UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JAMES DOBSON FAMILY INSTITUTE and USATRANSFORM d/b/a UNITED IN PURPOSE, *Plaintiffs*, v. XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *Defendants.*	)	No. 4:24-cv-00986-O

DEFENDANTS' COMBINED MEMORANDUM IN FURTHER SUPPORT OF CROSS-MOTION TO DISMISS PLAINTIFFS' RFRA AND FIRST AMENDMENT CLAIMS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

Plaintiffs' reply brief rests on purported "concessions" and other mischaracterizations of Defendants' arguments, which fail to establish an entitlement to relief. First and foremost, Plaintiffs have not carried their burden at summary judgment to demonstrate an injury in fact that is traceable to the conduct of Defendants and redressable by the relief sought in this suit. Beginning with Plaintiffs' claims against HHS, Plaintiffs acknowledge that they are not covered entities under the Section 1557 Final Rule, and do not identify any evidence in the record suggesting that HHS will, or even might at some point in the future, enforce the 1557 Final Rule against the third-party administrators (TPAs) with which Plaintiffs contract. Likewise, turning to Plaintiffs' claims against EEOC, Plaintiffs identify no evidence suggesting that any employee of Plaintiffs will seek the health care coverage under Title VII or employment accommodations under the PWFA to which Plaintiffs object, let alone that EEOC would pursue an enforcement action against Plaintiffs because of a failure to provide such coverage or employment accommodations. Nor do Plaintiffs explain how the Harassment Guidance itself creates a concrete injury to Plaintiffs, given that it does not impose any new legal obligations on employers, but instead merely summarizes pre-existing Title VII caselaw and illustrates examples. Further, Plaintiffs fail to identify evidence that they will face an EEOC enforcement action for hypothetically employing transgender individuals and then subjecting them to severe or pervasive harassment.

In addition, Plaintiffs' claims are not redressable by the relief sought in this suit. Even if this Court were to enjoin HHS and EEOC from enforcing the challenged agency interpretations, private employees could still bring suits against Plaintiffs or their TPAs that would have the same effect on Plaintiffs' ability to exclude health care coverage to which they object, employment accommodations for abortions and infertility treatments to which they object, and harassment involving misgendering and use of single-sex spaces. Thus, even if governmental enforcement were enjoined, Plaintiffs would

face all of the same purported injuries that they claim here. *See Tennessee v. EEOC*, --- F. Supp. 3d ---, 2024 WL 3012823, at *4 (E.D. Ark. June 14, 2024) ("Pausing all or part of the regulation or its enforcement will not . . . prevent an aggrieved employee [from filing a suit]."), *appeal filed*, No. 24-2249 (8th Cir. June 20, 2024); *Murthy v. Missouri*, 603 U.S. 43, 73-74 (2024) (private entities "not parties to the suit" are not "obliged to honor an incidental legal determination the suit produced").

Moreover, on the merits, Plaintiffs mischaracterize the requirements of the contested agency interpretations. Even if the Court were to determine that Plaintiffs have standing to bring their claims, the challenged interpretations comply with RFRA and the First Amendment because they do not on their face require Plaintiffs with religious objections to take any actions that conflict with their religious beliefs or otherwise burden Plaintiffs' religious exercise or speech in an unlawful manner. Indeed, HHS and EEOC have expressly acknowledged the potential applicability of religious defenses in specific cases and established enhanced procedures for covered entities to bring those defenses to each agency's attention. For these reasons, this Court should grant Defendants' motion to dismiss, or, in the alternative, their motion for summary judgment, and deny Plaintiffs' motions.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS

A. Plaintiffs Lack Standing to Bring Insurance-Related Claims Against HHS

Plaintiffs' only claims against HHS are grounded in the unsupported allegation that HHS may enforce the 1557 Final Rule against Plaintiffs' TPAs or health insurers in a way that would require Plaintiffs to provide coverage for gender-affirming care, abortion, or infertility treatments to which they object. But the record here does not establish Plaintiffs' standing to bring these claims.

As explained in Defendants' opening memorandum, Plaintiffs, who are employers, are not "covered entities" under section 1557 or the rule implementing it. *See* 45 C.F.R. §§ 92.2(a), 92.4 (defining covered entities); *see also* Defs.' Combined Opp'n to Pls.' Partial Mot. for Summ. J. at 4, ECF

No. 18 ("Defs.' Opp.") (explaining that Plaintiffs do not receive Federal financial assistance from HHS and are not otherwise covered entities under the 1557 Final Rule). Thus, Plaintiffs are not subject to *any* requirements that the 1557 Final Rule imposes. *See* Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522, 37,693 (May 6, 2024), *codified at* 45 C.F.R. § 92.2(b) (stating that the 1557 Final Rule does "not apply to any employer or other plan sponsor of a group health plan . . . with regard to its employment practices").

Further, Plaintiffs have not established that HHS's ability to enforce the 1557 Final Rule against TPAs and insurers that qualify as "covered entities" under section 1557 has injured or is imminently likely to injure Plaintiffs. *See id.* at 37,628-29 (describing when a TPA is a covered entity under the 1557 Final Rule). Though Plaintiffs allege that HHS's potential enforcement of the 1557 Final Rule against TPAs and insurers means that Plaintiffs "cannot contract with TPAs and insurers who receive federal assistance" while also "giv[ing] their employees health insurance consistent with their religious beliefs," this allegation is unsupported. Pls.' Reply in Supp. of Combined Mot. for Prelim. Inj. & Mot. for Partial Summ. J. at 3, ECF No. 22 ("Pls.' Reply"). To the contrary, Plaintiff Dr. James Dobson Family Institute explicitly states that it currently utilizes a TPA to offer health plans that exclude the services to which Plaintiffs object. *See* Pls.' Combined Mot. For Prelim. Inj. & Mot. for Partial Summ. J. at 4, ECF No. 16 ("Pls.' Mem."). Likewise, UIP has not alleged that any of its members have had difficulty locating a TPA to administer a plan that is consistent with their religious beliefs or that their TPA intends to discontinue this practice.

