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

BRIEF FOR APPELLANTS

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns challenges under the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*) (RFRA) to hypothetical future enforcement actions of the U.S. Department of Health and Human Services (HHS) and the U.S. Equal Employment Opportunity Commission (EEOC). Religious-entity plaintiffs brought suit seeking to prevent HHS and EEOC from enforcing the prohibition of sex discrimination in Section 1557 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (Affordable Care Act) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII) in a manner that would require plaintiffs to perform or provide insurance coverage for gender-transition procedures. The district court issued both declaratory and permanent injunctive relief, concluding that plaintiffs had shown a credible threat of enforcement and that requiring the provision or coverage of gender-transition procedures would substantially burden plaintiffs' religious exercise. The issues on appeal are whether the district court erred in concluding that plaintiffs had demonstrated standing, ripeness, and imminent irreparable injury sufficient to justify permanent injunctive relief.

The government believes that oral argument would aid in the consideration of this appeal and respectfully suggests that twenty minutes be allotted per side to allow sufficient time for the presentation of the case.

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INTRODUCTION

This appeal involves challenges to the possible future application of the nondiscrimination requirements of Section 1557 of the Affordable Care Act and Title VII to religious entities. The private sector provision of Title VII prohibits employers from discriminating because of sex. Section 1557 prohibits any federally funded health program or activity from discriminating on the basis of sex. The statutes provide important protections, including protections for members of the LGBTQ community. But the relevant agencies have not yet addressed the application of these provisions to plaintiffs—or, more generally, to the particular context at issue here—rendering plaintiffs' challenges premature on numerous grounds.

In 2016, HHS adopted a rule interpreting Section 1557's prohibition of sex discrimination to prohibit discrimination on the basis of gender identity. That portion of the 2016 Rule has since been vacated and rescinded. In 2020, HHS adopted a new rule that paraphrases the statutory text of Section 1557 but does not adopt any new regulatory definition of sex discrimination. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court confirmed that Title VII's prohibition of discrimination because of sex includes discrimination on the basis of gender identity. After plaintiffs filed the operative complaints and after the district court in this case issued its opinion, HHS announced that *Bostock*'s reasoning also extends to Section 1557. But HHS and EEOC have not to date evaluated whether Section 1557 and Title VII require the provision and coverage of gender-transition procedures by entities with

religious objections to providing or covering those procedures, or how RFRA and other religious exemptions might apply to such religious entities. Nor have the agencies threatened or initiated any related enforcement activity against any objecting religious entities in which the protections of RFRA or other religious exemptions could be asserted and assessed.

Plaintiffs are religious entities opposed to performing and providing insurance coverage for gender-transition procedures. Plaintiffs believe that they will be required to provide and cover gender-transition procedures and brought suit to prevent HHS and EEOC from enforcing, respectively, Section 1557 and Title VII against them. Despite the fact that the government has not to date taken a position on whether plaintiffs' conduct violates the relevant statutes and has not threatened any enforcement action against plaintiffs, the district court proceeded to entertain this hypothetical dispute and issued both declaratory and permanent injunctive relief against HHS and EEOC.

The district court's basic error was clear: it enjoined the government from enforcing the relevant statutes based on positions that the government has not actually adopted. Such anticipatory injunctions based on hypothetical facts are at odds with core Article III and equitable principles. Whether viewed as an Article III standing defect, a lack of ripeness, and/or an absence of irreparable harm to support an injunction, the district court erred by adjudicating and providing relief on claims that are fundamentally rooted in speculation. *See, e.g.*, *Trump v. New York*, 141 S. Ct.

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530, 535 (2020) (per curiam) (holding that both an absence of standing and a lack of ripeness impeded judicial resolution where the plaintiffs' claims were "riddled with contingencies and speculation").

First, plaintiffs have not demonstrated that they have standing to challenge HHS's possible future enforcement of Section 1557 or that their RFRA claims are ripe. The 2020 Rule does not take a position on whether the provision or coverage of gender-transition procedures is required for religious entities. Moreover, HHS has not initiated any Section 1557 enforcement activity against plaintiffs in which RFRA and other religious exemptions could be considered or applied.

Second, plaintiffs have not demonstrated that they have standing to challenge EEOC's possible future enforcement of Title VII or that their RFRA claims are ripe. Plaintiffs have not demonstrated—or even alleged—that they have ever been asked to cover transition-related care for any particular employee, and EEOC has not initiated any related Title VII enforcement activity against plaintiffs in which RFRA and other religious exemptions could be considered or applied. Moreover, EEOC has not taken a position in any guidance documents on how, if at all, Title VII should be enforced against religious employers that object to providing insurance coverage for gender-transition services and has instead suggested that this remains an open question.

For similar reasons, plaintiffs have not demonstrated imminent irreparable harm sufficient to justify permanent injunctive relief.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361, 2201, 2202, and 42 U.S.C. § 2000bb-1. A29, A137.[1] Plaintiffs' standing is contested. *See infra* Parts IA, IIA. On January 19, 2021, the district court granted summary judgment for plaintiffs on their RFRA claims and entered permanent injunctions against HHS and EEOC. A755-811. On February 19, 2021, the district court entered final judgment for plaintiffs on their RFRA claims. A812-821. On April 20, 2021, defendants filed a timely notice of appeal. A822-823. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the religious-entity plaintiffs meet the requirements of standing and ripeness to seek an injunction against HHS based on the possibility that HHS might, at some time in the future, interpret and enforce the anti-discrimination requirements of Section 1557 of the Affordable Care Act to require that plaintiffs perform and provide insurance coverage for gender-transition services.

The most apposite authorities are: *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998); *Public Water Supply Dist. No. 10 of Cass Cty. v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139

[1] Citations to the government's Appendix are abbreviated A__. Citations to the Addendum are abbreviated Add.__

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(9th Cir. 2000); *AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001); U.S. Const. art. III; Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a).

2. Whether the religious-entity plaintiffs meet the requirements of standing and ripeness to seek an injunction against EEOC based on the possibility that EEOC might, at some time in the future, interpret and enforce Title VII of the Civil Rights Act of 1964 to require that plaintiffs' health-insurance plans cover gender-transition services.

The most apposite authorities are: *Ohio Forestry Ass'n*, 523 U.S. at 735; *Public Water Supply*, 345 F.3d at 573; *Thomas*, 220 F.3d at 1139; *AT&T*, 270 F.3d at 976; U.S. Const. art. III; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

3. Whether the district court abused its discretion by granting permanent injunctive relief against possible future enforcement of Section 1557 and Title VII in the manner plaintiffs fear, when plaintiffs have not demonstrated imminent irreparable harm.

The most apposite authorities are: *Ohio Forestry Ass'n*, 523 U.S. at 735; *Public Water Supply*, 345 F.3d at 573; *Thomas*, 220 F.3d at 1139; *AT&T*, 270 F.3d at 976.

STATEMENT OF THE CASE

A. Statutory, Regulatory, and Factual Background

1. Title VII of the Civil Rights Act of 1964

The private sector provision of Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms,

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conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). EEOC administers and enforces Title VII by (1) investigating charges of discrimination filed with the EEOC; (2) issuing determination letters indicating whether EEOC has found reasonable cause to believe an employer has violated the statute; (3) attempting voluntary conciliation with the employer, if EEOC found reasonable cause to believe the employer has violated Title VII; and (4) sometimes filing enforcement actions in district court. *See id.* § 2000e-5; *id.* § 2000e-5(f)(1) (if the employer declines to resolve the matter informally, EEOC "may" file an enforcement action).

EEOC has taken the position that Title VII prohibits gender-identity discrimination, and last year, the Supreme Court agreed in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). However, EEOC has not to date filed any enforcement action in court—in which religious exemptions could be asserted and evaluated—challenging any employer's exclusion of gender-transition services from its health plan.

2. Section 1557

Section 1557 of the Affordable Care Act prohibits, as relevant here, "any health program or activity" "receiving Federal financial assistance" from discriminating against an individual based on "ground[s] prohibited under" several other statutes. 42 U.S.C. § 18116(a). One of the specified statutes is Title IX of the Education

Amendments of 1972, which prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a).

