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

DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiffs fail to meaningfully engage with Defendants' arguments or cure their evidentiary deficiencies. Instead, they reiterate their opening brief's arguments and ask this Court to simply convert its preliminary injunction ruling into a permanent injunction, disregarding their heightened burden on summary judgment. For the reasons described herein and in Defendants' opening brief, *see* ECF No. 40 ("Defs. MSJ"), Plaintiffs have failed to demonstrate an entitlement to relief. The Court should thus deny Plaintiffs' motion, grant Defendants' cross-motion, and dismiss this case.

I. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS

Regulatory Injury: Plaintiffs fail to establish that they have suffered "added regulatory burden by way of compliance costs," ECF No. 44 at 7 ("CBA Op."). Plaintiffs identify *zero* costs that they have actually incurred, *see* Defs. MSJ at 13-14, including in the many months between when the Final Rule and Guidance issued and when this Court granted preliminary injunctive relief. While Plaintiffs vaguely reference potential "cost[s] of adopting policies," CBA Op. at 7, neither the Final Rule nor the nonbinding Guidance requires Plaintiffs to formalize any specific policies regarding the matters to which they object. And in claiming that "[t]he regulatory burden exists separate and apart from [any] credible threat of enforcement," *id.*, Plaintiffs disregard binding precedent, *see Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972); Defs. MSJ at 10-11.[1]

Credible Threat: Plaintiffs ask the Court to "assume a credible threat of prosecution." CBA Op. at 3 (quoting *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020)). As an initial matter, such an assumption applies only to policies that "facially restrict expressive activity," *Speech First*, 979 F.3d at 335, and cannot establish standing as to Plaintiffs' non-speech claims. Plaintiffs also have not identified any provisions that "facially restrict" speech in ways to which they object, *id. Compare* CBA Op. at 18 (seeking to engage in "employment practices regarding individual employees and value-laden conversations with such employees") *with* 89 Fed. Reg. at 29,152 (a "personnel decision . . . is not protected speech or expressive conduct[.]"); *id.* at 29,142 ("general statements regarding an employer's

[1] For the reasons discussed under "Credible Threat," Defendants do not concede that the speculative "burden of investigation and possible litigation . . . provides a substantial likelihood of added regulatory burden." CBA Op. at 6-7 (citation omitted); *contra* Defs. MSJ at 10-12.

mission or religious beliefs" not proscribed); Guidance at 8 (Guidance "do[es] not have the force and effect of law, [is] not meant to bind the public"). *See also* 89 Fed. Reg. at 29,152 (committing to evaluating First Amendment concerns on case-by-case basis); Guidance at 96 (similar).

An assumption of credible threat is also only appropriate "in the absence of compelling contrary evidence." *Speech First*, 979 F.3d at 335. And Defendants have submitted such evidence here: EEOC *has never* undertaken *any* PWFA enforcement action against *any employer* regarding abortion- or infertility-related accommodations, including against the millions of employers not subject to the limited injunctive relief issued against the Final Rule, Defs. MSJ at 11; and EEOC has *never* undertaken *any* Title VII enforcement action against *any* employer raising a religious defense during the charge process for a claim filed by a transgender employee, *see id.* Plaintiffs have not identified any enforcement to the contrary, including under Title VII's longstanding abortion-related protections. Instead, they rely on irrelevant cases that do not involve EEOC, do not raise religious claims, and/or implicate issues different from those here. *See* CBA Op. at 5 (citing cases by *private* employees, *i.e.* cases EEOC determined *not* to bring); *id.* at 3 (citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* 884 F.3d 560 (6th Cir. 2018), where plaintiff failed to raise RFRA pre-litigation, *see* 89 Fed. Reg. at 29,147 n.243); *id.* at 4 (discussing amicus brief in *Lange v. Houston County*, No. 22-13626, (11th Cir. Mar. 17, 2023), filed by DOJ, not EEOC, in case unrelated to objections here and lacking religious claim).