Moreover, Plaintiffs have not established an imminent injury because they have not established a credible threat of enforcement against their TPAs under the 1557 Final Rule. As outlined in Defendants' opening memorandum, the 1557 Final Rule contemplates that TPAs "might not be responsible for the benefit designs of the self-insured group health plan coverage that they administer" and notes that in such circumstances, HHS "does not intend to enforce this rule against a third-party

administrator." 89 Fed. Reg. at 37,627. Because the 1557 Final Rule expressly states that HHS does not intend to enforce the Rule against TPAs who do not design self-insured plans and do not have control over those plans, Plaintiffs have not shown that HHS's potential enforcement of the 1557 Final Rule has had or will have an impact on Plaintiffs' abilities to contract with TPAs to provide plans consistent with their religious beliefs at all. *Id.* Thus, Plaintiffs have not carried their burden to demonstrate an injury that is actual or imminent.

Relatedly, Plaintiffs' argument that ERISA does not supersede section 1557 is neither contested by Defendants nor pertinent to Plaintiffs' ability to establish an injury in fact. Contrary to Plaintiffs' assertion, Pls.' Reply at 3, Defendants have not argued that ERISA immunizes TPAs from liability for their members' plan designs. Defendants instead rely on the 1557 Final Rule itself, which expressly states that HHS will not enforce section 1557 against a TPA that does not participate in designing or controlling a plan for an employer. *See* Defs.' Opp. at 19; *see also* 89 Fed. Reg. at 37,627. *Pritchard v. Blue Cross Blue Shield of Ill.*, Case No. 3:20-cv-06145-RJB, 2022 WL 17788148, at *8, *10 (W.D. Wash. Dec. 19, 2022), which was decided two years before issuance of the 1557 Final Rule and thus did not discuss that rule, is not to the contrary. That a private party, like the plaintiff in *Pritchard*, may be able to bring a suit against a TPA that Plaintiffs partner with does not establish an injury in fact that is traceable to HHS's enforcement of the 1557 Final Rule; it instead supports Defendants' argument that any alleged injury is not traceable to HHS or redressable through this suit.

For the aforementioned reasons, this Court should dismiss Plaintiffs' claims against HHS.

B. Plaintiffs Lack Standing to Bring Insurance-Related Claims Against EEOC

As a preliminary matter, Plaintiffs' challenge to any potential enforcement action that they allege EEOC could bring in relation to Plaintiffs' health care coverage plans should be construed as a challenge to Title VII, not as a challenge to HHS's 1557 Final Rule. Plaintiffs argue that, "as covered employers under Title VII, the 2024 Rule requires Plaintiffs and their members to cover and

accommodate gender transition and immoral infertility treatments in employee health plans." Pls.' Reply at 5. But the 1557 Final Rule does not have any bearing on whether or how EEOC would evaluate any charge of discrimination under Title VII. As previously explained, HHS's 1557 Final Rule does not regulate employers, who are not covered entities under the Rule. *See supra* I.A. In addition, HHS's 1557 Final Rule cannot grant EEOC jurisdiction to enforce a law or regulation that Congress has not otherwise tasked EEOC with enforcing. *See* 89 Fed. Reg. at 37,627 (the 1557 Final Rule "does not determine how or whether any other agency will investigate or enforce any matter referred or transferred by [HHS]"). Thus, because EEOC lacks enforcement power under the 1557 Final Rule and has not *itself* promulgated any regulation or guidance under Title VII as it may relate to Plaintiffs' health care coverage choices, EEOC could only review a charge alleging discrimination against employees in health coverage offerings under Title VII itself.

On that understanding, Plaintiffs lack standing to challenge hypothetical enforcement actions by EEOC under Title VII related to Plaintiffs' health care coverage choices for two reasons. First, as just explained, while Plaintiffs allege that "complying with the AGT Mandate" imposes an "additional burden" on Plaintiffs, Pls.' Reply at 5, Plaintiffs do not face any obligation to comply with the 1557 Final Rule, let alone one that would be enforceable by EEOC. Thus, Plaintiffs' citations to three cases where courts found injuries resulting from compliance burdens associated with agency regulations are inapposite; those regulations, unlike the 1557 Final Rule: (1) regulated the plaintiffs at issue; and (2) were enforceable by the agencies in question. *See* Pls.' Reply at 5-6 (citing *Ass'n of Am. Railroads v. Dep't of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019); *Christian Emps. All. v. EEOC*, Case No. 1:21-cv-195, 2022 WL 1573689, at *5 (D.N.D. May 16, 2022)). Relatedly, although Plaintiffs argue that "the Fifth Circuit assumes a credible threat of injury" from the 1557 Final Rule because that Rule was issued just this year, Pls.' Reply at 6, this argument is a

strawman given that the 1557 Final Rule cannot create an injury that would give Plaintiffs standing to sue EEOC regarding enforcement under Title VII in any event.

Second, Plaintiffs have not established a credible threat that EEOC will attempt to enforce Title VII against them as it relates to their health care plan choices. "[A] justiciable controversy does not exist where 'compliance with (challenged) statutes is uncoerced by the risk of their enforcement.'" *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972) (quoting *Poe v. Ulman*, 367 U.S. 497, 508 (1961)); *see also Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 350 (5th Cir. 2024) ("[M]erely being subject to . . . regulations, in the abstract, does not create an injury."), *cert denied*, 2024 WL 4529808 (Oct. 21, 2024). Indeed, although Plaintiffs argue that "Defendants are actively enforcing their AGT interpretation of Title VII" against employers, Pls.' Reply at 6, that is not true. Again, EEOC is not enforcing and could not enforce the 1557 Final Rule. And Plaintiffs have otherwise failed to cite to a single case where EEOC has pursued an enforcement action under Title VII based on a charge that the employer excluded health plan coverage for gender affirming care or specific infertility treatments to which it had religious objections.[1] The one case Plaintiffs do cite, *Lange v. Houston County*, No. 22-13626 (11th Cir. 2023), is inapposite for two reasons. First, that suit was brought by a private employee—not EEOC. And second, the employer in that suit did not allege a religious objection to the gender-affirming care in question. Moreover, EEOC has confirmed that it does not have any open enforcement actions for health care coverage related claims against employers who have raised religious defenses. *See* Defs.' Opp. Ex. 5, Decl. of Christopher Lage ¶ 8, ECF No. 18-1 ("Lage Decl.") (Appx. at 379-380).

