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

U.S. Pastor Council, et al., Plaintiffs, v. **Equal Employment Opportunity Commission**, et al., Defendants.	Case No. 4:18-cv-00824-O

PLAINTIFFS' RESPONSE TO THE GOVERNMENT'S CONDITIONAL MOTION TO STAY PROCEEDINGS

The plaintiffs oppose the government's conditional motion to stay proceedings, and we urge the Court to proceed swiftly to judgment in the event that the Court denies the government's motion to dismiss for lack of jurisdiction. The recent grants of certiorari in *Harris Funeral Homes v. EEOC*, No. 18-107, *Altitude Express v. Zarda*, No. 17-1623, and *Bostock v. Clayton County, Ga.*, No. 17-1618, do not warrant a stay of proceedings, and they only reinforce the need for a prompt ruling from this Court on the legality of the EEOC's behavior.

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A federal district court "has a general discretionary power to stay proceedings before it in the control of its docket and in the interests of justice." *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). The "interests of justice" would not be served by a stay of proceedings.

First, the EEOC is disregarding the Religious Freedom Restoration Act and intimidating religious employers throughout the United States with its "regulatory guidance," which threatens employers with lawsuits if they refuse to recognize same-

sex marriage or allow their employees into restrooms that correspond with whatever gender identity the employee chooses to assert. The EEOC refuses to acknowledge any exemptions for religious employers—even for churches—despite the existence of the Religious Freedom Restoration Act, and the EEOC has already sued a Christian funeral home that refused to allow a biologically female employee to dress like a man. *See EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018) (cert. granted April 22, 2019). Religious employers need to know as soon as possible whether the EEOC's announced interpretation of Title VII is lawful and whether it trumps the statutory protections for religious freedom that RFRA purports to confer.

If, for example, the EEOC is acting lawfully by refusing to exempt religious employers from its interpretation of Title VII, then churches and religious employers need to know that immediately so they can bring their employment practices into compliance with the law and eliminate their exposure to lawsuits. And if the EEOC is violating RFRA by failing to accommodate religious objectors, then the EEOC should be promptly enjoined from enforcing its "regulatory guidance" against the plaintiffs and their fellow class members. Prolonging the uncertainty for another year—and enabling the EEOC to continue threatening religious employers with a guidance document that may or may not violate the Religious Freedom Restoration Act—is unacceptable. *Harris Funeral Homes*, *Zarda*, and *Bostick* will not even be argued until next term, and a ruling may not come until June of 2020. The "interests of justice" are not served by allowing an administrative agency to postpone judicial review of a legally dubious regulatory edict and enabling the *in terrorem* effects of that edict to continue unabated.[1]

1. The government asserts that any "harm" to the *named plaintiffs* will be "limited" because the EEOC has not yet commenced enforcement proceedings against Braidwood or the members of the U.S. Pastor Council. *See* Br. in Support of Defs.' Cond. Mot. to Stay Proceedings (ECF No. 34) at 9–10. But the government refuses to acknowledge the harms that will be inflicted on the *putative class members*

Second, the government *admits* that the EEOC's interpretation of Title VII is unlawful. *See* Br. in Support of Defs.' Renewed Mot. to Dismiss (ECF No. 29) at 5–8; *id*. at 5 ("The longstanding position of the Department of Justice, however, is that Title VII does not reach discrimination based on sexual orientation or gender identity. This well-established position correctly reflects the plain meaning of the statute, the overwhelming weight and reasoning of the case law, and the clear congressional ratification of that interpretation."). Given that concession, it is hard to understand how the government can simultaneously assert that the "interests of justice" favor a stay of this Court's proceedings. What consideration of "justice" could be more paramount than the need to bring a rogue agency into compliance with the law at the earliest possible moment? We could half understand the government's argument for a stay if it were defending the EEOC's position on the merits, because then a stay of proceedings would (at least from the government's perspective) advance the cause of "justice" by perpetuating a policy that it believes to be lawful. But we cannot understand how considerations of "efficiency" and avoiding "waste of judicial resources"—which the government touts throughout its brief—can prevail over the need for prompt judicial relief against an agency that the government admits is acting in violation of the law.

