No. 21-1890

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THE RELIGIOUS SISTERS OF MERCY, et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, et al.,

Defendants-Appellants.

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

REPLY BRIEF

BRIAN M. BOYNTON
Acting Assistant Attorney General
MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
ASHLEY A. CHEUNG
Attorneys, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 353-9018

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INTRODUCTION

The district court erred in entering permanent injunctive relief against the government based on positions that the government has not actually adopted and in the absence of an Article III case or controversy. The court's permanent injunctions and plaintiffs' arguments are based on the premise that the Department of Health and Human Services (HHS) and the Equal Employment Opportunity Commission (EEOC) "have interpreted [and will enforce] Section 1557 and Title VII to mandate that plaintiffs—all Catholic organizations—perform and pay for gender-transition surgeries and related medical services." Catholic Benefits Association (CBA) Br. 1; *see also* Religious Sisters Br. 51 (same); A788 (same). But this premise is fundamentally incorrect. At the time of the operative complaint, HHS and EEOC had not—and still have not—taken positions on whether Section 1557 and Title VII require the provision or coverage of gender-transition procedures by entities with religious objections, or how the Religious Freedom Restoration Act (RFRA) interacts with these general prohibitions on discrimination on the basis of sex. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (specifically reserving the question of how RFRA and other "doctrines protecting religious liberty interact with Title VII" and explaining that these "are questions for future cases"). Plaintiffs have thus failed to satisfy the requirements of standing, ripeness, and irreparable harm, and the district court's judgment should be vacated.

First, plaintiffs have not established a concrete case or controversy with respect to their challenge to HHS's hypothetical future enforcement of Section 1557, and their RFRA claims are not ripe. Plaintiffs have not demonstrated any imminent injury, as they have not shown that HHS has ever brought or threatened an enforcement action against plaintiffs or *any* objecting religious entity for declining to provide or cover gender-transition services. Plaintiffs' RFRA claims are not ripe for review, as they cannot properly be evaluated in the abstract and instead require a factual record in which HHS is actually requiring plaintiffs to do something specific.

Second, the CBA plaintiffs have not demonstrated standing and ripeness with respect to their challenge to EEOC's hypothetical future enforcement of Title VII. The CBA plaintiffs offer no response to the government's argument that their theory of injury is based on a speculative chain of events. Additionally, EEOC has never brought an enforcement action in court against *any* employer to challenge the employer's exclusion of gender-transition services in its health plan, let alone an objecting *religious* employer, and the inapposite examples cited by the CBA plaintiffs do not show otherwise. Nor do the CBA plaintiffs respond to the government's argument that their claim is not ripe because they have not identified any final agency action for the court to review.

For similar reasons, plaintiffs have not made the necessary showing of imminent irreparable harm sufficient to justify permanent injunctive relief.

ARGUMENT

I. Plaintiffs Have Failed to Demonstrate Standing and Ripeness for Their Challenge to HHS's Future Enforcement of Section 1557.

A. Plaintiffs Lack Standing.

Plaintiffs argue that they have demonstrated an injury-in-fact because their conduct is "arguably proscribed" by the 2016 Rule, the 2020 Rule, and Section 1557. Religious Sisters Br. 32; CBA Br. 28-29. But as explained in our opening brief (Gov't Br. 22-23), at the time of the operative complaint, the provisions of the 2016 Rule prohibiting gender-identity discrimination had been vacated by a final judgment in *Franciscan Alliance v. Becerra*, 414 F. Supp. 3d 928 (N.D. Tex. 2019), as well as formally rescinded by HHS. Because courts "must assess standing in view only of the facts that existed at the time" of the operative complaint, *Conners v. Gusano's Chi. Style Pizzeria*, 779 F.3d 835, 840 (8th Cir. 2015), plaintiffs have no plausible claim of injury from the 2016 Rule. And despite plaintiffs' contentions to the contrary (Religious Sisters Br. 33; CBA Br. 28 n.7), the district courts in *Whitman-Walker* and *Walker* did not have the authority to reverse the *Franciscan Alliance* district court's vacatur. The *Walker* court explicitly stated that it "agrees [with HHS] that it has no power to revive a rule vacated by another district court." *Walker v. Azar*, 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020). The *Whitman-Walker* court explained that the plaintiffs in that case had "identif[ied] no authority that would permit either this Court or HHS to disregard the final order of [the *Franciscan Alliance*] district court vacating part of a regulation,"

and thus the court was "powerless to revive it." *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 26 (D.D.C. 2020). In any event, to the extent there is any ambiguity in the *Walker* and *Whitman-Walker* orders, they should be read to avoid a conflict with the *Franciscan Alliance* order for reasons of comity. *Cf. Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) ("Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders."); *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (same).