3. The 2016 Rule and Subsequent Litigation

In 2016, HHS promulgated a rule implementing the anti-discrimination requirements of Section 1557. *See* 81 Fed. Reg. 31,376 (May 18, 2016) (2016 Rule). As relevant here, the 2016 Rule defined discrimination "on the basis of sex" to include discrimination on the basis of "gender identity." *See id.* at 31,467. The 2016 Rule also stated that the categorical exclusion of health-insurance coverage for gender-transition services is unlawful. *Id.* at 31,429. Although Title IX contains a religious exemption, the 2016 Rule did not expressly incorporate that exemption. *Id.* at 31,380; *see* 20 U.S.C. §§ 1681(a)(3), 1687.

Several lawsuits by religious entities followed, including the cases at issue here. In December 2016, a district court in the Northern District of Texas issued a nationwide preliminary injunction barring enforcement of the challenged parts of the 2016 Rule. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016).

In 2017, the district court in this case granted defendants' motion for a stay to permit HHS to reconsider the 2016 Rule. Dkt. No. 56. While HHS was reconsidering, the *Franciscan Alliance* district court issued a final judgment vacating the 2016 Rule "insofar as the [2016] Rule define[d] 'on the basis of sex' to include gender identity." Order at 2, *Franciscan All. v. Becerra*, 414 F. Supp. 3d 928 (N.D. Tex. 2019)

(No. 16-cv-00108), Dkt. No. 182 (quotation marks omitted). The government did not appeal.[2]

4. The 2020 Rule and Subsequent Litigation

a. In June 2020, HHS finalized a new rule implementing Section 1557. *See* 85 Fed. Reg. 37,160 (June 19, 2020) (2020 Rule). As relevant here, the 2020 Rule rescinded the 2016 Rule's provisions defining sex discrimination, including the portion regarding gender-identity discrimination. *See id.* at 37,162-65. In place of those provisions, the 2020 Rule paraphrased the statutory language without adopting a new regulatory definition of sex discrimination. *See id.* at 37,178 (codified at 45 C.F.R. § 92.2). The new provision reads as follows:

> (a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.
>
> (b) The grounds are the grounds prohibited under the following statutes: . . . Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) (sex); . . . .

[2] Plaintiffs in that case appealed, seeking an injunction in addition to vacatur. The Fifth Circuit remanded to the district court without reaching the merits. *Franciscan All., Inc. v. Becerra*, 843 F. App'x 662, 663 (5th Cir. 2021).

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45 C.F.R. § 92.2.

In the 2020 Rule's preamble, HHS explained that it did not believe that either Section 1557 or Title IX prohibited gender-identity discrimination. *See* 85 Fed. Reg. at 37,162, 37,168, 37,183-86, 37,207.

In addition, the 2020 Rule stated that the religious exemptions provided by Title IX, RFRA, and other statues would apply under Section 1557. 85 Fed. Reg. at 37,209 (codified at 45 C.F.R. § 92.6(b)). The relevant provision reads as follows:

> (b) Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section [including Title IX] or provided by . . . the Religious Freedom Restoration Act . . . such application shall not be imposed or required.

45 C.F.R. § 92.6(b). In the preamble, the agency stated its view that the new provision would "not . . . create any new conscience or religious freedom exemptions beyond what Congress has already enacted." 85 Fed. Reg. at 37,206.

b. Three days after HHS submitted the 2020 Rule for publication in the Federal Register, the Supreme Court decided *Bostock*, 140 S. Ct. at 1731. The Court held that Title VII's prohibition of discrimination "because of" sex extends to discrimination because of sexual orientation and transgender status. *Id.* at 1737-41. However, the Court specifically reserved the question of how RFRA and other "doctrines protecting religious liberty interact with Title VII," explaining that these "are questions for future cases." *Id.* at 1754. The Court noted in dicta that "RFRA

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operates as a kind of super statute, displacing the normal operation of other federal laws" and that "it might supersede Title VII's commands in appropriate cases." *Id.*

c. Following *Bostock*, groups of plaintiffs in several district courts challenged the 2020 Rule as substantively and procedurally unlawful under the Administrative Procedure Act. *See, e.g.*, *Washington v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-1105 (W.D. Wash. filed July 16, 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-1630 (D.D.C. filed June 22, 2020); *Walker v. Becerra*, No. 20-cv-2834 (E.D.N.Y. filed June 26, 2020). Two district courts issued preliminary injunctions barring HHS from enforcing its repeal of the 2016 regulatory definition of discrimination on the basis of sex as including discrimination on the basis of sex stereotyping, and one court enjoined HHS from enforcing the 2020 Rule's incorporation of Title IX's religious exemption. *See Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, 26 (D.D.C. 2020) (enjoining part of rescission of 2016 regulatory definition and enforcement of Title IX's religious exemption); *Walker v. Becerra*, 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020) (enjoining part of rescission of the 2016 regulatory definition); *Walker*, No. 20-cv-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020) (enjoining rescission of related provision). Both district courts acknowledged that their orders did not affect the *Franciscan Alliance* district court's vacatur of the 2016 Rule insofar as it defined sex discrimination to include gender-identity discrimination. *See Whitman-Walker Clinic*, 485 F. Supp. 3d 1, 14 (acknowledging *Franciscan Alliance* vacatur); *Walker*, 480 F. Supp.

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3d 417, 427 (same). HHS appealed the preliminary injunctions in *Walker* and *Whitman-Walker Clinic* to the Second and D.C. Circuits respectively. *See Walker v. Becerra*, No. 20-3580 (2d Cir. filed Oct. 16, 2020); *Whitman-Walker Clinic v. U.S. Dep't of Health & Human Servs.*, No. 20-5331 (D.C. Cir. filed Nov. 9, 2020). Those appeals are currently stayed. *See* Order, *Whitman-Walker*, No. 20-5531 (D.C. Cir. Feb. 18, 2021); Order, *Walker*, No. 20-3580 (2d Cir. Mar. 18, 2021); Order, *Whitman-Walker*, No. 20-5531 (D.C. Cir. May 14, 2021); Order, *Walker*, No. 20-3580 (2d Cir. May 18, 2021).

B. Prior Proceedings

1. This appeal involves two consolidated cases, which began in 2016: *Religious Sisters of Mercy v. Becerra*, No. 16-cv-386 (D.N.D. filed Nov. 7, 2016), and *Catholic Benefits Association v. Becerra*, No. 16-cv-432 (D.N.D. filed Dec. 28, 2016). Plaintiffs in *Religious Sisters of Mercy* are religious organizations that provide medical care.[3] Plaintiffs in *Catholic Benefits Association* (CBA) are the CBA, which is a nonprofit organization that supports Catholic employers, and three of CBA's member organizations: the Diocese of Fargo (Diocese), which "carries out the spiritual, educational, and social service mission of the Catholic Church in eastern North Dakota," Add.27 (citing A137-138, ¶ 11); Catholic Charities North Dakota (Catholic Charities), whose mission is to "serve people in need . . . based on the fundamental

[3] The State of North Dakota also brought a Spending Clause claim against HHS. The district court ruled in favor of the government, and North Dakota did not cross-appeal. Add.55-60; A818.

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principles of Catholic Social Teaching," A140, ¶ 24; and the Catholic Medical Association, which is "a national, physician-led community of healthcare professionals that strives to uphold the principles of the Catholic faith," Add.28 (citing A141, ¶ 30). As relevant here, plaintiffs initially challenged the 2016 Rule, alleging that its definition of sex discrimination substantially burdened their religious exercise without a compelling governmental interest in violation of RFRA. The CBA plaintiffs also challenged EEOC's interpretation of Title VII on the same grounds.

The district court issued a preliminary stay of the challenged aspects of the 2016 Rule and then stayed the case to permit HHS to reconsider the 2016 Rule. Dkt. Nos. 23, 36, 56.

2. On November 23, 2020, following publication of HHS's 2020 Rule and *Bostock*, plaintiffs filed amended complaints. As relevant here, the amended complaints brought RFRA challenges to prospective future enforcement of Section 1557 through either revived portions of the 2016 Rule, the 2020 Rule, or any other means, and the CBA plaintiffs also brought a RFRA challenge to EEOC's prospective future enforcement of Title VII. A25-94, A132-217. Plaintiffs sought injunctions prohibiting HHS and EEOC from enforcing Section 1557 and Title VII in a manner that would require plaintiffs to perform or provide insurance coverage for gender-transition procedures. A95-97, A269-273. The government opposed plaintiffs' motions and moved to dismiss for lack of jurisdiction. A274-275.