[1] While Plaintiffs also allege that EEOC could bring Commissioner charges, Pls.' Reply at 7, they still do not explain how any such charge is more than hypothetical. Plaintiffs cannot cite to a single Commissioner charge of the nature they describe. Moreover, Defendants have not argued that any action Plaintiffs have described in their briefing amounts to a violation of the PWFA Final Rule, or Title VII more generally. Further, as to UIP, EEOC does not even know who its members are.

Additionally, by implementing enhanced procedures to ensure that employers can easily raise religious defenses upon receiving notice of a charge of discrimination, EEOC has made clear that it seriously and carefully evaluates religious defenses to Title VII claims before pursuing enforcement actions. *See* Defs.' Opp. Ex. 3, Questions and Answers for Respondents on EEOC's Position Statement Procedures Q.2, ECF No. 18-1 (Appx. at 181-186); *see also* Defs.' Opp. Ex. 4, EEOC, Directive 915.064 (Apr. 29, 2024), ECF No. 18-1 (describing the enhanced procedures) (Appx. at 187-376). Notably, these enhanced procedures did not exist when the District of North Dakota enjoined EEOC from enforcing Title VII against religious employers who excluded coverage for gender-affirming care in *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1142 (D.N.D. 2021), *aff'd in part, remanding in part sub nom. Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022), or *Christian Employers Alliance v. United States Equal Opportunity Commission*, 719 F. Supp. 3d 912 (D.N.D. 2024). The fact that EEOC may *generally* enforce Title VII against employers who are charged with discriminating against employees in providing health care plan coverage is not sufficient to establish a credible threat of prosecution in the presence of such "compelling contrary evidence" that EEOC has not so enforced Title VII against employers who, like Plaintiffs, raise religious objections. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (noting that courts "will assume a credible threat of prosecution" when dealing with pre-enforcement challenges to "recently enacted" statutes "*in the absence of compelling contrary evidence*" (quoting *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) (emphasis added)). And notably, Title VII is not a "recently enacted" statute, *id.*, and instead has been in effect for decades.

Finally, the Fifth Circuit's decision in *Braidwood Management v. Equal Employment Opportunity Commission*, 70 F.4th 914, 938 (5th Cir. 2023), is inapposite for three reasons. First, that case concerned an EEOC position that expressly addressed those plaintiffs' employment practices. *Id.* Here, to the contrary, EEOC has not expressed a position on how it will enforce Title VII in specific regards to

employer health care plans in the circumstances challenged here. Second, *Braidwood* presented a notably different situation because, as the Fifth Circuit held there, EEOC did not "seriously contest" that Plaintiffs' were "breaking EEOC guidance." *Id.* at 926. Here, EEOC has not made any assessment as to whether Plaintiffs would violate Title VII by excluding gender-affirming care or certain infertility treatments[2] from their employee health plans because of religious objections to those forms of care. To the contrary, EEOC understands Title VII to prohibit only exclusions to health care plans that are based on a protected class, such as sex-based exclusions, and to permit exclusions unrelated to a protected characteristic. In light of these differences, Plaintiffs have failed to establish that there is a credible risk that EEOC will enforce Title VII against them because of their health care coverage choices. Third, in *Braidwood*, the Fifth Circuit noted that EEOC had filed a similar enforcement action relatively recently. *Id.* at 926-27 (discussing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020)). Here, in contrast, there are no such enforcement actions by EEOC.

C. Plaintiffs Lack Standing to Bring PWFA and Harassment Guidance Claims Against EEOC

Similarly, Plaintiffs fail to satisfy their burden to establish an actual or imminent injury that is traceable to EEOC's promulgation of the PWFA Final Rule or the Title VII Harassment Guidance. In particular, Plaintiffs' argument that the Court should assume a credible threat of enforcement fails to contend with the Fifth Circuit's admonition that "merely being subject to . . . regulations, in the abstract, does not create an injury." *Consumers' Rsch.*, 91 F.4th at 350. Plaintiffs have identified no case

[2] Plaintiffs state that Defendants argue that Plaintiffs' health plans would not violate "the AGT Mandate" if the plans "*categorically* exclude infertility coverage," as opposed to excluding only certain types of infertility treatment. Pls.' Reply at 8. But this characterization of Defendants' argument is inaccurate. Defendants' position is that Title VII only prohibits sex-based exclusions, not exclusions of particular treatments in the abstract or on other grounds. Plaintiffs have not established that their exclusion of what they refer to as "immoral infertility treatments" necessarily equates to sex-based differential treatment that would violate Title VII. *Id.*

holding that the object of a regulation always and automatically has standing without evidence of a concrete, particularized, and actual or imminent injury. And Plaintiffs cite no case holding that a party has standing to challenge a regulatory obligation when it is entirely hypothetical whether factual circumstances will ever arise to actually trigger that regulatory obligation.[3]

Again, Plaintiffs do not dispute that the record here is devoid of evidence suggesting that any of their employees will ever (1) request an accommodation to which Plaintiffs have a religious objection, or (2) assert that workplace conduct mandated by Plaintiffs' religious beliefs amounts to unlawful harassment. Likewise, Defendants have explained that this is only one step in a lengthy chain of speculative contingencies that would have to arise for EEOC to pursue an enforcement action in the narrow circumstances relevant to Plaintiffs' claims. Defs.' Opp. at 24-25. Indeed, Plaintiffs cannot demonstrate that any injury is "certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)), because they provide no evidence that even a single step in that chain has ever materialized or is imminently likely to materialize. Such a "highly attenuated chain of possibilities" does not support standing and forecloses relief. *Id.*; *see also Tennessee*, 2024 WL 3012823, at *4.

