

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

Bear Creek Bible Church, et al.,

Plaintiffs,

v.

**Equal Employment Opportunity
Commission, et al.,**

Defendants.

Case No. 4:18-cv-00824-O

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTIONS TO AMEND
FINAL JUDGMENT AND ENTER A CLASS-CERTIFICATION ORDER**

TABLE OF CONTENTS

Table of contents	i
Table of authorities	ii
Background	1
Argument	4
I. The Court may consider the plaintiffs’ proposed final judgment under Rule 60(b)(1)	5
II. The Court may also consider the plaintiffs’ proposed final judgment under Rule 59(e)	9
III. The defendants’ remaining arguments are without merit.....	14
Conclusion	15
Certificate of service	17

TABLE OF AUTHORITIES

Cases

Bell v. Brockett,
922 F.3d 502 (4th Cir. 2019)10

Edward H. Boblin Co. v. Banning Co.,
6 F.3d 350 (5th Cir. 1993)1

In re Transtexas Gas Corp.,
303 F.3d 571 (5th Cir. 2002)9

Local Union No. 1992 of the Int’l Brotherhood of Electrical Workers v. The Okonite Co., 358 F.3d 278 (3d Cir. 2004).....11

Marcus v. BMW of North America, LLC,
687 F.3d 583 (3d Cir. 2012)10

Ritzen Group, Inc. v. Jackson Masonry, LLC,
140 S. Ct. 582 (2020)12

Rogers v. Hartford Life & Accident Insurance Co.,
167 F.3d 933 (5th Cir. 1999)5

Sapp v. Renfroe,
511 F.2d 172 (5th Cir. 1975)15

Soo Line Railroad Co. v. Escanaba & Lake Superior Railroad Co.,
840 F.2d 546 (7th Cir. 1988)11, 12

Stewart v. Banks,
397 F.2d 798 (5th Cir. 1968)12

Templet v. HydroChem Inc.,
367 F.3d 473 (5th Cir. 2004)1

Wachtel ex rel. Jesse v. Guardian Life Insurance Co. of America,
453 F.3d 179 (3d Cir. 2006)10

Whole Woman’s Health v. Hellerstedt,
136 S. Ct. 2292 (2016)15

Statutes

42 U.S.C. § 2000e-1(a).....9, 12

Rules

Fed. R. Civ. P. 23(c)(1)(B)10

Fed. R. Civ. P. 54(c)12, 13, 14

Fed. R. Civ. P. 59(e)9

Fed. R. Civ. P. 60(b)(1)5, 8, 11, 15

The defendants say that the Court should not even consider the plaintiffs' requests to amend the final judgment—and they insist that the rules of civil procedure make no allowance for the Court to amend its judgment in these circumstances. *See* Defs.' Br., ECF No. 132, at 1–7. But the defendants are mistaken: The Court has broad discretion to amend its judgment in response to the issues flagged by the plaintiffs,¹ and the circumstances of this case fit comfortably within the criteria of both Rules 59(e) and 60(b)(1).

BACKGROUND

On October 31, 2021, the Court issued its initial memorandum opinion and order granting in part and denying in part the plaintiffs' motion for class certification and the parties' competing motions for summary judgment (ECF No. 118). On November 8, 2021, the Court ordered the parties to “file a status report, addressing what further matter needs to be considered in this case,” and to submit that report no later than November 15, 2021 (ECF No. 119). On November 10, 2021, the defendants filed a motion for reconsideration and asked the Court to remove a concession that was mistakenly attributed to Mr. Takemoto on account of a transcription error (ECF Nos. 120 & 121). The Court issued an amended memorandum opinion and order on November 22, 2021, which corrected this mistake in the opinion but otherwise left the Court's initial ruling intact. (ECF No. 124).

Meanwhile, the parties submitted their joint status report on November 15, 2021, which informed the Court as follows:

After the Court rules on the defendants' motion for reconsideration, the parties will promptly confer *and submit a proposed final judgment for the Court to sign. If the parties cannot agree on what the final judgment should say, then they will submit competing proposals for the Court to consider.*

1. *See Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993) (“The district court has considerable discretion in deciding whether to reopen a case under Rule 59(e.”); *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (“[A] district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration”).

ECF No. 122 (emphasis added). After the Court ruled on the defendants' motion for reconsideration and issued its corrected memorandum opinion and order on November 22, 2021, the parties began exchanging drafts of proposed orders and proposed final judgments. On November 28, 2021, Jonathan F. Mitchell, counsel for the plaintiffs, e-mailed Benjamin Takemoto, counsel for the defendants, to inform him that the plaintiffs intended to move for the issuance of a class-certification order that complies with the requirements of Rule 23:

I have drafted a proposed class-certification order in the EEOC lawsuit that complies with the requirements of Rule 23(c)(1)(B). Would you be willing to review and let us know if you think any changes should be made? I'm available to discuss any time this week.

I have also been working on a draft judgment, which I hope to circulate later tonight.

E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Nov. 28, 2021) (attached as Ex. 1). Mr. Mitchell also attached a draft of his proposed class-certification order. *See id.*

On November 30, 2021, Mr. Mitchell e-mailed Mr. Takemoto again, this time with a proposed final judgment and a request to consider submitting a short status report to inform the Court that the parties were exchanging drafts of their proposed final judgments, and that the parties intended to submit their proposals to the Court by a certain date:

Ben:

I have attached a draft proposed final judgment for Bear Creek. Comments and edits are welcome, and I'm available to discuss any time this week.

I'm think about submitting a short joint status report to Judge O'Connor to let him know that we're exchanging drafts of proposed class-certification orders and proposed final judgments, and that we will submit a proposal (or competing proposals) to the Court by a certain date. Please let me know if you OK with this and what date (or approximate date) we should submit the proposals by.

E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Nov. 30, 2021) (attached as Ex. 2).

On December 2, 2021, Mr. Takemoto e-mailed Mr. Mitchell to let him know that he and his colleagues were reviewing Mr. Mitchell's proposed class-certification order and proposed

final judgment. In that e-mail, Mr. Takemoto disagreed with Mr. Mitchell's suggestion to submit a supplemental joint status report to the Court:

Hi Jonathan,

Thanks for sending this and the class certification order. We're reviewing them.

For now, though, we don't believe that it's necessary to submit a JSR. We told the Court in our November 15 JSR, "After the Court rules on the defendants' motion for reconsideration, the parties will promptly confer and submit a proposed final judgment for the Court to sign. If the parties cannot agree on what the final judgment should say, then they will submit competing proposals for the Court to consider." We believe this covers our current review of your proposal, and we still intend to submit a final judgment or, if we can't come to an agreement, competing proposals.

E-mail from Benjamin Takemoto to Jonathan F. Mitchell (Dec. 2, 2021) (attached as Ex. 3).

On December 10, 2021, Mr. Takemoto e-mailed his redlined edits to Mr. Mitchell's proposed final judgment, and informed Mr. Mitchell that the defendants would not join his motion for entry of a class-certification order that complies with Rule 23:

Hi Jonathan,

Thanks for sending along a draft class certification order, judgment, and fee application extension motion.

On the class certification order, Defendants will not join in proposing an order. However, we would appreciate it if you could include the following in your proposed order: "Defendants oppose Plaintiffs' proposed class certification order for the same reasons that they opposed Plaintiffs' Motion for Class Certification."

On the judgment, Defendants have the attached edits. Of course, I'm happy to discuss if it's helpful.

E-mail from Benjamin Takemoto to Jonathan F. Mitchell (Dec. 10, 2021) (attached as Ex. 4).