Plaintiffs also miss the point in arguing that Section 1557 itself "arguably proscribes" their conduct. Religious Sisters Br. 35-36, 41-42; CBA Br. 28-29. Plaintiffs ignore Article III's requirements that an injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (*SBA List*) (quoting *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs' allegations of harm rest entirely on their speculation that HHS will one day interpret Section 1557 to require them to provide or cover gender-transition services over their religious objections, despite the protections of RFRA. But this speculative "allegation of future injury" is not sufficient to prove standing where plaintiffs have not demonstrated that the threatened injury is "'certainly impending'" or that there is a "'substantial risk'" that it will occur. *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)).

Section 1557 prohibits discrimination "on the basis of sex." 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a). The statute does not address how RFRA might affect

the application of Section 1557 to objecting religious entities, and HHS has not taken a position on this issue. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (specifically reserving the question of how RFRA and other "doctrines protecting religious liberties interact with Title VII" and explaining that these "are questions for future cases"). And "mere uncertainty" over how an agency might interpret a statute is insufficient to confer standing. *See National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 811 (2003); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1338 (Fed. Cir. 2008) (plaintiff's "'paralyzing uncertainty'" from fear that it might be sued was not sufficient to confer standing).

Although HHS has now—after the filing of the operative complaint and after the district court ruled—taken the position that sex discrimination under Section 1557 encompasses gender-identity discrimination, consistent with *Bostock*, HHS has not staked out any position on whether and how this prohibition will be enforced in the specific context of gender-transition services and religious providers who object under RFRA. *See* 86 Fed. Reg. 27,984 (May 10, 2021) (explicitly stating that HHS "will comply with [RFRA] and all other legal requirements"). Any injury to plaintiffs is thus not "actual or imminent." *SBA List*, 573 U.S. at 158; *see also Park v. Forest Serv. of the U.S.*, 205 F.3d 1034, 1037-38, 1040 (8th Cir. 2000) (explaining that a plaintiff cannot "use evidence of what happened after the commencement of the suit" to demonstrate standing).

Plaintiffs further argue that they face a credible threat of prosecution and thus have demonstrated an injury-in-fact. Religious Sisters Br. 37-41; CBA Br. 29-32. But plaintiffs have not pointed to *any* instances of HHS revoking federal funding from, or bringing enforcement actions in court against, religious providers for declining to provide or cover gender-transition procedures in the eleven years since Section 1557 was enacted. *Cf. SBA List*, 573 U.S. at 164 (plaintiffs demonstrated substantial threat of future enforcement where enforcement agency had already found probable cause that plaintiff had violated the challenged statute in the past). Plaintiffs attempt to rely on HHS's general statements that it will enforce Section 1557's prohibition of sex discrimination. Religious Sisters Br. 37-38, 40; CBA Br. 29. But the prospect that HHS might bring an enforcement action against a provider who refuses to treat a transgender patient's broken bone based on the patient's gender identity provides no basis for concluding that HHS will bring an enforcement action against providers who decline to provide gender-transition services due to their religious beliefs. The validity of religious objections that could be asserted in those two scenarios would be quite different, and the likelihood of government enforcement activity would likewise vary.

Plaintiffs declare that there is a "history of past enforcement," (Religious Sisters Br. 38), but the examples they cite do not support this assertion. That HHS (1) received a complaint against a Catholic hospital for denying birth control to a cis-gender woman, *see* SA679 n.1; (2) indicated that it would initiate an investigation—during which a provider could assert a RFRA defense—against a provider for denying

gender-transition services, *see* Compl., *Conforti v. St. Joseph's Healthcare Sys., Inc.*, No. 2:17-cv-00050, 2017 WL 67114 (D.N.J. Jan. 5, 2017); and (3) investigated a state, which cannot assert a RFRA defense, for declining to cover gender-transition procedures in its Medicaid program, *see* SA679 n.2, does not show that HHS has brought enforcement actions in court or initiated funding termination proceedings against religious providers who decline to provide gender-transition services or that plaintiffs have demonstrated an imminent injury sufficient to support standing. *See California v. Texas*, 141 S. Ct. 2104, 2114 (2021) ("In the absence of contemporary enforcement, we have said that a plaintiff claiming standing must show that the likelihood of future enforcement is 'substantial.'" (quoting *SBA List*, 573 U.S. at 164)).