As to Plaintiffs' argument that *Speech First* instructs the Court to "assume a credible threat of prosecution" in pre-enforcement actions concerning recently enacted government actions that restrict First Amendment rights, Plaintiffs overlook an important caveat to the Fifth Circuit's statements there. *See* Pls.' Reply at 8-9 (quoting *Speech First*, 979 F.3d at 335). Contrary to Plaintiffs' framing, the Fifth Circuit did not state that courts should *always* assume a credible threat of prosecution in the aforementioned circumstances. Instead, it stated that courts could assume a credible threat of

[3] As explained in Defendants' opening brief, Defs.' Opp. at 11-12, the Harassment Guidance is not a regulation; it does not have the force and effect of law. Any requirements flow from Title VII and the cases cited in the Guidance, not from the document itself. This is an additional reason that Plaintiffs do not have standing regarding their claims against the Harassment Guidance.

enforcement "in the absence of compelling contrary evidence." *Speech First*, 979 F.3d at 335 (citation omitted). Here, in addition to proving a lack of enforcement actions in the specific circumstances that Plaintiffs challenge, *see* Lage Decl. ¶¶ 5, 8 (Appx. at 379-380), EEOC has provided compelling evidence that it will not attempt to enforce the PWFA Final Rule or Title VII against employers with legally protected religious objections.

Specifically, the PWFA Final Rule itself states that employers can raise constitutional and statutory defenses to charges, including but not limited to RFRA and undue hardship. Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,144-48 (Apr. 19, 2024). Likewise, the Harassment Guidance notes that EEOC "works with great care to analyze the interaction of Title VII harassment law and the rights to free speech and free exercise of religion" when considering administrative charges of harassment. Defs.' Opp. Ex. 4 at 97-98 (Appx. at 284-285). And, as noted in Part I.B, EEOC will apply its enhanced administrative procedures for raising and deciding religious defenses when considering any charge. 89 Fed. Reg. at 29,147-48. Under this process, employers are allowed 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." 89 Fed. Reg. at 29,148. The fact that both the PWFA Final Rule and the Harassment Guidance contemplate RFRA and First Amendment exceptions, and that EEOC recently changed its procedures to provide additional protections for employers with religious objections from facing investigations related to charges brought under the PWFA and Title VII, provides further compelling evidence that Plaintiffs do not suffer a credible threat of enforcement by EEOC, as would be required to establish an Article III injury in regard to these claims.

Plaintiffs argue that *Braidwood* undermines Defendants' argument, *see* Pls.' Reply at 9, but *Braidwood* did not hold that a speculative injury of the type Plaintiffs invoke here could establish standing. Instead, the employer there established that they "hired at least one religiously non-

conforming employee in the past, whom they would now be prevented from acting against without running the risk of an enforcement action." *Braidwood*, 70 F.4th at 932 n.33. And unlike here, the *Braidwood* plaintiff was already forced to choose between their religious beliefs and legal compliance because, as the Fifth Circuit found, they "admit[ted] they [were] breaking EEOC guidance, which the EEOC [did] not seriously contest." *Id.* at 926. The *Braidwood* plaintiff also established that "EEOC ha[d] brought an enforcement action against a similar violator." *Id.* at 929. The undisputed record here, by contrast, is that EEOC has undertaken zero PWFA enforcement actions involving abortion and infertility treatments. Lage Decl. ¶ 5 (Appx. at 379). Likewise, EEOC has not undertaken any enforcement actions under Title VII involving harassment and a transgender charging party where the employer has raised a religious objection. *Id.* ¶ 8 (Appx. at 380). Plaintiffs' citations to federal sector cases that do not involve religious objections, *see* Pls.' Reply at 8 & n.5, are thus unavailing. Plaintiffs cannot dispute EEOC's lack of enforcement in the situation they describe.

Plaintiffs also fail to establish injury based on compliance costs. Their citations to the PWFA Final Rule's estimate of potential economic costs to employers across the country generally, *see* Pls.' Reply at 9, do not establish that *these* Plaintiffs have or will incur costs. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, those potential costs are attributable to the PWFA and the PWFA Final Rule as a whole—not to the narrow provisions to which Plaintiffs object and claim harm. *See* 89 Fed. Reg. at 29,155 (explaining how EEOC calculated the costs associated with the Rule). Additionally, while Plaintiffs assert that the Harassment Guidance requires Plaintiffs and their members to change employee policies now, *see* Pls.' Reply at 9, they fail to distinguish their arguments from those rejected in *Murthy*, 603 U.S. at 73 (self-censorship did not support standing where "based on [Plaintiffs'] fears of hypothetical future harm that is not impending" (quoting *Clapper*, 568 U.S. at 416)), and *Lake Carriers' Association*, 406 U.S. at 507 (no standing where compliance with a statute was uncoerced by the risk of enforcement).

D. Plaintiffs' Claims Are Not Traceable or Redressable

As to Plaintiffs' brief arguments concerning redressability, Plaintiffs rely on an out-of-circuit case for the proposition that "[t]he *additional* availability of private-party enforcement 'does not undercut redressability.'" Pls.' Reply at 11 (quoting *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 62 (9th Cir. 2024)). But Plaintiffs do not even attempt to distinguish the Fifth Circuit *en banc* decision and Northern District of Texas decision that Defendants cite for the proposition that Plaintiffs' claims are not redressable because Plaintiffs will be exposed to their same claimed legal obligations and injuries at the hands of private parties, regardless of any relief provided here. *See* Defs.' Opp. at 28-29 (concluding there is no standing because "[t]he defendants have no authority to prevent a private plaintiff from invoking the statute in a civil suit" (quoting *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001)) (en banc)); *id.* (finding there is no redressability when an "order in this case will not prevent private suits" (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, 542 F. Supp. 3d 465, 480 (N.D. Tex. 2021), *appeal dismissed*, 2022 WL 1554993 (5th Cir. Jan. 21, 2022))). Likewise, Plaintiffs do not attempt to respond to the Eastern District of Arkansas' directly applicable holding that redressability is not satisfied because "[p]ausing all or part of the regulation or its enforcement will not . . . prevent an aggrieved employee" from filing a charge or lawsuit under the PWFA or Title VII alleging that their employer failed to accommodate their abortion or infertility treatment. *Tennessee*, 2024 WL 3012823, at *4.