On December 12, 2021, Mr. Mitchell replied to Mr. Takemoto explaining that he was unwilling to accept many of his proposed edits and attaching a new proposed final judgment. Mr. Mitchell wrote:

Ben:

Thanks for sending us your edits. I have made some changes to our proposed final judgment in response, but I think we may have to submit competing proposed final judgments. There were some changes that I was unwilling to accept (at least for now), and I will explain my thinking below. I'm happy to discuss further over the phone if you think that would be helpful. . . .

Let me know if you think we should discuss any of this further. Otherwise I'm inclined to think that we should submit competing final judgments and explain our thinking to Judge O'Connor.

E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Dec. 12, 2021) (attached as Ex. 5). Later that day, Mr. Mitchell filed a “Notice to the Court and Proposed Order,” which asked the Court to issue a class-certification order that complies with the requirements of Rule 23 and attached a proposed order for the Court’s consideration (ECF No. 125).

On December 14, 2021—before the parties had submitted their proposed final judgments to the Court—the Court issued a final judgment (ECF No. 126). The Court issued this judgment without acting on the notice to the court and proposed class-certification order that Mr. Mitchell had submitted on December 12, 2021 (ECF No. 125). On December 22, 2021, the plaintiffs filed a motion that once again asked the Court to enter a class-certification order in conformity with the requirements of Rule 23 (ECF No. 129), as well as a motion to amend the final judgment (ECF No. 130). Each of these motions was filed within the 28-day period allowed by Rule 59(e).

ARGUMENT

The Court may reconsider or amend its judgment as proposed by the plaintiffs under either Rule 60(b)(1) or Rule 59(e). The parties had informed the Court in their joint status report of November 15, 2021, that that they would either “submit a proposed final judgment

for the Court to sign” or “submit competing proposals for the Court to consider.” ECF No. 122. The parties were working diligently toward this end when the Court unilaterally issued its final judgment on December 14, 2021. It is entirely appropriate for the Court to allow the parties to submit the proposed final judgments that they had promised and had nearly completed when the Court entered judgment on its own initiative—and to consider those proposals before entering a truly final judgment that will be reviewed on appeal. That is especially true when the plaintiffs are in no way seeking to relitigate the Court’s rulings on class certification and summary judgment, and are seeking only to translate the Court’s amended ruling of November 22, 2021, into a final judgment that comports with the rules of civil procedure and awards appropriate relief to each of the parties.

I. THE COURT MAY CONSIDER THE PLAINTIFFS’ PROPOSED FINAL JUDGMENT UNDER RULE 60(b)(1)

Rule 60(b)(1) allows a Court to alter or amend its judgment for reasons of “mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1). And courts are to “construe Rule 60(b)(1) liberally to ensure that they resolve doubtful cases on the merits.” *Rogers v. Hartford Life & Accident Insurance Co.*, 167 F.3d 933, 938 (5th Cir. 1999). The circumstances that led this Court to issue its judgment before the parties had submitted the proposed final judgments that they had promised fall easily within the categories of “mistake,” “inadvertence,” and “excusable neglect.”

First. Counsel for both parties had informed the Court in their joint status report of November 15, 2021, that they would submit either an agreed-upon final judgment or competing final judgments for the Court to consider:

After the Court rules on the defendants’ motion for reconsideration, the parties will promptly confer *and submit a proposed final judgment for the Court to sign. If the parties cannot agree on what the final judgment should say, then they will submit competing proposals for the Court to consider.*

ECF No. 122 (emphasis added).

Second. Mr. Mitchell e-mailed Mr. Takemoto on November 30, 2021, to suggest that the parties submit an additional joint status report to remind the Court that the parties would submit either a proposed final judgment or competing proposals, and to set a date in that joint status report so that the Court would know when to expect them:

I'm think about submitting a short joint status report to Judge O'Connor to let him know that we're exchanging drafts of proposed class-certification orders and proposed final judgments, and that we will submit a proposal (or competing proposals) to the Court by a certain date. Please let me know if you OK with this and what date (or approximate date) we should submit the proposals by.

E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Nov. 30, 2021) (attached as Ex. 2). Mr. Takemoto, however, disapproved this idea as unnecessary:

For now, though, we don't believe that it's necessary to submit a JSR. We told the Court in our November 15 JSR, "After the Court rules on the defendants' motion for reconsideration, the parties will promptly confer and submit a proposed final judgment for the Court to sign. If the parties cannot agree on what the final judgment should say, then they will submit competing proposals for the Court to consider." We believe this covers our current review of your proposal, and we still intend to submit a final judgment or, if we can't come to an agreement, competing proposals.

E-mail from Benjamin Takemoto to Jonathan F. Mitchell (Dec. 2, 2021) (attached as Ex. 3).

Third. Counsel for each of the parties acted with reasonable dispatch in preparing their proposed final judgments and in providing feedback on each other's drafts, especially given the complexity of the Court's ruling and the need for precision in the eventual final judgment. Mr. Mitchell drafted and circulated his draft proposed judgment on November 30, 2021, eight days after the Court issued its amended memorandum despite the intervening Thanksgiving holiday. Mr. Takemoto responded to Mr. Mitchell's proposed final judgment with his competing proposal on December 10, 2021, ten days after Mr. Mitchell's e-mail of November 30, 2021, which is an understandable length of time considering that Mr. Takemoto's supervisors and colleagues in the Department of Justices needed to review and approve any proposed final judgment that he might offer on the Department's behalf. The

parties were continuing negotiations over the proposed final judgment when this Court entered judgment unilaterally on December 14, 2021. *See* E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Dec. 12, 2021) (attached as Ex. 5). And Mr. Mitchell had already submitted his proposed class-certification order to the Court on December 12, 2021 (ECF No. 125)—two days before the Court entered judgment on December 14, 2021 (ECF No. 126).

Counsel does not know why the Court decided to issue judgment on December 14, 2021, before the parties had submitted the proposed final judgment or the competing proposals that they had promised in their joint status report of November 15, 2021. But each of the possible explanations falls well within the categories of “mistake,” “inadvertence,” or “excusable neglect.”

One possible explanation is that the Court concluded that the parties were not going to submit proposed final judgments, despite their promise to do so in the joint status report of November 15, 2021, because 23 days had passed between November 22, 2021 (the date on which the Court issued its amended memorandum opinion and order) and December 14, 2021 (the date on which the Court entered its final judgment). In this scenario, counsel for the parties made the “mistake” of failing to submit their proposed final judgments sooner, or at least failing to inform the Court during their negotiations that the proposed final judgments were forthcoming. This mistake, however, is excusable and justifies relief under Rule 60(b)(1) because: (1) The parties *did* inform the Court in their joint status report of November 15, 2021, that they would submit either a proposed final judgment or competing proposals to the Court (ECF No. 122); (2) Mr. Mitchell proposed submitting a supplemental joint status report to remind the Court that proposed final judgments would be forthcoming in his e-mail of November 30, 2021, although Mr. Takemoto vetoed the idea;² and (3) The parties acted diligently to prepare and circulate draft proposed judgments and were continuing to negotiate over their proposals when the Court entered judgment on December 14,

2. *See* E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Nov. 30, 2021) (attached as Ex. 2).

2021.³ This situation comes nowhere close to “[g]ross carelessness, ignorance of the rules, or ignorance of the law” on the part of counsel, which are “insufficient bases for 60(b)(1) relief,”⁴ and is (at worst) a “mistake,” an act of “inadvertence,” or an act of “excusable neglect” arising from counsel’s failure to remind the Court that they still intended to submit proposed final judgments, in accordance with their joint status report of November 15, 2021.

