IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

BRANDON & CLARK, INC., Plaintiff, v. **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**, *et al.*, Defendants.	Case No. 5:24-cv-00173-H

DEFENDANTS' COMBINED
OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STAY

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INTRODUCTION

There is no need for the emergency preliminary relief that Brandon & Clark seeks. Instead, this case should be stayed because the Equal Employment Opportunity Commission (EEOC) is not currently enforcing the Pregnant Workers Fairness Act (PWFA) against Brandon & Clark and will not do so during the pendency of the appeal in *Texas v. Garland*, No. 5:23-CV-034-H (N.D. Tex.). In that litigation, several months ago, this Court entered a permanent injunction against many of these same Defendants on the same legal theory that Brandon & Clark advances here: that the 2023 Consolidated Appropriations Act—including the PWFA—never became law because the House of Representatives violated the Quorum Clause. *Texas v. Garland*, 2024 WL 967838, at *48 (N.D. Tex. Feb. 27, 2024). That decision has now been appealed to the Fifth Circuit, where briefing is ongoing. *Texas v. Garland*, No. 24-10386, 2024 WL 3813719 (5th Cir. Apr. 26, 2024). Against this backdrop, Brandon & Clark seeks a preliminary injunction. That motion should be denied and Defendants' motion to stay should be granted for four primary reasons.

First, Brandon & Clark cannot establish a substantial likelihood of imminent, irreparable harm because, as the company is already aware, the EEOC is not currently enforcing the PWFA against the company. After Brandon & Clark filed the instant action, Defendants' counsel proposed that the parties agree to a stay of this litigation in light of the EEOC's commitment not to investigate charges or issue right-to-sue letters under the PWFA against Brandon & Clark during the appeal in *Texas v. Garland*. *See* App1, Email from Clayton Bailey to Matt Miller (July 30, 2024). Prior to the filing of this motion, Defendants' counsel provided further detail to Plaintiff's counsel about how the EEOC will handle any PWFA-related charges filed against Brandon & Clark during the pendency of the *Texas v. Garland* appeal. *See* App2-4, Email from Michael Gaffney to Matt Miller (Aug. 20, 2024). Specifically, Defendants' counsel explained, if the EEOC receives a charge against Brandon & Clark where the sole statutory basis for the charge is the PWFA, the EEOC will not investigate the charge or issue a

right-to-sue letter. And if the EEOC receives a charge against Brandon & Clark that includes allegations under both the PWFA and one or more other laws enforced by the EEOC (*e.g.*, Title VII of the Civil Rights Act of 1964), the EEOC will not investigate or issue a right-to-sue letter where the PWFA supplies the statutory basis for the charge and will limit any investigatory actions to alleged violations of laws other than the PWFA. Accordingly, during the pendency of the requested stay, Brandon & Clark will not suffer any injury—let alone irreparable harm.

Second, Brandon & Clark has not demonstrated that it will suffer any irreparable harm *imminently*. The company points to costs it says it will incur to comply with the PWFA. But there is no indication that these costs will be incurred soon, if ever. The PWFA was enacted in December 2022, and it took effect in June 2023—13 months before Brandon & Clark filed this action. To date, the company has still not updated its policies, and there is no reason to believe that it is on the verge of doing so now. Indeed, Brandon & Clark explicitly says it "will not change its policies" to comply with the PWFA's implementing regulations "absent legal compulsion." Declaration of Scott Clark ¶ 9 (July 16, 2024), ECF No. 7.

Third, Brandon & Clark's delay militates against a preliminary injunction. The claims here rest on a single legal argument about events that occurred 20 months ago, and the company's purported irreparable harm flows from the PWFA itself, which took effect more than 13 months ago.

Fourth, because the merits of this action overlap with those at issue in the *Texas v. Garland* appeal, a stay will save both judicial and party resources, allowing the parties to address at summary judgment the underlying claims with the benefit of the Fifth Circuit's ruling.

Brandon & Clark seeks a temporary reprieve from the EEOC investigating or issuing right-to-sue letters under the PWFA while this case proceeds to the merits. *See generally* ECF No. 6. That is the position in which the company already finds itself. Thus, because Brandon & Clark will not suffer irreparable harm absent a preliminary injunction during the requested stay, the motion for

preliminary relief should be denied and Defendants' motion to stay should be granted. Defendants request that the stay remain in effect until resolution and exhaustion of appellate review in *Texas v. Garland*, following which the parties would propose a further briefing schedule.

