UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; BISMARK DIOCESE,

Plaintiffs,

v.

CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

Case No. 1:24-cv-00142-DMT-CRH

MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Code

Rules

Reports and Regulations

Other Authorities

INTRODUCTION

Plaintiffs, a Catholic diocese and an association of employers, seek summary judgment as to their challenges to selected portions of two Equal Employment Opportunity Commission (EEOC) documents: EEOC's implementing regulations under the Pregnant Workers Fairness Act (PWFA), *see Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29,096 (Apr. 19, 2024) (Final Rule), and EEOC's non-binding guidance discussing workplace harassment law, including under Title VII of the Civil Rights Act (Title VII). *See* Enforcement Guidance on Harassment in the Workplace, ECF No. 22-1 (Guidance). Plaintiffs' claims, brought in a pre-enforcement posture and based primarily on religious freedom protections that are expressly preserved as exceptions and defenses to PWFA and Title VII charges, fail for both jurisdictional and merits reasons. The Court should therefore deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion. In particular, Defendants respectfully submit that the Court erred in its preliminary injunction ruling and maintain that a different result is warranted in this summary-judgment posture.

As discussed in prior filings, the PWFA builds on existing law to ensure workers with "known limitations related to . . . pregnancy, childbirth, or related medical conditions" can obtain reasonable accommodations that do not "impose an undue hardship" on their employer. 42 U.S.C. § 2000gg-1(1). As described in the Final Rule, in certain cases the PWFA affords protections related to abortion or infertility treatments based on identical language affording protections under Title VII. The Final Rule neither requires employers to endorse any specific employee conduct nor prohibits them from generally speaking about their religious views. The Final Rule enumerates the various religious defenses and other defenses available to employers and commits EEOC to evaluating such defenses promptly and on a case-by-case basis.

Separately, EEOC's non-binding Guidance relies on Title VII case law, including *Bostock v. Clayton County*, 590 U.S. 644 (2020), in recognizing that Title VII's prohibition against sex discrimination extends to claims of unlawful harassment based on gender identity. The Guidance does not impose any substantive requirements on employers or identify conduct that is *per se* unlawful; rather, it summarizes the types of conduct that courts have found may contribute to a hostile work

environment in specific cases. The Guidance does not affect the availability of religious freedom defenses under Title VII. Rather, it explains the Commission's serious commitment to considering any religion-based defenses as they arise in specific factual scenarios.

Plaintiffs' challenges to the Final Rule and Guidance fail for several reasons. First, Plaintiffs lack standing to press their challenges because, while Plaintiffs claim the EEOC documents create new obligations that violate their religious beliefs, Plaintiffs have failed to demonstrate they face any current or imminent injury. Plaintiffs have not met their burden of establishing even the first step in the attenuated chain of contingencies giving rise to their claimed injury—namely, that an employee will seek an accommodation under the PWFA from a Plaintiff or member thereof to which they object, or that any employee will experience harassment of the type addressed by the Guidance—which are prerequisites to any enforcement action. Nor have Plaintiffs identified a history of enforcement action against similarly situated employers. For these and other reasons, Plaintiffs lack standing.

Second, Plaintiffs are not entitled to relief under the Religious Freedom Restoration Act (RFRA) or any other statutory or constitutional provisions. EEOC has expressly recognized that religious defenses and exceptions—including under RFRA and the First Amendment—apply to the PWFA and Title VII, committed to seriously considering such concerns when they arise, and enhanced its processes to enable employers to readily raise and request priority consideration of religious defenses. Plaintiffs have not proven that this approach is unlawful or that they are entitled to a categorical, blanket exception regardless of the specific facts presented in any individual case.

Third, Plaintiffs' remaining claims lack merit. Plaintiffs have not identified any speech that they wish to engage in, let alone demonstrated that such speech is proscribed by the portions of the EEOC documents they challenge. Plaintiffs' APA challenge ignores that Congress imported the relevant language in the PWFA—and its settled meaning—from Title VII, which has long been understood to encompass the protections here at issue. It also disregards the PWFA's incorporation of Title VII's religious employer defense as a rule of construction, which is included in the Final Rule.

Finally, Plaintiffs have not carried their burden at summary judgment to establish their

entitlement to the broad relief they seek. Even if this Court concludes otherwise, any remedy should be tailored to the Plaintiffs and only their identified members, as well as to any actual injuries that this Court concludes they have established.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. THE PREGNANT WORKERS FAIRNESS ACT

A. Pre-PWFA Framework

Congress enacted the PWFA to "fill a gap in the existing legal framework," H.R. Rep. No. 117-27, at 10 (2021), which offered only limited pregnancy-related protections for workers. *See id.* at 10-26; *see also* ECF No. 36 ("CBA Br.") at 5. In particular, Congress sought to build on and expand the protections in Title VII, which prohibits "discriminat[ion] against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Initially, the Supreme Court interpreted Title VII's prohibition not to include pregnancy discrimination. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). In response, Congress quickly enacted the Pregnancy Discrimination Act (PDA) of 1978, which "unambiguously expressed its disapproval of both the holding and the reasoning of the . . . *Gilbert* decision," *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983), and amended Title VII to clarify that sex-based discrimination encompasses pregnancy-related discrimination:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]

42 U.S.C. § 2000e(k).

Congress wrote the PDA to cover not only discrimination based on actual pregnancy, but also based on the "capacity to become pregnant," H.R. Rep. No. 95-948, at 2 (1978) (discussing *Gilbert* dissent with approval); S. Rep. No. 95-331, at 2-3 (1977) (same). Congress also understood that the PDA's "basic language covers decisions by women who chose to terminate their pregnancies." H.R. Rep. No. 95-948, at 7. In response to concerns about requiring employers to pay for abortions, however, Congress clarified that the PDA does "not require an employer to pay for health insurance

benefits for abortion," except in certain circumstances implicating maternal health. 42 U.S.C. § 2000e(k); *see* H.R. Rep. No. 95-948, at 7. Shortly after the PDA's enactment, EEOC issued guidelines recognizing that Title VII protects employees who have (or do not have) abortions. *See* 29 C.F.R. pt. 1604, App., Questions 34-37. Even after the PDA, however, Title VII requires employers to provide workplace accommodations related to pregnancy only in certain cases. *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015).

B. PWFA Statutory Framework

To address this gap in statutory protections, Congress enacted the PWFA, *see* Pub. L. No. 117-328, div. II, 136 Stat. 4459, 6084-89 (2022), with an effective date of June 27, 2023, *see id.* § 109, 136 Stat. at 6089. The PWFA requires covered employers to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless . . . the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]" 42 U.S.C. § 2000gg-1(1). The PWFA borrows heavily from existing statutes. For example, Congress defined both "reasonable accommodation" and "undue hardship" by reference to the ADA. *See id.* § 2000gg(7). Congress also included anti-retaliation and anti-coercion provisions similar to those found in Title VII and the ADA—*i.e.*, making it unlawful to discriminate against employees who file charges or participate in investigations, or to "coerce, intimidate, threaten, or interfere with any individual['s]" exercise of rights under the statute, *id.* § 2000gg-2(f)(1), (2); *see also id.* §§ 2000e-3(a) (Title VII anti-retaliation), 12203(b) (ADA anti-coercion). The PWFA's definition of employer is the same as Title VII's. *See id.* § 2000gg(2)(B).

The PWFA also incorporates Title VII's remedies and enforcement procedures. *See id.* § 2000gg-2. An employee who believes their rights have been violated must first file a charge of discrimination with EEOC within a statutorily defined time. *Id.* § 2000e-5(b). EEOC notifies the employer within ten days, investigates the charge—which may include soliciting a position statement from the employer—and then determines whether "reasonable cause" exists to believe discrimination occurred. *Id.* If EEOC does not find "reasonable cause" or determines that an employer defense applies, the charge is dismissed, and the employee may file suit within 90 days of receiving a

Determination and Notice of Rights (Notice of Right to Sue or NRTS), which EEOC is required to issue. *Id.* § 2000e-5(b), (f)(1). Thus, EEOC issues an NRTS even when it *agrees* that an employer has a valid defense and EEOC does not intend to pursue an enforcement action. *See Newsome v. EEOC*, 37 Fed. App'x 87, *1 (5th Cir. 2002) (per curiam) (describing EEOC dismissal of Title VII charge after employer provided documentation that it fell within Title VII's religious employer exception). If EEOC determines that reasonable cause exists, EEOC will attempt to conciliate the charge; if that fails, EEOC may file suit against the private employer. If it does not file suit, EEOC issues an NRTS.[1] Regardless of the outcome of EEOC's administrative process, a court reviews the matter *de novo*. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974).

C. EEOC's Rulemaking Implementing the PWFA

The PWFA directs EEOC to issue implementing regulations, 42 U.S.C. § 2000gg-3(a), which EEOC accomplished in the Final Rule. As relevant here, the Final Rule discusses the circumstances when accommodations may be required, and explains that because the PWFA uses the same statutory language as Title VII—"pregnancy, childbirth, or related medical conditions"—and because the PWFA was intended to fill a gap in the existing Title VII framework, that language in the PWFA has the same meaning as in Title VII. *See* 89 Fed. Reg. at 29,105-14. Thus, because Title VII protects employees who choose to have (or not have) an abortion, so does the PWFA. *See id.* Similarly, because the Supreme Court has interpreted Title VII to include "discrimination based on the potential to be pregnant, not only current pregnancy," *id.* at 29,102 (citing *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)), the PWFA may encompass circumstances in which employees seek workplace accommodations for infertility treatments "depending upon the facts of the case, including whether the infertility treatments are sought by an employee with the capacity to become pregnant for the purpose of becoming pregnant." *Id.* at 29,102-03. For both abortion and infertility treatments, however, there is no obligation that an

[1] Time limits for filing a charge and suit are not jurisdictional and are subject to waiver, estoppel, and tolling. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Tennessee v. EEOC*, -- F. Supp. 3d ---, 2024 WL 3012823, at *5 (E.D. Ark. June 14, 2024), *appeal filed,* No. 24-2249 (8th Cir. June 20, 2024).

employer or employer-sponsored health plan cover or pay for the procedures, or "that leave as an accommodation be paid leave." *Id.* at 29,101, 29,104.

As for the PWFA's anti-retaliation and anti-coercion provisions, the Final Rule borrows from the Title VII and ADA frameworks. *See id.* at 29,148. The anti-coercion provision "does not apply to any and all conduct or statements that an individual finds intimidating; it prohibits only conduct that is reasonably likely to interfere with the exercise or enjoyment of PWFA rights." *Id.* As such, "general statements regarding an employer's mission or religious beliefs [are] not the type of conduct that . . . would be prohibited[.]" *Id.* Nothing in the Final Rule requires employers to engage in any specific speech or to endorse matters with which they disagree. *See, e.g.*, 89 Fed. Reg at 29,111 (Final Rule does not require employers to "promote, or endorse abortion").