Another possible explanation is that the Court had overlooked or forgotten the parties’ promise to submit proposed final judgments, either because the parties had not submitted their proposals quickly enough or because the parties had failed to notify the Court that their negotiations were prolonging the eventual submission of the proposed judgments. This, too, falls comfortably within the categories of “mistake,” “inadvertence,” or “excusable neglect”—regardless of how blame should be apportioned between parties and the Court. No one in this scenario acted with “[g]ross carelessness, ignorance of the rules, or ignorance of the law”⁵; the Court simply issued a final judgment before the parties submitted the proposed final judgments that they had promised in their status report of November 15, 2021. The Court should not deny the parties an opportunity to present their arguments regarding the contents of the final judgment—and deny itself the benefit of an adversarial presentation—over what appears to be nothing more than an oversight on the part of the Court or counsel.

Finally, the Court’s failure to consider the plaintiffs’ proposed class-certification order (ECF Nos. 125, 129) before entering final judgment falls easily within Rule 60(b)(1)’s allowance for “mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1). The plaintiffs submitted this proposed order two days *before* the Court entered final judgment on December 14, 2021, so the Court’s failure to address this proposal before entering final judgment appears to be an oversight, which would trigger Rule 60(b)(1).

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3. See E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Dec. 12, 2021) (attached as Ex. 5).
 4. *Trevino v. City of Fort Worth*, 944 F.3d 567, 571 (5th Cir. 2019) (citation and internal quotation marks omitted).
 5. *Id.*

The defendants appear to concede that Rule 60 would allow the Court to correct the “oversight” of failing to formally appoint class counsel as required by Rule 23(g). *See* Defs.’ Br., ECF No. 132, at 4. But they never explain why Rule 60(b)(1) should prevent the Court from reconsidering its final judgment in response to *other* apparent oversights, including: (1) The failure to address the plaintiffs’ request for entry of a class-certification order, which was filed on December 12, 2021 (ECF No. 125); and (2) The Court’s decision to enter final judgment before the parties had submitted their proposed final judgments as promised in their joint status report of November 15, 2021 (ECF No. 122). To the extent that these were the result of oversight—either on the part of the Court or on the part of counsel—they fall comfortably within the Court’s corrective powers under Rule 60.

II. THE COURT MAY ALSO CONSIDER THE PLAINTIFFS’ PROPOSED FINAL JUDGMENT UNDER RULE 59(e)

Rule 59(e) allows a party to file a “motion to alter or amend a judgment,” so long as the motion is filed “no later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e). The text of the rule does not purport to limit the circumstances in which a court may alter or amend its judgment, but the Fifth Circuit has held that Rule 59(e) “is properly invoked to correct manifest errors of law or fact or to present newly discovered evidence.” *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002) (citation and internal quotation marks omitted). The plaintiffs’ motion satisfies the “manifest errors of law” standard because the final judgment entered by the Court does not comply with the requirements of Rule 23 and Rule 54(c), and because Bear Creek Bible Church is entitled judgment given the Court’s conclusion that section 702(a) of Title VII (42 U.S.C. § 2000e-1(a)) exempts churches from the EEOC’s interpretation of “sex” discrimination.

First. The judgment purports to certify classes and award class-wide relief without the entry of a class-certification order that complies with Rule 23. *See* Notice to the Court and Proposed Order, ECF No. 125. Rule 23 provides that a class-certification order must “define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule

23(g).” Fed. R. Civ. P. 23(c)(1)(B). The Court’s judgment and its amended opinion and order of November 22, 2021, do not provide these required definitions or an appointment of class counsel, and there is no other order from this Court that does so. It is essential that the Court enter an order that complies with Rule 23(c)(1)(B) *before* entry of final judgment, because otherwise the classwide relief in the judgment will be vulnerable to reversal on appeal. *See Wachtel ex rel. Jesse v. Guardian Life Insurance Co. of America*, 453 F.3d 179, 188 (3d Cir. 2006) (vacating class-certification order for “fail[ing] to meet the substantive requirements of Rule 23(c)(1)(B).”); *id.* at 184 (“Rule 23(c)(1)(B) requires district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment. Current practice often falls short of that standard.”); *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592 (3d Cir. 2012) (“The definition of the class certified here is not clear and precise. Rather than set out its own definition, the District Court noted in its certification order that ‘[c]ertification of the New Jersey sub-class is granted [D.E. 144],’ cross-referencing the docket entry for Marcus’s amended notice of motion for class certification.”); *Bell v. Brockett*, 922 F.3d 502, 511 (4th Cir. 2019) (“[T]he district court abused its discretion by failing to appoint class counsel at the time of certification[.]”); *id.* at 512 (“Rule 23(c)(1)(B) plainly provides that ‘[a]n order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).’ Fed. R. Civ. P. 23(c)(1)(B). This requirement is not optional.”); *id.* (“Failure to comply with the requirements of Rule 23 in the vast majority of cases render certification fatally defective.”).

The defendants suggest that Rule 59(e) cannot be used to correct this problem because Rule 59(e) “applies only to judgments” and cannot be used for “revisiting the current class certification order.” Defs.’ Br., ECF No. 132, at 4. But the judgment would *still* need to be amended in response to a revised class-certification order, because the judgment is awarding

classwide relief that must be defined in the judgment itself,⁶ and the existing judgment's efforts to rely upon or incorporate a previous class-certification order that does not comport with Rule 23 leaves the award of classwide relief susceptible to vacatur on appeal. *See supra* at 10–11. And the class-certification order can be amended under the criteria of Rule 60(b)(1), which allow a district court to amend an “order” in response to “mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1); *see also supra* at 5–9.

The defendants also accuse us of attempting to “relitigate disputes over the scope of the certified classes,”⁷ but we have no intention of doing that. The plaintiffs are simply seeking entry of a class-certification order that contains the material required by Rule 23(c)(1)(B), along with a self-contained judgment that provides classwide relief in accordance with that order. The defendants apparently believe that the Court was defining the scope of the certified class on page 27 of the amended memorandum opinion, but we do not interpret the Court's discussion that way. Here is the full context of what the Court said:

By contrast, Braidwood and members of the Religious Business-Type Employers Class are for-profit entities producing a secular product. While faith may be a motivating part of the businesses' missions, their incorporating documents generally do not include a religious purpose. For an employer like Braidwood, religion plays an important role, but is not the sole mission of the organization.

Amended Memorandum Opinion and Order, ECF No. 124, at 27. This is simply describing some features of the class and comparing it to the proposed church-employer class that the Court rejected. It is not purporting to define the scope of the certified class under Rule 23(c)(1)(B).

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6. *See Local Union No. 1992 of the Int'l Brotherhood of Electrical Workers v. The Okonite Co.*, 358 F.3d 278, 284 (3d Cir. 2004) (“[A] judgment must, generally speaking, ‘be a self-contained document, saying who has won and what relief has been awarded’” (quoting James Wm. Moore et al., *Moore's Federal Practice* ¶ 58.05[4][a] (3d ed. 2003) (internal quotation marks omitted)); *Soo Line Railroad Co. v. Escanaba & Lake Superior Railroad Co.*, 840 F.2d 546, 549 (7th Cir. 1988) (“[A] judgment must be self-contained . . . ; it is not enough to refer parties to the court's opinion.”).
 7. Defs.' Br., ECF No. 132, at 4.