BACKGROUND

Brandon & Clark alleges that the Consolidated Appropriations Act, 2023 (Act), including the PWFA, never became law. The legislative events underlying Brandon & Clark's argument—that the passage of the Act violated the Quorum Clause—occurred nearly two years ago. The Act passed the House of Representatives with bipartisan support on December 23, 2022. Two hundred and twenty-five Members voted in favor of the bill, 201 voted against it, one Member was marked as "present," and four were recorded as "not voting." 168 Cong. Rec. H10528 (Dec. 23, 2022). "Pursuant to section 3(b) of H. Res. 965, . . . Members casting their vote or recording their presence by proxy [were] counted for the purpose of establishing a quorum under the rules of the House." *Id.* at H10529. The bill then became an enrolled bill,[1] *id.*, and it was sent to the President. President Biden signed the bill into law on December 29, 2022.[2]

The PWFA took effect on June 27, 2023. *See* Pub. L. No. 117-328, div. II, § 109, 136 Stat. 4459, 6089 (2022). A few months prior to the effective date, on February 15, 2023, Texas requested that this Court preliminarily enjoin the PWFA. Motion for Preliminary Injunction, *Texas v. Garland*, No. 5:23-CV-034-H (N.D. Tex. Apr. 4, 2023), ECF No. 37. Texas alleged that the Act (including the PWFA) "never 'passed the House of Representatives'" and is "not law" because the House

[1] When a bill passes either the House of Representatives or the Senate, it is printed and the printed copy is then referred to as an "engrossed bill." 1 U.S.C. § 106. The engrossed bill is then signed by the Clerk of the House or the Secretary of the Senate, sent to the other chamber to be dealt with by that chamber, and, if passed, it is returned by the Clerk or Secretary. *Id.* When such a bill passes both Houses of Congress, it is then printed and called an "enrolled bill." *Id.* The enrolled bill is signed by the presiding officers of each House and is sent to the President. *Id.*

[2] The White House, Bill Signed: H.R. 2617 (Dec. 29, 2022), https://perma.cc/8BM5-289P.

unconstitutionally determined that a quorum existed at the time of the Act's passage. Complaint, *Texas v. Garland*, No. 5:23-CV-034-H (N.D. Tex. Feb. 15, 2023), ECF No. 1 at 2. On February 27, 2024, the Court granted a permanent injunction against the EEOC and various officials, barring them from enforcing the PWFA against Texas and its agencies. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 WL 967838, at *48 (N.D. Tex. Feb. 27, 2024), *appeal pending*, No. 24-10386 (5th Cir.).

The PWFA directs that the EEOC "shall issue regulations . . . to carry out this chapter." 42 U.S.C. § 2000gg-3(a). On August 11, 2023, the EEOC issued a notice of proposed rulemaking. *Regulations to Implement the Pregnant Workers Fairness Act*, 88 Fed. Reg. 54,714 (Aug. 11, 2023) (NPRM). On April 19, 2024, the EEOC issued regulations to implement the PWFA. *See Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29,096 (Apr. 19, 2024) (Final Rule). The Final Rule took effect on June 18, 2024. *Id.*

On July 22, 2024, Brandon & Clark filed this case. ECF No. 1. Brandon & Clark filed a motion for preliminary relief on July 24, 2024. ECF No. 6 (requesting that the Court enjoin Defendants from enforcing the PWFA against Plaintiff and seeking a stay of the effective date of the Final Rule).

LEGAL STANDARDS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The party seeking a preliminary injunction under Federal Rule of Civil Procedure 65 thus bears the burden to show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016).

"[T]he power to stay proceedings is incidental to the power inherent in every court to control

the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Although not "unbounded," the district court has a "discretionary power to stay proceedings before it in the control of its docket and in the interests of justice." *In re Beebe*, 56 F.3d 1384 (5th Cir. 1995) (citation omitted). "The court should consider, among other factors, (1) the potential prejudice to the non-moving party, (2) the hardship and inequity to the moving party if the action is not stayed, and (3) judicial efficiency." *Mulvey v. Vertafore, Inc.*, No. 3:21-CV-00213-E, 2021 WL 4137522, at *1 (N.D. Tex. May 7, 2021) (citing *Blunt v. Prospect Mortg., LLC*, No. 3:13-CV-1595-P, 2013 WL 12129263, at *1 (N.D. Tex. Nov. 20, 2013)).