3. On January 19, 2021, the district court issued permanent injunctions against HHS and EEOC. A809-811.

a. The court first concluded that the Religious Sisters of Mercy plaintiffs had standing to bring a RFRA challenge against HHS because plaintiffs had shown a "credible threat of enforcement for refusal to provide or insure gender-transition procedures." Add.31. The court reasoned that "Section 1557 arguably proscribes the Plaintiffs' refusal to perform or cover gender-transition procedures." Add.36 (brackets and quotation marks omitted). The court explained its view that the preliminary injunctions against the 2020 Rule "reinstate the [2016 Rule's] definition of 'on the basis of sex' to include 'gender identity' and 'sex stereotyping'" and that HHS's decision not to include a new regulatory definition of sex discrimination in the 2020 Rule "le[ft] the door open to" the application of *Bostock*. Add.36.

As to the CBA plaintiffs, the court concluded that they did not have standing to sue HHS in their own right because none of the CBA plaintiffs alleged that they received federal funding, and thus they are not regulated entities under Section 1557. Add.32-34. However, the court concluded that CBA had associational standing to sue on behalf of its unnamed members who receive federal funding. Add.34-35, 41.

b. The district court similarly found that CBA had associational standing to bring a RFRA challenge against EEOC's potential enforcement of Title VII on behalf of "individual CBA members like the Diocese and Catholic Charities." Add.41. The court reasoned that EEOC has interpreted sex discrimination to include gender-

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identity discrimination and that *Bostock* affirmed this interpretation in a Title VII case. Add.42. In addition, the court determined that "[i]n the 2016 Rule, HHS confirmed that the EEOC would pursue enforcement actions against nonhealthcare employers with gender-transition exclusions in their health plans," citing the part of the 2016 Rule in which HHS said that it would refer such administrative complaints to EEOC when HHS lacked jurisdiction over them. Add.42 (citing 81 Fed. Reg. at 31,432).

c. Turning to ripeness, the district court concluded that plaintiffs' challenges to HHS's interpretation of Section 1557 and EEOC's interpretation of Title VII were ripe. The court reasoned that "[t]hese cases present 'purely legal questions' . . . and need no additional factual development," and that "[p]ractical harm is manifest here because the Plaintiffs must either alter their policies for providing and covering gender-transition procedures . . . or risk the loss of critical federal healthcare funding along with potential civil and criminal penalties." Add.48-49.

d. On the merits, the court concluded that requiring the provision or coverage of gender-transition procedures would constitute a substantial burden on plaintiffs' religious exercise in violation of RFRA. Add.51-52.

The district court issued both declaratory and permanent injunctive relief. The court held that plaintiffs were entitled to injunctions against HHS and EEOC because "intrusion upon . . . Plaintiffs' exercise of religion is sufficient to show irreparable harm" and "[a]bsent an injunction," plaintiffs "will either be forced to violate their sincerely held religious beliefs . . . or to incur severe monetary penalties." Add.61

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(quotation marks omitted). The court thus enjoined HHS "from interpreting or enforcing Section 1557 . . . or any implementing regulation thereto" and EEOC "from interpreting or enforcing Title VII . . . in a manner that would require [plaintiffs] to perform or provide insurance coverage for gender-transition procedures." Add.62-63; A814-815; A818-819.

C. Subsequent Developments

On January 20, 2021—the day after the district court issued its order—President Biden issued Executive Order No. 13,988, which acknowledges *Bostock* and directs agencies to "consider whether to" take any actions "necessary to fully implement statutes that prohibit sex discrimination," "consistent with applicable law" (which includes RFRA). 86 Fed. Reg. 7,023, 7,024 (Jan. 20, 2021).

In light of the Executive Order, the appeals of the preliminary injunctions against the 2020 Rule have been stayed. *See* Order, *Whitman-Walker*, No. 20-5531 (D.C. Cir. Feb. 18, 2021); Order, *Walker*, No. 20-3580 (2d Cir. Mar. 18, 2021); Order, *Whitman-Walker*, No. 20-5531 (D.C. Cir. May 14, 2021); Order, *Walker*, No. 20-3580 (2d Cir. May 18, 2021).

On May 10, 2021, HHS issued a notification to inform the public that, consistent with *Bostock* and Title IX, beginning on May 10, HHS would interpret and enforce Section 1557's prohibition of discrimination because of sex to include discrimination on the basis of sexual orientation and discrimination on the basis of gender identity. 86 Fed. Reg. 27,984 (May 10, 2021). The notification explicitly states

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that HHS "will comply with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and all other legal requirements." *Id.* at 27,985.

SUMMARY OF ARGUMENT

This appeal involves challenges to the possible future application of the nondiscrimination requirements of Section 1557 of the Affordable Care Act and Title VII to religious entities. Section 1557 and Title VII prohibit discrimination on the basis of sex. HHS and EEOC have not to date evaluated whether Section 1557 and Title VII require the provision and coverage of gender-transition procedures by entities with religious objections to providing or covering those procedures, or how RFRA and other religious exemptions might apply to such religious entities. Nor have the agencies threatened or initiated any enforcement activity against plaintiffs—or any objecting religious entities—in which the protections of RFRA or other religious exemptions could be asserted and assessed.

Nonetheless, religious-entity plaintiffs speculate that the agencies will attempt to enforce the statutes to require them to perform and to provide insurance coverage for gender-transition procedures and brought this lawsuit seeking to prevent future enforcement of the statutes against them. The district court erred in adjudicating this hypothetical dispute.

The central flaw in the district court's decision is straightforward: The court enjoined the government from enforcing the statutes in a way that the government has not to date indicated that it will enforce them. Because plaintiffs' claims are

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rooted in speculation, plaintiffs lack standing, their claims are not ripe, and they have not demonstrated imminent irreparable harm necessary to justify permanent injunctive relief.

I. Plaintiffs have not demonstrated that they have standing to challenge HHS's possible future enforcement of Section 1557. At the time of the operative complaints, HHS had not taken a position on whether sex discrimination includes gender-identity discrimination. Additionally, HHS has not initiated or threatened any Section 1557 enforcement activity against plaintiffs or any religious entity with religious objections to performing or providing coverage for gender-transition procedures. Accordingly, plaintiffs' speculation about what enforcement actions HHS may take in the future cannot demonstrate imminent injury sufficient to support standing.

Moreover, plaintiffs' RFRA claim against HHS is not ripe. Much of the RFRA analysis necessarily depends on specifically what actions HHS may take in the future, and plaintiffs could raise these same RFRA arguments in the context of any specific enforcement proceeding.

II. Plaintiffs have not demonstrated that they have standing to challenge EEOC's possible future enforcement of Title VII. Plaintiffs have not demonstrated—or even alleged—that they have ever been asked to cover transition-related care for any particular employee. EEOC has not initiated or threatened any Title VII enforcement activity against plaintiffs, or any other objecting religious

employer, with respect to the type of insurance-coverage claims at issue here. Plaintiffs' theory of injury thus is based on an entirely speculative chain of events.

Additionally, plaintiffs' RFRA claim against EEOC is not ripe. Plaintiffs have not identified any final agency action for the court to review. Moreover, plaintiffs' RFRA claim is not fit for review, as a court would need to evaluate a factual record establishing specifically what EEOC is asking a religious employer to do before ruling in plaintiffs' favor. Further, plaintiffs could raise these same RFRA arguments in EEOC's administrative proceedings if any discrimination charge is ever filed against them, as well as in court if EEOC ever pursues an enforcement action against them.

III. For similar reasons, plaintiffs have not demonstrated imminent irreparable harm sufficient to justify permanent injunctive relief.

STANDARD OF REVIEW

This Court reviews the district court's grant of a permanent injunction for abuse of discretion, but questions of law are reviewed de novo. *See Kittle-Aikeley v. Strong*, 844 F.3d 727, 735 (8th Cir. 2016).

ARGUMENT

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quotation marks omitted). That "bedrock" Article III requirement ensures that the judicial power is invoked only "as a necessity in the determination of real, earnest and

vital controversy." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (quotation marks omitted); *see also Zanders v. Swanson*, 573 F.3d 591, 593 (8th Cir. 2009). The case-or-controversy inquiry is "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was" unlawful. *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997); *see also Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III."). Several Article III doctrines are implicated when plaintiffs bring suit when there has not been any enforcement action against them.