EEOC also emphasized that whether an accommodation is covered by the PWFA is a fact-specific determination, *e.g.*, *id.* at 29,100. In other words, the Final Rule does *not* impose any blanket requirement on employers to provide an accommodation related to abortion, infertility treatments, or any other care. For example, the Final Rule affirmatively acknowledges that accommodations are *not* required where they would pose "undue hardship," *id.* at 29,125, or implicate "numerous statutory and constitutional defenses" applicable to "religious exercise," *id.* at 29,144, including the Rule of Construction, *id.* at 29,220; RFRA, *id.* at 29,148; the ministerial exception, *id.* at 29,150; and the First Amendment, *id.* at 29,152—all of which are considered on a "case-by-case basis," *id.* at 29,112-13; 29,125; 29,114; 29,148; 29,150; 29,152; 29,220. EEOC also enhanced its administrative procedures for raising and deciding religious liberty defenses, including allowing employers to request that "EEOC prioritize the consideration of a particular defense that could be dispositive and obviate the need to investigate the merits of a charge." *Id.* at 29,147-48.

II. THE HARASSMENT GUIDANCE

In April 2024, EEOC issued the Guidance, a 189-page resource document that discusses the basic provisions of a harassment claim under the federal equal employment opportunity laws EEOC enforces. The Guidance cites pertinent case law that "addresses how harassment based on race, color, religion, sex, national origin, age, disability, or genetic information is defined under EEOC-enforced

statutes and the analysis for determining whether employer liability is established." Guidance at 2; *see Clobes v. 3M Co.*, 106 F.4th 803, 808 (8th Cir. 2024) (discussing elements of Title VII harassment claim). Its contents "do not have the force and effect of law, are not meant to bind the public in any way, and do not obviate the need for EEOC and its staff to consider the facts of each case and applicable legal principles when exercising their enforcement discretion." Guidance at 8. EEOC does not "prejudge the outcome of a specific set of facts presented in a charge." *Id.*

Section II of the Guidance, in relevant part, relies on *Bostock*, 590 U.S. at 662, to explain that "[s]ex-based discrimination under Title VII includes employment discrimination based on sexual orientation or gender identity." Guidance at 17. The Guidance also provides examples of "harassing conduct" that courts have found can contribute to unlawful harassment, such as conduct that includes "repeated and intentional . . . misgendering" and "the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity." *Id.* (cleaned up). The Guidance also explains that "harassment based on pregnancy, childbirth, or related medical conditions," which "can include issues such as . . . deciding to have, or not to have, an abortion" may be considered sex-based harassment under Title VII. *Id.* at 15 (collecting cases).

Although the Guidance was designed to "communicate[] the Commission's position on important legal issues," it is not a "survey of all legal principles that might be appropriate in a particular case." *Id.* at 2, 8. For example, EEOC expressly acknowledged that the "rights or requirements" of "the United States Constitution; other federal laws, such as [RFRA]; or sections 702(a) and 703(e)(2) of Title VII," *id.* at 8, may be implicated in specific circumstances and committed both to considering those defenses "on a case-by-case basis" and to enhancing its administrative procedures to facilitate prompt resolution of religious defenses. *Id.* at 8, 98-99. EEOC also emphasized that its Guidance should not be construed to prohibit "workplace discussion of religious perspectives on certain issues, such as abortion or gender identity." *Id.* at 96.

III. PROCEDURAL HISTORY AND PLAINTIFFS' CLAIMS

The Final Rule took effect on June 18, 2024, *see* 89 Fed. Reg. at 29,096, though the PWFA has been in effect since June 2023. The Guidance was issued on April 29, 2024. Plaintiffs filed suit on

July 24, 2024, naming EEOC and its Chair, Charlotte Burrows, as Defendants. *See* ECF No. 1. Plaintiffs seek relief on behalf of the Bismarck Diocese and CBA's identified and unidentified current and future members, based on their claims that the Final Rule requires them to accommodate an employee's abortion or infertility treatments to which they object,[2] that the Guidance requires them to use "pronouns inconsistent with a person's biological sex" or "allow persons to use bathrooms or other private spaces reserved for those of the opposite sex," and that both require them to speak or refrain from speaking about these issues in ways with which they disagree. ECF No. 35 ("CBA Mot.") at 2. On September 23, 2024, this Court granted preliminary relief, holding that Plaintiffs had established a likelihood of success on their RFRA claim. *See* ECF No. 31 ("PI Order"). The Parties now bring cross-motions for summary judgment.

The undisputed record identifies no instance of Plaintiffs, or any member thereof, ever receiving from an employee a request for an accommodation or time off related to abortion or CIT or alleging harassment regarding use of pronouns or sex-specific bathrooms to which Plaintiffs or any CBA member object. *See generally* ECF Nos. 1, 1-5, 1-6. Similarly, Plaintiffs do not provide any evidence of any EEOC charge being filed against them, or any CBA member, regarding these issues, much less that any such charge ultimately resulted in a finding of "reasonable cause" or EEOC suit. *See generally* ECF Nos. 1, 1-5, 1-6. Plaintiffs offer no evidence that they, or any CBA member, currently employs anyone seeking abortion or infertility care or who identifies as transgender. *See generally* ECF Nos. 1, 1-5, 1-6. Plaintiffs do not offer any evidence of any actual costs they incurred as a result of the Guidance or Final Rule, nor do they provide evidence that they have had to alter their policies,

[2] Plaintiffs describe their religious beliefs in terms of opposition to "direct abortion" and "immoral infertility treatment." *E.g.* Compl. ¶ 172. They assert that "direct abortion" is an "abortion willed either as an end or a means," *id.* ¶ 65, and "immoral infertility treatments" are "methods that involve third parties"; "separate fertilization from the conjugal act"; or "entail conception outside of a marriage," *id.* ¶ 73. Defendants do not understand Plaintiffs to object to all abortions or infertility treatments. *E.g.*, *id.* ¶¶ 66, 72. Defendants' use of the word "abortion" is intended to mean what Plaintiffs refer to as "direct abortion" unless otherwise indicated. As to infertility treatments, the main objects of Plaintiffs' objections appear to be, as relevant to the Final Rule, care that involves oocyte (egg) retrievals, artificial inseminations, or embryo transfers. Defendants refer to the care here at issue as Challenged Infertility Treatments or "CIT."

practices, or speech as a result of them. *See generally* ECF Nos. 1, 1-5, 1-6. Plaintiffs have not identified any specific speech that they wish to engage in, or have previously engaged in, that is proscribed by the Final Rule or Guidance. *See generally* ECF Nos. 1, 1-5, 1-6. Plaintiffs do not provide any evidence that EEOC has represented to them, any CBA member, or any similarly situated employer, that they would not be entitled to religious or other exceptions if a charge ever were filed against them regarding abortion, CIT, pronouns, or bathroom access. *See generally* ECF Nos. 1, 1-5, 1-6.

STATEMENT OF DISPUTED FACTS

While Defendants dispute certain factual assertions pursuant to the mandates of Local Rule 7.1(A)(3), they do not believe that there are genuine issues of fact that preclude summary judgment in Defendants' favor. Many of Plaintiffs' assertions in their statements of undisputed facts are legal conclusions, not issues of material fact. Defendants object to these assertions as improper. Out of an abundance of caution, however, Defendants set forth below certain points that are disputed.

While Defendants do not dispute the religious views expressed by the individual declarants, they dispute that those declarations establish that *all* CBA members, current and future, share identical views and thus share the same objections as the declarants, *contra* CBA Br. at 2. The declarants speak to the views of their specific dioceses and their understanding of Catholic doctrine, but do not purport to know or represent the views of others, including unidentified CBA members (and potential future members). *See generally* ECF No. 1-5; ECF No. 1-6. *Contra* CBA Br. at 2-5. Similarly, Reverend Lori's verification of the complaint as to allegations regarding the "Catholic Church, Catholic values, and the beliefs, values, and governance of the [CBA]" does not purport to represent the views of individual and unidentified CBA members (and potential future members). *See* Compl. at 56. Defendants also disagree with Plaintiffs' characterization of CBA membership criteria as "foreclos[ing] CBA members from providing *any* accommodations" regarding abortion, infertility treatments, or permitting harassment based on pronouns or bathroom access. CBA Br. at 2. CBA's membership criteria provide that "[w]ith regard to the benefits it provides to its employees, . . . the employer shall, as part of its religious witness and exercise, be committed to providing no such benefits . . . inconsistent with Catholic values[.]" ECF No. 1-2, at 1 § 3.1.2. Nothing therein provides that

extending a reasonable accommodation pursuant to a statutory obligation is considered an employee "benefit[]" falling within the scope of the criteria, *id.*, or that such commitment would be implicated in a scenario where the accommodation is provided pursuant to applicable law, unknowingly, or in other case-specific scenarios that could theoretically arise. This is especially true as to Plaintiffs' claims regarding the Guidance, as Plaintiffs nowhere establish that abstaining from harassing an employee and using pronouns and bathrooms that correspond with their gender identity constitutes an employment "benefit," *id.*, or is understood as such and agreed to by all CBA members (or potential future members).

STANDARD OF REVIEW

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

This Court should not convert its preliminary injunction into final relief, *see* CBA Br. at 13, and should instead enter summary judgment for Defendants, for the reasons discussed below. If this Court disagrees, any determination of Plaintiffs' rights should be limited to their RFRA claim, which Plaintiffs concede "is sufficient to resolve the dispute between the parties," CBA Br. at 20.

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS

"Article III requires a plaintiff to show that [it] has suffered an injury in fact that is 'fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Haaland v. Brackeen*, 599 U.S. 255, 291-92 (2023) (quoting *California v. Texas*, 593 U.S. 659, 669 (2021)); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). While this Court determined that Plaintiffs satisfied the standing requirements at the preliminary injunction stage, PI Order at 6, Plaintiffs cannot satisfy the heightened summary judgment burden of demonstrating "specific facts" proving each element of standing, *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

A. Plaintiffs Do Not Have Standing as Regulated Parties and Their Alleged Injuries are Too Speculative

Plaintiffs suggest that, as objects of the regulation, they automatically have standing. *See* CBA Br. at 16. But "every American is subject to a great many regulations . . . [and] merely being subject to

those regulations, in the abstract, does not create an injury." *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 350 (5th Cir. 2024), *cert denied*, No. 23-1323 (U.S. Oct. 21, 2024). Even a regulated party must still establish an "actual or imminent" injury to demonstrate standing. *Lujan*, 504 U.S. at 560-61; *see Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972) (regulated party must show "justiciable controversy" which "does not exist where compliance with (challenged) statutes is uncoerced by the risk of their enforcement" (cleaned up)). Plaintiffs cannot show a regulatory injury because unless and until an employee requests an accommodation or complains of harassment in circumstances to which Plaintiffs object, Plaintiffs are under no obligation to undertake any action. And Plaintiffs have not demonstrated that any employee has or imminently will make such an accommodation request or harassment complaint.