ARGUMENT

I. A Preliminary Injunction Is Not Warranted Here.

A. Brandon & Clark Cannot Demonstrate Irreparable Harm.

Brandon & Clark bears the burden of showing that, in the absence of a preliminary injunction, it is "likely to suffer irreparable harm[;]" *i.e.*, harm for which there is no adequate remedy at law. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (citation omitted). To satisfy this requirement, there must be "a significant threat of injury from the impending action" and—of particular relevance here—the injury must be "imminent." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). Brandon & Clark must demonstrate that irreparable harm is likely, not merely possible, *Winter*, 555 U.S. at 20; "[s]peculative injury is not sufficient" "to make a clear showing of irreparable harm," *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). Moreover, "the irreparable harm element must be satisfied by independent proof, or no injunction may issue." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (citing *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). Brandon & Clark has not carried that burden here for three reasons.

1. Plaintiff Will Not Suffer Irreparable Harm Because EEOC Is Not Enforcing the PWFA Against Plaintiff During the Pendency of the *Texas v. Garland* Appeal.

Brandon & Clark cannot establish a credible threat of irreparable harm because Defendants will not investigate or issue right-to-sue letters for PWFA charges filed against Brandon & Clark during the pendency of the *Texas v. Garland* appeal, which has the effect of halting any potential EEOC enforcement of the PWFA and its implementing regulations against the company for the duration of the appeal. *See* App2-4, Email from Michael Gaffney to Matt Miller (Aug. 20, 2024). Specifically, if the EEOC receives a charge against Brandon & Clark where the sole statutory basis for the charge is the PWFA, the EEOC will advise the complainant that, because of the pending appeal in *Texas v. Garland* and this litigation, the Commission will not investigate the charge or issue a right-to-sue letter. The EEOC will advise Brandon & Clark of the existence of the charge and will inform Brandon & Clark that the EEOC will not investigate it or issue a right-to-sue letter. And if the EEOC receives a charge against Brandon & Clark that includes allegations under both the PWFA and one or more other laws enforced by the EEOC (*e.g.*, Title VII of the Civil Rights Act of 1964), the EEOC will: (1) advise the complainant that, because of the pending appeal in *Texas v. Garland* and this litigation, the EEOC will not investigate or issue a right-to-sue letter where the PWFA supplies the statutory basis for the charge and (2) limit any investigatory actions to alleged violations of laws other than the PWFA. The EEOC will also inform Brandon & Clark of the charge and that the EEOC will limit any investigation or further action to alleged violations of laws other than the PWFA.[3] Therefore, for the

[3] If, after taking reasonable steps to identify charges as noted above, the EEOC mistakenly sends notice to Brandon & Clark related to a PWFA charge that does not include the information that the EEOC will not investigate the PWFA allegations in the charge or issue a right-to-sue letter (which might occur, for example, because a complainant provides a different name or address than the one used by the EEOC to identify charges filed against Brandon & Clark), the EEOC will take all necessary steps to inform Brandon & Clark that the charge (or, if other statutes are involved, the portion of the charge) alleging a violation of the PWFA will not be investigated and to notify the complainant that,

pendency of the *Texas v. Garland* appeal, Brandon & Clark has already secured the relief that it seeks in its pending preliminary-injunction motion: Brandon & Clark will not be subject to the PWFA before the litigation proceeds to the merits.

In response to Defendants' counsel explaining that the EEOC will not investigate or issue right-to-sue letters for PWFA charges filed against Brandon & Clark during the pendency of the *Texas v. Garland* appeal, Brandon & Clark has not explained how the company would incur any imminent, irreparable harm. App5-7, Email from Matt Miller to Michael Gaffney (Aug. 20, 2024). And, indeed, there is no reason to conclude that Brandon & Clark will suffer any harm absent a preliminary injunction during the requested stay. Accordingly, Brandon & Clark has not met its burden of establishing that it will imminently suffer irreparable harm.

2. Plaintiff's Unsupported Compliance-Cost Estimates Do Not Demonstrate Imminent, Irreparable Harm.

That the EEOC is not investigating charges or issuing right-to-sue letters under the PWFA against Brandon & Clark during the *Texas v. Garland* appeal provides a sufficient basis to deny the company's motion for preliminary relief. But apart from that fact, Brandon & Clark has not met its burden of establishing that it confronts "certainly impending" irreparable harm. That is because, even if the Court credits the company's conclusory declaration about compliance costs, it is purely speculative to conclude that such costs will be incurred anytime soon, if ever. *See Optimus Steel, LLC v. U.S. Army Corps of Eng'rs*, 492 F. Supp. 3d 701, 725 (E.D. Tex. 2020) ("Injunctions are forward looking remedies that may be issued 'only if *future* injury is certainly impending.'") (quoting *Aransas Project v. Shaw*, 775 F.3d 641, 664 (5th Cir. 2014)); *see also Friends of Lydia Ann Channel v. U.S. Army Corps of Eng'rs*, 701 F. App'x 352, 357 (5th Cir. 2017) ("[S]peculation built upon further speculation does not

due to the pending appeal in *Texas v. Garland* and this litigation, the EEOC will not investigate or issue a right-to-sue letter regarding any allegations of a violation of the PWFA in the charge.

amount to a 'reasonably certain threat of imminent harm.'") (citations omitted). Brandon & Clark thus falls far short of showing that it will suffer irreparable harm absent a preliminary injunction.

