Federal conscience or religious freedom law. As noted above, the Department also maintains a strong interest in taking a case-by-case approach to such determinations, which will allow it to account for any harm an exemption could have on third parties and, in the context of RFRA, to consider whether the application of any substantial burden on a person's exercise of religion is in furtherance of a compelling interest and is the least restrictive means of advancing that compelling interest.

Id. at 47,886.

RESPONSE TO PLAINTIFF'S RECITATION OF FACTS UNDER LOCAL CIV. R. 7.1(A)(2)

I. Response To Part I

Part I of Plaintiff's Recitation asserts alleged facts relating to CEA or its members, but many of these statements are not supported by any record evidence that may properly be considered on a motion for summary judgment. Under the Federal Rules, "[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Apart from CEA's bylaws and articles of incorporation, the only source cited by CEA to support Part I is the Verified Amended Complaint. That complaint is verified by Shannon O. Royce, the President of CEA. *See* Am. Compl., Verification, at 55. CEA must therefore show that Ms. Royce has "personal knowledge[]" of the matters asserted in allegations cited in its factual recitation, and that she "is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

Allegations in the Amended Complaint verified by Ms. Royce are "not admissible" on a motion for summary judgment to the extent that Ms. Royce "does not 'show affirmatively that [she] is competent to testify' to that matter." *Brooks v. Tri-Sys., Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005). Although courts may "infer personal knowledge from the content or context of a statement in an affidavit," a court cannot consider statements in a declaration where its "content and context . . . do not support an inference that it reflected . . . personal knowledge." *Id.* at 1111-12.

The verification states that the allegations are true "to the best of [Ms. Royce's] knowledge," Am. Compl., Verification, at 55, but does not assert or show that Ms. Royce has personal knowledge. The only allegation in the Amended Complaint concerning Ms. Royce's

knowledge alleges that Ms. Royce "is the President of Christian Employers Alliance, and has personal knowledge of the facts about CEA and its members asserted herein." Am. Compl. ¶ 24. However, a mere conclusory assertion of personal knowledge is insufficient. *See Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) ("summary judgment affidavits cannot be conclusory[]"); *Drake v. Stenehjem*, No. 1:20-cv-00231, 2023 WL 6049251, at *4 n.1 (D.N.D. Sept. 15, 2023) (a plaintiff "is not permitted 'to replace conclusory allegations of a complaint or answer with conclusory allegations of an affidavit'") (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

The Court therefore must assess whether Ms. Royce affirmatively set forth facts showing her personal knowledge of the allegations in the Amended Complaint supporting the Recitation. Although it is perhaps a reasonable inference from Ms. Royce's position as President of CEA that she has personal knowledge of CEA's organizational structure and activities, it is not a fair inference that she has personal knowledge of the religious beliefs and activities of CEA's "numerous members," Am. Compl. ¶ 54. Nothing in the Amended Complaint shows that Ms. Royce has conducted any investigation into the religious beliefs and activities of CEA's members writ large, or into the religious beliefs and activities of the two members identified in the Amended Complaint, Trinity Bible College & Graduate School and Children's Center Rehabilitation Hospital. To the extent that Ms. Royce contends she has knowledge of these matters based on out-of-court statements that CEA's members made to her, then her recitation of those statements to establish the truth of the matters asserted constitutes hearsay inadmissible on summary judgment. *See Brooks*, 425 F.3d at 1111 ("When an affidavit contains an out-of-court statement offered to prove the truth of the statement that is inadmissible hearsay, the statement may not be used to support or defeat a motion for summary judgment."); *Ward v. Int'l Paper Co.*, 509 F.3d 457, 462

(8th Cir. 2007) (rejecting admission of summary judgment affidavits based on information that the affiants "heard" or "learned" from others).

Many of the factual assertions in Part I of the Recitation are not supported by any evidence that is admissible on a motion for summary judgment. For example, the Recitation asserts: "CEA members commit to integrating their Christian convictions into every aspect of their operations, whether ministry or business." Pl.'s Mem. in Supp. of Mot. for Partial Summ. J. 3, ECF No. 69-1 ("Mem."). The Recitation cites this allegation in support of the statement: "CEA members are Christ-centered organizations, dedicated to integrating their Christian convictions into every aspect of their operations, whether ministry or business. Their sincerely held religious beliefs include traditional Christian teachings on God's purposeful design and creation of individuals as male or female, which is a gift from God and immutable." Am. Compl. ¶ 31. But Ms. Royce sets forth no facts showing that she has personal knowledge of the sincerely held religious convictions of CEA's members, or how they integrate those convictions into their operations.