The many contingencies that must occur before any possibility of EEOC enforcement arises defeat standing. *See Sch. of Ozarks, Inc. v. Biden*, 41 F.4th 992, 1000 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2638 (2023); Defs. MSJ at 11-12. Plaintiffs attempt to distinguish *Ozarks* by claiming that the plaintiff there received "a blanket religious exemption." CBA Op. at 6. But that exemption was extended by a non-defendant agency under a different statute than the one at issue in *Ozarks*. 41 F.4th at 999-1000. And as in *Ozarks*, Plaintiffs identify no EEOC enforcement against religious employers in ways to which Plaintiffs object.[2] *See supra* at 2. Finally, Plaintiffs attempt to establish a risk of imminent

[2] Plaintiffs' sole citation, *Roxanna B. v. Yellen*, EEOC Appeal Nos. 2020004142, 2021003810, 2024 WL 277871 (Jan. 10, 2024), is an inapposite federal-sector appeal that does not present religion claims. *See* ECF No. 40-1 ¶ 6; Defs. MSJ at 11.

enforcement by asserting that they have violated Title VII and the PWFA. However, Defendants do not claim Plaintiffs "are breaking EEOC guidance," CBA Op. at 6 (quoting *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 926-27 (5th Cir. 2023)), and acknowledge that defenses and exceptions may apply to the scenarios Plaintiffs envision. *See* Defs. MSJ at 13. For the same reason, Plaintiffs cannot show that they are at imminent risk of a Commissioner charge, *contra* CBA Op. at 6.

Redressability: Plaintiffs cannot explain how their alleged injuries would be redressable. Regardless of Plaintiffs' requested declaratory and injunctive relief against EEOC, their employees would retain the ability to sue to enforce the PWFA and Title VII in the same ways here at issue, *see Murthy v. Missouri*, 603 U.S. 43, 73-74 (2024), thus presenting the same risk of liability and the same compliance obligations.

Unnamed Members: CBA claims that individual association members need not participate because they are seeking "declaratory" and "injunctive relief," and because "one" CBA member "would have standing," CBA Op. at 8-9. This contravenes binding case law. *See, e.g.*, *SFFA, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181, 199 (2023) ("an organization must demonstrate that . . . its members would otherwise have standing to sue in their own right" *and* that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"). CBA's diverse members may be entitled to differing protections and may suffer different injuries. *See* Defs. MSJ at 16. While CBA maintains that its members share the same views, it has not proffered sufficient proof of that claim. *See id.* at 15-16 (explaining that CBA membership criteria does not establish that providing reasonable accommodations or abstaining from harassment is employment "benefit" and that dioceses' declarations do not establish views of other members). Thus, regardless of whether CBA's claims are legal in nature, they turn on members' religious beliefs and "participation of individual members . . . is essential." *Harris v. McRae*, 448 U.S. 297, 321 (1980); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("*O Centro*"); *Pharm. Rsch. & Mfrs.*

of Am. v. Williams, 64 F.4th 932, 948 (8th Cir. 2023); *Brown v. Collier*, 929 F.3d 218, 230 (5th Cir. 2019).[3]

Finally, Plaintiffs cannot invoke collateral estoppel. *See* CBA Op. at 12. CBA has not identified any case against EEOC where CBA's organizational standing to challenge the Guidance or Final Rule was actually litigated. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984) (estoppel "preclude[s] relitigation of the *same issue* already litigated against the *same party* in another case involving *virtually identical* facts" (emphasis added)). Nor may Plaintiffs rely on cases to which they were not a party. *See United States v. Mendoza*, 464 U.S. 154, 162 (1984).

II. NEITHER THE FINAL RULE NOR GUIDANCE VIOLATE RFRA

Plaintiffs cannot establish a RFRA violation because they are not required to take *any* action absent a long chain of contingencies occurring and because the Final Rule and the Guidance recognize the availability of religious defenses and exceptions. *See* Defs. MSJ at 11-12, 17-18; *contra* CBA Op. at 13-14. Plaintiffs adduce no evidence that asserting a RFRA defense in response to a specific charge is burdensome or violates their beliefs. *Cf. Zubik v. Burwell*, 578 U.S. 403, 406-07 (2016) (discussing RFRA claim where only alternative to violating organizations' beliefs itself violated their beliefs). Application of the case-by-case approach comports with 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, and is adequate and appropriate to protect Plaintiffs' rights.