Plaintiffs' reliance on private lawsuits and administrative complaints alleging violations of Section 1557 to support their standing to seek injunctive relief against HHS is similarly misplaced. Religious Sisters Br. 38-39; CBA Br. 32-32. Private lawsuits under Section 1557 have no bearing on whether *defendant HHS* will bring enforcement actions against plaintiffs for declining to provide or cover gender-transition services, and the injunction against HHS has no effect on private litigants. *See Balogh v. Lombardi*, 816 F.3d 536, 544 (8th Cir. 2016) (plaintiff did not have standing despite the threat of private lawsuits because the "injury is 'fairly traceable' only to the private civil litigants"); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) ("Private litigants with rights to enforce the Act would not be the subject of any relief in this action, and any judgment would not oblige

private litigants to refrain from proceeding under the Act."). Moreover, the fact that HHS receives complaints alleging violations of Section 1557 does not demonstrate that HHS will bring enforcement actions against objecting religious entities. *See AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (explaining that even "law enforcement agencies rarely have the ability, or for that matter the need, to bring a case against each violator").

Nor does defendants' motion to modify the injunction in this case support plaintiffs' claim that they face a credible threat of prosecution. Religious Sisters Br. 41; CBA Br. 32. Defendants sought to clarify that they would not violate the injunction by "taking any action under either Section 1557 or Title VII as to any entities that Defendants are unaware are covered by the scope of the Order, given that CBA has not identified its members." SA717. That defendants may enforce Section 1557 and Title VII against non-religious entities and cannot identify all of CBA's members—of which there are "over 1000"[1]—without further information does not demonstrate that either HHS or EEOC intends to bring an enforcement action against plaintiffs or any other religious entity or that plaintiffs have suffered imminent injury sufficient to support standing.

The cases cited by plaintiffs (Religious Sisters Br. 30-50; CBA Br. 33-35) only confirm that this suit is not justiciable, as all of these cases are distinguishable. First,

[1] CBA, *Frequently Asked Questions*, https://perma.cc/8H6G-TN2N (last visited Oct. 20, 2021).

in several cases relied on by plaintiffs, there was a clear history of enforcement or clear threats of enforcement. *See SBA List*, 573 U.S. at 164 (holding that plaintiff had standing to challenge a false statement statute where there was "a history of past enforcement" against plaintiff itself); *Kiser v. Reitz*, 765 F.3d 601, 608-09 (6th Cir. 2014) (holding that plaintiff had standing to challenge an advertising regulation where plaintiff had been threatened with enforcement actions in the past); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) (finding a "credible threat of enforcement" where State authorities had asserted a clear intent to enforce the statute against similarly situated businesses and had brought an enforcement proceeding); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (noting that the government had charged about 150 persons under the challenged criminal statute). *See also* Gov't Br. 42-43 (distinguishing *United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422, 426-29 (8th Cir. 1988), and *Rodgers v. Bryant*, 942 F.3d 451, 454-55 (8th Cir. 2019)).

Second, plaintiffs err in relying on cases in which the plain text of the relevant statutes clearly prohibited the specific conduct plaintiffs sought to engage in. *See Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 778 (8th Cir. 2019) (explaining that "when a course of action is within the plain text of a statute, a 'credible threat of prosecution' exists"); *Majors v. Abell*, 317 F.3d 719, 721,721 (7th Cir. 2003) (statute "on its face" applied to plaintiffs). In contrast with those cases, the convergence of

Section 1557 and RFRA—the relevant statutes in this case—in this context leaves uncertainty regarding the scope of proscribed conduct.

Third, plaintiffs cite cases in which courts held at the motion to dismiss stage that plaintiffs had standing because it was "at least arguable" that their conduct was proscribed by the challenged statute. *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 700 (8th Cir. 2021) (concluding that it was "at least 'arguable' *at this stage of the litigation*" that "Plaintiffs' intended commercial speech will be proscribed by the Statute," but noting that "the district court can address these questions again at a later stage" (emphasis added)); *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 372-73 (D.C. Cir. 2020) (holding that "[o]n this record" at the motion to dismiss stage, "there is also ample reason to conclude that the threat of future enforcement against [plaintiff] is substantial"). Because this case was resolved on summary judgment, however, plaintiffs have a higher burden to demonstrate standing, and plaintiffs have not met that burden. *See Clapper*, 568 U.S. at 411-12 ("The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage, such a party . . . must set forth by affidavit or other evidence specific facts" (quotation marks omitted)).