Also unsupported is the statement that "CEA members believe and teach that God's creation of individuals as two, distinct biological sexes of male and female, is immutable, reflects the image and likeness of God, and is complementary to each other." Mem. 3. Again, Ms. Royce sets forth no facts showing that she has personal knowledge of whether each, or any, of CEA's members hold these religious beliefs. CEA also cites its Bylaws, which state that its "Members shall subscribe to" a listed "Statement of Faith" and "Christian Ethical Convictions." Am. Compl., Ex. 1 §§ 1.1, 1.3, ECF No. 68-1. But the Amended Complaint contains no evidence that CEA makes any effort to verify whether each or any Member in fact holds each of the religious beliefs listed in the Statement of Faith and Christian Ethical Convictions. Furthermore, the fact that an employer has subscribed to a high-level set of statements of faith does not address how that

employer exercises its religious beliefs in the conduct of its business, and how (if at all) the employer's religious exercise is burdened by government regulation. Other statements in the Recitation similarly include assertions about the religious beliefs and activities of CEA members that are not supported by record evidence because Ms. Royce does not show that she has personal knowledge of the matters asserted.[4]

The Recitation also asserts various facts about two members of CEA: Trinity Bible College & Graduate School and Children's Center Rehabilitation Hospital. *See* Mem. 5-6. This section makes assertions about these members' religious beliefs, business activities, and the services they

[4] *See*, *e.g.*, Mem. 4 ("CEA members believe and teach that the rejection of one's biological sex is a rejection of the image of God within that person."); *id.* ("CEA members therefore believe and teach that gender transition and reassignment (and the procedures necessary to accomplish it) are wrong, and that they cannot, as a matter of religious conscience and conviction, knowingly or intentionally perform, participate in, pay for, facilitate, enable, or otherwise support access to gender transition surgeries and procedures, including through their employer-provided health plans or health insurance coverage."); *id.* ("The commitment of CEA members to comply with Christian Values and Christian Ethical Convictions in their provision of healthcare services and health insurance or coverage benefits is part of CEA members' religious witness and religious exercise."); *id.* at 4-5 ("To avoid violating their religious beliefs, . . . [CEA's] members wish to sponsor health plans that categorically exclude coverage of gender reassignment therapies, treatments, procedures, medication, or counseling affirming or encouraging such reassignment or transition."); *id.* at 5 ("Pursuant to these commitments, CEA members that provide health plans or health insurance coverage to their employees either already categorically exclude coverage for gender transition services or desire to categorically exclude such coverage for gender transition services."); *id.* at 7 ("CEA members, as part of their religious exercise, wish to arrange their employer-provided health plans or health insurance coverage to contain an explicit categorical exclusion or limitation of coverage for all health services related to gender transition."); *id.* at 12 ("The Healthcare Members are healthcare providers that receive Federal financial assistance and are thus under immediate threat of enforcement."); *id.* at 13 ("However, the Healthcare Members have religious, moral, ethical, conscientious, medical, and free speech objections to HHS Gender Identity Mandate."); *id.* ("The Healthcare Members currently do not have past or current policies or practices in their healthcare activities that comply with HHS Gender Identity Mandate and they wish to continue their current policies and practices in the future, rather than change their practices to conform to the government's mandate.").

wish not to perform and for which they do not wish to provide insurance coverage.[5] But this section is supported only by citations to the Amended Complaint, verified by Ms. Royce. The Amended Complaint does not indicate any source of Ms. Royce's knowledge about these matters. *See generally* Am. Compl. ¶¶ 62-75 (making allegations about Trinity Bible College & Graduate School and Children's Center Rehabilitation Hospital but not indicating any basis for personal knowledge). To the extent that Ms. Royce has knowledge based on statements that these members made to her, then her relaying those statements through the Amended Complaint is inadmissible hearsay. *See Brooks*, 425 F.3d at 1111; *Ward*, 509 F.3d at 462. Accordingly, the Recitation's assertions about Trinity Bible College & Graduate School and Children's Center Rehabilitation Hospital are not supported by admissible evidence.

II. Response To Part II

Part II of the Recitation contains statements about the legal effects of Title VII, EEOC guidance documents, and EEOC's investigative or enforcement activities. These statements are not the proper subject of a summary judgment factual recitation because they are legal conclusions and arguments, not factual assertions. *See* Fed. R. Civ. P. 56(c)(1) (party moving for summary judgment must support with evidence an "asserti[on] that *a fact* cannot be . . . disputed") (emphasis added); D.N.D. Civ. L. R. 7.1(A)(2) (summary judgment memorandum shall contain "a recitation of *the material facts* that the moving party claims are uncontested") (emphasis added). Furthermore, most of these statements are supported only by allegations in the Amended Complaint. As explained above, Ms. Royce does not show that she has personal knowledge supporting those allegations.

[5] *See also* Mem. 8-9 ("Multiple CEA members, including the Children's Center, are principally engaged in the business of providing healthcare who receive Federal financial assistance (the 'Healthcare Members') and are thus subject to Section 1557's nondiscrimination provisions.").