Under the doctrine of standing, a court must ensure that "the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quotation marks omitted). A plaintiff must, *inter alia*, show he has suffered an injury that is "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)). An alleged future injury satisfies that requirement only "if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."

Id. (quoting *Clapper*, 568 U.S. at 410, 414 n.5). This Court "must assess standing in view only of the facts that existed at the time" of the operative complaint. *See Conners v. Gusano's Chi. Style Pizzeria*, 779 F.3d 835, 840 (8th Cir. 2015).

A plaintiff "satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *SBA List*, 573 U.S. at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). A plaintiff may show a credible threat by demonstrating that it was subject to past enforcement or has received a targeted threat of future enforcement. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff had standing where he was twice instructed that if he did not cease challenged conduct, he would be prosecuted); *SBA List*, 573 U.S. at 164 ("threat of future enforcement of the [challenged] statute is substantial" as "there is a history of past enforcement here"); *cf. Clapper*, 568 U.S. at 411 (plaintiffs' theory of standing was "substantially undermine[d]" by their "fail[ure] to offer any evidence that their communications ha[d] been monitored" under the challenged statute).

A plaintiff cannot, however, satisfy Article III merely by alleging that it engages in conduct that it fears may violate federal law. *See, e.g.*, *Clapper*, 568 U.S. at 410; *Zanders*, 573 F.3d at 594; *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). Likewise, "'general threat[s] by officials to enforce those laws which they are charged to administer' do not create the necessary injury in fact" absent a

more particularized basis for the plaintiff to fear enforcement. *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010) (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947)).

Lawsuits filed when there has been no enforcement action against plaintiffs also implicate the doctrine of ripeness. The ripeness doctrine seeks to prevent the adjudication of claims relating to "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). "'Ripeness requir[es] [the court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *United States v. Gates*, 915 F.3d 561, 563 (8th Cir. 2019) (quoting *Texas*, 523 U.S. at 300-01). "The fitness prong safeguards against judicial review of hypothetical or speculative disagreements." *Id.* (quotation marks omitted). "The hardship prong considers whether delayed review inflicts significant practical harm on the petitioner." *Id.* (quotation marks omitted).

Adherence to those principles ensures that federal courts remain within their assigned role in our system of separated powers. A plaintiff cannot sue to obtain an anticipatory injunction based on its speculative predictions about what policies an agency may adopt in the future. *See KCCP Tr. v. City of N. Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005) ("Article III limits the federal courts to deciding 'Cases' and 'Controversies' and thus prohibits [courts] from issuing advisory opinions."). Nor may a plaintiff sue to compel the Executive Branch to formulate an enforcement

position and thereby create a dispute that does not otherwise exist. *Cf. Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Article III courts are limited to real, extant disputes requiring immediate resolution.

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

Plaintiffs have not established any Article III case or controversy with respect to their challenge to HHS's possible future enforcement of Section 1557 against religious entities that invoke the protections of RFRA and other religious exemptions. Plaintiffs have not demonstrated that HHS has threatened to enforce Section 1557 against them or informed them that they may be in violation of the statute. *See Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016) (plaintiff did not have standing to challenge city's use of traffic cameras where plaintiff asserted fear of enforcement against him but had not received a notice of violation). Rather, plaintiffs base their alleged fear of enforcement entirely on their speculation that HHS might, at some unspecified time in the future, choose to bring enforcement actions against plaintiffs to require them to perform and provide insurance coverage for gender-transition services and conclude that plaintiffs are not entitled to a religious exemption. This speculation is insufficient to demonstrate standing and ripeness.

A. Plaintiffs Lack Standing.

1. This Court "must assess standing in view only of the facts that existed at the time" of the operative complaints. *Conners*, 779 F.3d at 840. In November 2020—

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when the operative complaints were filed—HHS had not taken a position on whether sex discrimination includes gender-identity discrimination. Indeed, at that time, the 2016 Rule's provisions prohibiting gender-identity discrimination had been vacated by a final judgment in the *Franciscan Alliance* case, which HHS did not appeal. Moreover, at the relevant time, HHS's latest word on Section 1557's prohibition of sex discrimination was the 2020 Rule, which rescinded the (already-vacated) 2016 Rule's provisions prohibiting gender-identity discrimination, and paraphrased the statutory language without adopting a new regulatory definition of sex discrimination. 85 Fed. Reg. at 37,162-65, 37,178. And in the 2020 Rule's preamble, HHS explained that it did not believe that either Section 1557 or Title IX prohibited gender-identity discrimination and stated that a failure to perform or provide insurance coverage for such procedures would not necessarily amount to sex discrimination. *See id.* at 37,162, 37,168, 37,183-87, 37,198, 37,207.

In May 2021—six months after plaintiffs filed the operative complaints and four months after the district court issued its opinion—HHS issued a notification indicating that, beginning on May 10, HHS would interpret and enforce Section 1557's prohibition of discrimination on the basis of sex to include discrimination on the basis of sexual orientation and discrimination on the basis of gender identity. 86 Fed. Reg. at 27,984. However, this notification is insufficient to demonstrate an Article III case or controversy for multiple reasons. As an initial matter, plaintiff cannot "use evidence of what happened after the commencement of the suit" to

demonstrate standing. *Park v. Forest Serv. of the U.S.*, 205 F.3d 1034, 1037-38, 1040 (8th Cir. 2000).

More fundamentally, even though HHS has now taken the position that sex discrimination includes gender-identity discrimination under Section 1557, consistent with the Supreme Court's interpretation of Title VII in *Bostock*, the agency has not to date evaluated whether Section 1557 requires the provision and coverage of gender-transition procedures by entities with religious objections to providing or covering those procedures, or how RFRA and other religious exemptions might apply to such religious entities. Nor has the agency threatened or initiated any enforcement activity against plaintiffs—or any objecting religious entities—in which the protections of RFRA or other religious exemptions could be asserted and assessed. *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 585-87 (8th Cir. 2013) (holding that plaintiff lacked standing to bring a First Amendment challenge where defendant had not threatened to enforce the challenged provisions against plaintiff and the challenged policy did not compel any actions by plaintiff). Indeed, the May 2021 notification explicitly states that HHS "will comply with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., and all other legal requirements." 86 Fed. Reg. at 27,985. Because the government has not to date concluded that plaintiffs' conduct violates the relevant statute, this Court should reject plaintiffs' attempts to pretermit the agency's evaluation of the issues and obtain a preemptive judicial declaration that HHS may not bring an enforcement action against plaintiffs. *See Ohio Forestry Ass'n v. Sierra Club*,

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523 U.S. 726, 735 (1998) (concluding that dispute was not justiciable where "immediate judicial review . . . could hinder agency efforts to refine its policies").

2. The district court erred in concluding that plaintiffs established standing with respect to their claims against HHS's enforcement of Section 1557. The district court reasoned that "Section 1557 arguably proscribes the Plaintiffs' refusal to perform or cover gender-transition procedures." Add.36 (brackets and quotation marks omitted). The court based this conclusion on its view that the preliminary injunctions against the 2020 Rule "reinstate the [2016 Rule's] definition of 'on the basis of sex' to include 'gender identity' and 'sex stereotyping'" and that HHS's decision not to include a new regulatory definition of sex discrimination in the 2020 Rule "le[ft] the door open to" applications of *Bostock*. *Id.* This reasoning is flawed for multiple reasons.

As an initial matter, the language the district court itself used in its opinion underscores the speculative nature of plaintiffs' injuries. Put simply, it is not enough that Section 1557 "arguably proscribes," Add.36, actions plaintiffs wish to take or refrain from taking; instead, the asserted prohibitions must be "'actual or imminent.'" *SBA List*, 573 U.S. at 158. *See also Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030 (8th Cir. 2014) (explaining that "'mere speculation' that injury did or might occur 'cannot satisfy'" Article III's requirement that an injury be "'concrete, *particularized*, and *actual* or imminent'" (citation omitted)). The district court's own description of plaintiffs' possible future injuries does not satisfy this standard. *See also* Add.36

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(noting that 2020 Rule did not include a new regulatory definition of sex discrimination, thus "leaving the door open to" the possible future application of *Bostock*).