Second. The judgment does not comply with Rule 54(c) because it does not set forth the *relief* to which the parties are entitled; it instead describes the Court’s rulings on the parties’ motions for summary judgment and the plaintiffs’ motion for class certification. *See* Fed. R. Civ. P. 54(c) (“Every . . . final judgment should grant the relief to which each party is entitled”); Motion to Amend Final Judgment, ECF No. 130, at 2 (citing authorities). No declaratory judgment has been awarded and no injunction has been issued—indeed, there is no relief of *any* sort described in the judgment (ECF No. 126). The absence of relief in the judgment is a “manifest error of law” that allows the Court to consider the plaintiffs’ request to amend the judgment under Rule 59(e). *See Stewart v. Banks*, 397 F.2d 798, 799 (5th Cir. 1968) (“[A] final judgment must grant the relief to which the party in whose favor it is rendered is entitled”). A final judgment must “leave[] nothing for the court to do but execute the judgment,”⁸ and it is impossible to “execute” a judgment that does not describe relief that the parties are entitled to. *See Soo Line Railroad Co. v. Escanaba & Lake Superior Railroad Co.*, 840 F.2d 546, 549 (7th Cir. 1988) (Easterbrook, J.) (“The Soo could not execute on a judgment saying that its motion for summary judgment is granted.”).

The defendants do not deny any of this—and they do not acknowledge or discuss Rule 54(c)’s requirement that a judgment set forth *relief* and not merely recite the Court’s rulings on the parties’ motions for summary judgment. Yet the defendants want the Court to keep in place a judgment that provides *no* declaratory or injunctive relief to the plaintiffs, even though the Court granted the plaintiffs’ motion for summary judgment in part and agreed with many (though not all) of the plaintiffs’ claims. The defendants’ stance is untenable. A judgment must provide relief to the prevailing parties, and a judgment that fails to do so should be amended under Rule 59(e) if a party raises the issue within the 28-day window.

Third. Bear Creek Bible Church is entitled to declaratory and injunctive relief given the Court’s holding that section 702(a) of Title VII (42 U.S.C. § 2000e-1(a)) exempts it from

8. *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020) (citation and internal quotation marks omitted).

the EEOC's sexual-orientation and gender-identity edicts. *See* Amended Memorandum Opinion and Order, ECF No. 124, at 42; *see also* Fed. R. Civ. P. 54(c) (“A . . . final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”). The plaintiffs have not had an opportunity to argue for this relief because the Court entered final judgment before the parties submitted their proposed judgments to the Court. But Rule 54(c) requires the Court to award declaratory and injunctive relief to Bear Creek on the section 702(a) issue if the Court concludes that Bear Creek is “entitled” to such relief—and it is hard to comprehend how Bear Creek could *not* be “entitled” to that relief when this Court has held that “Bear Creek falls squarely within th[e] exemption” described in section 702(a). Amended Memorandum Opinion and Order, ECF No. 124, at 42; *see also id.* (“As Title VII exempts “religious employers,” Bear Creek Church cannot be burdened by it”). The judgment’s failure to award this relief in accordance with Rule 54(c) is a “manifest error of law” that warrants reconsideration under Rule 59(e).

The defendants contend that Bear Creek is not entitled to judgment on the section 702(a) issue because this Court denied Bear Creek’s motion for summary judgment on its RFRA and First Amendment claims—and they claim that Bear Creek therefore cannot qualify as a “prevailing party.” *See* Defs.’ Br., ECF No. 132 at 5–6. But that is a non sequitur. The Court indeed denied Bear Creek’s motion for summary judgment, but that is because Bear Creek sought summary judgment only on the grounds set forth in its summary-judgment brief, which relied on RFRA, the First Amendment, and the meaning of “sex” discrimination. *See* Amended Br. in Support of Mot. for Sum. J., ECF No. 90, at 6–17. The Court found it unnecessary to grant summary judgment *on those claims* because it concluded that section 702(a) independently protected Bear Creek from the EEOC’s non-discrimination edicts. *See* Amended Memorandum Opinion and Order, ECF No. 124, at 42–43. But it does not follow that Bear Creek cannot be entitled to judgment on the section 702(a) issue, which this Court raised on its own initiative, nor does it follow that Bear Creek is not a “prevailing party” with respect to section 702(a). This Court ruled that section 702(a) protects Bear Creek from the

EEOC's mandates regarding sexual orientation and gender identity, and the Court's judgment should memorialize that holding and award appropriate relief.

The defendants also claim that Bear Creek should not be awarded judgment on the section 702(a) issue because Bear Creek did not seek declaratory or injunctive relief on that ground. *See* Defs.' Br., ECF No. 132 at 6 (quoting Order of September 16, 2021, ECF No. 110, at 1 n.1). But that stance is incompatible with Rule 54(c), which requires a court's judgment to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). And the defendants have not been prejudiced in any way by the plaintiffs' failure to plead or request relief under section 702(a), as this Court gave both sides an opportunity to brief the issue before ruling on it. *See* Order of September 16, 2021, ECF No. 110.

Even if the Court is unwilling or reluctant to conclude that these issues with the judgment rise to the level of "manifest errors of law," they are assuredly enough to justify reconsideration under the more forgiving standard of Rule 60(b)(1), which requires only the existence of "mistake, inadvertence, surprise, or excusable neglect." The absence of a class-certification order that comports with Rule 23, the failure to specify relief as required by Rule 54(c), and the failure to enter judgment and award relief to Bear Creek on the section 702(a) issue are acts of "mistake" or "inadvertence" because the Court entered judgment before receiving proposed final judgments from the parties, and each of these issues would have been raised in the proposed final judgment submitted by the plaintiffs. *See* E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Nov. 30, 2021) (attached as Ex. 2).

III. THE DEFENDANTS' REMAINING ARGUMENTS ARE WITHOUT MERIT

The defendants claim that the plaintiffs cannot request an injunction requiring the EEOC to amend its existing brochures and guidance documents because "they never asked for an injunction while the case was pending." Defs.' Br., ECF No. 132, at 5. But that does not foreclose the plaintiffs from requesting an injunction after the Court grants their motion

for summary judgment. The plaintiffs fully preserved this requested remedy by including in their complaint a demand for “all other relief that the Court deems just, proper, or equitable.” Fourth Amended Complaint, ECF No. 86, at ¶ 87(e); *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (a request in the complaint to issue “such other and further relief as the Court may deem just, proper, and equitable” is sufficient to preserve claims and remedies that go unmentioned in the pleadings); *Sapp v. Renfroe*, 511 F.2d 172, 176, n.3 (5th Cir. 1975) (allowing claim for damages raised for first time on appeal in light of Rule 54(c) and the catchall prayer for relief in plaintiff’s complaint). The plaintiffs also intended to request an injunction in their proposed final judgment, but the Court issued its judgment on December 14, 2021, before the plaintiffs could submit this proposal to the Court. *See* E-mail from Jonathan F. Mitchell to Benjamin Takemoto (Nov. 30, 2021) (attached as Ex. 2). The parties were going to submit competing proposals before the entry of judgment and the propriety of injunctive relief would have been briefed and argued at that time. *See* Joint Status Report of November 15, 2021, ECF No. 122. There is nothing wrong with considering those matters now, given that the entry of judgment before the parties’ submissions is attributable to “mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1); *see also supra* at 6–9. And the defendants will not be prejudiced because they will have an opportunity to argue against the requested injunctive relief before an amended final judgment is entered.

CONCLUSION

The plaintiffs’ motions to amend final judgment and enter a class-certification order should be granted.

Respectfully submitted.