Finally, in several cases on which plaintiffs rely, the injury sufficient to support standing was plaintiffs' chilled First Amendment activity. *See Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 720 (8th Cir. 2021) ("[T]he statute's deterrent effect on the investigations is sufficient to establish an injury"); *Turtle Island*, 992 F.3d at 699 (noting

that plaintiffs have self-censored their labels and marketing materials due to fear of prosecution under the challenged section); *281 Care Comm. v. Arenson*, 638 F.3d 621, 628 (8th Cir. 2011) (noting that plaintiffs' speech was chilled by the challenged false statement statute); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) (noting plaintiffs' allegation that they have been forced to "modify their speech and behavior to comply" with the challenged statutes); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (highlighting evidence in the record that plaintiff's members' speech was deterred by the challenged university policies concerning speech on campus). In their appellate briefs, plaintiffs argue for the first time that "HHS's interpretation of Section 1557 'chills' Plaintiffs' religious exercise." Religious Sisters Br. 54; *see also* CBA Br. 36. However, plaintiffs did not raise this argument before the district court, and thus it has been forfeited. Even if it were not forfeited, plaintiffs do not offer any support for their assertion of chilled religious exercise. Indeed, the record belies any claim of chill, as it conclusively demonstrates that plaintiffs have *not* chosen to provide or cover gender-transition procedures against their religious beliefs due to fear of enforcement actions under the challenged statutes. *See, e.g.*, A103 (declaration that Religious Sisters of Mercy has declined to provide cross-hormone therapy services to a patient for gender-transition purposes); A104 (declaration that a Religious Sisters of Mercy health plan excludes gender-transition services); A139 ("Consistent with Catholic values and teaching, the Diocese of Fargo's health plan categorically excludes gender transition and abortion

procedures."); CBA Br. 27 ("CBA members . . . refuse to perform and cover gender-transition services, and they will continue to do so in the future, based on their Catholic beliefs.").[2] Accordingly, this belated and unsupported allegation of a chilling effect on plaintiffs' religious exercise provides no basis for standing.

Plaintiffs also rely on the contraceptive coverage cases (Religious Sisters Br. 44-45), but none of the cases cited by the Religious Sisters plaintiffs addresses standing or ripeness. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quotation marks omitted)).[3] And unlike here, the government largely consented to injunctions in the cases on which plaintiffs rely,

[2] CBA does allege that, as a result of the 2016 Rule, "some members" of CBA received notices from their insurers that their health plans had begun covering gender-transition services. A136, ¶ 4; A163, ¶¶ 136-140. But when CBA filed its amended complaint, the 2016 Rule had been vacated and replaced by the 2020 Rule. Under the 2020 Rule, insurance providers are generally not covered entities, and the rule would only apply to an insurance provider's health programs or activities to the extent each specific health program or activity is in receipt of federal funding. *See* 85 Fed. Reg. 37,160, 37,244-45 (June 19, 2020) (45 C.F.R. § 92.3(c)); *see also id.* at 37,244 (45 C.F.R. § 92.3(b)); *infra* pp. 13-14. The CBA plaintiffs do not allege that these insurers receive federal funding. Thus, any injury to these CBA members is caused by the third-party insurers' own decisions and not by HHS. *See Miller v. Redwood Toxicology Lab'y, Inc.*, 688 F.3d 928, 935 (8th Cir. 2012). As the district court properly recognized, actions by insurers pressuring plaintiffs to cover gender-transition procedures "are not attributable to HHS." A780-781.

[3] The contraceptive coverage cases cited by the CBA plaintiffs are addressed below, *infra* p. 14.

further undercutting plaintiffs' attempt to draw parallels between that litigation and this case. *See, e.g.*, *Christian Emps. All. v. Azar*, No. 3:16-CV-309, 2019 WL 2130142, at *1 (D.N.D. May 15, 2019) ("The Defendants do not raise a substantive defense to the motions [for permanent injunctions].").