Many of the statements in Part II are inaccurate, misleading, or incomplete. CEA states that EEOC "has interpreted Title VII's prohibition on 'sex' discrimination to encompass discrimination on the basis of 'gender identity, including transgender status, or because of sexual orientation.'" Mem. 6. What CEA calls EEOC's "interpret[ation]" of Title VII is the Supreme Court's holding in *Bostock*. CEA further ignores that EEOC has issued a Compliance Manual, which states that the "applicability and scope of . . . defenses based on Title VII's interaction with the First Amendment or . . . [RFRA] is an evolving area of the law." EEOC's Compliance Manual,§ 12-1-C. The EEOC Compliance Manual also counsels EEOC investigators to "take great care" in situations involving RFRA, directs EEOC personnel to "seek the advice of the EEOC Legal Counsel in such a situation," and notes that "on occasion, the [EEOC] Legal Counsel may consult as needed with the U.S. Department of Justice." *Id.*

CEA's assertion that "[t]he EEOC has applied this interpretation to require employers that are subject to Title VII to pay for and provide gender transition services for employees through health plans or employee health insurance coverage," Mem. 6-7, is inaccurate and lacks any evidentiary support. EEOC has never filed an enforcement action against any employer, much less a religious employer, to require payment for or the provision of insurance coverage for gender transition services, and CEA cites no example of EEOC ever having done so. CEA also fails to point to any CEA member who has faced a charge being filed against it based on its health insurance coverage.

CEA asserts that "[t]he EEOC's interpretation categorically prohibits employers from excluding gender transition services in their group health plans," *id.* at 7, but again, this ignores that EEOC has never issued a document imposing such a "categorical prohibition," and in fact,

EEOC has recognized the potential applicability of religious defenses, which must be evaluated on a case-by-case basis.[6]

Supported only by an allegation in the Amended Complaint, CEA asserts: "Based on its interpretation of 'sex' under Title VII, the EEOC would pursue Title VII enforcement actions against employers with gender transition services exclusions or limitations in their health plans." *Id.* Ms. Royce lacks personal knowledge to speculate on what EEOC "would" do in the future. CEA points to no past enforcement that supports this speculation, and with respect to religious employers, EEOC has stressed the importance of respecting rights under RFRA and evaluating the applicability of religious defenses on a case-by-case basis. Similarly, CEA's statement that a religious employer's exclusion of gender transition services from an employee health insurance plan "would be an unlawful act under the EEOC's interpretation," ignores that EEOC recognizes the applicability of RFRA in its Title VII enforcement.

Unsupported by any citation, CEA asserts that EEOC has enforced its alleged "Coverage Mandate," *id.*, but each of the supposed examples described by CEA are misleading. CEA suggests that in *EEOC v. Deluxe Financial Services, Inc.*, No. 0:15-cv-2646 (D. Minn. Jan. 20, 2016), EEOC prevented an employer from excluding gender-affirming care from an employee health plan. Mem. 7. But in that case, EEOC did *not* assert any claims concerning the scope of gender transition services covered by the employer's insurance plan. *See* Compl., *EEOC v. Deluxe Fin. Servs., Inc.*, No. 0:15-cv-2646, ECF No. 1 (D. Minn. June 4, 2015). Instead, the *employee* in question intervened and asserted such claims. *See* Compl. in Intervention, *Deluxe Fin. Servs., Inc.*, No. 0:15-cv-2646, ECF No. 26 (D. Minn. Oct. 22, 2015). The district court subsequently entered

[6] *See*, *e.g.*, *Newsome v. EEOC*, 301 F.3d 227, 229-230 (5th Cir. 2002) (per curiam) (describing a case in which EEOC dismissed a charge where the employer offered evidence that it was exempt from the religious discrimination provisions of Title VII pursuant to 42 U.S.C. § 2000e-1(a)).

a consent decree signed by all parties providing relief on the insurance-coverage claim. *See* Consent Decree at 11, *Deluxe Fin. Servs., Inc.*, No. 0:15-cv-2646, ECF No. 37 (D. Minn. Jan. 20, 2016). But at no point in the proceedings did EEOC itself adopt the private employee's legal theories as its own, and CEA may not impute the private litigant's challenge to EEOC. *See Balogh v. Lombardi*, 816 F.3d 536, 544 (8th Cir. 2016).

CEA also points to an amicus brief that EEOC filed in *Robinson v. Dignity Health*, No. 16-cv-3035, 2016 WL 11517056 (N.D. Cal.). *See* Mem. 7. But the claimant there was a private employee pursing a Title VII claim, not EEOC. In fact, EEOC *declined* to pursue its own enforcement action in that case. *Robinson*, No. 16-cv-3035, ECF No. 1-2 at 5, (N.D. Cal. June 6, 2016). Moreover, the employer did *not* raise any religion-based defenses to the private employee's claim. *See Robinson*, No. 16-cv-3035, ECF No. 49-1 (N.D. Cal. Sept. 7, 2016); *id.*, No. 16-cv-3035, ECF No. 50 (N.D. Cal. Sept. 8, 2016). The *Robinson* amicus brief therefore is not an example of EEOC enforcement against any employer, and certainly sheds no light on EEOC's views on whether religious employers should be compelled to provide insurance coverage for services to which they object. CEA also cites HHS's 2016 regulation implementing Section 1557 to argue that EEOC "has even cooperated with HHS to ensure employer healthcare plans cover gender transition procedures." Mem. 8. But HHS's 2016 Rule stated only that when HHS "lack[ed] jurisdiction over an employer responsible for" an allegedly discriminatory health insurance plan, HHS "typically will refer or transfer the matter to EEOC and allow that agency to address the matter." 81 Fed. Reg. at 31,432. That rule did not state that EEOC would take any particular enforcement action on any such referred matter or reflect an agreement on EEOC's part to do so. In fact, if the EEOC were to receive such a referral, it would treat it as a charge and go through its usual investigation process. *See* 28 C.F.R. § 42.605.