GENE P. HAMILTON
Virginia Bar No. 80434
Vice-President and General Counsel
America First Legal Foundation
300 Independence Avenue SE
Washington, DC 20003
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201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Dated: January 9, 2022

/s/ Jonathan F. Mitchell
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*

CERTIFICATE OF SERVICE

I certify that on January 9, 2022, I served this document through CM/ECF upon:

BENJAMIN T. TAKEMOTO
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box No. 883, Ben Franklin Station
Washington, DC 20044
(202) 532-4252 (phone)
(202) 616-8460 (fax)
benjamin.takemoto@usdoj.gov

Counsel for Defendants

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

From: Jonathan Mitchell jonathan@mitchell.law 
Subject: draft proposed order on class certification
Date: November 28, 2021 at 4:23 PM
To: Takemoto, Benjamin (CIV) benjamin.takemoto@usdoj.gov
Cc: Gene P. Hamilton gene.hamilton@aflegal.org

JM

Ben:

I hope you had a great Thanksgiving. I have drafted a proposed class-certification order in the EEOC lawsuit that complies with the requirements of Rule 23(c)(1)(B). Would you be willing to review and let us know if you think any changes should be made? I'm available to discuss any time this week.

I have also been working on a draft judgment, which I hope to circulate later tonight.

—Jonathan



Bear Creek
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Bear Creek
Bible C...FT).pdf

Jonathan F. Mitchell
Mitchell Law PLLC
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Austin, Texas 78701
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PRIVILEGED AND CONFIDENTIAL — ATTORNEY–CLIENT COMMUNICATION / ATTORNEY WORK PRODUCT

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

Bear Creek Bible Church, et al.,

Plaintiffs,

v.

Case No. 4:18-cv-00824-O

**Equal Employment Opportunity
Commission, et al.,**

Defendants.

**[PROPOSED] ORDER GRANTING IN PART AND DENYING IN
PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

The plaintiffs' motion for class certification is granted in part and denied in part. The Court certifies the following two classes under Rule 23(b)(2) of the federal rules of civil procedure:

I. THE OBJECTING RELIGIOUS-EMPLOYER CLASS

The Court certifies the following class under FRCP 23(b)(2):

Every employer in the United States that: (1) opposes homosexual or transgender behavior for sincere religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

Braidwood Management Inc. is appointed class representative. Jonathan F. Mitchell, Gene P. Hamilton, Charles W. Fillmore, and H. Dustin Fillmore are appointed class counsel under FRCP 23(g). The class claims are:

1. Whether the Religious Freedom Restoration Act compels exemptions to *Bostock's* interpretation of Title VII;
2. Whether the Free Exercise Clause compels exemptions to *Bostock's* interpretation of Title VII;

3. Whether the First Amendment right of expressive association compels exemptions to *Bostock's* interpretation of Title VII;
4. Whether Title VII, as interpreted in *Bostock*, prohibits or allows employers to discriminate against bisexual employees;
5. Whether Title VII, as interpreted in *Bostock*, allows employers to establish sex-neutral rules of conduct that have the effect of excluding practicing homosexuals or transgender individuals from employment.

II. THE OBJECTING RELIGIOUS AND NON-RELIGIOUS EMPLOYER CLASS

The Court certifies the following class under FRCP 23(b)(2):

Every employer in the United States that: (1) opposes homosexual or transgender behavior for religious or non-religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

Braidwood Management Inc. is appointed class representative. Jonathan F. Mitchell, Gene P. Hamilton, Charles W. Fillmore, and H. Dustin Fillmore are appointed class counsel under FRCP 23(g). The class claims are:

1. Whether Title VII, as interpreted in *Bostock*, prohibits or allows employers to discriminate against bisexual employees;
2. Whether Title VII, as interpreted in *Bostock*, allows employers to establish sex-neutral rules of conduct that have the effect of excluding practicing homosexuals or transgender individuals from employment.

Dated: _____, 2021

REED O'CONNOR
UNITED STATES DISTRICT JUDGE

From: Jonathan Mitchell jonathan@mitchell.law 
Subject: draft proposed final judgment in Bear Creek
Date: November 30, 2021 at 4:30 PM
To: Takemoto, Benjamin (CIV) benjamin.takemoto@usdoj.gov
Cc: Gene P. Hamilton gene.hamilton@aflegal.org



Ben:

I have attached a draft proposed final judgment for Bear Creek. Comments and edits are welcome, and I'm available to discuss any time this week.

I'm think about submitting a short joint status report to Judge O'Connor to let him know that we're exchanging drafts of proposed class-certification orders and proposed final judgments, and that we will submit a proposal (or competing proposals) to the Court by a certain date. Please let me know if you OK with this and what date (or approximate date) we should submit the proposals by.

Also, I propose that we ask Judge O'Connor to postpone our deadline for submitting a fee application until after 14 days after appeals have concluded. If you're OK with that, I will draft a joint motion that we can submit.

—Jonathan

Jonathan F. Mitchell
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Bear Creek Bible Church, et al.,

Plaintiffs,

v.

**Equal Employment Opportunity
Commission, et al.,**

Defendants.

Case No. 4:18-cv-00824-O

[PROPOSED] JUDGMENT

I. BEAR CREEK BIBLE CHURCH

The Court enters judgment in favor of plaintiff Bear Creek Bible Church and against defendants Equal Employment Opportunity Commission; Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, and Andrea R. Lucas, in their official capacities as chair, vicechair, and commissioners of the Equal Employment Opportunity Commission, and the United States of America. The Court **DECLARES** that section 702(a) of Title VII (42 U.S.C. § 2000e-1(a)) exempts Bear Creek Bible Church from any provision or requirement in Title VII or *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that limits an employer's right to:

- (a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;
- (b) Refuse to employ individuals who are engaged in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;
- (c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

It is therefore **ORDERED** that:

1. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ENJOINED** from enforcing or threatening to enforce Title VII in a manner that limits the right of Bear Creek Bible Church to:

(a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;

(b) Refuse to employ individuals who engage in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

(c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

2. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ORDERED** to amend their existing brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, websites and web pages, and any other agency-created or agency-issued documents regarding Title VII's

application to lesbian, gay, bisexual, or transgender employees, and to include an explicit acknowledgement in each of those documents that section 702(a) of Title VII exempts religious employers, including churches and religious nonprofits, who refuse to employ an individual because of sexual orientation or gender expression, so long as the employer's refusal to employ that individual is based on religious observance, practice, or belief. This acknowledgement must also be included in any future brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees.

II. BRAIDWOOD MANAGEMENT INC. AND THE OBJECTING RELIGIOUS-EMPLOYER CLASS

The Court also enters judgment in favor of plaintiff Braidwood Management Inc. and the following certified plaintiff class that Braidwood represents, consisting of:

Every employer in the United States that: (1) opposes homosexual or transgender behavior for sincere religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

The Court **DECLARES** that Title VII, as interpreted by the defendants and by the Supreme Court in *Bostock*, violates the Religious Freedom Restoration Act, the Free Exercise Clause of the First Amendment, and the right of expressive association protected by the First Amendment, to the extent that it limits the right of the objecting religious-employer class members to:

- (a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;
- (b) Refuse to employ individuals who are engaged in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

(c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

It is therefore **ORDERED** that:

1. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ENJOINED** from enforcing or threatening to enforce Title VII in a manner that limits the right of the objecting religious-employer class members to:

(a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;

(b) Refuse to employ individuals who engage in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

(c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

2. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are

ORDERED to amend their existing brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, websites and web pages, and any other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees, and to include an explicit acknowledgement in each of those documents that the Religious Freedom Restoration Act and the First Amendment allows members of the objecting religious-employer class to make any of the employment decisions or policies described in paragraph II(1), notwithstanding any provision or requirement of Title VII, the Supreme Court's opinion in *Bostock*, or any document created or issued by the EEOC. This acknowledgement must also be included in any future brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees.