The sole declaration that Brandon & Clark submitted illustrates the company's failure to meet its burden. That declaration is dated July 16, 2024—more than one year after the PWFA took effect. *See* Clark Decl., ECF No. 7. And yet the declaration explains that Brandon & Clark still does "not have formal policies in place to provide accommodations for conditions associated with" a pregnancy. *Id.* ¶ 6; *see also id.* ("Such accommodation requests are handled on a case-by-case basis."). Thus, 18 months after the PWFA's passage and 12 months after the law took effect, Brandon & Clark has not "create[d] a PWFA-compliant accommodations policy" or "train[ed] managers and employees on how to comply with the PWFA." *Id.* ¶ 11. It would be pure speculation to conclude that Brandon & Clark is on the verge of taking those steps now. Indeed, the declaration states that Brandon & Clark "will not change its policies" to comply with the PWFA's implementing regulations "absent legal compulsion." *Id.* ¶ 9.

Other aspects of Brandon & Clark's declaration also fail to establish a likelihood of irreparable harm. For one, the compliance costs that the declaration identifies could constitute a cognizable injury-in-fact only when the costs are necessary to avoid a genuine threat of enforcement; otherwise, they are self-inflicted injuries. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending."); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972).[4] And Brandon & Clark has not established

[4] In the Fifth Circuit cases that have found standing based on compliance costs, there appears to have been no dispute that, in the absence of those compliance efforts, the challenging party faced a genuine threat of enforcement. *See Career Coll. & Sch. of Tex. v. Dep't of Educ.*, 98 F.4th 220, 234-37 (5th Cir. 2024); *Rest. L. Ctr. v. Dep't of Lab.*, 66 F.4th 593, 599-600 (5th Cir. 2023); *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016); *Contender Farms, LLP v. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015).

that it confronts a credible, imminent threat of an investigation by the EEOC much less litigation by the EEOC under the PWFA. Despite the PWFA being in effect since June 2023, Brandon & Clark does not identify *any* employee who has ever sought an accommodation covered by the PWFA, or that any employee has been denied an accommodation covered by the PWFA, Clark Decl. ¶ 9, let alone filed an EEOC charge for the denial of such an accommodation. All that the company musters is the statement that "Brandon & Clark, Inc. employs 231 people, including 18 women," and—in the estimation of the declarant—"[a] number of these women are of a child bearing age." *Id.* ¶ 2.[5]

Finally, the declaration's contents are conclusory and should not be credited.[6] The declaration states that, because of the PWFA, Brandon & Clark must take various steps, including "engag[ing] a compliance firm to determine [the company's] duties and prohibitions under the PWFA." *Id.* ¶ 10.[7] It appears that these steps have not yet occurred. *Id.* ¶ 11 ("These implementation costs will be

[5] Even if Brandon & Clark could show that it imminently faces the prospect of having to defend itself in a lawsuit alleging that it violated the PWFA—and it has not done so—that would not constitute irreparable harm. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980). And the opportunity to later raise the argument that the PWFA is unconstitutional is a sufficient legal remedy militating against the issuance of a preliminary injunction here. *See Sampson v. Murray*, 415 U.S. 61, 88 (1974) ("[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."). There may be scenarios where having to appear in court may itself cause some harm—such as in the First Amendment context, where state laws guard against the prospect of "retaliatory lawsuits that seek to intimidate or silence" defendants from exercising their constitutional rights, *see Sw. Airlines Co. v. Roundpipe, LLC*, 375 F. Supp. 3d 687, 695 (N.D. Tex. 2019) (describing Texas's anti-SLAPP law)—but nothing of that sort is alleged here.

[6] As previewed in the parties' prior joint filing, *see* ECF No. 21, Defendants intend to seek discovery—including as to the various unsupported estimates found in the declaration—before this case proceeds to summary judgment.