Further, Plaintiffs attempt to distinguish *School of the Ozarks v. Biden*, 41 F.4th 992 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2638 (2023)—which Defendants cite in support of the proposition that traceability and redressability are especially tenuous with respect to the Harassment Guidance (*see* Defs.' Opp. at 29-30)—by claiming that the plaintiff in that case received "a blanket religious exemption" that is nonexistent here. Pls.' Reply at 11 n.6. But the exemption in *Ozarks* was extended under a different statute than the one at issue in that case, and by a non-defendant agency. 41 F.4th at

999-1000. Here, like in *Ozarks*, Plaintiffs have not identified a single EEOC enforcement action taken against a religious employer concerning the practices Plaintiffs assert they will continue to engage in.

E. Plaintiff UIP Lacks Associational Standing to Bring Its Claims

Plaintiff UIP alleges the same injuries to its sixty-five members that Plaintiff Dr. James Dobson Family Institute alleges. *See* Pls.' Reply at 16. Thus, UIP lacks associational standing to bring its claims against Defendants because none of its members have standing for all of the aforementioned reasons. *See supra* I.A-D.

In addition, UIP lacks standing to assert claims on behalf of unidentified members because UIP's diverse members may be entitled to differing protections and may suffer different injuries. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181, 199 (2023) ("an organization must demonstrate that . . . neither the claim asserted nor the relief requested requires the participation of individual members" (citation omitted)). This follows from the fact that Plaintiffs have not established that the UIP membership criteria *requires* all of its members to interpret the requirement that employers must "commit to provid[ing] . . . employer health plan coverage consistent with Christian values" in the same manner. Compl. ¶ 157. Indeed, while Plaintiffs allege that "all UIP members share the same belief that accommodating gender-affirming care, abortion, immoral infertility treatments, false pronouns, and access to single sex spaces violates their Christian faith," Pls.' Reply at 12, the record actually demonstrates that UIP appears to allow employers to provide these things in certain circumstances. Specifically, the UIP membership criteria provides that an employer must only exclude the aforementioned services "unless the employer has exhausted all alternatives that do not bring about a greater evil, the employer opposes the act, and the employer has taken reasonable steps to avoid compromising its Biblical witness." Compl. ¶ 157. Thus, Plaintiffs' Complaint contemplates that it is possible for a UIP member to generally oppose a treatment but to provide "healthcare coverage of, reimbursement for, or access to" that treatment because the

employer concludes that it "has exhausted all alternatives that do not bring a greater evil." *Id.* The RFRA analysis governing that entity's claims would differ from the analysis of other UIP members who do not provide such treatment or benefits, which highlights why individual member participation is necessary.

Notably, the fact that UIP's membership policies may allow some members to provide care that Plaintiffs have characterized as otherwise conflicting with their religious beliefs does not mean that associational standing is never permissible for religion-related claims. *Contra* Pls.' Reply at 13-14. Instead, Defendants' argument is merely that associational standing fails where an association fails to prove that its members' beliefs are uniform, as is the case here.

II. NEITHER HHS's NOR EEOC's PROCESSES FOR CONSIDERING RELIGIOUS DEFENSES TO EMPLOYER HEALTH CARE COVERAGE CHOICES VIOLATES RFRA

Although Plaintiffs make multiple arguments that HHS's religious exemption process imposes a substantial burden on Plaintiffs in violation of RFRA, *see* Pls.' Reply at 15-17, each argument is unavailing. First, while Plaintiffs allege that the HHS exemption process places a substantial burden on UIP because the process cannot be invoked by an association, *see id.* at 16, a RFRA analysis is inherently entity specific. *See 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." (quoting *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004))). Thus, it cannot be that a case-by-case review of religious exemptions inherently creates a substantial burden under RFRA. For the same reason, a case-by-case review of religious exemptions does not violate Plaintiffs' expressive right of association. While Plaintiffs cite two cases for the general proposition that the right to expressive association is fundamental, Pls.' Reply at 16, they do not cite a single case in support of the argument that the First Amendment right to expressive association is limited when an agency considers religious protections on a case-by-case basis.

Further, Plaintiffs' argument that the HHS exemption process places a substantial burden on them as employers because the process is only available to "recipients" of Federal financial assistance from HHS, which Plaintiffs are not, is unavailing. Although the language used to describe the 1557 Final Rule's exemption process focuses on how covered entities could use the 1557 Final Rule's exemption process, that merely reflects the fact that HHS would not normally expect an entity that is not covered by the Rule to seek an exception from that Rule. Nevertheless, HHS understands the 1557 Final Rule to require the agency to exempt any entity that submits an application that otherwise meets the requirements of RFRA. Indeed, section 92.302(a) of the 1557 Rule makes clear that "[a] recipient may rely on applicable Federal protections for religious freedom and conscience, and . . . application of a particular provision(s) of this part to specific contexts, procedures, or health care services shall not be required where such protections apply." *See also* 45 C.F.R. § 92.3(c) ("Insofar as the application of any requirement under this part would violate applicable Federal protections for religious freedom and conscience, such application shall not be required."). HHS will consider exemption requests from non-religious TPAs seeking to administer health plans for religious employers and from religious employers seeking exemption requests on behalf of their non-religious TPAs under section 93.302. *See id.* § 92.302(a).