III. BRAIDWOOD MANAGEMENT INC. AND THE OBJECTING RELIGIOUS OR NON-RELIGIOUS EMPLOYER CLASS

The Court also enters judgment in favor of plaintiff Braidwood Management Inc. and the following certified plaintiff class that Braidwood represents, consisting of:

Every employer in the United States that: (1) opposes homosexual or transgender behavior for religious or non-religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

The Court **DECLARES** that the defendants' interpretation of Title VII is incompatible with the statute, as interpreted by the Supreme Court in *Bostock*, to the extent that it limits the rights of the objecting religious or non-religious employer class members to establish sex-neutral rules of conduct that apply equally to members of both biological sexes. The Court further **DECLARES** that the defendants' interpretation of Title VII is incompatible with the statute, as interpreted by the Supreme Court in *Bostock*, to the extent that it limits the rights of the objecting religious or non-religious

employer class members to establish and enforce sex-specific dress codes and rules that require employees to use the restroom that corresponds with their biological sex.

It is therefore **ORDERED** that:

1. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ENJOINED** from enforcing or threatening to enforce Title VII in a manner that limits the right of the objecting religious or non-religious employer class members to establish and enforce:

(a) sex-neutral rules of conduct that apply equally to members of both biological sexes;

(b) Sex-specific employee dress codes that correspond to the employee's biological sex;

(c) Rules that require employees to use the restroom that corresponds with their biological sex.

2. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ORDERED** to amend their existing brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and any other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees, and to include an explicit acknowledgement in each of those documents that Title VII allows employers to establish and enforce any of the policies described in paragraph III(1). This

acknowledgement must also be included in any future brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees.

IV. THE DEFENDANTS

The Court enters judgment in favor of defendants Equal Employment Opportunity Commission; Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, and Andrea R. Lucas, in their official capacities as chair, vicechair, and commissioners of the Equal Employment Opportunity Commission, and the United States of America, and against plaintiff Braidwood Management Inc. and the following certified plaintiff class that Braidwood represents, consisting of:

Every employer in the United States that: (1) opposes homosexual or transgender behavior for religious or non-religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

The Court **DECLARES** that members of the objecting religious or non-religious employer class who refuse to hire or discriminate against employees or job applicants simply for being bisexual are discriminating “because of such individual’s . . . sex” within the meaning of Title VII. The Court further **DECLARES** that members of the objecting religious or non-religious employer class who refuse to hire or discriminate against employees or job applicants for taking hormone therapy, or for undergoing surgery to modify their genitals, are discriminating “because of such individual’s . . . sex” within the meaning of Title VII.

Dated: _____, 2021

REED O'CONNOR
UNITED STATES DISTRICT JUDGE

From: Takemoto, Benjamin (CIV) Benjamin.Takemoto@usdoj.gov
Subject: RE: [EXTERNAL] draft proposed final judgment in Bear Creek
Date: December 2, 2021 at 10:49 AM
To: Jonathan Mitchell jonathan@mitchell.law
Cc: Gene P. Hamilton gene.hamilton@aflegal.org

BT

Hi Jonathan,

Thanks for sending this and the class certification order. We're reviewing them.

For now, though, we don't believe that it's necessary to submit a JSR. We told the Court in our November 15 JSR, "After the Court rules on the defendants' motion for reconsideration, the parties will promptly confer and submit a proposed final judgment for the Court to sign. If the parties cannot agree on what the final judgment should say, then they will submit competing proposals for the Court to consider." We believe this covers our current review of your proposal, and we still intend to submit a final judgment or, if we can't come to an agreement, competing proposals.

And last on the fee application, yes, we agree to postpone the deadline.

Best,
Ben

From: Jonathan Mitchell <jonathan@mitchell.law>
Sent: Tuesday, November 30, 2021 7:30 PM
To: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Cc: Gene P. Hamilton <gene.hamilton@aflegal.org>
Subject: [EXTERNAL] draft proposed final judgment in Bear Creek

Ben:

I have attached a draft proposed final judgment for Bear Creek. Comments and edits are welcome, and I'm available to discuss any time this week.

I'm think about submitting a short joint status report to Judge O'Connor to let him know that we're exchanging drafts of proposed class-certification orders and proposed final judgments, and that we will submit a proposal (or competing proposals) to the Court by a certain date. Please let me know if you OK with this and what date (or approximate date) we should submit the proposals by.

Also, I propose that we ask Judge O'Connor to postpone our deadline for submitting a fee application until after 14 days after appeals have concluded. If you're OK with that, I will draft a joint motion that we can submit.

—Jonathan

Jonathan F. Mitchell
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law
papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=791842

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From: Takemoto, Benjamin (CIV) Benjamin.Takemoto@usdoj.gov 
Subject: RE: [EXTERNAL] draft proposed final judgment in Bear Creek
Date: December 10, 2021 at 2:11 PM
To: Jonathan Mitchell jonathan@mitchell.law
Cc: Gene P. Hamilton gene.hamilton@aflegal.org

BT

Hi Jonathan,

Thanks for sending along a draft class certification order, judgment, and fee application extension motion.

On the class certification order, Defendants will not join in proposing an order. However, we would appreciate it if you could include the following in your proposed order: "Defendants oppose Plaintiffs' proposed class certification order for the same reasons that they opposed Plaintiffs' Motion for Class Certification."

On the judgment, Defendants have the attached edits. Of course, I'm happy to discuss if it's helpful.

And Defendants consent to the fee application extension motion without any edits.

Ben

From: Jonathan Mitchell <jonathan@mitchell.law>
Sent: Thursday, December 02, 2021 2:54 PM
To: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Cc: Gene P. Hamilton <gene.hamilton@aflegal.org>
Subject: Re: [EXTERNAL] draft proposed final judgment in Bear Creek

Ben:

I've attached a draft motion and proposed order extending the deadline to submit a fee application.

I don't plan to submit this until after Judge O'Connor enters final judgment. But please let me know if you have any comments or edits.

—Jonathan

On Dec 2, 2021, at 10:49 AM, Takemoto, Benjamin (CIV)
<Benjamin.Takemoto@usdoj.gov> wrote:

Hi Jonathan.

.....
Thanks for sending this and the class certification order. We're reviewing them.

For now, though, we don't believe that it's necessary to submit a JSR. We told the Court in our November 15 JSR, "After the Court rules on the defendants' motion for reconsideration, the parties will promptly confer and submit a proposed final judgment for the Court to sign. If the parties cannot agree on what the final judgment should say, then they will submit competing proposals for the Court to consider." We believe this covers our current review of your proposal, and we still intend to submit a final judgment or, if we can't come to an agreement, competing proposals.

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Also, I propose that we ask Judge O'Connor to postpone our deadline for submitting a fee application until after 14 days after appeals have concluded. If you're OK with that, I will draft a joint motion that we can submit.

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papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=791842

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

Bear Creek Bible Church, et al.,

Plaintiffs,

v.

Equal Employment Opportunity
Commission, et al.,

Defendants.

Case No. 4:18-cv-00824-O

[PROPOSED] JUDGMENT

I. **BEAR CREEK BIBLE CHURCH**

The Court enters judgment against Plaintiff Bear Creek Bible Church and in favor of Defendants Equal Employment Opportunity Commission; Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, and Andrea R. Lucas, in their official capacities as chair, vice chair, and commissioners of the Equal Employment Opportunity Commission, and the United States of America.

Commented [TB(1)]: The Court granted summary judgment in favor of Defendants with respect to Bear Creek. See Op. 2 ("Because Bear Creek Bible Church . . . and the Church-Type Employers Class are not burdened by Title VII, Plaintiffs' Motion for Summary Judgment is DENIED in part as to this class."). So, this section should be changed to reflect that decision.