Nor can Plaintiffs demonstrate a credible threat of enforcement. EEOC has *never* undertaken enforcement action against any employer under the PWFA regarding accommodations for abortion or infertility care, *see* Lage Decl. ¶ 5, nor has it ever taken enforcement action based on a charge filed by a transgender person where the employer raised religious defenses during the charge process, *see id.* ¶ 8. *See also* Hudson Decl. ¶ 9 (discussing EEOC charge data). Although Plaintiffs cite a handful of EEOC administrative appeals that include misgendering claims, *see* CBA Br. at 14 n.4, those appeals deal exclusively with federal government—not religious—employers, Lage Decl. ¶ 6. Similarly, their reliance on cases cited in the Guidance that include, *inter alia*, misgendering, *see* CBA Br. at 14 (citing Guidance at 17 n.42), is misplaced because those cases involve private—not EEOC—enforcement, *id* at ¶ 7; thus, they say nothing about the risk of enforcement by EEOC (the only defendant here). And Plaintiffs' citations to cases where Catholic employers were sued *by their own employees*, *see* PI Order at 7 (citing ECF No. 26 at 5-6), say nothing about the possibility of *government* enforcement. Plaintiffs have produced no evidence that EEOC has *ever* enforced the PWFA or Title VII against a religious employer regarding the issues Plaintiffs challenge, and the undisputed record demonstrates that, in fact, it has not. *See* Lage Decl. ¶¶ 5, 8. Contrary to the PI Order, then, the current record does reflect a long history of EEOC's "nonenforcement against the plaintiffs and others like them." PI Order at 7.

The risk of EEOC enforcement is further attenuated because numerous contingencies would

have to occur before EEOC could even become involved. As to the PWFA, a CBA member's female employee would need to become pregnant or seek to become pregnant; need and/or choose to pursue care to which Plaintiffs object; need an accommodation for that care; be unable to use existing leave to the extent time off is needed; and notwithstanding her employer's known beliefs, choose to seek an accommodation from her employer. A similarly attenuated chain of events would have to occur for any harassment allegations to arise under the circumstances here at issue: a member would need to employ a transgender employee; that employee would have to face workplace conduct including misgendering and restrictions on bathroom usage that amounts to severe or pervasive harassment; and there must be some basis for holding the employer liable for that harassment. *E.g.*, *Warmington v. Bd. of Regents of Univ. of Minn.*, 998 F.3d 789, 799 (8th Cir. 2021). Even then, under both the PWFA and Title VII, EEOC's involvement is predicated on a charge being filed.

Courts routinely reject such theories of injury that "rel[y] on a highly attenuated chain of possibilities[.]" *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013); *see also Nat'l Conf. of Cath. Bishops v. Smith*, 653 F.2d 535, 540 (D.C. Cir. 1981) (Catholic organization lacked standing to challenge PDA because it could not establish employees "have or would seek" abortion benefits, particularly where employees were "likely to be aware of [employers'] opposition to abortions" and thus unlikely "to request such benefits."). Indeed, the Eighth Circuit found that a Christian college lacked standing to challenge an agency interpretation of law that could be enforced against them to require housing transgender students in dorms that do not align with their gender identity. Like here, that possibility "lack[ed] imminence because it is speculative" that "a sex-discrimination complaint will be filed against the College based on claims involving . . . gender identity." *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1000 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2638 (2023); *see Tennessee*, 2024 WL 3012823, at *3-4 (relying on *School of the Ozarks* to find chain-of-contingencies for PWFA enforcement "too speculative").[3]

At the preliminary injunction stage, this Court concluded that EEOC's case-by-case approach

[3] This Court previously discounted *Tennessee* because plaintiffs there "alleged sovereign and economic harms" while plaintiffs here claim "religious harms." PI Order at 8. But the chain of events leading to an enforcement action does not change based on the nature of a given employer's objections.

meant Plaintiffs *could be* subject to "[t]he burden of investigation and possible litigation[.]" PI Order at 7. Putting aside that a mere possibility of enforcement "does not satisfy the requirement that threatened injury must be certainly impending," *School of the Ozarks* specifically recognizes that the availability of defenses to a charge "under [RFRA] or the Free Exercise Clause" counsels against finding imminent injury. 41 F.4th at 1000 (quoting *Clapper*, 568 U.S. at 410). This Court failed to contend with this Eighth Circuit holding at the preliminary injunction stage, instead relying on *Religious Sisters of Mercy v. Becerra* ("*RSM*"), 55 F.4th 583 (8th Cir. 2022), and non-binding Fifth Circuit decisions. But unlike the findings in those cases—and like in *School of the Ozarks*, 41 F.4th at 1001—Defendants have identified a "history of nonenforcement against the plaintiffs and others like them," *RSM*, 55 F.4th at 606; *see* Lage Decl. ¶¶ 5, 8. Additionally, EEOC does "seriously contest" the suggestion that plaintiffs "are breaking EEOC guidance," *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 926 (5th Cir. 2023), and has unambiguously recognized the availability of exceptions and defenses, including under RFRA and the First Amendment, *compare Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 376 (5th Cir. 2022) (agency "ha[d] not to date evaluated" whether it would undertake enforcement against identified plaintiffs for violating regulation in context of mootness challenge). Nor have Plaintiffs claimed that their members or other religious employers have experienced "prior enforcement." *Compare Braidwood*, 70 F.4th at 932. For these reasons, Plaintiffs have not established a credible threat of enforcement.

B. Plaintiffs' Other Alleged Injuries are Unfounded

Plaintiffs briefly suggest that they would suffer compliance costs or chilled speech as a result of the Final Rule and Guidance. As to compliance costs, they claim only that—as to the Final Rule—"they would incur compliance and training burdens," CBA Br. at 16. But the Final Rule does not require that Plaintiffs undertake any training initiatives, and Plaintiffs' citation to language in the Final Rule recognizing that *some* employers may incur minimal costs does not establish that *these* plaintiffs will do so, much less based specifically on the challenged portions of the Final Rule. The mere suggestion of compliance costs—without evidentiary support—does not satisfy Plaintiffs' burden of demonstrating a "concrete and particularized" injury. *Lujan*, 504 U.S. at 560.

Regarding their claims of chilled speech, Plaintiffs misapprehend the Guidance and Final Rule,

which do *not* "require CBA members to . . . speak in favor of employee abortions, immoral infertility treatments, or gender ideology." CBA Br. at 15; *cf. Sch. of the Ozarks*, 41 F.4th at 998 (rejecting "theory of injury . . . based on a misunderstanding" of challenged action). The Guidance does not impose any obligations on employers, let alone compel any speech. *E.g.* Guidance at 92 (Guidance does not "impose new legal obligations on employers with respect to any aspect of workplace harassment law, including gender identity discrimination."). Rather, it merely identifies conduct that courts have found contributed to a viable hostile work environment claim based on the specific circumstances at hand. And Plaintiffs do not claim that those kinds of circumstances are present here.

As to the Final Rule, to the extent that Plaintiffs suggest a desire to speak about Catholic teachings on subjects like abortion, Compl. at 19, the Final Rule states that "the making of general statements regarding an employer's mission or religious beliefs" is not prohibited. 89 Fed. Reg. at 29,148. While this Court previously suggested that "[t]he Final Rule gave no guidance to religious organizations on what speech or conduct based on sincerely held beliefs would or would not violate the coercion provision," PI Order at 8, the Final Rule contains several examples of coercive conduct, none of which implicates religious speech, *see* 89 Fed. Reg. at 29,216. Moreover, anti-retaliation and anti-coercion provisions similar to the PWFA's have existed in Title VII (which provides protections related to abortion and infertility treatments) and the ADA for decades without challenge, *see id.* at 29,152, and Plaintiffs do not identify any history of allegedly unlawful enforcement under those statutes. Because the Guidance and Final Rule do not facially restrict Plaintiffs' speech and EEOC has not enforced comparable anti-coercion and anti-retaliation provisions in the way Plaintiffs allegedly fear, they cannot establish a credible threat of enforcement. *Compare Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020); *Sch. of the Ozarks*, 41 F.4th at 1000 ("College's free-speech theory of standing fails . . . [because] College has not shown that there exists a credible threat that the defendants will enforce the [law] against the institution based on its religiously-based housing policies.").

C. Plaintiffs Have Not Proven That Their Alleged Injuries Are Traceable to EEOC or Redressable by an Order Against EEOC

Plaintiffs further lack standing because they have not established traceability or redressability.

Any relief entered in this case could not properly preclude private individuals, who are neither "parties to th[is] suit" nor "obliged to honor an incidental legal determination" produced by it, *Murthy v. Missouri*, 603 U.S. 43, 73-74 (2024), from enforcing the protections of the PWFA and Title VII. *See Sch. of the Ozarks*, 41 F.4th at 1001; *Tennessee*, 2024 WL 3012823, at *4. Plaintiffs do not explain why their claimed harms would not still occur as a result of the legal obligations threatened by private lawsuits. And to the extent the threat of private lawsuits is not enough to motivate Plaintiffs to incur costs or chill their speech—perhaps because Plaintiffs view such lawsuits as inherently speculative—Plaintiffs do not explain why the hypothetical prospect of governmental enforcement is any different. Thus, the availability of private enforcement highlights that Plaintiffs' speculative, hypothetical injuries are not redressable in this suit. S*ee Murthy*, 603 U.S. at 73 ("redressability problem" where non-parties remain "free to" take allegedly injurious action); *Sch. of the Ozarks*, 41 F.4th at 1001.

D. CBA Further Lacks Standing to Bring Claims on Behalf of Unnamed Members

CBA asserts associational standing, requiring it to demonstrate, *inter alia*, that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Worth v. Jacobsen*, 108 F.4th 677, 685 (8th Cir. 2024) (citation omitted). CBA has not made that showing.

CBA's three identified members are all Catholic dioceses. CBA claims that the dioceses' allegations support standing for approximately 8,480 diverse and unidentified members, which include "parishes, religious orders, schools, charities, colleges, hospitals, and other Catholic ministries along with Catholic-owned businesses," some of which are "for-profit employers." Compl. ¶¶ 38, 40, 41. CBA has not established that the dioceses' claims sufficiently represent all unidentified members.