Even if the Court holds that the case-by-case approach could potentially burden Plaintiffs' religious exercise, Plaintiffs are not entitled to a categorical exemption. Depending on the particular factual scenario in which a potential claim arises, the RFRA analysis may well resolve in the Government's favor, which precludes the broad relief Plaintiffs request here.[4] *E.g.*, Defs. MSJ at 20-

[3] For the same reasons, Plaintiffs' claims are not ripe. *See* Defs. MSJ at 17. Plaintiffs suffer no hardship because they do not risk violating the law absent the speculative chain of contingencies materializing, and because they could raise the same defenses at that time. *See id.* at 11-12; *contra* CBA Op. at 11 n.3.

[4] Statements made elsewhere by EEOC, including in an amicus brief in *McMahon v. World Vision, Inc.*, No. 24-3259 (9th Cir. Oct. 28, 2024), ECF No. 78.1 ("Amicus Br."), *see* CBA Op. at 14, simply reflect the application of the case-by-case approach. In *McMahon*, EEOC made arguments regarding the proper interpretation of Title VII—not the PWFA—reflecting "applicable law" in the Ninth Circuit. Amicus Br. at 7, 9-10. EEOC did not comment on interpretations of the PWFA's Rule of

23; *contra* CBA Op. at 13-14.

Plaintiffs do not rescind prior statements that they do not object to certain categories of accommodations. *See* Defs. MSJ at 20-21 (discussing knowing accommodations); *contra* CBA Op. at 15-16 (failing to address Defendants' arguments). This illustrates why the case-by-case, fact-specific approach is appropriate here, because Plaintiffs concede that not every accommodation necessarily burdens their religious exercise. Nor do Plaintiffs explain how the non-binding discussion of case law contained in the Guidance imposes any religious burdens on them. *See* Defs. MSJ at 21. Plaintiffs thus cannot demonstrate that *every* challenged alleged requirement in the Final Rule or Guidance would substantially burden their religious exercise.

The Final Rule and Guidance lay out compelling interests. *See id.* at 21-22. Plaintiffs have no substantive response other than to characterize these interests as "broadly formulated" and "generalized," CBA Op. at 16, which, even if true, would only highlight why such interests must be considered in the context of individual cases, *see* Defs. MSJ at 22-23. Nor does the inclusion of certain secular exemptions in Title VII and the PWFA undermine the Government's interests, given that those exemptions also apply to religious entities. *See id.*; *contra* CBA Op. at 16.

The Final Rule and Guidance also apply the least restrictive means for the Government to achieve its compelling interests. Plaintiffs do not dispute Defendants' arguments as to why an alternative approach was infeasible. *See* Defs. MSJ at 19-20, 23. Their contention that Congress "granted religious employers a blanket exemption in Title VII, the PWFA, or RFRA," CBA Op. at 16, is similarly unsupported, *e.g.*, Defs. MSJ at 30-31; 168 Cong. Rec. S10069-70 (daily ed. Dec. 22, 2022).

III. THE FINAL RULE AND GUIDANCE SATISFY THE FIRST AMENDMENT

The parties agree that if the Court grants relief to Plaintiffs pursuant to RFRA, it need not address any of the remaining claims, either under the First Amendment or the Administrative Procedure Act ("APA"). *See* ECF No. 36 at 20. In any event, these claims lack merit.

Free Exercise: Plaintiffs are incorrect in claiming that Title VII and the Final Rule improperly

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Construction, standing alone. *E.g.*, *id.* at 16-17. The statements in *McMahon* are not necessarily representative of the view EEOC would take in reviewing other charges in other jurisdictions.

reserve to EEOC discretion to determine whether a religious claimant is entitled to an exemption; the defenses and exceptions are applied based on set statutory and constitutional standards—they do not permit EEOC to evaluate whether a claimed exception is "worthy of solicitude," CBA Op. at 17 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 537 (2021)). Plaintiffs also misread *Tandon v. Newsom, see id.*, which applies heightened scrutiny only if a State "treat[s] *any* comparable secular activity more favorably than religious exercise," 593 U.S. 61, 62 (2021). That is not the case here, because all of the secular exemptions at issue apply as readily to religious employers. *See* Defs. MSJ at 23-24.