CEA cites a technical assistance document that EEOC issued in 2021 concerning EEOC's interpretation of Title VII's prohibition of sex discrimination. Mem. 8. But that document, which was non-binding in the first instance and has now been vacated by a district court in Texas, does not mention health insurance coverage. Moreover, it recognizes that "[c]ourts and the EEOC consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws," and cites the EEOC Compliance Manual quoted above. EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender. In addition, because that technical assistance document was vacated by a federal district court, it cannot be relied upon as evidence of EEOC's potential legal positions in hypothetical future enforcement actions. *Texas v. EEOC*, 633 F. Supp. 3d 824, 847 (N.D. Tex. 2022).

In sum, CEA fails to support with record evidence its assertions that EEOC has a "Coverage Mandate," has "enforced the EEOC Coverage Mandate in the past, and it will continue to do so today against CEA members." Mem. 8. Because its claim is predicated on there being a "Coverage Mandate" that its members are violating, and CEA has failed to establish this material fact, its motion for summary judgment should be denied.

III. Response To Part III.

Part III of the Recitation contains statements about the legal effects of Section 1557 and various actions by HHS. Like Part II, Part III asserts legal conclusions that are not the proper subject of a summary judgment factual statement and in any case are not supported by a declarant who demonstrates personal knowledge. *See supra*, p. 16. Also like Part II, Part III contains several statements that are inaccurate, incomplete, or misleading.

CEA states: "Since 2016, HHS has promulgated rules and notices insisting that Section 1557 prohibits gender identity discrimination by any entity principally engaged in providing healthcare that receives Federal financial assistance (referred to as the 'HHS Gender Identity Mandate')." Mem. 9. But CEA ignores that HHS has repeatedly indicated that its enforcement of civil rights laws is subject to federal religious freedom protections, such as RFRA, and that HHS abides by such laws when enforcing the civil rights laws. *See, e.g.*, 81 Fed. Reg. at 31,466 ("application" of requirements of rule implementing Section 1557 "shall not be required" where it "would violate applicable Federal statutory protections for religious freedom and conscience[]"); 85 Fed. Reg. at 37,207 (HHS "is bound to enforce Section 1557 in compliance with RFRA"); 87 Fed. Reg at 47,886 (notice of proposed rulemaking) ("OCR is thus committed to complying with RFRA and all other legal requirements").[7]

CEA states: "The 2016 Rule required covered healthcare providers to perform gender transition services, even if those services were not medically necessary. Thus, if a healthy individual desired medical procedures to change features of his or her biological sex, the healthcare provider had to perform those services; or if the provider did not typically perform those services (i.e., did not specialize in them), the provider had to refer the individual to someone who did." Mem. 9. But the cited page of the 2016 Rule's preamble states only that denials of service based on sex "without a legitimate nondiscriminatory reason" could be discriminatory, and that under some circumstances, refusing to perform a "medically necessary" service related to gender transition could be discriminatory. 81 Fed. Reg. at 31,455. The 2016 Rule did not say that

[7] Further, the agency's recent notice of proposed rulemaking implementing Section 1557 proposes a procedure under which, if a covered entity asserts rights under a federal conscience or religious freedom law, HHS will not take action unless and until HHS makes a determination on the entity's entitlement to an exemption. *See* 87 Fed. Reg. at 47,918-19.

providers are obligated to provide services regardless of medical necessity. In any event, the 2016 Rule's provisions regarding discrimination on the basis of gender identity were vacated by a federal district court and are no longer in effect. *See Franciscan All.*, 414 F. Supp. 3d at 928.

CEA acknowledges the *Franciscan Alliance* court's vacatur of the 2016 Rule, but states: "However, two district courts entered injunctions ordering HHS to reinstate the 2016 Rule's definition of 'sex' to include gender identity." Mem. 10. That is incorrect. Both district courts recognized that they could not revive portions of the 2016 Rule vacated by *Franciscan Alliance*. *See Whitman-Walker Clinic, Inc. v. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, 26 (D.D.C. 2020) (explaining that the court was "powerless to revive" provisions that the *Franciscan Alliance* district court had vacated); *Walker v. Azar*, 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020) (acknowledging that court had "no power to revive [provisions] vacated by another district court").

CEA mischaracterizes an executive order in asserting that "President Biden signed an executive order on his first day in office requiring that Section 1557 and Title IX be interpreted nationwide to include gender identity as a protected trait." Mem. 10. The cited executive order directed agency heads to "review" existing regulations, orders, and guidance regarding sex discrimination and "consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions," but the order did not direct a specific outcome of such review or consideration. *See Preventing and Combating Discrimination on the Basis of Gender or Sexual Orientation*, Exec. Order 13,988, 86 Fed. Reg. 7023, 7023-24 (Jan. 20, 2021).