Finally, the CBA plaintiffs argue that plaintiff Diocese of Fargo (the Diocese) has demonstrated an injury sufficient to support standing because, although it maintains a self-insured health insurance plan excluding gender-transition coverage, its third-party administrator has required the Diocese to indemnify the third-party administrator and accept any liability for its decision to exclude transition services from its plan. CBA Br. 40-45. The CBA plaintiffs allege that the third-party administrator imposed this indemnification requirement due to its belief that it is a covered entity under the 2016 Rule. The district court correctly rejected this alleged injury as a basis for standing. A780-781. When the CBA plaintiffs filed their amended complaint, the 2016 Rule had been vacated and replaced by the 2020 Rule, which makes clear that third-party administrators are subject to Section 1557 "only to the extent any such operation receives Federal financial assistance." *See* 85 Fed. Reg. at 37,244-45 (45 C.F.R. § 92.3(c)) ("an entity principally or otherwise engaged in the business of providing health insurance shall not . . . be considered to be principally engaged in the business of providing healthcare"); *see also id.* at 37,244 (45 C.F.R. § 92.3(b)) ("For any entity not principally engaged in the business of providing healthcare, the requirements . . . shall apply to such entity's operations only to the

extent any such operation receives Federal financial assistance"); *id.* at 37,173 (noting that "[s]ome commentators expressed support for the provision that third-party administrators of self-funded group health plans would no longer be subject to Section 1557"). The CBA plaintiffs have not demonstrated, or even alleged, that the Diocese's third-party administrator receives federal funding, and thus the third-party administrator would not be covered by Section 1557 under the 2020 Rule.

Accordingly, any injury to the Diocese as a result of the indemnity agreement is caused by the third-party administrator's misunderstanding of the state of the law and not by HHS. *See Miller*, 688 F.3d at 935 ("When the injury alleged is the result of actions by some third party, not the defendant, the plaintiff cannot satisfy the causation element of the standing inquiry" (citation omitted)). The cases cited by the CBA plaintiffs do not compel a different result. In *Wieland v. HHS*, 793 F.3d 949, 954 (8th Cir. 2015), and *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, No. 20-35507, 2021 WL 3087873, at *1 (9th Cir. July 22, 2021), the courts found standing because the contraceptive coverage mandate *required* plaintiffs' employers to eliminate contraceptive-free coverage. In contrast, the 2020 Rule does not require third-party administrators who do not receive federal funds to do anything, as they are not covered entities. *See* 85 Fed. Reg. at 37,244-45, 37,173.

B. Plaintiffs' Claims Are Not Ripe.

Plaintiffs' arguments that their claims are ripe also fail. Plaintiffs assert that this case presents a "purely legal" question of "whether the challenged interpretations of

federal law violate [RFRA]." Religious Sisters Br. 50-51. But as we have explained, *supra* pp. 3-5; Gov't Br. 22-25, HHS has not actually adopted the interpretations that plaintiffs challenge, rendering any analysis purely hypothetical. Plaintiffs are thus asking the court to broadly declare that a wide range of hypothetical future enforcement actions by HHS all violate RFRA such that plaintiffs are entitled to an anticipatory permanent injunction divorced from the specific context necessary to evaluate a RFRA claim.

In any event, courts have long recognized that even a "purely legal" question is unfit for adjudication where a concrete factual context would facilitate a court's "ability to deal with the legal issues presented." *National Park Hosp. Ass'n*, 538 U.S. at 812 (quotation marks omitted); *see, e.g.*, *Texas v. United States*, 523 U.S. 296, 301 (1998); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 56 (1974); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967); *Zemel v. Rusk*, 381 U.S. 1, 18-20 (1965); *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 78 (1961); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89-90 (1947). Judicial review is thus properly deferred if "[t]he operation of [a] statute" would be "better grasped when viewed in light of a particular application." *Texas*, 523 U.S. at 301.

The issues that plaintiffs raise are much better resolved in the context of a fully developed factual record in which HHS is actually requiring plaintiffs to do something specific. Gov't Br. 31; *see also American Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 755-56 (D.C. Cir. 1984) ("Courts customarily deal in specific facts or circumstances

drawn with some precision and legal questions trimmed to fit those facts or circumstances; they are not in the business of deciding the general without reference to the specific."). One example of a concrete dispute would be if HHS brought an enforcement action against an objecting religious hospital for denying a hysterectomy to a transgender man who alleged that the procedure was intended to treat severe endometriosis, where the hospital alleged that the surgery was a gender-transition procedure. Among other things, a court would have to determine, based on the evidence in the record, whether the procedure was medically necessary, how the hospital treats other patients with similar conditions, whether this was actually a gender-transition procedure, whether performing the procedure would substantially burden the hospital's religious exercise, whether there is a compelling government interest, and whether the government satisfied the least restrictive means requirement of RFRA. This highly fact-specific inquiry underscores why plaintiffs' RFRA claims cannot be evaluated in the abstract.