Expressive Association: Plaintiffs do not explain how EEOC's case-by-case approach to expressive association concerns fails to protect their rights, *see* 89 Fed. Reg. at 29,153; Guidance at 97-98, particularly as Title VII allows entities that fall under its religious employer exception to prefer hiring co-religionists. *See* 42 U.S.C. § 2000e-1(a); *see also id.* § 2000gg-5(b); EEOC, Compliance Manual on Religious Discrimination, § 12-I(C) (Jan. 15, 2021), https://perma.cc/GJ6R-BLZL. Nor, consistent with *Hishon v. King & Spalding*, 467 U.S. 69 (1984), have Plaintiffs shown that their "ideas and beliefs" would be "inhibited," *id.* at 78.

Free Speech: Plaintiffs still have not identified any specific speech they wish to engage in that is proscribed by the challenged agency actions. *See* Defs. MSJ at 25; *supra* at 1-2. The Final Rule does not bar "comments" related to "abortions and infertility," CBA Op. at 19; rather, it recognizes that frequent critical comments about an employee's late start time as a pregnancy accommodation, coupled with, *inter alia*, intentionally scheduling important meetings at times she cannot attend, may support a retaliatory harassment claim. 89 Fed. Reg. at 29,218. Nor does the *non-binding* Guidance "explicitly prohibit[] 'misgendering,'" CBA Op. at 19. It merely recognizes that courts have found that such conduct may be considered in determining whether harassment is severe or pervasive. Guidance at 112 n.42.

IV. THE FINAL RULE IS CONSISTENT WITH THE APA

Abortion: Plaintiffs do not dispute that Title VII's text encompasses abortion, arguing only that identical language in the PWFA should be interpreted differently. That argument lacks merit. Plaintiffs' suggestion that regulatory authority and case law are insufficient to establish that Congress

understood "pregnancy, childbirth, or related medical conditions" to cover abortion, CBA Op. at 20, is belied by Congress's express intent to encompass abortion within that phrase, *see* Defs. MSJ at 26-27. Distinguishing between the statutes as concerning discrimination (Title VII) versus accommodations (PWFA), CBA Op. at 20-21, disregards that accommodation law is a species of anti-discrimination law. *See* 42 U.S.C. §§ 2000gg-1 (PWFA titled "Nondiscrimination with regard to reasonable accommodations related to pregnancy"), 12112(b)(5)(A) ("discrimination" in ADA defined to include "not making reasonable accommodations"); Defs. MSJ at 22. Nor does the presence of "include, but are not limited to," in Title VII change the meaning of the phrase here at issue. *See In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d 936, 942 n.2 (8th Cir. 2007) (quoting 42 U.S.C. § 2000e(k)); *contra* CBA Op. at 20-21.

On the PWFA's text, Plaintiffs wholly fail to dispute Defendants' argument that abortion-related limitations are "related to pregnancy." Defs. MSJ at 28; *see In re Union Pac.*, 479 F.3d at 942. Their argument regarding "related medical conditions" similarly fails to engage with Defendants' explanation as to why "physical conditions" stemming from abortion are "related medical conditions" regardless of whether abortion is a procedure itself. *See* Defs. MSJ at 27-28. For these reasons and those previously described, *id.* at 26-28, the PWFA encompasses abortion-related accommodations.

Challenged Infertility Treatments (CIT): In arguing that the phrase "pregnancy . . . or related medical conditions" only covers actual pregnancy, Plaintiffs disregard the Supreme Court's holding that the phrase encompasses "childbearing capacity" and "potential for pregnancy." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197, 199 (1991). CIT can only be provided to those with the capacity to become pregnant for the purpose of achieving pregnancy, and thus any limitations CIT produces are inherently related to pregnancy. *See Walsh v. Nat'l Comput. Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) ("[p]otential pregnancy . . . is a medical condition [covered by Title VII] because only women can become pregnant.").