II. **BRAIDWOOD MANAGEMENT INC., THE RELIGIOUS BUSINESS-TYPE EMPLOYER CLASS, AND THE ALL OPPOSING CLASS**

Commented [TB(2)]: Edits to track language in the opinion and Fourth Amended Complaint.
I also restructured to make it easier to follow who is granted what relief.

A. **Claims 1, 2, and 3 (Exceptions to Title VII)**

The Court enters judgment in favor of Plaintiff Braidwood Management Inc. and the Religious Business-Type class that Braidwood represents with respect to Claims 1, 2, and 3.

The Court **DECLARES** that the Religious Freedom Restoration Act, the Free Exercise Clause of the First Amendment, and the First Amendment right of expressive association protects Plaintiff Braidwood Management Inc. and the Religious Business-Type Class members' prerogatives to:

(a) Refuse to employ individuals who are engaged in sexual behavior that is inconsistent with the employers' sincerely held religious beliefs;

(b) Refuse to employ individuals who are engaged in gender non-conforming behavior, including efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

(c) Refuse to recognize their employees' same-sex marriages or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

B. Claim 4 (Discrimination Against Bisexual Employees)

The Court enters judgment in favor of Defendants and against Plaintiffs with respect to Claim 4.

C. Claim 5 (Sex-Neutral Rules of Conduct)

With respect to Claim 5, on the issues of policies that regulate sexual conduct regardless of sexual orientation, sex-specific restrooms, and sex-specific dress codes, the Court enters judgment in favor of Plaintiff Braidwood Management Inc., the Religious Business-Type Class, and the All Opposing Class; and on the issue of policies that prohibit hormone treatments and genital surgery, the Court enters judgment in favor of Defendants.

The Court **DECLARES** as follows:

1. Plaintiff Braidwood Management Inc., the Religious Business-Type Class, and the All Opposing Class are permitted to regulate the sexual conduct of their employees so long as those employers do not discriminate on the basis of sexual orientation or gender identity.

2. Plaintiff Braidwood Management Inc., the Religious Business-Type Class, and the All Opposing Class may prohibit employees from using a restroom designated for the opposite biological sex.
3. Plaintiff Braidwood Management Inc., the Religious Business-Type Class, and the All Opposing Class are permitted to enforce sex-specific dress codes.

Dated: _____, 2021

REED O'CONNOR
UNITED STATES DISTRICT JUDGE

From: Jonathan Mitchell jonathan@mitchell.law 
Subject: Re: [EXTERNAL] draft proposed final judgment in Bear Creek
Date: December 12, 2021 at 2:10 PM
To: Takemoto, Benjamin (CIV) Benjamin.Takemoto@usdoj.gov
Cc: Gene P. Hamilton gene.hamilton@aflegal.org

JM

Ben:

Thanks for sending us your edits. I have made some changes to our proposed final judgment in response, but I think we may have to submit competing proposed final judgments. There were some changes that I was unwilling to accept (at least for now), and I will explain my thinking below. I'm happy to discuss further over the phone if you think that would be helpful.

(1) On Bear Creek Bible Church, we think our client is entitled to judgment because Judge O'Connor did rule that churches are statutorily exempt from Bostock and the EEOC's guidance documents. I realize we didn't plead that claim, but in my view that shouldn't prevent us from asking for judgment. See Fed. R. Civ. P. 54(c) ("Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."); see also *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (a request in the complaint to issue "such other and further relief as the Court may deem just, proper, and equitable" is sufficient to preserve claims that go unmentioned in the pleadings).

Judge O'Connor of course granted your motion for summary judgment on Bear Creek's RFRA and constitutional claims, but that was premised on his conclusion that Bear Creek is shielded from Title VII under section 702(a). So we believe the judgment should reflect that. We may have to submit competing proposals on this point.

(2) We would like to include an injunction in our proposed final judgment alongside the declaratory relief. It's possible that Judge O'Connor will agree with you that declaratory relief is sufficient, but we'd at least like to request an injunction and see what he decides.

(3) I'd prefer to call the certified class "the objecting-employer class," despite Judge O'Connor's terminology, because it's possible that an appellate court or the Supreme Court might someday rule that churches are not shielded from sex-discrimination claims under section 702(a). So I want to keep the class definition (and class name) flexible in case a later court disagrees with Judge O'Connor on the scope of section 702(a).

(4) I tried to avoid referring to the "claims" asserted in my pleadings because Judge O'Connor's opinion departed from what we had pleaded argued in several respects. For example, Judge O'Connor held that Title VII itself allows employers to impose sex-specific dress codes and enforce restroom-usage policies based on biological sex, even though I did not argue for that and we never pleaded a claim of that sort. And of course Judge O'Connor ruled on section 702(a), which was something we did not plead either (even though we argued the point in response to his supplemental briefing request). So I would prefer to avoid tying the judgment to the claims in my pleading, even though I understand why you structured your proposed final judgment that way.

Let me know if you think we should discuss any of this further. Otherwise I'm inclined to think that we should submit competing final judgments and explain our thinking to Judge O'Connor.

—Jonathan



Bear Creek
Bible C...).docx

On Dec 10, 2021, at 2:11 PM, Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov> wrote:

Hi Jonathan,

Thanks for sending along a draft class certification order, judgment, and fee application extension motion.

On the class certification order, Defendants will not join in proposing an order. However, we would appreciate it if you could include the following in your proposed order: "Defendants oppose Plaintiffs' proposed class certification order for the same reasons that they opposed Plaintiffs' Motion for Class Certification."

On the judgment, Defendants have the attached edits. Of course, I'm happy to discuss if it's helpful.

And Defendants consent to the fee application extension motion without any edits.

Ben

From: Jonathan Mitchell <jonathan@mitchell.law>
Sent: Thursday, December 02, 2021 2:54 PM
To: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Cc: Gene P. Hamilton <gene.hamilton@aflegal.org>
Subject: Re: [EXTERNAL] draft proposed final judgment in Bear Creek

Ben:

I've attached a draft motion and proposed order extending the deadline to submit a fee application.

I don't plan to submit this until after Judge O'Connor enters final judgment. But please let me know if you have any comments or edits.

—Jonathan

On Dec 2, 2021, at 10:49 AM, Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov> wrote:

Hi Jonathan,

Thanks for sending this and the class certification order. We're reviewing them.

For now, though, we don't believe that it's necessary to submit a JSR. We told the Court in our November 15 JSR, "After the Court rules on the defendants' motion for reconsideration, the parties will promptly confer and submit a proposed final judgment for the Court to sign. If the parties cannot agree on what the final judgment should say, then they will submit competing proposals for the Court to consider." We believe this covers our current review of your proposal, and we still intend to submit a final judgment or, if we can't come to an agreement, competing proposals.

And last on the fee application, yes, we agree to postpone the deadline.

Best,
Ben

From: Jonathan Mitchell <jonathan@mitchell.law>
Sent: Tuesday, November 30, 2021 7:30 PM
To: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Cc: Gene P. Hamilton <gene.hamilton@aflegal.org>
Subject: [EXTERNAL] draft proposed final judgment in Bear Creek

Ben:

I have attached a draft proposed final judgment for Bear Creek. Comments and edits are welcome, and I'm available to discuss any time this week.

I'm think about submitting a short joint status report to Judge O'Connor to let him know that we're exchanging drafts of proposed class-certification orders and proposed final judgments, and that we will submit a proposal (or competing proposals) to the Court by a certain date. Please let me know if you OK with this and what date (or approximate date) we should submit the proposals by.

Also, I propose that we ask Judge O'Connor to postpone our deadline for submitting a fee application until after 14 days after appeals have concluded. If you're OK with that, I will draft a joint motion that we can submit.