Moreover, plaintiffs face little, if any, cognizable harm from deferring judicial review. Although plaintiffs may prefer to press broad RFRA claims divorced from any government enforcement activity compelling any specific action, and to obtain broad injunctive relief as soon as possible, that preference does not constitute hardship justifying premature judicial review. Plaintiffs do not contest (Religious Sisters Br. 54) that "mere uncertainty" does not "constitute[] a hardship for purposes of the ripeness analysis." *National Park Hosp. Ass'n*, 538 U.S. at 811. Their only

response is that HHS's actions also cause "practical harm" in the form of a chilling effect on plaintiffs' religious exercise and forcing plaintiffs to either change their behavior or risk losing federal funding. Religious Sisters Br. 54. But as explained above, *supra* pp. 11-12, the record refutes plaintiffs' new argument that their religious exercise has been chilled. And as explained in our opening brief (Gov't Br. 34), HHS has not evaluated whether Section 1557 requires the provision or coverage of gender-transition procedures by objecting religious entities, and thus plaintiffs are not being forced to do anything.

And even if HHS were to determine at some point in the future that Section 1557 requires plaintiffs to provide or cover these procedures, plaintiffs would still be many steps removed from losing federal funding. *See Colwell v. HHS*, 558 F.3d 1112, 1128 (9th Cir. 2009). First, HHS would be required to attempt to achieve informal or voluntary compliance. 45 C.F.R. § 80.8(c). Second, there must be a formal adjudication and an administrative hearing. *Id.* Third, HHS must wait thirty days after providing a full written report to Congressional committees. *Id.* Moreover, "[j]udicial review of any funding termination is available in an Article III court." *Colwell*, 558 F.3d at 1128. Plaintiffs make no effort to explain why they would be harmed by waiting to bring their RFRA claims in the context of a factual record in the event that HHS were to ever take action against them.

II. Plaintiffs Have Failed to Demonstrate Standing and Ripeness for Their Challenge to EEOC's Future Enforcement of Title VII.

A. Plaintiffs Lack Standing

For many of the same reasons discussed above, the CBA plaintiffs have failed to demonstrate standing to challenge EEOC's hypothetical future enforcement of Title VII. As explained in our opening brief (Gov't Br. 35-40), the CBA plaintiffs' speculation that EEOC might, at some unspecified time in the future, bring enforcement actions under Title VII against the CBA plaintiffs for declining to cover gender-transition services is insufficient to support standing.

The CBA plaintiffs do not respond to the government's argument that their theory of injury is based on an attenuated and entirely speculative chain of events. *See* Gov't Br. 36-38 (summarizing numerous things that would need to occur before EEOC could bring enforcement action). The CBA plaintiffs also fail to grapple with the fact that EEOC has not taken a position on how, if at all, Title VII should be enforced against religious employers who object to providing insurance coverage for gender-transition services. The CBA plaintiffs contend that "[a]ccording to EEOC," Title VII's "prohibition on sex discrimination fully proscribes CBA's members' conduct," and that EEOC has never "hinted that religious employers might be exempt from any of [Title VII's] requirements." CBA Br. 37, 38. But these assertions are wrong. EEOC has never taken a position on whether Title VII proscribes any particular conduct by CBA's members. Moreover, the CBA plaintiffs completely

ignore EEOC's Compliance Manual on Religious Discrimination, Directive 915.063, § 12-I-C (Jan. 15, 2021)[4] (Gov't Br. 39-40), which suggests that the interaction between Title VII and RFRA is an open question and counsels EEOC investigators to "seek the advice of the EEOC Legal Counsel" in situations involving RFRA. *See id.* (noting that in addressing the interaction between Title and RFRA, courts have "stressed the importance of a nuanced balancing of potential burdens on religious expression, government interests at issue, and how narrowly tailored the challenged government requirements are"); *Cf. Newsome v. EEOC*, 301 F.3d 227, 229-30 (5th Cir. 2002) (noting that after an employer responded to a charge of religious discrimination "by providing documentation that it is a religious organization that is exempt from the religious discrimination provisions of Title VII," EEOC dismissed the charge of discrimination).

The CBA plaintiffs are on no firmer ground in urging that "[i]n 2016, EEOC pledged to cooperate with HHS to enforce a coverage mandate for gender-transition services." CBA Br. 30. As we have explained (Gov't Br. 41-42), this argument rests on a misreading of the 2016 Rule's preamble. The preamble of the 2016 Rule—a rule promulgated by HHS, not EEOC—merely stated that charges of discrimination misfiled with HHS would be referred to EEOC if they were within EEOC's jurisdiction. *See* 81 Fed. Reg. 31,375, 31,432 (May 18, 2016). It did not indicate that

[4] https://go.usa.gov/x6bp4.