Plaintiffs' allegation that the affirmative exemption process places a substantial burden on them because the non-anonymous process will "eliminate religious individuals' and entities' ability to associate" is also unavailing. *See* Pls.' Reply at 18. Specifically, Plaintiffs argue that Defendants will create a "Hall of Shame" by "disclos[ing] the names and submissions of those who consulted with HHS about a religious exemption" "upon receipt of a FOIA request." *Id.* at 17. But Plaintiffs fail to note that HHS expressly declined to "require any entity receiving a religious exemption to include notice of the exemption" in their standard Notice of Nondiscrimination. 89 Fed. Reg. at 37,566. While HHS did note in the Final Rule that it is "subject to the Freedom of Information Act (FOIA), and

information may be released to a requestor or made available for public inspection consistent with the agency's obligations under" FOIA, HHS did not expressly state that FOIA requires the agency to disclose such entities in response to a hypothetical future request. *Id.* Moreover, the possibility that HHS may disclose which entities receive religious exemptions if required to do so by other laws does not impose a burden on Plaintiffs that is traceable to the 1557 Final Rule itself.

Additionally, Plaintiffs' argument that the case-by-case consideration process imposes a substantial burden on Plaintiffs because any "religious exemption only applies during the administrative proceeding and could be contested all over again during any subsequent litigation" relies on a misreading of the 1557 Final Rule. *See* Pls.' Reply at 18. The "temporary exemption" referred to in section 92.302 of the 1557 Final Rule is an exemption that is put into place while HHS reviews the recipient's submission supporting their claim to an exemption under Federal religious freedom and conscious laws. 45 C.F.R. § 92.302(c). But, if the necessity of a religious exemption is confirmed during the 1557 religious exemption review process, the exemption will not have to be relitigated later. *Id.*; *see also* 89 Fed. Reg. at 37,702.

Finally, Plaintiffs' argument that Defendants have been relying on these arguments to no avail since 2016 is inaccurate. Pls.' Mem at 19. The process for protecting religious liberty under the 2024 1557 Final Rule is new to this version of the regulation. Any cases dealing with past iterations of the 1557 Final Rule are therefore irrelevant, given this comprehensive affirmative process for ensuring that covered entities with religious objections are not subjected to compliance or other regulatory burdens under the 1557 Final Rule.

Likewise, EEOC's process for considering religious defenses to Title VII charges alleging a discriminatory exclusion of health plan coverage complies with RFRA. Plaintiffs do not contend or provide evidence that, because of Title VII, they are being pressured to violate their religious convictions by offering health care coverage for services to which they object; indeed, Plaintiffs are

currently not offering this type of health care coverage. Nor do Plaintiffs provide any evidence that EEOC has taken any action against Plaintiffs to impose any adverse consequences on them or against any employer raising religious objections regarding health care coverage and Title VII. In fact, EEOC has never filed an enforcement action in court against any employer, much less an employer asserting religious objections, for not offering the health care coverage Plaintiffs object to. *See, e.g.*, Lage Decl. ¶ 8, 9 (Appx. at 380). Given that Title VII has been in effect for decades, Plaintiffs have not established that the statute (let alone EEOC's purported interpretation of that statute) imposes any burden on their ongoing religious exercise, *i.e.,* excluding coverage to which they object. *See Brown*, 929 F.3d at 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." (citation omitted)).

Moreover, as discussed above, EEOC's Compliance Manual directs EEOC investigators to "take great care" in situations involving RFRA. And, as EEOC has done for decades, it contemplates that EEOC will appropriately consider the applicability of defenses such as RFRA on a case-by-case basis. *See Holt v. Hobbs*, 574 U.S. 352, 362-63 (2015) (describing RFRA as contemplating a "more focused inquiry" and requiring examination of the "application of the challenged law" to "the particular claimant whose sincere exercise of religion is being substantially burdened" (citation omitted)); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (requiring "scrutin[y] [of] the asserted harm of granting specific exemptions to particular religious claimants"); *Ramirez v. Collier*, 595 U.S. 411, 433 (2022) (describing RFRA's test as requiring "that courts take cases one at a time"). This general practice, in combination with EEOC's demonstrated lack of enforcement in any hypothetical cases where an employer has religious objections regarding insurance coverage, forecloses Plaintiffs' RFRA claim because there is no substantial burden on Plaintiffs.

III. NEITHER THE PWFA FINAL RULE NOR THE HARASSMENT GUIDANCE VIOLATES RFRA

Under the PWFA Final Rule, as explained in I.C., *supra*, Plaintiffs are not required to take any action to comply with the alleged agency interpretations absent a long chain of hypothetical events occurring. Simply put, the PWFA Final Rule does not flatly require any employer to grant accommodations to which they have religious objections (or that pose undue hardships). Rather, the PWFA Final Rule appropriately recognizes that such employers can raise with EEOC on a case-by case basis religious objections to accommodations and that the EEOC will consider the applicability of certain defenses, such as RFRA. *See supra* I.C. The same is true of Title VII and has been for decades.

Plaintiffs' reply does not identify any reason why this case-by-case consideration of RFRA defenses is itself a substantial burden on Plaintiffs' religious exercise. Instead, the most Plaintiffs contend is that EEOC does not respect religious rights, *see* Pls.' Reply at 20 (citing EEOC's amicus brief in *McMahon v. World Vision, Inc.*, No. 24-3259 (9th Cir. Oct. 28, 2024) ("Amicus Br."). But EEOC's brief in *McMahon* only demonstrates EEOC's commitment to evaluating religious defenses under the law. Indeed, in *McMahon*, EEOC made arguments regarding the proper interpretation of Title VII—not the PWFA—that reflect "applicable law" in the Ninth Circuit. *See* Amicus Br. at 7, 9-10. EEOC did not comment on interpretations of the PWFA's Rule of Construction or the application of Title VII's religious organization exemption in other circuits or under other sets of facts. *See id.* at 16-17 ("[N]othing in the text of the PWFA amended Title VII."). The statements in *McMahon* are not necessarily representative of the view EEOC would take in reviewing other charges in other jurisdictions.