CEA states that HHS has imposed a "Gender Identity Mandate" that "currently requires covered healthcare providers perform the following non-exclusive list," before listing 23 services that HHS purportedly requires every healthcare provider covered by Section 1557 to perform. Mem. 11-12. But HHS has not imposed a "Gender Identity Mandate," as CEA tacitly admits when

it professes not to know when or where HHS has imposed such a mandate. *See* Am. Compl. ¶ 229 (seeking relief "whether the current HHS Gender Identity Mandate arises from the 2016 Rule or the 2021 Notice of Enforcement, or both, from any still-in-effect sections of the 2020 Rule or applicable court orders, or from any HHS regulations imposing the same mandate"). Although HHS has taken the general position that sex discrimination includes discrimination on the basis of gender identity, HHS has never taken the position that it always constitutes gender identity discrimination to decline to perform any of the 23 services listed by CEA.

CEA incorrectly asserts that "HHS currently recognizes no RFRA exemptions under its interpretation of Section 1557 except those ordered by a court." Mem. 13. As explained above, HHS has consistently reaffirmed that its enforcement of Section 1557 is subject to the protections of RFRA. *See supra*, p. 21. Recently, HHS closed an investigation of a religious hospital under Section 1557 based on its conclusion that the hospital's decision not to provide a service on the basis of its religious beliefs was protected by RFRA. *See* OCR Closure Letter, Ex. 1, attached hereto.[8]

Finally, CEA asserts that "[t]he Healthcare Members are thus under an immediate threat of enforcement of HHS Gender Identity Mandate." Mem. 13. Aside from Ms. Royce's lack of showing of a basis for personal knowledge to support this assertion, CEA provides no evidence (not even from Ms. Royce) that HHS has ever threatened any CEA member with enforcement.

LEGAL STANDARD

A party moving for summary judgment has the burden of "show[ing] that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *RSA 1 Ltd. P'ship v. Paramount Software Assocs., Inc.*, 793 F.3d 903, 906 (8th Cir. 2015);

[8] HHS has previously filed this redacted letter in other litigation. *See Texas v. Becerra*, No. 7:23-cv-00022, ECF No. 55-1 (W.D. Tex. Oct. 10, 2023).

see also Fed. R. Civ. P. 56(a). "The movant must identify portions of the record that he 'believes demonstrate the absence of a genuine issue of material fact.'" *RSA*, 793 F.3d at 906 (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)). A plaintiff must support its standing "with the manner and degree of evidence required at the successive stages of the litigation," which at the summary judgment stage, requires "affidavit or other evidence." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "An affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

ARGUMENT

I. CEA Lacks Associational Standing To Represent Its Members

To demonstrate associational standing to sue on behalf of its members, an organization must show: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. CEA fails to show that it satisfies either the first or third requirement.

A. CEA Fails To Demonstrate That Any Identified Member Has Standing

To establish associational standing, an organization must show that at least "one of" its members would have standing to sue individually. *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013). The member or members whose individual standing supports associational standing must be identified. *Religious Sisters of Mercy*, 55 F.4th at 601 (agreeing "that the district court's conclusion that members on whose behalf suit is brought may remain unnamed is contrary to the Supreme Court's requirement that an organization must identify particular members and their injuries in order to establish associational standing") (quotations omitted). Here, CEA argues

that two identified members, Trinity Bible College & Graduate School and Children's Center Rehabilitation Hospital, have standing. Mem. 32-33. But CEA fails to demonstrate these members' standing with evidence admissible on summary judgment.

CEA's claim that the two identified members have standing rests on the factual assertions that both members have more than 15 employers (as necessary to be covered by Title VII); both members object to providing health insurance coverage for gender transition services; the Children's Center Rehabilitation Hospital is principally engaged in providing healthcare services and receives federal funding; the Children's Center Rehabilitation Hospital objects to providing gender transition services; and both members face an imminent threat of enforcement as a result of their practices. *See id.* at 5-6, 32-33.

However, as explained above, those factual assertions are supported only by declarations of CEA President Shannon Royce, and Ms. Royce fails to show that she has personal knowledge of these alleged facts. Therefore, her statements regarding these members are inadmissible on summary judgment. *See Brooks*, 425 F.3d at 1111 (summary judgment affidavit "is not admissible because the affidavit does not 'show affirmatively that the affiant is competent to testify' to that matter"). To the extent Ms. Royce claims to have knowledge of the members' activities because of statements the members made to her, such repetitions of what she "learned" or "heard" from the members would be "inadmissible hearsay." *Ward*, 509 F.3d at 462. Accordingly, CEA has not met its burden at the summary judgment stage to show that any identified member has standing.

The Court's preliminary injunction ruling is not to the contrary. In addressing associational standing at the preliminary injunction stage, the Court did not hold that CEA had shown that any identified member had standing. Rather, the Court concluded that the members supporting associational standing "are permitted to be unnamed." Order Granting Mot. for Prelim. Inj. 9, ECF

No. 39. But *Religious Sisters* and Supreme Court precedent clearly require an organization asserting associational standing "to identify members who have suffered the requisite harm." 55 F.4th at 602 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). CEA has failed to make the showing required by *Religious Sisters* and the Supreme Court.