EEOC would bring enforcement actions against any religious entities who decline to cover gender-transition services. Indeed, EEOC has never brought an enforcement action against *any* employer to challenge the employer's exclusion of gender-transition services in its health plan, let alone an objecting *religious* employer.

The CBA plaintiffs assert that "EEOC has repeatedly enforced [Title VII] to require employers to pay for gender-transition services as part of employee health coverage," (CBA Br. 8-9, 11), but that assertion is factually incorrect and is not supported by plaintiffs' examples. First, the CBA plaintiffs rely on the consent decree from *EEOC v. Deluxe Financial Services, Inc.*, No. 0:15-cv-2646 (D. Minn.). CBA Br. 8. But as we have explained, EEOC did not assert any claims concerning the exclusion of gender-transition services from the employer's insurance plan. Gov't Br. 44. Instead, the *employee* in that case intervened and asserted such claims. *Id.*

Second, the CBA plaintiffs cite EEOC's amicus briefs in *Robinson v. Dignity Health*, No. 4:16-cv-03035 (N.D. Cal. 2016), in which EEOC took the position that *non*-religious employers' health plans that categorically exclude gender-transition procedures violate Title VII. CBA Br. 8. But EEOC taking this position in *amicus briefs* does not demonstrate that EEOC has ever brought an *enforcement action* in court to challenge an employer's exclusion of gender-transition services. And importantly, the employer in *Robinson* did not assert any religious defenses. Gov't Br. 44 n.10

Third, the CBA plaintiffs rely on an article discussing EEOC's investigation of Wal-mart and determination that there was reasonable cause to believe that a violation

of Title VII occurred. CBA Br. 9. But an *investigation* and administrative reasonable-cause determination inviting the employer to participate in voluntary conciliation do not constitute an *enforcement action*, as EEOC did not sue Wal-mart in court to enforce Title VII. As we have explained, not every charge for which EEOC finds reasonable cause results in an enforcement action. Gov't Br. 38 (citing 42 U.S.C. § 2000e-5(f)(1) (if the employer declines to resolve the matter informally, EEOC "may" file an enforcement action); *AT&T Co.*, 270 F.3d at 976 (explaining that even though EEOC had sued other similarly situated employers, "it does not follow that the agency will use its limited resources to sue them all; law enforcement agencies rarely have the ability, or for that matter the need, to bring a case against each violator")). Additionally, Wal-mart did not assert any religious defenses. Gov't Br. 44 n.10.

Finally, the CBA plaintiffs cite *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1028 (D. Alaska 2020), in which a transgender state employee brought suit against Alaska alleging a violation of Title VII. CBA Br. 9. But private lawsuits have no bearing on whether *defendant EEOC* will bring enforcement actions. *See supra* pp. 7-8. The CBA plaintiffs rely on the *Fletcher* court's reference to EEOC's reasonable-cause determination. CBA Br. 9; *see Fletcher*, 443 F. Supp. 3d at 1028; *see also id.* at 1028 n.21, n.22. But this reasonable-cause determination does not support the CBA plaintiffs' assertion of a history of enforcement, as the government did not bring an enforcement action in court against the state employer. And the state employer did not, and could not, assert a RFRA defense.

The CBA plaintiffs attempt to bolster their mistaken claim that EEOC has taken the position that Title VII requires objecting religious employers to cover gender-transition services by invoking *EEOC v. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018), in which EEOC argued that the religious employer was not exempt from Title VII's prohibition of discrimination on the basis of sex or gender identity. CBA Br. 38. But plaintiffs' reliance on *Harris Funeral Homes* is misplaced, as that case involved a different context—employment of a transgender employee—and did not involve the unique issue of health plans covering gender-transition services. *See* 884 F.3d at 589-90 (holding that requiring the defendant employer to comply with Title VII in employing a transgender employee did not substantially burden that employer's religious practice); *see also id.* at 589 (noting that the RFRA analysis might be different where an employer is asked to "assist[] or facilitat[e]" an employee's transition).

Moreover, EEOC's position in *Harris* did not reflect an across-the-board conclusion that Title VII overrides a RFRA defense in every case. To the contrary, EEOC's position was based on a fact-intensive analysis of the specific burden posed to the employer's religious exercise in that particular case and the unavailability of less restrictive means to further the government's compelling interest in that case. *See* EEOC Br. 41-50, *EEOC v. Harris Funeral Homes*, No. 16-2424 (6th Cir.), Dkt. 22, (noting that employer had not identified how continuing to employ the transgender employee would interfere with any religious action or practice); *id.* at 55-61 (considering specific less-restrictive alternatives and arguing that they would not

further the government's compelling interest); *see also infra* p. 24 (explaining that the CBA plaintiffs' RFRA claim is not ripe because there is no factual record on which a court could properly conduct the fact-intensive analysis and nuanced balancing of interests that is required in cases involving the interaction between Title VII and RFRA).