Further, Plaintiffs concede that their religious practice is not burdened by granting accommodations under the PWFA when Plaintiffs do not know the underlying reason for why the employee is requesting the accommodation. Pls.' Reply at 21. Specifically, Plaintiffs allege that the

Government could, as an alternative to the PWFA Final Rule, "require employers to give their employees certain amounts of paid time off that can be invoked without requiring the employee to state [a] reason why." *Id.* But nothing in the PWFA requires an employer to find out the underlying reason for why the employee is requesting an accommodation. *See, e.g.* 29 C.F.R. § 1636.3(h)(2); (h)(2)(ii). The fact that this purported alternative would not burden Plaintiffs' religious beliefs supports Defendants' argument that the PWFA Final Rule does not place a substantial burden on Plaintiffs' religious beliefs to begin with. *See* Defs.' Opp. at 38-39. It is far from clear that every accommodation request will necessarily burden Plaintiffs' religion because some accommodations may be requested without the employer's knowledge of which specific health event or condition calls for the accommodation under the PWFA.

In regard to RFRA's compelling interest requirement, Plaintiffs assert that Defendants' articulated compelling interests are not stated at the level of specificity required by RFRA. *See* Pls.' Reply at 21. But the compelling interests in eradicating discrimination and ensuring that pregnant workers have access to reasonable accommodations to promote the economic well-being of working mothers and their families—among other interests—are well established. *See* 89 Fed. Reg. at 29,148 (noting that "[n]ondiscrimination laws and policies have been found to serve a compelling governmental interest"); *id.* at 29,148 n.252 (collecting cases); *id.* at 29,150 n.261 (collecting cases). And these interests are furthered by the PWFA's and Harassment Guidance's application to specific employees in specific situations, subject to all appropriate defenses. *See* Defs.' Opp. at 40-41 (discussing specific potential scenarios).–Moreover, to the extent there is any generality to these interests, such generality is a necessary feature of Plaintiffs' request for categorical relief against two generally applicable laws (the PWFA and Title VII), and it only highlights why RFRA is more appropriately analyzed on a case-by-case basis as EEOC currently does. *See O Centro*, 546 U.S. at 430-31 ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied

through application of the challenged law . . . [to] the particular claimant whose sincere exercise of religion is being substantially burdened."). Indeed, although Plaintiffs cite *O Centro* in support of their compelling interest argument, *see* Pls.' Reply at 21, that case involved the Government's refusal to grant *particular plaintiffs* a religious exemption to the Controlled Substances Act (CSA). 546 U.S. at 435-37. There, the Court merely held that the Government's interest in "the *uniform* application of the [CSA]" was not an adequate compelling interest to enforce the CSA against those plaintiffs despite their religious objections. *Id.* at 423. Here, by contrast, EEOC has not denied Plaintiffs a religious exemption and is not asserting a compelling interest in enforcing the PWFA or Title VII uniformly without regard to religious objections that may arise in specific circumstances.[4]

Turning next to least restrictive means, Plaintiffs propose two purported alternatives to the PWFA Final Rule, both of which fall short. First, as previously mentioned, Plaintiffs argue that EEOC could require employers to grant all employees a certain amount of paid leave that could "be invoked without requiring the employee to state the reason why." Pls.' Reply at 21. But, nothing in the PWFA Final Rule *requires* employers to demand additional information once an employee asks for an accommodation under the PWFA. *See, e.g.* 29 C.F.R. 1636.3(h)(2); (h)(2)(ii). Thus, the Final Rule already incorporates this least restrictive means. Further, because this purported alternative would require employers to grant paid leave to *all* employees, not just those who require accommodations, doing so would pose a far greater burden on employers. Second, Plaintiffs suggest that Defendants could require abortion providers to accommodate employee work schedules when scheduling abortions. Pls.' Reply at 21. But, in addition to being impractical, this purported solution would not

[4] The same response applies to Plaintiffs' hypothetical concerning the Catholic diocese and their practice of ordaining only men. *See* Pls.' Reply at 21. EEOC has not claimed a compelling interest in the uniform application of the PWFA Final Rule or Title VII that would justify enforcement against employers that raise sincere religious objections to a particular application of the PWFA or Title VII. That hypothetical also fails to account for the existence of the ministerial exception under both the PWFA and Title VII. *See generally Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 736 (2020).

be effective as it would not address the potential need for recovery after a procedure or other accommodations needed in the workplace, such as additional bathroom breaks for a period of time, which are accommodations that can be provided only by the employer. Moreover, this hypothetical alternative is outside of the EEOC's authority under the PWFA.

Finally, Plaintiffs do not address the least restrictive means test with regard to harassment; given the fact specific nature of workplace harassment and employers' control of workplace issues, *see Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam), EEOC could not fulfill the compelling interest of protecting workers from severe or pervasive harassment if it determined, as Plaintiffs seek here, that certain facts could never, under any circumstances, be included in a potential claim of harassment.

For each of these reasons, neither the PWFA Final Rule nor the Harassment Guidance violates RFRA.

IV. THE CHALLENGED AGENCY INTERPRETATIONS SATISFY THE FIRST AMENDMENT

For many of the same reasons that the challenged interpretations do not violate RFRA, none of the challenged agency interpretations violates the Free Exercise Clause or the Free Speech Clause of the First Amendment. Beginning with the Free Exercise Clause, Plaintiffs allege that in considering religious objections on a case-by-case basis, Defendants grant themselves discretion to choose whether to pursue enforcement actions against employers who raise religious objections. *See* Pls.' Reply at 22-23. And Plaintiffs argue that this discretion triggers strict scrutiny under *Fulton v. City of Philadelphia*, 593 U.S. 522, 537 (2021). But that is incorrect. As Defendants' opening brief explained, *see* Defs.' Opp. at 43-44, the PWFA Final Rule, Title VII, and 1557 Final Rule do not trigger strict scrutiny because they "are neutral and generally applicable." *Fulton*, 593 U.S. at 533. That is, the challenged laws and regulations do not treat "*any* comparable secular activity more favorably than religious exercise."