The district court's ruling also rests on several erroneous factual premises. First, the court is incorrect that the preliminary injunctions against the 2020 Rule "reinstate the [2016 Rule's] definition of 'on the basis of sex' to include 'gender identity.'" Add.36. Both district courts that issued preliminary injunctions against the 2020 Rule explicitly recognized that they had "no power to revive [provisions] vacated by another district court." *Walker*, 480 F. Supp. 3d at 427; *Whitman-Walker Clinic, Inc.*, 485 F.Supp.3d at 26 (explaining that the court was "powerless to revive" provisions that the *Franciscan Alliance* district court had vacated). Accordingly, the preliminary injunctions against the 2020 Rule did not affect the *Franciscan Alliance* district court's vacatur of the 2016 Rule "insofar as [it] define[d] 'on the basis of sex' to include gender identity." Order at 2, *Franciscan All.*, 414 F. Supp. 3d 928 (No. 16-cv-00108), Dkt. No. 182 (quotation marks omitted). Moreover, although the preliminary injunctions against the 2020 Rule revived the 2016 Rule's prohibition of discrimination on the basis of sex stereotyping, plaintiffs have not demonstrated that HHS has brought or threatened any enforcement action against any religious entity that objects to performing or covering gender-transition procedures based on the sex-stereotyping provision.

Additionally, the district court's own description of the likelihood of injury only underscores that plaintiffs' claimed injury is hypothetical. The court reasoned that the 2020 Rule did not include a new regulatory definition of sex discrimination, thus "leaving the door open to" the possible future application of *Bostock*. Add.36. As explained above, at the time of the operative complaints, HHS had not taken any position on whether it would interpret Section 1557 to encompass gender-identity discrimination, consistent with *Bostock*. More importantly, HHS had not—and still has not—evaluated whether Section 1557 requires objecting religious entities to provide and cover gender-transition procedures, in light of the protections of RFRA. *See* 86 Fed. Reg. at 7,024 (directing agencies to "consider whether to" take any actions "necessary to fully implement statutes that prohibit sex discrimination" and "consistent with applicable law" (which includes RFRA)); 86 Fed. Reg. at 27,985 (explicitly stating that HHS "will comply with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and all other legal requirements" when enforcing Section 1557). Indeed, *Bostock* itself explicitly reserved the question of how RFRA interacts with nondiscrimination statutes, emphasizing that the way in which "doctrines protecting religious liberty interact with Title VII are questions for future cases." *Bostock*, 140 S. Ct. at 1754.

The district court also erred in concluding that plaintiffs had demonstrated a credible threat of enforcement. The court reasoned that "[s]uch a threat arises when a course of action is within the plain text of a statute." Add.37 (quotation marks

omitted). But the "plain text" of Section 1557 prohibits discrimination based on "ground[s] prohibited under" several other statutes, 42 U.S.C. § 18116(a), including Title IX, which prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a). Section 1557 itself is silent as to what this means in the context of religious entities that object to covering or providing gender-transition services. And the relevant "statute" here is not just Section 1557; it is also RFRA, which (as *Bostock* emphasized) sometimes alters the normal application of other statutes to objecting religious entities. *See Bostock*, 140 S. Ct. at 1754.

The court further erred in reasoning that plaintiffs had demonstrated a credible threat of enforcement because "HHS has undertaken two rulemakings to refine enforcement parameters in the ten years following Section 1557's enactment," Add.37-38, and the 2020 Rule's preamble indicates that the agency will "vigorously enforce the prohibitions on discrimination based on . . . sex," Add.38 (alteration in original) (quoting 85 Fed. Reg. at 37,175). "'[G]eneral threat[s] by officials to enforce those laws which they are charged to administer' do not create the necessary injury in fact" absent a more particularized basis for the plaintiff to fear enforcement. *Lopez*, 630 F.3d at 787 (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947)). Moreover, that HHS will enforce Section 1557's prohibition of sex discrimination—by, for example, bringing enforcement actions against a healthcare provider who refused medical services to a patient because she is a woman, or a healthcare provider who refuses to treat a transgender patient's broken bone based on the patient's gender

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identity—does not demonstrate that HHS will bring enforcement actions against religious providers who refuse to provide gender-transition services.

The district court also relied on one district court's preliminary injunction against the provision of the 2020 Rule incorporating Title IX's religious exemption. Add.36. But this preliminary injunction does not demonstrate a credible threat of enforcement sufficient to support standing, as plaintiffs may also seek to invoke the protections of RFRA. Moreover, in the 2020 Rule's preamble, HHS stated its view that the provision adopting Title IX's religious exemption would "not … create any new conscience or religious freedom exemptions beyond what Congress has already enacted." 85 Fed. Reg. at 37,206.

Finally, the district court erred in concluding that CBA has associational standing to sue on behalf of its unnamed members. Add.34-35, 41. The court reasoned that CBA's "second amended complaint confirms that its membership includes Catholic hospitals and other healthcare entities" that receive federal funding. Add.35; *see also* Add.33 ("None of the *Catholic Benefits Association* Plaintiffs aver that their own health plans receive federal funding."). But these unnamed members would not have standing to sue in their own right for the reasons discussed above. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (holding that to establish associational standing, an organization must demonstrate, among other things, that its members would have "standing to sue in their own right"). Furthermore, the district court's conclusion that "members on whose behalf suit is

brought may remain unnamed," Add.34, is contrary to the Supreme Court's requirement that an organization must identify particular members and their injuries in order to establish associational standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009) (holding that an organization must identify particular members and their injuries in order to establish associational standing); *see also Ouachita Watch League v. U.S. Forest Serv.*, 858 F.3d 539, 543 (8th Cir. 2017) ("[t]his requirement of naming the affected members has never been dispensed with in light of statistical probabilities" (quoting *Summers*, 555 U.S. at 498-99)).

B. Plaintiffs' Claims Are Not Ripe.

1. Plaintiffs' RFRA challenge against HHS's possible future enforcement of Section 1557 also fails because it is not ripe. Plaintiffs' RFRA claim requires an analysis of how Section 1557 and RFRA might interact and whether HHS's hypothetical future action would substantially burden plaintiffs' religious exercise without furthering a compelling governmental interest or without using the least restrictive means. 42 U.S.C. § 2000bb-1(a), (b). Because much of this analysis necessarily depends on a case-specific assessment of both the action (or failure to act) that plaintiffs claim is protected under RFRA and the specific enforcement activity undertaken by HHS, it is not fit for judicial review at this time. *See Ohio Forestry Ass'n*, 523 U.S. at 735-36 (dispute was not ripe where it was unclear specifically what action the agency may take in the future).

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If, for example, HHS were to interpret Section 1557 to require plaintiffs to provide gender-transition services only under certain limited circumstances, the court would need to evaluate the issues of how Section 1557 and RFRA might interact, substantial burden, compelling interest, and least restrictive means in the specific context of what is being required of plaintiffs. *See State of Mo. ex rel. Mo. Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1337 (8th Cir. 1997) (The Court "may not render 'an opinion advising what the law would be upon a hypothetical state of facts.'" (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). And if, for example, HHS does not require objecting religious entities like plaintiffs to provide gender-transition services at all, there would be no dispute. *See National Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 694 (8th Cir. 2003) (holding that case was not ripe because "[w]ithout additional factual development, we cannot be sure there is even a dispute here to resolve."). Thus, plaintiffs' RFRA claims are best adjudicated in the context of a fully developed factual record in which HHS is actually requiring plaintiffs to do something specific. *See Renne v. Geary*, 501 U.S. 312, 324 (1991) (explaining that "[r]ules of justiciability" counsel against deciding a case "based upon the amorphous and ill-defined factual record presented to us"); *Ohio Forestry Ass'n*, 523 U.S. at 736 (concluding that dispute was not justiciable where review "would require time-consuming judicial consideration" "without benefit of the focus that a particular [application of the challenged agency plan] could provide").

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The lack of ripeness is underscored by the district court's vague merits analysis that reached out to address arguments that HHS previously made in defending the (since-vacated and rescinded) 2016 Rule in November 2016. The court, for example, analyzed HHS's compelling interest based on "[t]he 2016 Rule['s] . . . proffered [] compelling interest in ensuring nondiscriminatory access to healthcare," Add.53, even though the relevant provisions of the 2016 Rule have since been vacated, rescinded, and replaced by the 2020 Rule. The district court engaged in this hypothetical RFRA analysis based on HHS's previous arguments defending a now-defunct regulation precisely because there is no specific agency action or administrative record to review here.