First, CBA has not submitted evidence to establish that non-diocese members have identical employment practices or hold identical views as to the matters to which Plaintiffs object. While Plaintiffs attempt to rely on CBA's membership criteria as evidence of its members' uniform beliefs on the matters at issue here, CBA's stated criteria merely provides, in relevant part, that "[w]ith regard to the benefits it provides to its employees, . . . the employer shall, as part of its religious witness and exercise, be committed to providing no such benefits . . . inconsistent with Catholic values[.]" ECF No. 1-2, at 1 § 3.1.2. Plaintiffs do not establish that providing a reasonable accommodation where

required by law or abstaining from unlawful harassment is an employment "benefit" that falls within the scope of such criteria. And while Defendants do not dispute the religious views expressed by the identified dioceses, Plaintiffs provide no evidence that such views extend to other members, let alone that all other members implement those views through identical employment policies regarding accommodations and harassment. *See, e.g.*, *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (individuals of same religion may have "inconsistent . . . interpretations" of religious "doctrine"); 89 Fed. Reg. at 29,104 ("[B]eliefs about when an abortion may be morally or religiously permissible, even within religious traditions, are not monolithic."). Because Plaintiffs' claims turn on the particular nature of members' religious views, "participation of individual members . . . is essential to a proper understanding and resolution of" their claims. *Harris v. McRae*, 448 U.S. 297, 321 (1980) (Free Exercise claim "ordinarily requires individual participation" because it requires showing "coercive effect of the enactment as it operates against [individual] in the practice of his religion").

Second, even assuming identical beliefs, CBA has not shown that members would suffer the same alleged injuries. For example, the ministerial exception likely would apply to many employees of the named dioceses, potentially obviating the need for them to assert a RFRA or religious employer defense. *See, e.g.*, 89 Fed. Reg. at 29,151. Other members, including certain for-profit entities, may not be covered by the ministerial exception, Title VII's religious employer exception (and the PWFA's incorporation thereof), or RFRA, and thus those entities cannot be injured by EEOC's approach to such exceptions. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) ("[Section] 702 raises different questions as it is applied to nonprofit and for-profit organizations")[4]; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014) (declining to consider RFRA's applicability to large, publicly traded corporations).

This Court previously concluded that individual participation was unnecessary because

[4] Tests developed by circuit courts are in alignment that it is significantly more difficult for for-profit employers, even those majority owned and governed by adherents of a particular religion, *cf.* Compl. ¶ 38, than non-profit employers to qualify for Title VII's religious employer exception. *See, e.g.*, *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226, 229 (3d Cir. 2007).

Plaintiffs sought only declaratory and injunctive relief. PI Order at 11. Plaintiffs now seek broader relief, including vacatur. *See* CBA Mot. at 5; *see also infra* § IV.A (explaining why vacatur is inappropriate). In any event, an association does not automatically establish that individual participation is unnecessary "simply by requesting equitable relief rather than damages." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004); *see Pharm. Rsch. & Mfrs. of Am. v. Williams*, 64 F.4th 932 (8th Cir. 2023) (association lacks "standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof" (cleaned up) (quoting *Bano*, 361 F.3d at 713)). Here, numerous circumstance-specific issues would need to be resolved to determine whether unidentified members are injured. As to the PWFA, these include: the specific accommodation requested and whether it implicates the employer's religious beliefs; the employer's leave policies; the employer's actions in response to the accommodation request; any burdens on the employer of granting the accommodation; and the nature of the employer and whether any religious or other exceptions or defenses apply. Similarly, harassment cases present questions that "can be determined only by looking at all the circumstances" of a particular claim, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

For these same reasons, Plaintiffs' claims are not ripe, *see Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967), and are best adjudicated in a concrete scenario with the "benefit [of] further factual development," *Sch. of the Ozarks*, 41 F.4th at 998, and the certainty that "there is even a dispute here to resolve," *Nat'l Right to Life PAC v. Connor*, 323 F.3d 684, 694 (8th Cir. 2003). Plaintiffs and their members suffer no hardship from such a delay, as they could raise the same claims and exceptions should such a circumstance ever arise.

II. NEITHER THE FINAL RULE NOR GUIDANCE VIOLATE RFRA

A. The Final Rule and Guidance Lawfully Adopt a Case-By-Case Approach

Plaintiffs argue that the Final Rule and Guidance require them to either "comply[] with laws that are manifestly contrary to their Catholic values or fac[e] civil liability, injunctive relief, and entangling litigation." CBA Br. at 21. Not so. Both the Final Rule and Guidance adopt mechanisms for review of asserted religious defenses and do not purport to resolve any such defenses *ex ante*. *See*

89 Fed. Reg. at 29,146-47 (EEOC will evaluate RFRA defenses "consistent with the facts presented and applicable law"); Guidance at 7 (EEOC will "consider the implication of such rights and requirements on a case-by-case basis"). Indeed, unlike the description of the policy at issue in *RSM*, *see* 55 F.4th at 603, the Final Rule makes explicit that it does not require accommodations in all circumstances (including when it would implicate religious exceptions), *see* 89 Fed. Reg. at 29,149. It also commits to taking defenses such as RFRA seriously. *Id.* Plaintiffs have not credibly articulated any reason why such a case-by-case approach to RFRA defenses itself violates RFRA.

The Final Rule and Guidance apply nationwide, to a variety of entities, and make clear that EEOC is not deciding or pre-judging any RFRA claims. *See* 89 Fed. Reg. at 29,148-49; Guidance at 7. EEOC's commitment in both documents to addressing religious objections on a case-by-case basis is wholly consistent with RFRA and makes plain that neither the Rule nor the Guidance infringes on Plaintiffs' religious freedoms. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("*O Centro*") (affirming "feasibility of case-by-case consideration of religious exemptions to generally applicable rules"); *Brown v. Collier*, 929 F.3d 218, 230 (5th Cir. 2019) ("[W]hether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise requires a case-by-case fact-specific inquiry."). Respectfully, the Final Rule and Guidance thus do not "threaten litigation for adhering to sincerely held beliefs," PI Order at 14. *E.g.*, *Newsome*, 37 F. App'x at *1 (describing EEOC dismissal of Title VII charge after employer provided documentation that it qualified for religious employer exception). Accordingly, neither the Final Rule nor Guidance can be said to compel Plaintiffs to take any action in violation of RFRA.

Plaintiffs' argument relies on cases that find an agency action required plaintiffs to take some action contrary to their religious beliefs. *See* CBA Br. at 18-20. By contrast, EEOC has not asserted that Plaintiffs (or any employer) are required to accommodate abortions or CIT to which they have a religious objection (or that otherwise pose an undue hardship), or that Plaintiffs are required to have any specific employment practice related to pronouns or bathrooms. *Compare Hobby Lobby*, 573 U.S. at 720 (challenging *requirement* that closely held corporations provide insurance coverage for birth control); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 667-68 (2020)

(challenging self-certification *requirement* for religious organizations); *Braidwood*, 70 F.4th at 929 (noting "admissions from the EEOC that Braidwood's current practices violate Title VII"), *with* 89 Fed. Reg. at 29,149; Guidance at 7. EEOC has made no statements like those at issue in *RSM*, where the Eighth Circuit noted the agency's "warn[ing] that covered entities" violated relevant law, 55 F.4th at 603, which shows that non-compliance here does not necessarily have "substantial adverse practical consequences," *cf.* PI Order at 13. Indeed, Plaintiffs' declarations effectively concede that they are not pressured to change their behavior; they have refused to provide accommodations to which they object, including in the three months between the Final Rule taking effect and when they obtained preliminary relief. *E.g.*, ECF No. 1-5 (Cary Decl.) ¶ 13 ("The Diocese does not and will not provide any workplace accommodation for an employee to obtain a direct abortion."); *id.* ¶¶ 12, 16, 19, 20; ECF No. 1-6 (Hebda Decl.) ¶ 22 ("The Archdiocese . . . does not and will not provide any workplace accommodation for an employee to obtain a direct abortion or to undergo or otherwise participate in immoral infertility procedures."); *see also Brown*, 929 F.3d 229 ("To demonstrate a substantial burden, the plaintiff must show that the challenged action truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." (cleaned up)).

Plaintiffs likewise do not establish a substantial burden of their religious exercise from participating in a case-by-case assessment where they may use EEOC's enhanced procedures (which were not at issue in *Christian Employers' Alliance v. EEOC*, -- F. Supp. 3d --, 2024 WL 935591 (D.N.D. Mar. 4, 2024) to raise religious freedom defenses at any stage, request prioritization of them, and "easily inform [EEOC] of a potential defense" via an online portal, 89 Fed. Reg. at 29,147-48. *See* CBA Br. at 19. Thus, Plaintiffs have not established that they actually "face the choice of complying with laws that are manifestly contrary to their Catholic values or facing civil liability." CBA Br. at 19.

Plaintiffs also have not identified any alternative approach that EEOC could have adopted. Whether an accommodation is covered by the PWFA, is "reasonable," and is not an undue hardship is based on the specific circumstances of the employer and employee. *See, e.g.*, 89 Fed. Reg. at 29,100; 29,102; 29,122; 29,125. Similarly, whether a specific accommodation burdens an employer's religious exercise depends on the relevant details. *See id.* at 29,153; *see also* Compl. ¶ 66 (specifying, for example,

that Plaintiffs oppose only certain types of abortion). Therefore, even a blanket exception for religious objections would still require a fact-specific determination of whether the accommodation at issue implicates a given employer's religious beliefs. Other structural barriers also prevent EEOC from addressing potential religious defenses earlier in the process. Because EEOC has no investigatory authority until a charge is filed, "[t]he PWFA does not provide a mechanism for [EEOC] to provide legally binding responses to employer inquiries about the potential applicability of religious or other defenses before th[at] point." 89 Fed. Reg. at 29,147. Similarly, "[c]reating a per se rule that an employer's beliefs automatically and always create an undue hardship would be fundamentally inconsistent with [the PWFA statutory] requirement that undue hardship be assessed as a defense on a case-by-case basis and would therefore be inconsistent with the PWFA." *Id.* at 29,153.

Likewise, the Guidance could not have declared certain conduct *per se* non-harassing for certain employers given Supreme Court precedent stressing the importance of context in harassment claims. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). The Final Rule's and Guidance's case-by-case approaches thus address Plaintiffs' concerns and adheres to RFRA's demand for "a case-by-case, fact-specific inquiry." *Brown*, 929 F.3d at 230; *see also O Centro*, 546 U.S. at 430, 436.

B. The Court Should Not Grant Plaintiffs a Blanket RFRA Exemption

Even if the Court finds that EEOC's case-by-case approach to RFRA constitutes a substantial burden on Plaintiffs' religious exercise, that does not entitle them to a preemptive declaration that they always prevail under RFRA. *E.g.*, CBA Mot. ¶¶ 1-2. Depending on the situation, the RFRA analysis may well resolve in the Government's favor—precluding the broad relief Plaintiffs seek.

Substantial Burden: Regarding the Final Rule, Plaintiffs do not establish that they have a religious objection to granting every accommodation associated with abortion or CIT, as opposed to only knowing accommodations. *See, e.g.*, Compl. ¶ 96 (alleging that PWFA makes it "more likely [an employer will] become aware of an employee's [abortion or CIT], that, before the PWFA, might have remain hidden or left undiscussed"); Hebda Decl. ¶ 8 (describing "sacred obligation not to knowingly harm other persons"); Cary Decl. ¶ 23 (same); *see also* 89 Fed. Reg. at 29,192 (employee does "not

need[] to specifically indicate whether a condition is 'pregnancy, childbirth, or related medical conditions'"). Further, it is far from clear that every accommodation request will necessarily implicate every CBA member's religion. *See supra* § I.C. Plaintiffs cannot salvage this defect by asserting that EEOC "restrict[s] CBA members' religious speech." ECF No. 36 at 24. Plaintiffs fail to identify any speech that must be altered in response to the Rule; for the reasons described *supra* at 3-4 and *infra* at § 3.C, the Final Rule does not restrict their abortion- or CIT-related speech.