Third, the Supreme Court's eventual rulings in *Harris Funeral Homes*, *Zarda*, and *Bostock* will not even address the RFRA and First Amendment issues that the plaintiffs are asserting in this case. The grants of certiorari are limited to whether Title VII's prohibition on "sex" discrimination encompasses discrimination based on sexual orientation or gender identity. *See* Br. in Support of Defs.' Cond. Mot. to Stay

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who are being threatened with EEOC enforcement actions or who have unwillingly changed their employment practices out of fear of an EEOC lawsuit, and it is appropriate to consider harms to putative class members before a proposed class has been certified. *See Hinckley v. Kelsey-Hayes Co.*, 866 F. Supp. 1034, 1044–45 (E.D. Mich. 1994) ("[T]he court will take into consideration the irreparable harm faced by putative class members before class certification").

Proceedings (ECF No. 34) at 2. The plaintiffs in this case are litigating a different issue: Whether RFRA and the First Amendment compel religious exemptions to the EEOC's interpretation of Title VII. So regardless of how the Supreme Court resolves the issues in *Harris Funeral Homes*, *Zarda*, and *Bostock*, a stay of proceedings in this case will not advance the "interests of justice."

Suppose, for example, that the Supreme Court agrees with the EEOC and holds that Title VII prohibits discrimination on account of sexual orientation or gender identity. If that were to happen, this Court will *still* have to resolve whether RFRA and the First Amendment compel exemptions for religious employers. A stay of proceedings would accomplish nothing in that scenario—except to delay the resolution of those claims and force the plaintiffs and the proposed class members to continue living under a cloud of uncertainty, without knowing whether their religiously motivated employment practices are prohibited by federal law.

Suppose, on the other hand, that the Supreme Court holds that sexual orientation and gender identity are *not* protected categories under Title VII. That would mean that the EEOC was violating the law from the get-go by issuing its "regulatory guidance"—and a decision to stay the proceedings in this Court will have served only to perpetuate an unlawful agency policy that should never have been issued or enforced against anyone. None of these outcomes are consistent with the "interests of justice."

Finally, the Supreme Court's consideration of the issues in *Harris Funeral Homes*, *Zarda*, and *Bostock* will benefit from a thoughtful and well reasoned opinion from this Court, regardless of how this Court decides to resolve the plaintiffs' RFRA and First Amendment claims. The proper interpretation of "sex" discrimination in Title VII will depend in part on whether the EEOC's interpretation violates RFRA or the First Amendment rights of religious employers, as courts typically interpret federal statutes to avoid conflicts (or even potential conflicts) with the Constitution or other federal

laws. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("Our rules aim[] for harmony over conflict in statutory interpretation"). A ruling from this Court on those RFRA and First Amendment issues will assist the Supreme Court in resolving the statutory-interpretation questions presented in *Harris Funeral Homes*, *Zarda*, and *Bostock*. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. Chi. L. Rev. 603, 633 (1989) ("[I]t is important that the Supreme Court have the benefit of as much thinking on the question as is feasible before it makes this final resolution.").

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If this Court denies the government's motion to dismiss for lack of jurisdiction, the plaintiffs are prepared to move promptly for both class certification and summary judgment, so that this Court can rule on the RFRA and First Amendment issues before oral arguments in *Harris Funeral Homes*, *Zarda*, and *Bostock*. There is no warrant for this Court to delay a ruling on the merits, even if the Court decides to reject our arguments against the EEOC's regulatory guidance.

CONCLUSION

The government's conditional motion to stay proceedings should be denied.

Respectfully submitted.

/s/ Jonathan F. Mitchell

CHARLES W. FILLMORE
H. DUSTIN FILLMORE
The Fillmore Law Firm, L.L.P.
1200 Summit Avenue, Suite 860
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
chad@fillmorefirm.com
dusty@fillmorefirm.com

JONATHAN F. MITCHELL
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Plaintiffs and the Proposed Classes

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CERTIFICATE OF SERVICE

I certify that on June 9, 2019, I served this document through CM/ECF upon:

ERIC J. SOSKIN
Senior Trial Counsel
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, NW Room 12002
Washington, DC 20530
(202) 353-0533
eric.soskin@usdoj.gov

Counsel for the Defendants

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs and the Proposed Classes