B. Participation Of Individual Members Is Required

CEA also fails to demonstrate associational standing because its RFRA claims "require[] the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. In *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court held that an organization lacked associational standing to bring a First Amendment free exercise claim against HHS's predecessor because the participation of individual members was required. The Court explained that "[s]ince it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, the claim asserted here is one that ordinarily requires individual participation." *Id.* at 321 (quotation omitted). Other courts have similarly rejected associational standing in free exercise claims based on the necessity of individual participation. *See Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) ("*Harris* precludes Cornerstone's standing to bring the free exercise claim in this case. The involvement of parents and students, such as the Farharts, is essential to the resolution of the individualized element of coercion within this free exercise claim."); *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1288 (5th Cir. 1992) ("[I]t appears likely that the Society's claim would require the participation of individual members. It is often difficult for religious organizations to assert free exercise claims on behalf of their members because the religious beliefs and practices of the membership differ.").

The same reasoning applies to RFRA claims. As the Supreme Court has explained, Congress enacted RFRA to codify the standard that the Supreme Court had previously applied to

free exercise claims at the time that *Harris* was decided. *See City of Boerne v. Flores*, 521 U.S. 507, 512-16 (1997). RFRA provides that the "Government shall not substantially burden a person's exercise of religion," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA requires individual consideration of the claimant's religious beliefs, whether the application of a law to the claimant substantially burdens the claimant's exercise of religion, and whether, given the claimant's specific circumstances, the government can "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). The "to the person" analysis required by RFRA is incompatible with blanket application of RFRA to the entire membership of an organization with "numerous members," Am. Compl. ¶ 54, without the individual members' participation.

CEA asserts that individual member participation is not required because "CEA's verified complaint pleads that all their members now, and any members admitted in the future, ascribe to CEA's beliefs concerning this case." Mem. 33. This is incorrect for three reasons. First, the Amended Complaint does not show, as required for a summary judgment declaration, that Ms. Royce has personal knowledge of the religious beliefs and practices of every CEA member. *See supra*, pp. 12-16. Nor can Ms. Royce claim to have personal knowledge of the religious beliefs of unknown future members of CEA. Second, even if the Court accepted CEA's assertion that its members have identical religious beliefs on gender transition services, the Court would still need to consider whether each member acts on those religious beliefs in such a way that a purported

requirement to provide insurance coverage for or perform gender transition services would "substantially burden" each member's "exercise of religion." 42 U.S.C. § 2000bb-1(a). The high-level principles of faith in CEA's Bylaws do not establish how all CEA members exercise their religious beliefs in the conduct of their business, or how (if at all), their religious exercise has been burdened. Third, even if each member had established a substantial burden on religious exercise, the Court would still need to consider whether, given each member's individual circumstances, imposing such a burden was "the least restrictive means of furthering" a "compelling government interest." *Id.* § 2000bb-1(b). That test demands a fact-specific "application of the challenged law 'to the person,'" *O Centro*, 546 U.S. at 430, which is impossible without the presence of the members. *Cf. Ramirez v. Collier*, 595 U.S. 411, 433 (2022) (holding that the Religious Land Use and Institutionalized Persons Act, which applies RFRA's test in the prison setting, "requires that courts take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened'") (quoting *Holt v. Hobbs*, 574 U.S. 352, 363 (2015)).[9]

II. CEA Has Not Shown That Its Members' Religious Exercise Has Been Substantially Burdened

CEA is not entitled to summary judgment on the merits of its RFRA claims because it has not shown that its members' religious exercise has been "substantially burden[ed]." 42 U.S.C. § 2000bb-1(a). "Substantially burdening one's free exercise of religion means that the regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express

[9] The Court's preliminary injunction ruling is not to the contrary. The Court's associational standing analysis addressed only the first two requirements for associational standing, but did not address the third requirement for associational standing. *See* ECF No. 39 at 9. The Eighth Circuit's ruling in *Religious Sisters* did not address the third requirement at all, because the court held that the organizational plaintiff had failed to meet the first requirement. *See Religious Sisters*, 55 F.4th at 601-02.

adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008). CEA does not contend or provide evidence that any of its members because of the alleged EEOC and HHS mandates, are currently violating their religious convictions by offering insurance coverage for gender transition services or by performing gender transition services. Nor does CEA provide any evidence that EEOC or HHS has taken any action against any of CEA's members to impose any adverse consequences on them (or, for that matter, any other religious employer or healthcare provider) for action in violation to the supposed "mandates."[10] Indeed, EEOC has never filed an enforcement action against any employer, much less an employer asserting religious objections, for not offering coverage for gender transition services. Likewise, HHS has not enforced Section 1557 against a healthcare provider for not providing gender transition services, nor has HHS found that a healthcare provider with a religious objection was required to provide gender transition services.