—Jonathan

Jonathan F. Mitchell
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<Bear Creek Bible Church v. EEOC Proposed Final Judgment (12.10.2021) BTT.docx>

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

Bear Creek Bible Church, et al.,

Plaintiffs,

v.

Case No. 4:18-cv-00824-O

Equal Employment Opportunity
Commission, et al.,

Defendants.

[PROPOSED] JUDGMENT

I. BEAR CREEK BIBLE CHURCH

The Court enters judgment in favor of plaintiff Bear Creek Bible Church and against defendants Equal Employment Opportunity Commission; Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, and Andrea R. Lucas, in their official capacities as chair, vicechair, and commissioners of the Equal Employment Opportunity Commission, and the United States of America. The Court **DECLARES** that section 702(a) of Title VII (42 U.S.C. § 2000e-1(a)) exempts Bear Creek Bible Church from any provision or requirement in Title VII or *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that limits an employer's right to:

- (a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;
- (b) Refuse to employ individuals who are engaged in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;
- (c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

It is therefore **ORDERED** that:

1. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ENJOINED** from enforcing or threatening to enforce Title VII in a manner that limits the right of Bear Creek Bible Church to:

(a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;

(b) Refuse to employ individuals who engage in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

(c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

2. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ORDERED** to amend their existing brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, websites and web pages, and any other agency-created or agency-issued documents regarding Title VII's

application to lesbian, gay, bisexual, or transgender employees, and to include an explicit acknowledgement in each of those documents that section 702(a) of Title VII exempts religious employers, including churches and religious nonprofits, who refuse to employ an individual because of sexual orientation or gender expression, so long as the employer's refusal to employ that individual is based on religious observance, practice, or belief. This acknowledgement must also be included in any future brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees.

II. BRAIDWOOD MANAGEMENT INC. AND THE OBJECTING RELIGIOUS-EMPLOYER CLASS

The Court also enters judgment in favor of plaintiff Braidwood Management Inc. and the following certified plaintiff class that Braidwood represents, consisting of:

Every employer in the United States that: (1) opposes homosexual or transgender behavior for sincere religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

The Court **DECLARES** that the Religious Freedom Restoration Act, the Free Exercise Clause of the First Amendment, and the right of expressive association protected by the First Amendment protects the rights of plaintiff Braidwood Management Inc. and the members of the objecting religious-employer class described above to:

- (a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;
- (b) Refuse to employ individuals who are engaged in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

(c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

It is therefore **ORDERED** that:

1. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ENJOINED** from enforcing or threatening to enforce Title VII in a manner that limits the right of the objecting religious-employer class members to:

(a) Refuse to employ individuals who engage in homosexual behavior or who have a homosexual or bisexual orientation;

(b) Refuse to employ individuals who engage in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

(c) Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;

(d) Enforce sex-specific dress and grooming codes; or

(e) Prohibit employees from entering or using restrooms designated for the opposite biological sex.

2. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are

ORDERED to amend their existing brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, websites and web pages, and any other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees, and to include an explicit acknowledgement in each of those documents that the Religious Freedom Restoration Act and the First Amendment allows members of the objecting religious-employer class to make any of the employment decisions or policies described in paragraph II(1), notwithstanding any provision or requirement of Title VII, the Supreme Court's opinion in *Bostock*, or any document created or issued by the EEOC. This acknowledgement must also be included in any future brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees.

III. BRAIDWOOD MANAGEMENT INC. AND THE OBJECTING RELIGIOUS OR NON-RELIGIOUS EMPLOYER CLASS

The Court also enters judgment in favor of plaintiff Braidwood Management Inc. and the following certified plaintiff class that Braidwood represents, consisting of:

Every employer in the United States that: (1) opposes homosexual or transgender behavior for religious or non-religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

The Court **DECLARES** that the defendants' interpretation of Title VII is incompatible with the statute, as interpreted by the Supreme Court in *Bostock*, to the extent that it limits the rights of the objecting religious or non-religious employer class members to establish sex-neutral rules of conduct that apply equally to members of both biological sexes. The Court further **DECLARES** that the defendants' interpretation of Title VII is incompatible with the statute, as interpreted by the Supreme Court in *Bostock*, to the extent that it limits the rights of the objecting religious or non-religious

employer class members to establish and enforce sex-specific dress codes and rules that require employees to use the restroom that corresponds with their biological sex.

It is therefore **ORDERED** that:

1. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ENJOINED** from enforcing or threatening to enforce Title VII in a manner that limits the right of the objecting religious or non-religious employer class members to establish and enforce:

(a) sex-neutral rules of conduct that apply equally to members of both biological sexes;

(b) Sex-specific employee dress codes that correspond to the employee's biological sex;

(c) Rules that require employees to use the restroom that corresponds with their biological sex.

2. Defendants Equal Employment Opportunity Commission, Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, Andrea R. Lucas, and their officers, agents, servants, employees, attorneys, designees, subordinates, and successors in office, as well as any person acting in concert or participation with them, are **ORDERED** to amend their existing brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and any other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees, and to include an explicit acknowledgement in each of those documents that Title VII allows employers to establish and enforce any of the policies described in paragraph III(1). This

acknowledgement must also be included in any future brochures, guidance documents, technical-assistance documents, interpretative rules, general statements of policy, web sites and web pages, and other agency-created or agency-issued documents regarding Title VII's application to lesbian, gay, bisexual, or transgender employees.

IV. THE DEFENDANTS

The Court enters judgment in favor of defendants Equal Employment Opportunity Commission; Charlotte A. Burrows, Jocelyn Samuels, Janet Dhillon, Keith E. Sonderling, and Andrea R. Lucas, in their official capacities as chair, vicechair, and commissioners of the Equal Employment Opportunity Commission, and the United States of America, and against plaintiff Braidwood Management Inc. and the following certified plaintiff class that Braidwood represents, consisting of:

Every employer in the United States that: (1) opposes homosexual or transgender behavior for religious or non-religious reasons; and (2) is not exempt from Title VII's prohibition on sex discrimination under 42 U.S.C. § 2000e-1(a).

The Court **DECLARES** that members of the objecting religious or non-religious employer class who refuse to hire or discriminate against employees or job applicants simply for being bisexual are discriminating “because of such individual’s . . . sex” within the meaning of Title VII. The Court further **DECLARES** that members of the objecting religious or non-religious employer class who refuse to hire or discriminate against employees or job applicants for taking hormone therapy, or for undergoing surgery to modify their genitals, are discriminating “because of such individual’s . . . sex” within the meaning of Title VII.

Dated: _____, 2021

REED O'CONNOR
UNITED STATES DISTRICT JUDGE

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

Bear Creek Bible Church, et al.,

Plaintiffs,

v.

**Equal Employment Opportunity
Commission, et al.,**

Defendants.

Case No. 4:18-cv-00824-O

DECLARATION OF JONATHAN F. MITCHELL

I, Jonathan F. Mitchell, declare as follows:

1. My name is Jonathan F. Mitchell. I am over 21 years old and fully competent to make this declaration.

2. I have personal knowledge of each of the facts stated in this declaration, and everything stated in this declaration is true and correct.

3. I represent the plaintiffs in this litigation.

4. The documents that are attached as Exhibits 1–5 to the reply brief in support of the plaintiffs’ motions to amend final judgment and enter a class-certification order (ECF No. 134) are authentic copies of e-mail correspondence between me and Benjamin Takemoto, counsel for the defendants, as well as authentic copies of the attachments to those e-mails.

This concludes my sworn statement. I declare under penalty of perjury that the foregoing is true and correct.



DECLARANT