Tandon v. Newsom, 593 U.S. 61, 62 (2021). The fact that EEOC and HHS review each religious objection on a case-by-case basis is reflective of how fact-specific any particular application of the PWFA Final Rule, Title VII, or 1557 Final Rule is.

Contrary to Plaintiffs' suggestion, the case-by-case review process does not grant either agency discretion to decide whether religious protections or other defenses apply as a matter of law. EEOC and HHS have not "refuse[d] to extend [the] exemption system to cases of religious hardship" or "made available" "individual exemptions . . . at the sole discretion of the [agencies]." *Fulton*, 593 U.S. at 535 (citation omitted). Rather, the agencies have extensively discussed and outlined the various exceptions and defenses available under the PWFA Final Rule, Title VII, and the 1557 Final Rule. They have also described the general legal framework for their applicability, established processes to enable parties to readily assert them, and committed to applying those defenses and exceptions in every instance where they are implicated. 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.

Moreover, no law or rule challenged by Plaintiffs treats comparable secular activity more favorably than religious exercise. Secular activity is necessarily not treated more favorably than religious exercise when religious organizations have access to every exception available to secular organizations, and religious organizations have additional potential exceptions available to them only. This is unlike the situation in *Fulton*, where the "formal system" had "entirely discretionary exceptions," 593 U.S. at 536, or in *Tandon*, where the Court found that California "treats some comparable secular activities more favorably than at-home religious exercise." 593 U.S. at 63.

Turning next to Plaintiffs' free speech claims, none of the challenged agency interpretations violates the Free Speech Clause. As to expressive association, Plaintiffs continue to ignore the Supreme Court's holding that employment discrimination laws like Title VII do not violate employers'

associational rights. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (allowing Title VII claim against law firm and noting that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections" (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973))). Just as "the claim in *Hishon* did not infringe the defendant-employer's expression," Pls.' Reply at 23, neither do any of the challenged actions here infringe Plaintiffs' expression. Plaintiffs invoke *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571 (N.D. Tex. 2022), but Plaintiffs here do not explain—and do not identify any evidence in the record supporting—their assertion that granting non-public workplace accommodations to particular employees or being prohibited from exposing employees to severe or pervasive harassment, would infringe any expressive activity. *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (although court must "give deference to an association's view of what would impair its expression," that "is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message"). And even if Plaintiffs could establish a burden on expressive activity, the Government's actions still serve compelling interests, as discussed above.

Finally, Plaintiffs' free speech claims also fail because Plaintiffs have not demonstrated that they currently, or imminently intend to, engage in speech that would plausibly be censored by any challenged law or rule. *See* Defs' Opp. at 47-48. They still do not identify any aspect of the challenged agency interpretations that actually prohibits the type of "value-laden conversations" in which Plaintiffs seek to engage. Pls.' Reply at 24.

V. ANY REMEDY SHOULD BE LIMITED

If the Court disagrees with Defendants' arguments, any remedies should be limited. Plaintiffs do not dispute the vast majority of Defendants' remedial arguments in their prior memorandum—*i.e.*, that the declaratory relief and vacatur that Plaintiffs request in paragraphs E, H, and K of their

complaint are not warranted at this stage in the litigation; that any remedy must be no broader than necessary to remedy any demonstrated irreparable harms of the Plaintiffs in this case; that any relief should only extend to the narrow portion, if any, of a challenged agency interpretation that the Court finds unlawful; and that any relief should apply only to the Parties and include only the current members of UIP who are employers. *See* Defs.' Opp. at 48-49.

Plaintiffs instead dispute only one part of Defendants' suggested remedial limits, which is that any injunction should not extend to prohibiting EEOC from issuing notice-of-right-to-sue (NRTS) letters.[5] Contrary to Plaintiffs' characterization, *see* Pls.' Reply at 24-25, NRTS letters do not contribute to any alleged injury that Plaintiffs have asserted in this case because they do not impose any obligations on Plaintiffs or hinder the ability of private parties to bring suits against their employers. Instead, an NRTS letter merely: (1) informs a charging party and the employer charged that the EEOC will not be pursuing the charge; and (2) places a deadline on how long Plaintiffs have to bring a private lawsuit. Thus, NRTS letters do not represent "a determination of the agency that the organization is not subject to a religious exemption" or that an employee's claim is meritorious. *Id.* 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 v. EEOC*, 37 F. App'x 87, at *1 (5th Cir. 2002) (per curiam). Moreover, even with an injunction against Defendants prohibiting issuance of NRTS, employees will be able to file suit and assert equitable bases for waiver of the NRTS prerequisite to

[5] To the extent that Plaintiffs now seek an injunction prohibiting not only EEOC's issuance of NRTS letters but also EEOC's "acceptance of charges," *see* Pls.' Reply at 25 (quoting *Texas v. Garland*, 719 F. Supp. 3d 521, 598 (N.D. Tex. 2024)), such an injunction would be impossible to comply with as to UIP members. Because UIP members are generally not known to EEOC, EEOC cannot determine whether a charge implicates a UIP member. Thus, EEOC must be able to receive and issue notices of charges and, if a respondent then identifies itself as a UIP member, EEOC would cease investigating the portion of the charge affected by any injunctive relief.

suit. Accordingly, enjoining EEOC from issuing NRTS letters would not necessarily preclude private liability for employers. Moreover, to the extent that the Court seeks to enjoin EEOC from issuing NRTS letters for the purpose of hindering private parties' abilities to bring suits against their employers, that would run 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 (citation omitted). Thus, in addition to the remedial limits summarized above, the Court should not enjoin issuance of NRTS letters.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss, or, in the alternative, deny Plaintiffs' partial motion for summary judgment and grant Defendants' cross-motion for summary judgment.

Dated: January 15, 2025

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE R. BENNETT
EMILY B. NESTLER
Assistant Branch Directors

DANIEL SCHWEI
Special Counsel

/s/ Olivia G. Horton
OLIVIA G. HORTON (TX Bar No. 24120357)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-0747
Facsimile: (202) 616-8460
Email: olivia.g.horton@usdoj.gov
Counsel for Defendants