The CBA plaintiffs also argue that defendants' motion to modify the injunction in this case supports plaintiffs' claim that they face a credible threat of prosecution from EEOC. CBA Br. 32. But as explained above, *see supra* p. 8, that EEOC may enforce Title VII against non-religious entities and cannot identify all of CBA's members without further information does not demonstrate that EEOC intends to bring an enforcement action against plaintiffs or any other religious entity.

Finally, as explained in our opening brief (Gov't Br. 29-30), CBA has not demonstrated associational standing to sue on behalf of its unnamed members that receive federal funding. *See also* Gov't Br. 40. These unnamed members would not have standing to sue in their own right for the reasons discussed above and in our opening brief, and the CBA plaintiffs failed to satisfy the *Summers* naming requirement. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009); *see also Ouachita Watch League v. U.S. Forest Serv.*, 858 F.3d 539, 543 (8th Cir. 2017). The CBA plaintiffs' only response is that "the CBA made specific allegations about its members, including the other CBA Plaintiffs, and articulated the specific factual bases of their standing to challenge both agencies' interpretations of these statutes." CBA Br. 26

n.6. But the CBA plaintiffs fail to cite anything in the record indicating that they have identified any *specific members* who have been injured.

B. Plaintiffs' Claims Are Not Ripe

For many of the same reasons explained above and in our opening brief (Gov't Br. 45-49), the CBA plaintiffs' RFRA claim against EEOC also fails because it is not ripe. The CBA plaintiffs wholly fail to respond to the government's argument that the CBA plaintiffs have not identified any final agency action for the court to review. Gov't Br. 45-46. Additionally, the CBA plaintiffs' RFRA claim is not fit for judicial review because EEOC has not asked any employer to take any specific action, so there is no factual record on which a court could properly evaluate what interest the government might have in compelling such actions, what burden such actions might impose on plaintiffs' religious exercise, and whether less restrictive means of achieving the government's interest are available. Gov't Br. 46-47; *see also Bostock*, 140 S. Ct. at 1754 (noting that RFRA "might supersede Title VII's commands in *appropriate* cases" (emphasis added)). Delaying judicial review will not constitute a hardship on the CBA plaintiffs because the CBA plaintiffs have not demonstrated any harm. Gov't Br. 47-48. Although the CBA plaintiffs may prefer to press broad RFRA claims divorced from any government enforcement activity compelling any specific action, and to obtain broad injunctive relief as soon as possible, that preference does not constitute hardship justifying premature judicial review. *See supra* pp. 16-17.

The CBA plaintiffs argue that an agency cannot "promulgate RFRA-burdening interpretations of statutes, decline to create (or keep mum about) any exemption for religious entities, but then avoid judicial review on the ground that the agency" has not yet evaluated how the statutes might apply to religious entities. CBA Br. 39. But that gets matters exactly backwards. Plaintiffs cannot initiate a preemptive suit to obtain a broad injunction precluding *any* agency enforcement activity before the agency has even finished evaluating the issues and formulating a position. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733, 735 (1998).

III. The District Court Erred in Concluding that Plaintiffs Demonstrated Imminent Irreparable Harm Sufficient to Justify Permanent Injunctive Relief.

For many of the same reasons discussed above and in our opening brief (Gov't Br. 50-51), plaintiffs have not demonstrated imminent irreparable harm sufficient to justify permanent injunctive relief against HHS and EEOC. Plaintiffs argue that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Religious Sisters Br. 56 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)); *see also* CBA Br. 40. But as explained above, *supra* pp. 11-12, the record refutes plaintiffs' new argument that their religious exercise has been chilled. And plaintiffs' speculation about enforcement positions that HHS and EEOC may take at some unspecified time in the future is insufficient to demonstrate irreparable harm.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General
MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH

s/ Ashley A. Cheung
ASHLEY A. CHEUNG
Attorneys, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9018
ashley.cheung@usdoj.gov

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CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 6,500 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

I certify, in compliance with Eighth Circuit Local Rule 28A(h)(2), that this brief has been scanned for viruses and is virus free.

s/ Ashley A. Cheung
Ashley A. Cheung

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2021, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Ashley A. Cheung
Ashley A. Cheung