Plaintiffs also advance an overbroad reading of *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), *abrogated by Bragdon v. Abbott*, 524 U.S. 624 (1998), suggesting that Title VII excludes CIT. The fertility-related claims in *Krauel* were inactionable because there was no disparate treatment

between sexes, *see id.* at 680 (challenging denial of insurance coverage for all fertility treatments, including for men)—an element of Title VII that Congress decided *not* to import into the PWFA, *e.g.*, 117 H.R. Rep. No. 117-27, at 14-16 (2021). But care like CIT, provided only to those with "[p]otential pregnancy," is covered by Title VII "because only women can become pregnant." *Krauel*, 95 F.3d at 680. That is why Title VII claims by women challenging adverse action based on their use of CIT are cognizable. *E.g.*, *Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1175, 1178-79 (N.D. Ind. 2014) (cited in CBA Op. at 5); *Hall v. Nalco Co.*, 534 F.3d 644, 648-49 (7th Cir. 2008); *Govori v. Goat Fifty, LLC*, No. 10-cv-8982, 2011 WL 1197942, at *3 (S.D.N.Y. Mar. 30, 2011). And as explained *supra*, there is no basis to read the PWFA as narrower than Title VII. *Contra* CBA Op. at 19.

Rule of Construction: Plaintiffs fail entirely to respond to Defendants' arguments or counter the overwhelming authority against their preferred interpretation of Title VII's religious employer exemption. *See* Defs. MSJ at 30-31. EEOC properly exercised its discretion in implementing a fact-specific method, consistent with Title VII, for reviewing § 107(b) exceptions under the Final Rule.

Atextual Considerations: Plaintiffs' concession "that the PWFA is unambiguous," CBA Op. at 22, defeats their argument for applying the major questions doctrine and constitutional avoidance, *see* Defs. MSJ. at 29-31. Plaintiffs also fail to address Defendants' remaining arguments as to why this case does not meet the standard for application of the doctrine or constitutional avoidance. *Id.*

V. THE COURT SHOULD NOT GRANT PLAINTIFFS' REQUESTED REMEDIES

Appropriately tailored relief would remedy any irreparable harm Plaintiffs demonstrate in this case. *See* Defs. MSJ at 31-35. If the Court grants relief, it should be tailored in three ways:

First, as the Parties agree, any relief should extend only to the narrow portion of the Rule or Guidance that the Court finds unlawful, if any. *See id.* at 32; CBA Op. at 22-25.

Second, any relief should apply only to identified Parties and only to their identified injuries, as this would fully remedy any "inadequacy that produced [Plaintiffs'] injury in fact." *Gill v. Whitford*, 585 U.S. 48, 68 (2018). Plaintiffs fail to provide evidence—or otherwise respond to Defendants' arguments—that its diverse membership is aware of this suit, has agreed to be bound by any judgment, or has suffered the injury alleged. *E.g.*, Defs. MSJ at 33. As to future members, Plaintiffs provide no

support for their contention that limiting relief to current members would "cripple" the CBA. *See* CBA Op. at 22 n.7. The Supreme Court has never recognized an association's standing to bring suit on behalf of non-members who may become members. *See* Defs. MSJ at 33. Moreover, Plaintiffs do not dispute that the Court should continue to limit any relief to entities that were CBA members at the time of any alleged violation. *See* ECF No. 31 at 18; Defs. MSJ at 33 n.10. Plaintiffs additionally do not pursue the application of relief to "anyone acting in concert with or participating with" Plaintiffs, *see* CBA Op. at 22-25, and provision of such relief would exceed the Court's equitable authority, *see* Defs. MSJ at 33-34. Relief should therefore be limited to the Dioceses of Bismarck, Baker, and Saint Paul and Minneapolis—or, at most, to other CBA members similarly situated to the named dioceses who were members at the time of suit.[5] *See, e.g.*, Order at 5-6, 17-18, *CBA v. Sebelius*, No. 5:14-cv-240 (W.D. Okla. June 4, 2014), ECF No. 68 (recognizing that different types of CBA members are differently situated and eligible for different forms of relief under different causes of action); Order at 2, *CBA v. Hargan*, Case Nos. 5:14-cv-240, 5:14-cv-685 (W.D. Okla. Mar. 7, 2018), ECF No. 184 (same). Plaintiffs' proposed "guardrails," CBA Op. at 23, do not account for these problems, as they stretch beyond identified plaintiffs, identified injuries, and to future members.