Furthermore, both EEOC and HHS have made clear that they operate in compliance with RFRA when enforcing Title VII and Section 1557, respectively. EEOC's Compliance Manual directs EEOC investigators to "take great care" in situations involving RFRA, directs EEOC personnel to "seek the advice of the EEOC Legal Counsel in such a situation," and notes that "on occasion, the [EEOC] Legal Counsel may consult as needed with the U.S. Department of Justice." EEOC Compliance Manual § 12-1-C. Likewise, HHS has repeatedly reaffirmed across three

[10] CEA has not identified its members other than the two members named in the Amended Complaint. The preliminary injunction provides that EEOC and HHS do not violate the injunction by taking any action against an entity without knowledge of the entity's status as a member, but EEOC and HHS shall promptly comply with the injunction upon being notified that the entity is a member. *See* Order Granting Mot. to Am./Correct 4-5, ECF No. 44. CEA does not contend that any member has had to resort to this process during the time the preliminary injunction has been in place, because neither agency has even begun to take any adverse action against a CEA member.

presidential administrations (including the current administration) that it complies with RFRA when enforcing Section 1557. *See supra*, p. 21. The fact that HHS recently closed a Section 1557 investigation after concluding that a religious hospital's refusal to perform a service was protected by RFRA exemplifies HHS's adherence to RFRA. *See* OCR Closure Letter, Ex. 1.

Absent any evidence that EEOC or HHS are either preventing CEA's members from exercising their religion or penalizing them for doing so, CEA essentially argues that its members may face a substantial burden at some unspecified time in the future. For example, CEA argues that "if CEA members disregard the EEOC Coverage Mandate, they will face substantial adverse practical consequences," Mem. 17, essentially conceding that they have not suffered any such adverse practical consequences so far (or even a threat of such consequences that would have necessitated invoking the protections of the preliminary injunction). Similarly, CEA argues that its healthcare provider members "may," "would," or "could" face penalties in the future from HHS for continuing to engage in the conduct they have engaged in so far without penalty or threat of penalty. *Id.* Such predictions of future burden are insufficient to show that CEA's members' "religious exercise has been burdened in violation of" RFRA, 42 U.S.C. § 2000bb-1(c), meaning a "substantial[] burden," *id.* § 2000bb-1(a), as necessary to support judicial relief under RFRA.

Because CEA fails to show a substantial burden, it is unnecessary for the Court to address whether the imposition of a substantial burden would be the least restrictive means of furthering a compelling government interest. Indeed, the Supreme Court has made clear that application of the least restrictive means test requires a "to the person" fact-specific analysis. *O Centro*, 546 U.S. at 430. Therefore, this test cannot be applied on a blanket basis to the numerous members of an organization, where the organization has not introduced evidence of the members' specific factual circumstances. The federal government has a compelling interest in protecting the right of

transgender patients to access crucial healthcare and in protecting workers from sex discrimination. In the event that a person showed that EEOC's application of Title VII or HHS's application of Section 1557 would substantially burden that person's religious exercise, EEOC or HHS would consider the specific factual circumstances to assess whether applying those statutes to that person was the least restrictive means of furthering the federal government's compelling interests, as RFRA and Supreme Court precedent demands. CEA's inability to demonstrate a violation of RFRA is underscored by the fact that both agencies have demonstrated a commitment to applying RFRA's test, and there are no examples of either agency ever requiring anyone to perform or provide insurance coverage for gender transition services in violation of RFRA.

III. Any Relief Should Not Extend To Future Members

Although the Court should not grant any relief for the reasons explained above, to the extent the Court grants any relief, it should not extend relief to CEA's future members. CEA's motion seeks declaratory relief and injunctive relief on behalf of "present" and "future members." Mot. 3-4. But the Court should not extend relief to CEA members who are not members at the time of final judgment, for several reasons.

CEA lacks standing to assert claims on behalf of people or entities who are not members of CEA. The Supreme Court has "recognized that an association has standing to bring suit *on behalf of its members*" when the three-part test for associational standing is satisfied. *Hunt*, 432 U.S. at 343 (emphasis added). But the Supreme Court has never recognized an association's standing to bring suit on behalf of someone who *is not a member* of the organization, based on the mere possibility that the person or entity may become a member in the future. This Court should not extend Article III standing beyond what has been recognized by the Supreme Court.[11]

[11] Defendants recognize that in a prior case involving CEA, Judge Hovland entered an injunction in favor of CEA and its future members based on the conclusion that doing so would be "judicially

Traditional equitable principles further counsel against extending relief to future members. "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford,* 138 S. Ct. 1916, 1934 (2018), and "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Center*, 512 U.S. 753, 765 (1994) (citation omitted). The only plaintiff here is CEA. By definition, any present injury to CEA is limited to CEA and its present members. Granting relief to individuals or entities that presently have no relationship with CEA is not necessary to provide complete relief to CEA.

At a minimum, if the Court extends relief to future members, it should not apply relief to any person or entity who is not a member of CEA at the time of the alleged violation of Title VII or Section 1557. A rule that allowed an entity to join CEA and to take advantage of the relief awarded in this case at another time (such as during the investigation, during litigation, or on the eve of trial) would be open to manipulation.[12]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for Partial Summary Judgment.

efficient" and conserve "judicial resources." *Christian Emps. All. v. Azar*, No. 3:16-cv-309, 2019 WL 2130142, at *5 (D.N.D. May 15, 2019). But Judge Hovland did not address whether doing so was consistent with Article III. Defendants respectfully submit that concerns about judicial efficiency cannot justify expanding the jurisdiction of federal courts beyond what is authorized by Article III.