The Guidance likewise does not require or prohibit any speech or action that could potentially give rise to a religious objection. *See* Guidance at 96 (Title VII does not prohibit "workplace discussion of religious perspectives on certain issues, such as abortion or gender identity."). Plaintiffs offer no plausible explanation as to how the Guidance's nonbinding discussion of case law burdens their religious exercise.[5] The Guidance, moreover, addresses employer liability related to harassment, which depends on a case-specific analysis of factors unknowable in advance. Plaintiffs therefore cannot establish that it will necessarily impose a substantial burden on their religious exercise. In any case, Title VII itself provides for religious exceptions, 42 U.S.C. § 2000e-1(a), 2000e-2(e)(2); *see Hosana-Tabor Evang. Lutheran Church & Sch. v. EEOC.*, 565 U.S. 171, 188 (2012) (discussing ministerial exception), which further lessens any alleged burdens on Plaintiffs and CBA's members. *See supra* § I.D.

Compelling Interest: Even if the Court finds that Plaintiffs established a substantial burden on Plaintiffs' religious exercise, particular factual circumstances could involve compelling Governmental interests. *Cf.* PI Order at 14-15 (noting some of the Government's compelling interests).

As to the Final Rule, the Government presents important interests, including: ensuring that qualified employees can remain in the workforce while receiving health care, which may be needed for

[5] *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), though cited in the PI Order (at 13-14), is not to the contrary. *Contra* PI Order at 13-14. In that case, the Eighth Circuit concluded that certain agency letters had "a binding effect on regulated entities." *Id.* at 863. That is not the case with the Guidance, which surveys potentially applicable legal principles across circuits and which, by its own terms, "do[es] not have the force and effect of law[, is] not meant to bind the public in any way," and recognizes the availability of religious and other defenses to charges of harassment. Guidance at 8. Moreover, the analysis in *Iowa League of Cities* went to whether an agency action was a promulgation of a regulation, rather than whether an action is a substantial burden under RFRA. 711 F.3d at 862.

health- or life-saving reasons, *e.g.*, 89 Fed. Reg. at 29,103-04 n.57; *cf. HCI Distrib. Inc. v. Peterson*, --- F.4th ---, 2024 WL 3630135, at *6 (8th Cir. 2024) (collecting cases); eradicating workplace discrimination against women, *see* 167 Cong. Rec. H2338 (PWFA targets "sex discrimination against pregnant workers [which] often takes the form of reliance on insidious gender role stereotyping concerning women's place in the home and in the workplace"); and "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984); *see* H.R. Rep. No. 117-27, at 5, 25.

As to the Guidance, the harm is self-evident. "[A]llowing a particular person . . . to suffer discrimination" would be "directly contrary to the EEOC's compelling interest in combating discrimination in the workforce." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 (6th Cir. 2018), *aff'd sub nom. Bostock.*, 590 U.S. 644. To be sure, "the government's compelling interest in purportedly eradicating sex discrimination [is not] a trump card against every RFRA claim." *Braidwood*, 70 F.4th at 939. But Plaintiffs' contention that the Guidance can *never* satisfy a compelling governmental interest is contrary to *Bostock* itself, which recognized that RFRA "might supersede Title VII's commands *in appropriate* cases," but not in every case. 590 U.S. at 682 (emphasis added).

All of these interests, for both documents, are more specific than the kind of "broadly formulated interests" to which Plaintiffs object, CBA Br. at 19, and demonstrate that Plaintiffs are not entitled to a blanket RFRA exemption because relevant facts will shape whether compelling governmental interests are at stake. Any demand that the Government provide more specific compelling interests at this moment in time is inconsistent with the fundamental principle that RFRA claims are best assessed in the context of a specific case, with specific facts, as this Court acknowledged. *See* PI Order at 14; *see also Holt v. Hobbs*, 574 U.S. 352, 362-63 (2015); *O Centro*, 546 U.S. at 430-31; *supra* § II.A. For example, where an employee needs an accommodation in order to obtain life-saving medical care, or when an employee is seeking care after being the victim of rape, the Government's compelling interests in protecting women's lives and combatting gender-based violence would need to be considered, along with the other interests described here. Moreover, Plaintiffs' contention that EEOC always lacks a compelling interest due to exemptions in the Final Rule, PWFA,

or Title VII, *see* CBA Br. at 19-20, is not supported by precedent. *See infra* § III.A.

Least Restrictive Means: Given the nature of the PWFA framework, it is not clear what any alternative approach under the Final Rule could look like. Accommodations like leave from work can only be extended by employers, so EEOC "lacks other means of achieving its desired goal." *Hobby Lobby*, 573 U.S. at 728. Plaintiffs' proffered option—incorporation of Title VII's religious employer exception, CBA Br. 20, PI Order at 15—is already included in the PWFA and Final Rule. *See infra* § III.D. The Final Rule is also narrowly tailored in preserving religious defenses and enhancing procedures for considering them, excepting accommodations that cause undue hardship, and specifying that employers (and their health plans) need not pay for any specific care or provide paid leave to employees seeking it. *See* 89 Fed. Reg. at 29,104, 29,148; 42 U.S.C. § 2000gg–5(a)(2). The Final Rule makes available "specific exemption[s] for religious employers." PI Order at 16.

As to the Guidance, again, the only way to address harassment is through action by the employer. Indeed, "Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination" in the workplace. *Harris Funeral Homes, Inc.*, 884 F.3d at 594; *cf. Hobby Lobby*, 573 U.S. at 733 ("prohibitions on racial discrimination are precisely tailored to achieve th[e] critical goal" of workforce "equal opportunity"). Plaintiffs should not be granted a blanket RFRA exemption.

III. THE FINAL RULE AND GUIDANCE SATISFY THE FIRST AMENDMENT

To the extent the Court maintains its view that Plaintiffs succeed on their RFRA claim, there is no need to address Plaintiffs' other claims. *See* CBA Br. at 20. Regardless, those claims lack merit.

A. The Final Rule and Guidance Do Not Infringe Plaintiffs' Free Exercise Rights

Plaintiffs contend that the Final Rule and Guidance are subject to strict scrutiny. CBA Br. at 21. But the Final Rule is a "neutral law of general applicability," 89 Fed. Reg. at 29,151, and neither it nor the Guidance treats "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). Plaintiffs suggest that the statutory exemption for small employers and the undue hardship defense[6] mean that EEOC treats secular activities more favorably

[6] Small employer exemptions are common in civil rights laws. *See, e.g.*, 42 U.S.C. § 2000e(b) (Title VII),

than religious exercise.[7] CBA Br. at 21-22. These provisions, however, like all other exemptions and defenses available under Title VII, the PWFA, and the Final Rule, apply to "all *small* employers—religious and secular alike." *See McMahon v. World Vision, Inc.*, 704 F. Supp. 3d 1121, 1142-43 (W.D. Wash. 2023), *appeal filed*, 24-3259 (9th Cir.). Because religious employers are entitled to these same exemptions and defenses—in addition to religious ones—strict scrutiny does not apply.

Plaintiffs also argue that the Final Rule and Guidance improperly reserve "discretion for the government" in individualized cases. CBA Br. at 21 (citing *Fulton v. City of Philadelphia*, 593 U.S. 522, 537 (2021)). But the facts here are nothing like those in the cases on which Plaintiffs rely. EEOC has not "refuse[d] to extend th[e] exemption system to cases of religious hardship" or "made available" "individual exemptions . . . at the sole discretion of the Commission[]." *Fulton*, 593 U.S. at 535 (cleaned up). Rather, the Final Rule extensively discusses the various exemptions and defenses available, describes the general legal framework for their applicability, establishes processes to enable employers to readily assert them, and commits to applying them where implicated by a given charge. *See supra* at 6. Therefore, whether an undue hardship or religious defense exists is not a matter of individualized discretion, but a question of whether the facts presented meet the relevant statutory or constitutional standard. *Id.* The Guidance similarly explains that religious defenses and exceptions are available for Title VII claims. Guidance at 8. Indeed, Plaintiffs' argument is belied by the fact that the undue hardship test has long been applied to individual employee requests for religious accommodations under Title VII without invocation of strict scrutiny. *See, e.g.*, *Groff v. DeJoy*, 600 U.S. 447, 457-68 (2023). In any event, if strict scrutiny applies, Plaintiffs are not entitled to a categorical exemption for the reasons discussed *supra* § II.B.

B. The Final Rule and Guidance Do Not Restrict Associational or Speech Rights

Plaintiffs argue that the Final Rule and Guidance violate the Free Speech Clause by (1)

12111(5)(A) (ADA); 29 U.S.C. §§ 2611(4)(A)(i) (FMLA), § 630(b) (ADEA). Such exemptions allow the government to advance compelling interests while "preserving the competitive position of smaller firms." *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 447 (2003).

[7] Plaintiffs confine their Free Exercise claim to "religious objections to abortion." CBA Br. at 21. They have thus waived any Free Exercise claim as to other potential objections. *See Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 476 F.3d 598, 602, n.1 (8th Cir. 2007) (arguments not briefed are waived).

compelling CBA members to associate with employees whose conduct and speech undermines Plaintiffs' religious expression and (2) restricting CBA members' religious speech and requiring accommodation of messages of which they disapprove. CBA Br. at 22-23. Neither conclusion is supported.

1. As to expressive association, the Final Rule and Guidance expressly protect employers' First Amendment concerns. 89 Fed. Reg. at 29,153 ("should the responding employer raise constitutional expressive association concerns as a defense to the charge during the charge process, the Commission will evaluate each claim on a case-by-case basis"); Guidance at 97-98 (EEOC "works with great care to analyze the interaction of Title VII harassment law and the rights to free speech" based on "individualized facts"). Plaintiffs wholly ignore that the Supreme Court has generally held that employment discrimination laws like Title VII do not violate employers' associational rights. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Plaintiffs' preferred case, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), was brought under New Jersey's public accommodations law, a doctrine with a distinct and separate history, *id.* at 656-57, and did not overrule *Hishon*.