Third, any relief should not constrain EEOC from complying with its statutory authority to receive and send notices of charges to employers, including CBA members, and issue notice of right to sue letters (NRTS) to employees. *See* 42 U.S.C. §§ 2000e-5(b), (f)(1), 2000gg–2. As the Court and Plaintiffs recognized at the preliminary injunction hearing, because CBA's members are generally not known to EEOC, EEOC cannot determine whether a charge implicates a CBA member. *See* 9/18/24 Hr'g Tr. at 18, 45. Therefore, the parties agreed that EEOC must be able to receive and issue notices of charges and, if a respondent then identifies itself as a CBA member, EEOC would cease investigating the portion of the charge affected by any injunctive relief. *See id.* The same approach should apply to any permanent injunction. As to NRTS, Plaintiffs improperly describe them as a

[5] Plaintiffs' invocation of collateral estoppel is as inapplicable to their remedies arguments as to their standing arguments. *See supra* § I. The Government has not previously litigated whether relief should extend beyond CBA's current members in connection with the Final Rule or Guidance. *Contra* CBA Op. at 22-23. Nor, for that matter, was EEOC a party to the cases identified by Plaintiffs. *Id.*

determination that an "organization is not subject to a religious exemption," CBA Op. at 24. But the issuance of NRTS is "mandatory," *id.*, whenever EEOC does not bring suit after receiving a charge, including where EEOC has determined that there is *not* reasonable cause to believe that discrimination occurred or when a religious exception or other defense applies. *See* 42 U.S.C. § 2000e-5(b), (f)(1); *Newsome v. EEOC*, 37 F. App'x 87, at *1 (5th Cir. 2002) (per curiam); Defs. MSJ at 34-35. Prohibiting issuance of NRTS also creates uncertainty for employers, depriving them of clear time limits on when employees may bring their own claims in court. In any case, Plaintiffs cannot properly request relief from statutory requirements that they did not challenge in the Complaint, and which they previously conceded was unnecessary, *see* 9/18/24 Hr'g Tr. at 18. These facts distinguish *Texas v. Garland*, 719 F. Supp. 3d 521, 598 (N.D. Tex. 2024), *appeal filed,* No. 24-10386 (5th Cir. May 1, 2024), where Texas challenged the enactment of the PWFA as a whole—which necessarily included the PWFA's NRTS and notice of charge requirements.

Fourth, Plaintiffs acknowledge that appropriately tailored relief would remedy their injuries, such that vacatur is unwarranted.[6] *See* CBA Op. at 25. Even if the Court reached Plaintiffs' APA claim, however, vacatur would remain improper. *See* Defs. MSJ at 32. Vacatur is not a mandatory remedy under the APA. *Contra* CBA Op. at 25. Nothing in Section 706 authorizes vacatur, providing instead for more traditional remedies like injunctions. 5 U.S.C. § 703. And there is little indication Congress intended to create a new and radically different remedy in providing that courts reviewing agency action should "set aside" agency "action, findings, and conclusions," *id.* § 706(2); *see also United States v. Texas*, 599 U.S. 670, 693-703 (2023) (Gorsuch, J., concurring). Defendants are not aware of any Eighth Circuit precedent to the contrary, and Plaintiffs invoke none.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion and grant Defendants' cross-motion.

[6] Plaintiffs also reference relief under 42 U.S.C. § 1983. *See* CBA Op. at 25. Plaintiffs did not plead any § 1983 claim in their complaint or otherwise brief the issue, *see generally* Compl. at 42-54, and thus have no entitlement to any relief thereunder. Their brief reference to attorney's fees is likewise insufficient, as well as premature. *See* Fed. R. Civ. P. 54(d)(2) (requirements for a request for attorney's fees).

Dated: January 17, 2025

Respectfully submitted,

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