[12] Such an entity could, of course, raise its own defenses under RFRA, independent of this litigation.

Dated: November 30, 2023

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ Jeremy S.B. Newman
Jeremy S.B. Newman
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 532-3114
Email: jeremy.s.newman@usdoj.gov

Counsel for Defendants

Exhibit 1

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office for Civil Rights

Headquarters ● Humphrey Building
200 Independence Ave, S.W.
Washington, DC 20201
(800) 368-1019 ● TDD (800) 537-7697
Fax (202) 619-3818 ● www.hhs.gov/ocr

Hospital Attorney
Hospital

Via Email

RE: OCR Transaction Numbers # and #

, 2023

Dear Hospital Attorney:

I write in relation to the complaint Complainant filed with the U.S. Department of Health and Human Services' Office for Civil Rights (OCR) on 2021. The complaint alleged that Hospital, discriminated against Complainant on the basis of sex. Specifically, the complaint alleged that Hospital denied Complainant's request for PII, pursuant to its policy as a Catholic organization that does not PII PII

OCR enforces federal civil rights laws that prohibit discrimination in the delivery of health and human services based on certain prohibited bases of discrimination and the exercise of conscience, and also enforces the Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security and Breach Notification Rules. The laws that OCR enforces include Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116 (Section 1557), which prohibits discrimination on the basis of race, color, national origin, sex, disability, or age in certain health programs and activities.

OCR conducts a thorough and detailed review of all complaints, data requests, responses to the requests, and seeks and obtains additional relevant documentation as necessary. For this reason, OCR set out to determine all relevant information related to your underlying complaint through our normal investigatory process. During this investigation, OCR exchanged several correspondences with the Complainant as well as with Hospital, including by providing: initial notice of the complaint on , 2021; data and information requests in

U.S. Department of Health and Human Services
Office for Civil Rights
Headquarters • Humphrey Building
200 Independence Ave S.W. • Washington, DC 20201

connection to the allegations in the complaint; questions involving potential involvement in certain ongoing lawsuits on Section 1557 and [PII]; and follow-up requests for additional information.

During this process, [Hospital]'s [redacted] 2022, and [redacted] 2022, responses to OCR made clear its status as a Catholic health care institution. Specifically, [Hospital] confirmed that it is a 501(c)(3) non-profit Catholic health care corporation that adheres to the Ethical and Religious Directives for Catholic Health Care Services (ERDs). Pursuant to the ERDs, the hospital attested that it "does not provide [PII] to anyone, male or female" because [PII] is not permitted in a Catholic health care institution." [Hospital] further informed OCR that, regardless of the sex of the patient, it only [PII] "when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." [Hospital] [PII]

Given [Hospital]'s responses, OCR evaluated the complaint in light of its responsibilities under the Religious Freedom Restoration Act (RFRA).[1] Based on our review of the factual record, OCR determined that [Hospital] has adequately asserted its sincerely held religious beliefs to establish a substantial burden under RFRA as a matter of federal law. RFRA then requires the Department to determine whether applying Section 1557's prohibition on sex discrimination is the least restrictive way of achieving a compelling governmental interest.

Congress charged the Department with ensuring that health programs and activities that receive Federal financial assistance do not discriminate on the basis of sex. Discrimination presents a serious barrier to some patients' ability to access health care. And the Department has a compelling interest in protecting the right of [PII] patients to access crucial health care, including [PII] [PII]. With these allegations, however, the Department was unable to conclude that Section 1557's prohibition on sex discrimination as applied to the facts of this complaint was the least restrictive means of achieving the government's compelling interest.

OCR will therefore close this matter. This determination is based on the specific factual record in this case relative to this complaint and [Hospital]'s responses; it does not impact future complaints OCR may receive involving the same or similar [PII] policies applied differently to individuals on the basis of any protected category under Section 1557.[2]

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[1] *See* Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb *et seq*.

[2] On November 11, 2022, following OCR's communications with the hospital in this matter, the United States District Court for the District of Northern Texas set aside HHS's Notification and Interpretation of Enforcement of May 10, 2021, and issued a declaratory judgment stating that Section 1557 does not prohibit discrimination on the basis of sexual orientation and gender identity, as applied to "all health-care providers subject to Section 1557 of the Affordable Care Act." *Neese v. Becerra, et al.*, No. 2:21-cv-00163-Z, 2022 WL 16902425 (N.D. Tex. Nov. 11, 2022). HHS is currently appealing the district court's decision to the United States Court of Appeals for the Fifth Circuit. *See Neese v. Becerra, et al.*, No. 23-10078 (5th Cir.). In any event, neither Section 1557 nor RFRA are

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Office for Civil Rights
Headquarters ● Humphrey Building
200 Independence Ave S.W. ● Washington, DC 20201

If you have any questions about this letter, please call or email [redacted] at [redacted]. Thank you for contacting OCR.

Sincerely,

/s/ [redacted]

[redacted]
Office for Civil Rights
U.S. Department of Health and Human Services

jurisdictional; and we have concluded that resolution of this complaint is most appropriate based on the specific facts here and the hospital's RFRA assertion.