2. Plaintiffs' free speech claim also fails. Plaintiffs have not demonstrated that they currently, or imminently intend to, engage in speech that would plausibly be "censor[ed]," Br. at 23, by the PWFA's anti-coercion and anti-retaliation provisions, which have existed in similar form under Title VII and the ADA for decades. 89 Fed. Reg. at 29,152; *see also id.* at 29,216 (providing examples of coercive conduct, none of which implicates religious speech). Nor does the Final Rule prohibit Plaintiffs from making "general statements regarding [their] mission or religious beliefs" or require them to affirmatively "promote, or endorse" abortion or CIT. *Id.* at 29,312; 29,111. To the extent Plaintiffs' purported speech is really just their unwillingness to grant particular types of accommodations, that is conduct that can lawfully be regulated, not protected speech. *See Rumsfeld v. Forum for Acad. & Instit. Rts., Inc.*, 547 U.S. 47, 62 (2006). In any event, although this Court concluded that a religious employer would violate the retaliation provision if it fired an employee whose conduct ran contrary to the organization's religious tenets, PI Order at 14, the Final Rule commits to considering constitutional defenses to charges alleging coercion or retaliation, 89 Fed. Reg. at 29,152.

Similarly, the Guidance cannot itself burden Plaintiffs' speech, as it merely summarizes caselaw. Nor does Title VII. Just as a law prohibiting employers from discriminating on the basis of race does not regulate speech merely because it "will require an employer to take down a sign reading 'White Applicants Only,'" *Rumsfeld*, 547 U.S. at 62, the Guidance's recognition that certain conduct involving speech may support a harassment claim does not suggest that Title VII burdens free speech, *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (regulation of conduct does not abridge freedom of speech "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed").

C. The Final Rule Properly Encompasses Abortion and CIT

Plaintiffs' APA claims lack merit, because the plain meaning of "pregnancy, childbirth, or related medical conditions" encompasses abortion and CIT.

1. The PWFA Encompasses Abortion

Title VII's Text: Plaintiffs wholly ignore that the text of Title VII, which is identical to the PWFA in relevant part, encompasses abortion. Title VII, as amended by the PDA, provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions[.] . . . This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion[.]

42 U.S.C. § 2000e(k). The first sentence prohibits discrimination based on "pregnancy, childbirth, or related medical conditions," while the second sentence provides that this non-discrimination mandate does "not require an employer to pay for health insurance benefits for abortion," except in certain situations related to maternal health. *Id.* That latter sentence necessarily means that abortion is subsumed within "pregnancy, childbirth, or related medical conditions." *Id.* There would be no need to carve out payments for abortion, and no basis to except certain abortions from that carve out, if abortion did not fall within Title VII's general anti-discrimination mandate.

The contemporaneous record confirms that Congress expressly understood that the PDA's "basic language covers decisions by women who cho[o]se to terminate their pregnancies," and added

the second sentence due to concerns that the PDA's coverage of abortion could require employers "to pay for abortions not necessary to preserve the life of the mother," H.R. Rep. No. 95-948, at 7. *See also* H.R. Conf. Rep. No. 95-1786, at 4. Moreover, Congress' express intent in enacting the PWFA was to codify pre-*Gilbert* EEOC "guidelines [that] require[d] employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom as all other temporary disabilities." H.R. Rep. No. 95-948, at 2. EEOC's post-PDA guidance, which encompasses abortion similarly to its pre-PDA guidance, is thus particularly persuasive. *See* 29 C.F.R. pt. 1604, App'x, Questions 34-37 (1979); *cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). As a result, *every court* to have considered the issue has determined that Title VII encompasses abortion.[8]

Thus, when Congress enacted the PWFA to expand Title VII's protections, *see* CBA Br. at 5, and used the same phrase "pregnancy, childbirth, or related medical conditions" that appears in Title VII, Congress intended the identical phrase in the PWFA to have the same meaning. *See* 89 Fed. Reg. at 29,104-08; *George v. McDonough*, 596 U.S. 740, 746 (2022) ("Where Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." (cleaned up)); *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."). This alone confirms that the PWFA covers abortion.

PWFA's Text: Even on its own terms, the PWFA's text encompasses abortion-related accommodations. The PWFA requires reasonable accommodation (absent applicable exceptions) of a "known limitation"—a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg(4). Abortion—which can

[8] *See Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Nat'l Conf. of Cath. Bishops*, 653 F.2d at 537-38 & n.2; *see also In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d 936, 942 (8th Cir. 2007) ("abortion arguably would be 'related to' pregnancy"); *Ducharme v. Crescent City Déjà vu, L.L.C.*, 406 F. Supp. 3d 548, 556, 558 (E.D. La. 2019) (Louisiana PDA and Title VII encompass abortion); *DeJesus v. Fla. Cent. Credit Union*, Case No. 8:17-cv-2502-T-36TGW, 2018 WL 4931817, at *3-4 (M.D. Fla. Oct. 11, 2018) (allegation of employment termination "because of [employee's] choice to have an abortion" stated Title VII claim); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1403 (N.D. Ill. 1994) ("[T]here is authority for application of the PDA to a woman's choice to have an abortion.").

only be performed on account of pregnancy—is inherently "related to" and "arising out of pregnancy . . . or related medical conditions." *Id.*; *see, e.g.*, *In re Union Pac.*, 479 F.3d at 942 ("[A]bortion arguably would be 'related to' pregnancy . . . because abortion can only occur when a woman is pregnant."); *Doe*, 527 F.3d at 364 ("[T]he term 'related medical conditions' includes an abortion."). As the Final Rule explains, "pregnancy" includes "past pregnancy." 89 Fed. Reg. at 29,183; *see EEOC v. Hous. Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (recognizing post-pregnancy conditions covered by PDA). Therefore, to the extent a woman experiences physical conditions, like cramping or nausea, stemming from an abortion, those conditions arise of out and relate to (past) pregnancy and fall within the PWFA. For similar reasons, those physical conditions constitute "related medical conditions" to pregnancy. *See, e.g.*, *Hous. Funding II, Ltd.*, 717 F.3d at 428 (sources "broadly construe" "medical condition" to include "disease, illness, or injury;" or "[a]ny condition—*e.g.*, physiological, mental, or psychologic conditions or disorders"). Plaintiffs' sole argument that "direct abortion . . . is a voluntary decision to terminate a pregnancy" and thus "not a 'condition' that is related to pregnancy," CBA Br. at 25, is thus inapposite; regardless of the reason for an abortion, it is inherently related to pregnancy and can occasion physical or mental conditions that are subject to the PWFA.

2. The PWFA's Text Encompasses CIT

The PWFA's plain language also covers CIT. Something is "related to pregnancy," under Title VII, and thus the PWFA, *see supra* at § III.C.1, where it bears directly on a woman's "capacity to become pregnant" or "potential pregnancy." *Johnson Controls,* 499 U.S. at 197, 199, 204, 206. This alone defeats Plaintiffs' argument that the PWFA only covers "pregnancy that already has come into existence," CBA Br. at 25. *See Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 468 (6th Cir. 2005). And because CIT can only be administered on those with the "capacity to become pregnant," for the purpose of achieving pregnancy, it is "related to pregnancy." *Johnson Controls, Inc.,* 499 U.S. at 206; *see Walsh v. Nat'l Comput. Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) ("[p]otential pregnancy . . . is a medical condition that is sex-related [under Title VII] because only women can become pregnant." (citation omitted)); ECF No. 22 at 22. Thus, to the extent that CIT produces limitations, like unavailability while recovering from an impregnation procedure, those "physical or mental conditions"

are "related to, affected by, or arising out of pregnancy . . . or related medical conditions" and subject to the PWFA. 42 U.S.C. § 2000gg(4); *see* 89 Fed. Reg. at 29,102-03.

3. Materials Outside the Text Do Not Change the Clear Language

Plaintiffs' attempts to undermine the PWFA's text by relying on legislative history is unavailing. None of the materials they quote says anything about CIT, and multiple Members of Congress have recognized that the PWFA protects employees who have (or do not have) an abortion. *See, e.g.*, H.R. Rep. No. 117-27, at 60 (stating in Minority Report that the statute "could require [an] organization to comply with" a request for "time off to have an abortion procedure . . . as a reasonable accommodation"); 167 Cong. Rec. H2226, H2228-29 (daily ed. May 12, 2021) (statement of Rep. Taylor Greene declining to support PWFA because it covers abortions); 167 Cong. Rec. H2321, H2325 (daily ed. May 14, 2021) (statement of Rep. Letlow expressing same). Additionally, 25 Senators and 83 House of Representatives Members signed Comments endorsing the Final Rule's coverage of abortion. *See* 89 Fed. Reg. at 29,110 n.92 (citing Cmts. EEOC–2023–0004– 98257, EEOC–2023–0004–98470). So did Senate Sponsor Bob Casey, who recognized that "'pregnancy, childbirth, and related medical conditions,' . . . has been previously defined to include . . . abortion." Cmt. EEOC-2023-0004-98384 at 2 (Oct. 10, 2023), https://perma.cc/HEP8-QMSM.

There is also no basis to invoke the major questions doctrine with respect to abortion (CBA does not provide any argument as to why, and thus has waived that, CIT falls within the doctrine). EEOC was not exercising discretion in deciding abortion is covered by the PWFA; it was enforcing "policy decisions" made by "Congress itself" in adopting language with a well-established meaning. *West Virginia v. EPA*, 597 U.S. 697, 723, 735 (2022). While abortion may be an area of "national concern," CBA Br. at 27, that is not enough to invoke the doctrine. *See West Virginia*, 597 U.S. at 723 (doctrine applies in "extraordinary cases"); *Tennessee*, 2024 WL 3012823, at *8. EEOC did not "claim[] to discover in a long-extant statute an unheralded power" that had "rarely been used in the preceding decades," engage in a "radical or fundamental change to a statutory scheme," or "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." *West Virginia*, 597 U.S. at 723-24 (cleaned up). Rather, the Final Rule applies Title VII's longstanding meaning to a similar

statute containing identical language and intended to expand Title VII's protections.

D. The Final Rule Correctly Interprets the PWFA's Rule of Construction

Finally, Plaintiffs challenge the Final Rule's interpretation of the PWFA's Rule of Construction, which references Title VII's religious employer exception. The relevant portion of Title VII, § 702, provides that "[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. § 2000e-1(a); *see id.* § 2000gg-5(b) (section 2000e-1(a) applies to PWFA). Plaintiffs misapprehend the nature of the religious employer exception, and what the Final Rule says about § 107(b).

First they claim that the Final Rule interprets the exception to "be narrowed to cover only claims of religious-status discrimination." CBA Br. at 28. As the Final Rule makes clear, however, entities are free to invoke religion as a defense to *any* claim under the PWFA:

> If a qualifying religious organization asserts as a defense to a claim under the PWFA that it took the challenged action on the basis of religion and that section 107(b) should apply, the merits of any asserted defense will therefore be determined on a case-by-case basis consistent with the facts presented and applicable law.

89 Fed. Reg. at 29,147. EEOC has applied the same case-by-case approach to considering Title VII's religious employer provision for decades. 89 Fed. Reg. at 29,146-47.