Additionally, permitting plaintiffs to sue to preemptively block Executive agencies from adopting enforcement positions to which plaintiffs object, based simply on plaintiffs' predictions about what the agencies are likely to do, would subordinate administrative autonomy and aggrandize the role of the federal courts in the policymaking process. *See Freytag v. Commissioner*, 501 U.S. 868, 878 (1991) ("[S]eparation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch."); *Ohio Forestry Ass'n*, 523 U.S. at 733 (considering "whether judicial intervention would inappropriately interfere with further administrative action" in concluding that case was not justiciable); *Missourians for Fiscal Accountability v. Klah*r, 830 F.3d 789, 796 (8th Cir. 2016) (ripeness protects "agencies from judicial interference until an

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administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" (quotation marks omitted)).

Moreover, withholding premature review of plaintiffs' RFRA challenge would impose little, if any, hardship on plaintiffs because they are not currently suffering any injury. *See supra* pp. 22-30; *cf. 281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) (claim was ripe where plaintiffs' alleged injury was "not based on speculation about a particular future prosecution"). And plaintiffs could raise these same RFRA arguments in HHS's administrative proceedings if any discrimination charge is ever filed against them and if any enforcement action is ever brought against them. *See Ohio Forestry Ass'n*, 523 U.S. at 729-30, 733-34 (holding that case was not ripe where plaintiff "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain," and noting that there would be an administrative process before plaintiffs would face any "practical harm").

2. The district court erred in concluding that plaintiffs' RFRA claim against HHS was ripe. The court reasoned that the case presents a purely legal question—"whether the challenged interpretation[] of [Section 1557] violate[s] the RFRA"—and thus concluded that "no additional factual development" was needed. Add.48. But the "challenged interpretation" is purely hypothetical, as HHS has not yet interpreted how Section 1557 applies to religious entities that object to providing or covering gender-transition procedures. *See supra* pp. 24-25. Moreover, further factual development is needed to properly evaluate plaintiffs' RFRA claim. Courts do not

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evaluate RFRA claims in the abstract. Instead, to rule for a plaintiff, a court must consider the specific factual context of the religious exemption requested by a particular plaintiff. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The lack of specifics precludes a proper adjudication here. If, for example, HHS were to interpret Section 1557 to require an objecting religious entity to provide only counseling services for transgender patients or referrals to healthcare providers who are willing to provide such services, the RFRA analysis may be different from the assessment of the competing interests that would be necessary if HHS were to interpret Section 1557 to require an objecting religious entity to provide gender-transition surgery.

The district court also erred in concluding that plaintiffs face "practical harm" because they had to either "alter their policies for providing and covering gender-transition procedures" "or risk the loss of critical federal healthcare funding along with potential civil and criminal penalties." Add.48-49. HHS has not evaluated whether Section 1557 requires the provision and coverage of gender-transition procedures by objecting religious entities, and "mere uncertainty" does not "constitute[] a hardship for purposes of the ripeness analysis." *National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 811 (2003).

Moreover, under HHS's enforcement framework, plaintiffs are "several steps removed from any termination of their federal funding." *Colwell v. HHS*, 558 F.3d 1112, 1128 (9th Cir. 2009) (holding that case was not ripe where HHS had not

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threatened enforcement action against plaintiffs). Before plaintiffs' funding could be terminated, "there must be an effort to achieve informal or voluntary compliance, an administrative hearing, and notice to congressional committees," and "[j]udicial review of any funding termination is available in an Article III court." *Id.*; *see also id.* at 1119; 45 C.F.R. §§ 92.5; 80.7; 80.8.

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

The CBA plaintiffs have not demonstrated any Article III case or controversy with respect to their challenge to EEOC's interpretation of Title VII and possible future enforcement efforts against plaintiffs. The district court concluded that CBA has associational standing to sue on behalf of "individual CBA members like the Diocese and Catholic Charities." Add.41.[4] As an initial matter, to the extent the district court concluded that CBA has associational standing to sue on behalf of its unnamed members, *see id.*, that conclusion is incorrect. As noted previously, *see supra* pp. 29-30, to establish associational standing, an organization must identify specific members who could sue in their own right. *See Summers*, 555 U.S. at 498-99; *Ouachita Watch League*, 858 F.3d at 543. Moreover, the CBA plaintiffs have not demonstrated

[4] The district court did not address whether CBA has associational standing to sue EEOC on behalf of its member plaintiff the Catholic Medical Association, or whether the Catholic Medical Association itself has standing. For the reasons discussed below, *see infra* p. 40, CBA does not have associational standing to sue on behalf of the Catholic Medical Association, and the Catholic Medical Association itself does not have standing.

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that EEOC has threatened to enforce Title VII against Diocese or Catholic Charities (or any objecting religious employer) to require them to cover transition services, or that EEOC has informed Diocese or Catholic Charities (or any objecting religious employer) that it may be in violation of the statute based on its insurance plan. Rather, the CBA plaintiffs base their alleged fear of enforcement entirely on speculation that EEOC might, at some point in the future, bring enforcement actions under Title VII against Diocese or Catholic Charities and conclude that they are not entitled to any religious exemption. This speculation is insufficient to demonstrate standing and ripeness.

A. Plaintiffs Lack Standing

1. The CBA plaintiffs have not demonstrated a concrete injury sufficient to support standing. Their theory of injury is based on an entirely speculative chain of events, hypothesizing that (1) an employee of Diocese or Catholic Charities will seek gender-transition services; (2) the employee will file a charge of discrimination with EEOC based on the denial of insurance coverage for such services; (3) EEOC will find reasonable cause to believe that discrimination occurred; (4) EEOC's attempts at voluntary conciliation with the employer will fail; and (5) EEOC will decide to exercise its discretion to pursue an enforcement action against Diocese or Catholic Charities. The CBA plaintiffs have not demonstrated that any of these events is likely to occur, much less that *all* these events are likely. *See Cuffley*, 112 F.3d at 1338 ("A

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federal court is neither required nor empowered to wade through a quagmire of what-ifs like the one [plaintiff] placed before the District Court in this case.").

As an initial matter, the CBA plaintiffs have not demonstrated—or even alleged—that they have ever been asked to cover gender-transition services for any particular employee. And they have not identified any employee of Diocese or Catholic Charities who is transgender, let alone an employee who is likely to seek gender-transition services and file a charge of discrimination with the EEOC. *See Thomas*, 220 F.3d at 1139-40 (landlords who refused to rent to unmarried couples on religious grounds did not have standing to challenge nondiscrimination law where landlords could not identify any tenants turned away due to their marital status and no prospective tenant had every complained about landlords). Indeed, not all transgender individuals seek gender-transition services.[5]

Even if an employee of Diocese or Catholic Charities were to seek transition services and file a charge of discrimination, the CBA plaintiffs have not shown that that EEOC would likely find reasonable cause to believe that unlawful discrimination occurred and then exercise its discretion to bring an enforcement action against Diocese or Catholic Charities after a failed attempt at voluntary conciliation. In the last eight years, EEOC only found reasonable cause for approximately 3% of all of

[5] World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (2012), https://perma.cc/9U6C-VMX3.

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the Title VII charges filed[6] and approximately 3% of the LGBT-based sex discrimination charges.[7] Moreover, not every charge for which EEOC finds reasonable cause results in an enforcement action. *See* 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. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (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"). In the last nine years, EEOC filed only between 46 and 117 Title VII enforcement actions per year.[8]

Adding to the chain of speculation, it is also unclear whether the ministerial exception—which bars certain claims of discrimination by employees holding certain important positions with religious institutions—would apply to any employees of Diocese or Catholic Charities and bar any claim of discrimination. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060-69 (2020) (concluding that the ministerial exception barred Catholic school teachers' claims of discrimination based on age and disability).

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[6] EEOC, *Title VII of the Civil Rights Act of 1964 Charges*, https://go.usa.gov/x6bED (last visited June 15, 2021).

[7] EEOC, *LGBTQ+-Based Sex Discrimination Charges*, https://go.usa.gov/x6RfP (last visited June 15, 2021).

[8] EEOC, *EEOC Litigation Statistics, FY 1997 through FY 2020*, https://go.usa.gov/x6bmB (last visited June 15, 2021).