Plaintiffs also misapprehend relevant precedent, suggesting that Title VII's religious exemption conclusively protects religious entities from "all of Title VII, not merely the narrow category of religious class discrimination." CBA Br. at 28. As the Fourth Circuit recognized, "[n]o federal appellate court in the country has embraced the . . . argument that Title VII permits religiously motivated sex discrimination by religious organizations." *Billard v. Char. Cath. High Sch.*, 101 F.4th 316, 328 (4th Cir. 2024); *see also Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1141 n.10 (D.N.D. 2021) (noting most courts deem religious employer exemption inapplicable to, *e.g.*, "religious organization charged with discrimination on the basis of sex"). Even Plaintiffs' cited authority recognizes that several courts have rejected their interpretation of the religious employer exception. *See Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring).

The ultimate question here is whether it was unlawful for the Final Rule to adopt a case-by-case approach for evaluating the Rule of Construction, and Plaintiffs provide no reason why doing so was inappropriate even if their preferred interpretation were correct. The choice of whether to proceed "through rulemaking or case-by-case adjudication" "lies primarily in the informed discretion of the administrative agency." *N.D. ex rel. Bd. of Univ. & Sch. Lands v. Yetter*, 914 F.2d 1031, 1036 (8th Cir. 1990) (citation omitted); *see also NLRB v. Bell Aerospace Co., Div. of Textron Inc.*, 416 U.S. 267, 294 (1974) (similar). Plaintiffs have not shown that EEOC improperly exercised that discretion in implementing a case-by-case approach for deciding § 107(b) exceptions under the Final Rule, where the Rule applies nationwide to diverse entities and such approach is consistent with how courts have interpreted the same language in Title VII for decades. That is particularly true given that Congress itself refused to adopt a categorical rule in the PWFA. *See* 168 Cong. Rec. S10069-70 (daily ed. Dec. 22, 2022) (rejecting amendment that the PWFA "not be construed to require a religious entity . . . to make an accommodation that would violate the entity's religion"). Indeed, a case-by-case evaluation is unavoidable simply to determine whether an entity is a religious employer. *See Cline v. Cath. Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (applicability of exception is "primarily a factual battle").

Finally, Plaintiffs' invocation of the doctrine of constitutional avoidance is meritless. *See* CBA Br. at 29-30. The canon is only applicable to interpreting "ambiguous statutes," *United States v. Davis*, 588 U.S. 445, 463 n.6 (2019), and Plaintiffs do not assert any statutory ambiguity. In any event, multiple circuits have confirmed that Title VII's religious employer exception may be applied consistent with the First Amendment. *E.g.*, *Billard*, 101 F.4th at 329; *EEOC v. Miss. Coll.*, 626 F.2d 447, 486-89 (5th Cir. 1980). Thus, EEOC's case-by-case approach does not create "a significant risk that [constitutional rights] will be infringed," *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 502 (1979).

IV. THE COURT SHOULD NOT GRANT PLAINTIFFS' REQUESTED REMEDIES

Plaintiffs seek a variety of remedies: vacatur, an injunction, and declaratory relief. CBA Mot. at 2-5; Compl. at 51-54. It would be improper to grant every requested or potentially applicable form of relief. *E.g.*, *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 562 (8th Cir. 2009) (vacating "superfluous" relief as abuse of discretion); *Texas v. EEOC*, 933 F.3d 433, 451 (5th Cir. 2019). While Defendants

maintain that any remedy would be inappropriate, any relief this Court nevertheless grants should be limited to declaratory or injunctive relief that is tailored to the parties and legal claims Plaintiffs bring.[9]

A. Nationwide Relief, Including Vacatur, Is Not Appropriate in This Case

Although Plaintiffs request vacatur of "the PWFA Rule as it includes abortion, immoral fertility treatment, or speech about the same," CBA Mot. at 5, Plaintiffs fail to brief, let alone establish, any entitlement to such a remedy.

Plaintiffs fail to demonstrate that party-specific declaratory or injunctive relief is inadequate to provide them complete relief. *See, e.g.*, CBA Mot. at 2-5. Vacatur is thus improper. *See Gill v. Whitford*, 585 U.S. 48, 72-73 (2018) (remedies "must be tailored to redress the plaintiff's particular injury"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (remedies must be no "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."). Accordingly, any injury the Plaintiffs have experienced due to the Final Rule marks the outer limit of any relief they may be afforded. *Whitford*, 585 U.S. at 66, 72-73. Nationwide relief would therefore be improper, particularly to the extent that the Court continues to rule in Plaintiffs' favor on their RFRA claim, which provides no basis for extending relief beyond Plaintiffs. *See Braidwood*, 70 F.4th at 938 (agreeing with "the inapplicability of deciding RFRA claims class-wide"); *see also Ramirez v. Collier*, 595 U.S. 411, 433 (2022) (describing RFRA's test as requiring "that courts take cases one at a time").

B. Any Relief Must be Tailored to Plaintiffs' Asserted Harms

Should this Court find that relief is warranted, it should be limited in at least three respects. *See Whitford*, 585 U.S. at 73; *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *supra* § I.D.

First, as this Court determined at the preliminary injunction stage and as Plaintiffs agree, any relief should extend only to the narrow portion of the Rule or Guidance that the Court finds unlawful, if any. *See* PI Order at 17-18; CBA Mot. at 2-5; *Lewis v. Casey*, 518 U.S. 343, 357 (1996). This is particularly true because the Civil Rights Act, the PWFA, and the Final Rule all contain severability clauses, 42 U.S.C. §§ 2000h-6; 2000gg-6; 29 C.F.R. § 1636.8, and even Plaintiffs' APA claims must seek

[9] Plaintiffs do not ask the Court to vacate any portion of the Guidance and at most request party-specific declaratory and injunctive relief as to the Guidance. *See* CBA Mot. at 3-5.

relief against *agency* actions, not against statutes in the abstract.

Second, any relief should apply only to the identified Parties. CBA has not established that its roughly 8,480 unnamed members are aware of this suit, let alone that they have agreed to be bound by any judgment. Thus, nothing prevents CBA's members from individually suing (or joining a different associational plaintiff) in another jurisdiction. *See, e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d 1064, 1084 (9th Cir. 2023) ("If the individual members of the Association were not bound by the result of the former litigation, the organization would be free to attack the judgment *ad infinitum* by arranging for successive actions by different sets of individual member plaintiffs."). CBA also has not established injury as to its diverse unnamed members, who appear differently situated from the named dioceses.

Limiting relief to the Parties necessarily means that relief should not extend to CBA's "future members" who were not members at the time of suit, nor to a loosely defined category of "anyone acting in concert with or participating with them." CBA Mot. ¶ 7. The Supreme Court has never recognized an association's standing to bring suit on behalf of *non-members* who may become members in the future or those merely acting in concert with members. *See Hunt v. Wash. St. Advert. Comm'n*, 432 U.S. 333, 342 (1977) (association may have "standing to bring suit *on behalf of its members*" (emphasis added)); *Lujan*, 504 U.S. at 571 n.5 ("standing is to be determined as of the commencement of suit"); *Valley Forge Christian Coll. v. Ams. United for Sep. of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("plaintiff . . . cannot rest his claim to relief on the legal rights or interests of third parties").

Traditional equitable principles further counsel against extending relief beyond current members, because any present injury is definitionally limited to the current CBA members. *See, e.g.*, *Whitford,* 585 U.S.at 73; *Madsen.*, 512 U.S. at 765. Although in providing preliminary relief the Court found that "judicial efficiency weighs in favor of protecting future members," respectfully, the Court did not grapple there with these equitable and jurisdictional concerns. *See* PI Order at 18.[10] Relief as

[10] Should the Court nevertheless extend relief to future CBA members, it should continue to limit relief to entities that were CBA members at the time of any alleged violation so as to reduce the potential for manipulation and to enhance employee protections. *See* PI Order at 18.

to "anyone acting in concert with or participating with" Plaintiffs, CBA Mot. ¶ 7, is inappropriate for additional reasons. Plaintiffs have established no basis for imputing their beliefs to non-parties who have not sought relief against the Final Rule and may not share Plaintiffs' religious objections, *see, e.g.*, 42 U.S.C. § 2000bb-1(c) (providing cause of action to "*person whose religious exercise has been burdened*" (emphasis added)); *O Centro*, 546 U.S. at 431, or alleged any harms that would come to them absent relief to entities "acting in concert with or participating with" them. Accordingly, any relief entered by this Court should only apply to the Dioceses of Bismarck, Baker, and Saint Paul and Minneapolis—or, at most, CBA members similarly situated to those dioceses who were members at the time of suit.

Third, any relief should not prohibit EEOC from complying with its statutory duty to issue NRTS letters to members' employees, regardless of the conduct at issue. 42 U.S.C. § 2000e-5(b), (f)(1). The Complaint nowhere challenges or seeks relief against the statutory provisions authorizing issuance of NRTS, and Plaintiffs previously agreed that such restriction was not necessary, *see* 9/18/24 Hr'g Tr. at 18. To the extent this Court's preliminary injunction, restricting issuance of NRTS, sought to hinder private parties' abilities to bring suits against their employers, such aim runs counter to the Supreme Court's mandate that non-parties should not "be obliged to honor an incidental legal determination [that a] suit produced." *Murthy*, 603 U.S. at 73-74 (quoting *Lujan*, 504 U.S. at 569); *see also Whitford*, 585 U.S. at 73; *Madsen*, 512 U.S. at 765. Moreover, enjoining NRTS also would not achieve that purpose. NRTS do *not* represent a determination that an employee's claim is meritorious or that a religious defense does not apply; rather, EEOC is statutorily required to issue NRTS in situations where EEOC has dismissed a charge or elected not to file suit against a private employer, including where it has determined that a religious exception or other defense applies. *See* 42 U.S.C. § 2000e-5(f)(1); *Newsome*, 37 F. App'x at *1; Hudson Decl. ¶¶ 7-8. Even with an injunction, employees may assert equitable bases for waiver of the NRTS prerequisite to suit.

In fact, all parties would be worse off if EEOC remains unable to issue NRTS. Without the 90-day statutory limitations period for suit that NRTS triggers, *see* 42 U.S.C §§ 2000e-5(f)(1), 2000gg–2; 29 C.F.R. § 1601.28, employers would suffer uncertainty about whether and when employees might sue and could be subject to litigation for claims that would have otherwise long expired. Employees

would be similarly confused about their rights under the relevant statutes here, which is particularly problematic where those statutes are intended for use by laypeople. *E.g.*, *Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002). And both parties and courts would be burdened by having to litigate the applicability of equitable exceptions. *Cf. Christian Emps. All.*, 2024 WL 935591, at *11. This Court should avoid triggering such administrative confusion and costs.

These limits describe the maximum relief theoretically available, but the proper approach would be to grant Defendants' motion, deny Plaintiffs' cross-motions, and dismiss the case entirely.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied, and Defendants' cross-motion for summary judgment should be granted.