Relatedly, the CBA plaintiffs have not demonstrated a credible threat of an EEOC enforcement action against Diocese or Catholic Charities because the CBA plaintiffs have not shown that EEOC has ever brought an enforcement action in district court against *any* employer to challenge the employer's exclusion of transition procedures in its health plan, let alone a *religious* employer that has raised religious objections to such procedures. Indeed, EEOC has not taken a position on how, if at all, Title VII should be enforced against religious employers that object to providing insurance coverage for gender-transition services. Instead, EEOC's Compliance Manual on Religious Discrimination, Directive 915.063, § 12 (Jan. 15, 2021)[9] suggests that this remains an open question, stating that the "applicability and scope of . . . defenses based on Title VII's interaction with the First Amendment or . . . RFRA[] is an evolving area of the law." *Id.* at § 12-1-C. The EEOC Compliance Manual also counsels EEOC investigators to "take great care" in situations involving RFRA, directs EEOC personnel to "seek the advice of the EEOC Legal Counsel in such a situation," and notes that "on occasion, the [EEOC] Legal Counsel may consult as needed with the U.S. Department of Justice." *Id.* The CBA plaintiffs have offered no evidence to demonstrate that an enforcement action against Diocese or Catholic Charities is likely, let alone "'certainly impending.'" *See SBA List*, 573 U.S. at 158; *see also Clapper*, 568 U.S. at 411-12 ("The party invoking federal jurisdiction bears the

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

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burden of establishing standing—and, at the summary judgment stage, such a party . . . must set forth by affidavit or other evidence specific facts" (internal quotation marks omitted)).

Finally, the district court did not address whether CBA has associational standing to sue EEOC on behalf of its member, plaintiff Catholic Medical Association, or whether the Catholic Medical Association itself has standing. The Catholic Medical Association is a "community of healthcare professionals" whose "mission is to inform, organize, and inspire its members, in steadfast fidelity to the teachings of the Catholic Church." A141, ¶ 30. The Catholic Medical Association claims to have "standing to represent all of its present and future members." *Id.*, ¶ 39. CBA does not have associational standing to sue on behalf of its member the Catholic Medical Association because the Catholic Medical Association has not demonstrated any injury and does not claim to have standing to sue in its own right. *See Hunt*, 432 U.S. at 343 (holding that to establish associational standing, an organization must demonstrate, among other things, that its members would have "standing to sue in their own right"). Additionally, the Catholic Medical Association does not have associational standing to sue on behalf of its members because it has not identified any specific members who could sue in their own right. *See infra* pp. 29-30; *Summers*, 555 U.S. at 498-99; *Ouachita Watch League*, 858 F.3d at 543.

2. The district court erred in concluding that the CBA plaintiffs have demonstrated a credible threat of enforcement sufficient to support standing.

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Add.41-43. The court reasoned that "[i]n the 2016 Rule, HHS confirmed that the EEOC would pursue enforcement actions against nonhealthcare employers with gender-transition exclusions in their health plans." Add.42 (citing 81 Fed. Reg. at 31,432). As an initial matter, the 2016 Rule has been partially vacated, rescinded, and replaced by the 2020 Rule. *See* 85 Fed. Reg. at 37,162-65; *Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 26; *Walker*, 480 F. Supp. 3d at 427.

In any event, the district court's reasoning 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 HHS would refer administrative complaints of discrimination to EEOC if they were within EEOC's jurisdiction. *See* 81 Fed. Reg. at 31,432 (stating that where HHS "lacks jurisdiction over an employer responsible for" an allegedly discriminatory health-insurance plan, HHS "typically will refer or transfer the matter to the EEOC and allow that agency to address the matter"). It further stated that "EEOC has informed [HHS] that . . . the date a complaint was filed with [HHS] will be deemed the date it was filed with the EEOC." *Id.* Thus, the preamble to HHS's 2016 Rule explained that charges of discrimination misfiled with HHS would be referred to EEOC and that the operative filing date would remain the date of filing with HHS for purposes of Title VII's timeliness requirements. *See* 42 U.S.C. § 2000e-5(e)(1) (charges must be filed within either 180 or 300 days of allegedly unlawful employment practice). It did not indicate that EEOC would necessarily bring enforcement actions against Diocese or Catholic Charities or any other

objecting religious employers that exclude gender-transition procedures from their health plans.

The district court also erred in relying on *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). Add.42-43. In *United Food*, the court held that unions had standing to challenge a state mass-picketing statute, where the statute applied "directly to plaintiffs' picketing activity," "[p]laintiffs have picketed in the past and been subjected to threats of arrest as well as actual arrest" under the statute, and plaintiffs "will very likely picket again" and "desire to engage in conduct violative of" the statute. 857 F.2d at 430. In *Rodgers*, the court held that beggars had standing to challenge an anti-loitering law, where "the law's plain language covers [plaintiffs'] intended activities, and they have already been arrested or cited under a prior version of the law." 942 F.3d at 455.

United Food and *Rodgers* are distinguishable in at least two ways. First, in both *United Food* and *Rodgers*, the defendants had previously brought enforcement actions against the plaintiffs. *See United Food*, 857 F.2d at 427 (explaining that past prosecution is "relevant to determining the existence of a present threatened injury"); *Rodgers*, 942 F.3d at 455 (explaining that plaintiffs' fear of prosecution was not unreasonable because "they have already been arrested or cited under a prior version of the law"). In contrast, the CBA plaintiffs have not demonstrated that EEOC has ever previously brought enforcement actions against Diocese or Catholic Charities

based on their insurance plans, or even threatened any enforcement action. *Cf. Steffel*, 415 U.S. at 459 (plaintiff had standing where he was twice instructed that if he did not cease challenged conduct, he would be prosecuted). Indeed, the CBA plaintiffs have not demonstrated that EEOC has brought enforcement actions in court against *any* employers for excluding transition services from their health plans.

Second, unlike in *United Food* and *Rodgers*, it is unclear whether the relevant statutes—Title VII interpreted in light of RFRA—forbid the CBA plaintiffs' conduct. *See United Food*, 857 F.2d at 430 (noting that the plaintiffs "desire to engage in conduct violative of" the relevant law); *Rodgers*, 942 F.3d at 455 (noting that "the law's plain language covers [the plaintiffs'] intended activities). Title VII prohibits discrimination "because of . . . sex," but the statute itself is silent as to how this provision will be applied to objecting religious entities, and how Title VII might interact with the other relevant statute, RFRA. *See Bostock*, 140 S. Ct. at 1754 (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").

The district court's ruling also rests on a misunderstanding of EEOC's enforcement history. The district court relied on the CBA plaintiffs' allegation that EEOC has pursued "enforce[ment] . . . against other employers" for categorically excluding gender-transition services from their health plans to conclude that the CBA plaintiffs have demonstrated a credible threat of enforcement against Diocese and Catholic Charities. Add.43 (citing A169-70, ¶¶ 157-159). But EEOC has never filed

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an enforcement action in court to challenge an employer's exclusion of gender-transition services from its health plan. The only enforcement action that the CBA plaintiffs cite is *EEOC v. Deluxe Financial Services, Inc.*, No. 0:15-cv-2646 (D. Minn.). In that case, EEOC did not assert any claims concerning the scope of services covered by the employer's insurance plan. *See EEOC v. Deluxe Financial Services, Inc.*, No. 0:15-cv-2646 (D. Minn.), Dkt. No. 1 (EEOC complaint). Instead, the employee in question intervened and asserted such claims. *See id.*, Dkt. No. 26 (intervenor complaint). The district court subsequently entered a consent decree signed by all parties providing relief on the insurance-coverage claim. *See id.*, Dkt. No. 37 at 11 (consent decree).

Moreover, although EEOC has taken the position that *non*-religious employers' health plans that categorically exclude gender-transition procedures violate Title VII,[10] the CBA plaintiffs have not shown that EEOC has ever taken such a position with respect to *religious* employers, much less that EEOC has exercised its discretion to bring enforcement actions against objecting *religious* employers whose health plans exclude transition procedures. That distinction is significant because of the unique religious defenses that could be in play in such an enforcement action.

[10] EEOC has taken this position in a reasonable-cause determination made after an administrative investigation and in amicus briefs filed in a case addressing whether a transgender plaintiff had stated a plausible claim for relief under Title VII. *See Robinson v. Dignity Health*, No. 4:16-cv-3035 (N.D. Cal.), Dkts. 49-1, 50; *see also* A169-70, ¶¶ 158-59. In neither circumstance did the employer assert any religious defenses.