Dated: December 6, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

EMILY B. NESTLER
Assistant Branch Director

DANIEL SCHWEI
Special Counsel

/s/ Laura B. Bakst
LAURA B. BAKST (D.C. Bar No. 1782054)
JACOB S. SILER (D.C. Bar No. 1003383)
ALEXANDRA WIDAS (D.C. Bar No. 1645372)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-3183
Facsimile: (202) 616-8460
Email: Laura.b.bakst@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; and BISMARCK DIOCESE, *Plaintiffs*, v. CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Defendants*.	No. 1:24-cv-00142-CRH

DECLARATION OF CHRISTOPHER LAGE

Pursuant to 28 U.S.C. § 1746, I, Christopher Lage, declare the following to be a true and correct statement of facts:

1. I have been an employee of the U.S. Equal Employment Opportunity Commission (EEOC or Commission) continuously since 1994. I began my career at EEOC as a Trial Attorney in the San Antonio Field Office and served in that role until 1998. I then became a General Attorney in the Office of Legal Counsel from 1998 to 1999. In 1999, I joined the Office of General Counsel (OGC), serving as a General Attorney from 1999 to 2002, Assistant General Counsel from 2002 to 2021, and Deputy General Counsel from 2021 to the present day.

2. The mission of OGC is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and ensure compliance with the statutes enforced by the Commission (referred to as enforcement actions or enforcement litigation).

3. The Deputy General Counsel is responsible for overseeing all programmatic and administrative functions of OGC, including the litigation program.

4. OGC maintains electronically stored information related to enforcement actions brought by the Commission since at least 2003, including at least 95% of complaints filed since fiscal year 2009.[1] This includes enforcement actions brought under Title VII of the Civil Rights Act of 1964. On December 5, 2024, I personally conducted a search of OGC's electronically stored information concerning enforcement actions (litigation) for cases brought against The Catholic Benefits Association (CBA), Bismarck Diocese, Diocese of Baker, and Diocese of Saint Paul and Minneapolis— *i.e.* Plaintiffs and all identified CBA members in this case. After reviewing the search results, I identified no enforcement actions brought by the Commission against these employers under any statutes.

5. On November 26, 2024, I personally conducted a search of OGC's electronically stored information concerning enforcement actions (litigation) under the PWFA brought by the Commission involving abortion and fertility treatments (including, but not limited to, assisted reproductive technology like in vitro fertilization, artificial insemination, and surrogacy). After reviewing the search results, I identified no PWFA enforcement actions brought by the Commission involving any of the above-listed issues.

6. I reviewed the following federal appeal decisions cited in Plaintiffs' motion papers: *Roxanna B. v. Yellen*, EEOC No. 2020004142, 2024 WL 277871 (Jan. 10, 2024), *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013), and *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015). None of these decisions involves any enforcement actions brought by the EEOC. Rather, they are federal sector appeal

[1] This database may omit up to 5% of complaints because data must be uploaded manually, and staff may not have uploaded all of the complaints.

decisions for complaints brought against federal employers, which the EEOC handles via a separate process from that which applies to non-federal and private employers.

7. I have searched OGC's database to determine if the EEOC brought any of the claims or was a party in the following actions referenced in Plaintiffs' motion papers: *Copeland v. Georgia Dep't of Corrections*, 97 F.4th 766 (11th Cir. 2024); *Houlb v. Saber Healthcare Grp.*, No. 1:16CV02130, 2018 WL 1151566 (N.D. Ohio Mar. 2, 2018); *Tudor v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2017 WL 4849118 (W.D. Okla. Oct. 26, 2017); *Versace v. Starwood Hotels and Resorts Worldwide, Inc.*, No. 6:14-cv-1003, 2015 WL 12820072 (M.D. Fla. Dec. 7, 2015); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020); *Parker v. Strawser Constr., Inc.,* 307 F. Supp. 3d 744 (S.D. Ohio 2018). I confirmed that the EEOC did not bring any of the claims and was not a party in any of these actions.

8. I have searched OGC's database to identify any cases brought by EEOC under Title VII involving a transgender charging party. I identified a total of 14 cases. Of these fourteen cases, eight have been closed. With the exception of Harris Funeral Homes (2:14-cv-13710 (EDMI) (September 25, 2014), none of the employers in those cases asserted an affirmative defense, including a religious defense. In the six open cases, none of the employers has asserted an affirmative defense, religious or otherwise.

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

Executed this 5th day of December, 2024.

Christopher Lage

Digitally signed by Christopher Lage
Date: 2024.12.05 13:55:16 -05'00'

Christopher Lage
Deputy General Counsel
Office of General Counsel
U.S. Equal Employment Opportunity Commission

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

THE CATHOLIC BENEFITS ASSOCIATION, on behalf of its members; and BISMARCK DIOCESE, *Plaintiffs*, v. CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Defendants*.	No. 1:24-cv-00142-CRH

DECLARATION OF TRACY HUDSON[1]

Pursuant to 28 U.S.C. § 1746, I, Tracy Hudson, declare the following to be a true and correct statement of facts:

1. I have been an employee of the U.S. Equal Employment Opportunity Commission (EEOC) continuously since September 1990. In July 2023, I was selected to serve as Acting Field Management Programs Program Analysis Officer in the EEOC's Office of Field Programs. Prior to July 2023, I served in a number of positions, including Senior Attorney Advisor, Program Analyst/Attorney Advisor, Acting Washington Field Office Deputy Director, and Supervisory Trial Attorney.

[1] Section 709(e) of Title VII, 42 U.S.C. § 2000e-8(e), prohibits any employee of the Commission from making public any information obtained by the Commission pursuant to its statutory investigative authority prior to the institution of a lawsuit involving that information. The PWFA incorporates Section 709. See 42 U.S.C. § 2000gg-2(a)(1). To comply with these requirements, the EEOC's practice is to neither confirm nor deny the existence of any charges subject to Section 709(e). The EEOC thus provides this declaration only to counsel for The Catholic Benefits Association and Bismarck Diocese (and to this Court) to ensure each Plaintiff is provided only the information pertaining to charges to which they are the subject, and charge information is not otherwise made public.

2. Among other responsibilities, the Office of Field Programs, and specifically the Field Management Programs Division of the Office of Field Programs, oversees the EEOC's intake and processing by staff in the agency's 53 field offices of charges of discrimination under laws enforced by the EEOC, including the Pregnant Workers Fairness Act (PWFA) and Title VII of the Civil Rights Act of 1964 (Title VII).

3. The EEOC's administrative process begins when an individual (charging party) files a charge of employment discrimination with the EEOC.[2] Within 10 days of a charge being filed, the EEOC informs the employer (respondent) that a charge has been filed[3] and, if appropriate, requests a position statement from the employer. The EEOC has a robust voluntary mediation program that parties may be invited to participate in. If the parties decline to mediate or if the mediation is unsuccessful, depending upon the information in the charge and the position statement, the EEOC may conduct a further investigation.

4. As part of its evaluation of the charge, the EEOC encourages respondent-employers to raise any factual or legal defenses that they believe are relevant, including religious defenses. The EEOC takes religious defenses seriously and carefully evaluates such defenses whenever they are raised. If the respondent is a religious organization or otherwise claims that it had a right under the U.S. Constitution or other federal laws to take the employment action the charging party is challenging, the EEOC encourages the respondent to provide such information at the earliest possible time. Additionally, the respondent may request that the EEOC prioritize consideration of the religious defense before investigating the merits of the charge.[4]

---

[2] *See* 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 2000gg-2(a)(1).
[3] *See id.*
[4] EEOC, Questions and Answers for Respondents on EEOC's Position Statement Procedures 2, https://perma.cc/ED59-SNKR (explaining respondents may "request that the EEOC prioritize consideration of the religious defense before investigating the merits of the charge").

5. At any point during the charge process, the parties may settle the charge, or the charging party may ask for the charge to be withdrawn.

6. If the charge is not closed for one of the reasons in ¶ 5, based on the information received during its investigation, the EEOC determines whether there is reasonable cause to believe discrimination occurred or that no further investigation is warranted. If the EEOC determines it has "reasonable cause" to believe discrimination occurred, it endeavors to resolve the charge through conciliation, which is an informal process through which the EEOC works with the parties in an attempt to facilitate a resolution.[5] Participation in conciliation is voluntary.

7. If the EEOC determines that further investigation is not warranted—for example, if EEOC determines the charge was filed outside the statute of limitations, 42 U.S.C. § 2000e-5(e)(1) (providing the time period for filing a charge); 29 C.F.R. § 1601.18(a)—the agency will dismiss the charge and notify the charging party and the respondent. *See* 42 U.S.C. § 2000e-5(b) ("If the Commission determines after such investigation 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 respondent of its action."); *id.* § 2000e-5(f)(1) ("If a charge filed with the Commission … is dismissed by the Commission … the Commission … shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge by the person claiming to be aggrieved"); 29 C.F.R § 1601.18(a) ("Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under title VII, the ADA, GINA, or the PWFA, the Commission shall dismiss the charge."). In part, this includes the issuance of a Determination and Notice of Rights ("NRTS") to the charging party, notifying them of their statutory right to choose to file suit in federal

[5] *See* 42 U.S.C. § 2000e-5(b).

court. 29 C.F.R. § 1601.28(b)(3), (e). If the EEOC determines that further investigation is not warranted, the NRTS shall include EEOC's "decision, determination, or dismissal, as appropriate," *id.* § 1601.28(e)(4), but it does not address the substance of the charging party's claims or the respondent's defenses.

8. For example, if the EEOC determines that a defense to the employment practice challenged in a charge, including a religious defense, has been established, the agency dismisses the charge and issues a Determination and Notice of Rights to the charging party. This is true when any employer's defense has been established, whether the defense is religious, jurisdictional, or based on a non-discriminatory reason. *See supra* ¶ 7. Notably, EEOC's determination regarding the claims or defenses raised in a charge are not considered by the court if the charging party or the EEOC files a lawsuit because the court conducts a *de novo* review.

9. On September 16, 2024, EEOC personnel conducted a search for any charges under Title VII and the PWFA, received from October 1, 2017 through September 15, 2024[6] against the following employers: Bismarck Diocese, Archdiocese of St. Paul and Minneapolis, and Diocese of Baker, Oregon. On December 5, 2024, EEOC personnel conducted a search for any charges under Title VII and the PWFA, received from October 1, 2017 through December 4, 2024, against Catholic Benefits Association (CBA). Search results indicated [redacted].

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

[6] The search was limited because the EEOC does not have the ability to search charges filed prior to FY 2018 in a similar manner. The search was conducted on verified data for FY 2018-FY 2023 (October 1, 2017 – September 30, 2023) and unverified data (data that EEOC employees may change or update) for October 1, 2023 – September 15, 2024, and December 4, 2024.

Executed this 5th day of December, 2024.

TRACY HUDSON

Tracy Hudson
Acting Field Management Programs
Program Analysis Officer
Office of Field Programs
U.S. Equal Employment Opportunity Commission