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B. Plaintiffs' Claims Are Not Ripe

1. The CBA plaintiffs' RFRA claim seeking an injunction against EEOC's possible future enforcement of Title VII also fails because it is not ripe. As an initial matter, the CBA plaintiffs have not identified any final agency action for the court to review. *See Lane v. U.S. Dep't of Agric.*, 187 F.3d 793, 795 (8th Cir. 1999) (considering whether "the issues are based on final agency action" in deciding whether the case was ripe). EEOC has not issued a final rule interpreting Title VII. Indeed, EEOC could not do so, as EEOC lacks substantive rulemaking authority in this area. *See* 42 U.S.C. § 2000e-12(a) (EEOC has authority to issue procedural regulations only). And, as explained above, EEOC has not taken any enforcement action against the CBA plaintiffs with respect to their health plans and may never do so. *See Parrish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (holding that case was not ripe where alleged harm "'may not occur at all'"). All EEOC has done is express its interpretation of Title VII with respect to *non*-religious employers. *See American Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 390, 393 (D.C. Cir. 2013) (holding that claim was unripe because agency's interpretation of a statute "is not subject to judicial review unless it is relied upon or applied to support an agency action in a particular case").

"To constitute a final agency action, the agency's action must have inflicted an actual, concrete injury upon the party seeking judicial review," and "an agency does not inflict injury merely by expressing its view of the law." *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs*, 888 F.3d 906, 915 (8th Cir. 2018)

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(quoting *AT&T Co.*, 270 F.3d at 976). EEOC's position that Title VII prohibits *non-*religious employers from categorically excluding gender-transition services from employer health plans has not injured the CBA plaintiffs, since plaintiffs have not demonstrated that EEOC will bring an enforcement action against them or any objecting *religious* employer that would assert a religious defense. *See AT&T Co.*, 270 F.3d at 976 (concluding that there was no final agency action where EEOC "has not inflicted any injury upon AT&T merely by expressing its view of the law—a view that has force only to the extent the agency can persuade a court to the same conclusion" and where "EEOC is not bound to sue AT&T"); *see also Minnesota Pub. Utils. Comm'n. v. FCC*, 483 F.3d 570, 582-83 (8th Cir. 2007) (case was not ripe where agency's order "only suggests" what agency would do "if faced with the precise issue" and is thus "only a mere prediction").

For similar reasons, the CBA plaintiffs' RFRA challenge is not fit for judicial review. Because the CBA plaintiffs have not shown that any of their employees has filed a charge of discrimination with EEOC or that EEOC is attempting voluntary conciliation or pursuing an enforcement action involving any CBA member, the Court would be reviewing a purely hypothetical disagreement. *See Gates*, 915 F.3d at 563 ("The fitness prong safeguards against judicial review of hypothetical or speculative disagreements."). Before a court could rule in plaintiffs' favor, it would need to evaluate a factual record establishing precisely what EEOC is asking an employer to do, what the burden on plaintiffs' religious exercise might be, and

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whether EEOC could demonstrate a compelling interest and satisfy the least restrictive means requirement of RFRA. *See Ohio Forestry Ass'n*, 523 U.S. at 736 (concluding that dispute was not justiciable where review "would require time-consuming judicial consideration" "without benefit of the focus that a particular [application of the challenged agency plan] could provide").

Additionally, permitting plaintiffs to sue to preemptively block Executive agencies from adopting enforcement positions to which plaintiffs object, based simply on plaintiffs' predictions about what the agencies are likely to do, would subordinate administrative autonomy and aggrandize the role of the federal courts in the policymaking process. *See Freytag*, 501 U.S. at 878; *Ohio Forestry Ass'n*, 523 U.S. at 733; *Missourians for Fiscal Accountability*, 830 F.3d at 796.

Finally, because there is no imminent threat of an EEOC enforcement action, waiting until there is a concrete dispute for the Court to review will not impose a hardship on the CBA plaintiffs. *See Public Water Supply Dist. No. 10 of Cass Cty. v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003) (This Court "has repeatedly stated that a case is not ripe if the plaintiff makes no showing that the injury is direct, immediate, or certain to occur."). Further, the CBA plaintiffs could raise these same RFRA arguments in EEOC's administrative proceedings if any discrimination charge is ever filed against them and in court if EEOC ever pursues an enforcement action against them. *See id.* (holding that case was not ripe where plaintiff faced "no hardship as a

result of this court withholding review because it can raise its" claim challenging the city's dissolution of a district "when and if a petition [for dissolution] is filed").

2. The district court erred in concluding that the CBA plaintiffs' claim was ripe. The court reasoned that the case presents a purely legal question—"whether the challenged interpretation[] [of Title VII] violate[s] RFRA"—and thus concluded that "no additional factual development" was needed. Add.48. But as explained above, before a court could rule in plaintiffs' favor, it would need to evaluate a factual record establishing precisely what EEOC is asking an employer to do, what the burden on plaintiffs' religious exercise might be, and whether EEOC could demonstrate a compelling interest and satisfy the least restrictive means requirement of RFRA. If, for example, EEOC were to bring an enforcement action seeking to require a religious employer to provide insurance coverage for counseling services for transgender employees, the factors considered in the RFRA analysis may have different weight than they would in the analysis that would be required if EEOC were to bring an enforcement action seeking to require a religious employer to cover gender-transition surgery.

The district court also erred in concluding that there was final agency action for the court to review. The court concluded that "[t]hrough [HHS's] 2016 Rule, the EEOC staked out the position that Title VII forbids employers to categorically exclude gender-transition procedures from their health plans." Add.49 (citing 81 Fed. Reg. at 31,432). The court reasoned that "EEOC's position thus represents the

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consummation of the agency's decisionmaking process and determines 'rights or obligations' of the CBA and its members as covered employers." *Id.* But, as explained above, HHS's 2016 Rule has been partially vacated and rescinded, and, in any event, the 2016 Rule's preamble merely explained that administrative complaints of discrimination misfiled with HHS would be referred to EEOC. It did not indicate that EEOC will necessarily bring enforcement actions against religious employers that exclude gender-transition procedures from their health plans. *See supra* pp. 41-42; 81 Fed. Reg. 31,432.

The district court's conclusion that plaintiffs face "practical harm" because they had to either "alter their policies" "or risk the loss of critical federal healthcare funding along with potential civil and criminal penalties," Add.48-49, rests on another erroneous premise. Plaintiffs are subject to no such sanctions for a violation of Title VII; if EEOC or an employee were to successfully pursue a Title VII action against plaintiffs in district court, plaintiffs would be liable for damages and equitable relief flowing from the denial of insurance coverage for a particular transgender employee. *See* 42 U.S.C. §§ 1981a(a)-(b), 2000e-5(g)(1). As noted above, however, EEOC has not threatened any Title VII enforcement action against plaintiffs or any objecting religious employer that might assert a defense under RFRA. *Cf.* EEOC Compliance Manual § 12-1-C. "[M]ere uncertainty" does not "constitute[] a hardship for purposes of the ripeness analysis." *National Park Hosp. Ass'n*, 538 U.S. at 811.

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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, plaintiffs have not demonstrated imminent irreparable harm sufficient to justify permanent injunctive relief against HHS and EEOC. To obtain a permanent injunction, a "plaintiff must show that he will suffer irreparable harm if the injunction is not granted." *United States v. Green Acres Enters.*, 86 F.3d 130, 133 (8th Cir. 1996). Plaintiffs have not demonstrated that they will be irreparably harmed without an anticipatory injunction against HHS because HHS has not sought to enforce Section 1557 or threatened any enforcement activity—in which religious exemptions could be asserted and evaluated—against plaintiffs or other religious entities that oppose performing and providing coverage for gender-transition services. Similarly, the CBA plaintiffs have not demonstrated that they will be irreparably harmed without an anticipatory injunction against EEOC because EEOC has not sought to enforce Title VII or threatened any enforcement activity against plaintiffs or other religious employers that oppose providing coverage for gender-transition services. Just as plaintiffs' speculation about enforcement actions HHS and EEOC might take at some unspecified time in the future is insufficient to demonstrate the imminent injury necessary to confer standing, it is also insufficient to demonstrate irreparable harm. *See MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1020 (8th Cir.

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2020) ("[s]peculative harm does not support a[n] injunction" (quotation marks omitted)).

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,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,530 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

Pursuant to Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

s/ Ashley A. Cheung
Ashley A. Cheung

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Ashley A. Cheung
Ashley A. Cheung

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