[7] These costs—"engag[ing] a compliance firm to determine [the company's] duties and prohibitions under the PWFA," Clark Decl. ¶ 10—do not constitute Article III injury. *See Kentucky v. United States Env't Prot. Agency*, No. 3:23-CV-00007-GFVT, 2023 WL 3326102, at *4 (E.D. Ky. May 9, 2023) ("As the Court explained previously, the cost of determining whether action must be taken to comply with a regulation is not the same as the actual cost of complying. The latter is the form of compliance costs which the cases contemplate as an injury-in-fact; the former is not.").

unrecoverable once expended and do not include the additional costs for other related matters outlined above [in paragraph 10] that will also result."). And yet Brandon & Clark states that it already knows that the "initial costs" of implementing the PWFA will be "$3,500," *id.*, and the "cost to provide an employee with an average accommodation" will be "$1,440," *id.* ¶ 12. Neither figure is supported by any explanation. The former vastly exceeds the Final Rule's estimate of one-time administrative costs. *See* 89 Fed. Reg. at 29,177 (estimating that such costs would be $225). And the latter—$1,440 for the "average accommodation"—is implausibly high given the nature of what the PWFA requires. *See id.* at 29,175 (estimating that half of required accommodations will be "no-cost accommodations," like providing "access to water, stools, or more frequent bathroom breaks," while the other half will result, on average, in a one-time cost of $300); *see also id.* at 29,128 ("most accommodations employees are likely to seek under the PWFA are simple and easy to provide and have little to no cost to covered entities"). Nor does Brandon & Clark explain why these costs are attributable to the PWFA given that the company already handles pregnancy-related "accommodation requests . . . on a case-by-case basis," Clark Decl. ¶ 7, including reasonable accommodations covered under the Americans with Disabilities Act, *id.*

3. Plaintiff's Delay Demonstrates a Lack of Irreparable Harm.

Brandon & Clark's delay in seeking preliminary relief similarly shows a lack of imminent irreparable harm. "Absent a good explanation, . . . a substantial period of delay . . . militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief." *Wireless Agents, L.L.C. v. T-Mobile, USA, Inc.*, No. CIV.A. 3:05-CV-0094D, 2006 WL 1540587, at *4 (N.D. Tex. June 6, 2006) (citation omitted); *see also Joseph Paul Corp. v. Trademark Custom Homes, Inc.*, No. 3:16-CV-1651-L, 2016 WL 4944370, at *16 (N.D. Tex. Sept. 16, 2016) ("Plaintiff's delay in seeking a TRO and preliminary injunction militates against the issuance of a TRO or preliminary injunction.") (citing *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th

Cir. 1975)); *Pastel Cartel, LLC v. U.S. Food & Drug Admin.*, No. 1:23-CV-1010-DAE, 2023 WL 9503484, at *4 (W.D. Tex. Dec. 14, 2023) ("Courts in this District have denied preliminary injunctions due to delays shorter than the nine months here.").

The PWFA became law more than 18 months ago, and it has been in effect for more than a year. And it is the PWFA itself that Brandon & Clark asserts will cause it to suffer irreparable harm: "Because the PWFA arbitrarily imposes new requirements on Brandon & Clark, Inc.," Brandon & Clark asserts that "it must now" take various steps, including engaging "a compliance firm to determine [the company's] duties and prohibitions under the PWFA," updating "policies to provide PWFA-compliant accommodations," and responding to "charges of discrimination" filed with the EEOC and "lawsuits by private individuals" "relating to the same." Clark Decl. ¶ 10. The declaration then refers to "the initial costs" "to implement the PWFA," *id.* ¶ 11, "[a]ccommodations the PWFA requires," *id.* ¶ 12, and litigation that the "PWFA . . . subjects Brandon & Clark, Inc. to," *id.* ¶ 13. All of these alleged costs—which the company argues constitute irreparable harm warranting a preliminary injunction—pertain to the PWFA itself rather than the Final Rule.[8] Brandon & Clark's unexplained 13-month delay in seeking a preliminary injunction provides a further basis to deny the pending motion for preliminary relief.

B. Defendants Are Likely to Prevail on the Merits.

Defendants acknowledge this Court's decision in *Texas v. Garland*. But neither the Fifth Circuit nor any other appellate court has addressed the central legal questions at issue in that case. Defendants briefly summarize their arguments here, despite the Court's prior decision, for two reasons: (1) to

[8] Even if Brandon & Clark had relied on costs attributable to the Final Rule—which it has not—the rulemaking process has been ongoing for a year. *See* 88 Fed. Reg. 54,714 (NPRM published more than one year ago, on August 11, 2023). And the Final Rule itself was promulgated in April 2024 and took effect more than two months ago, on June 18, 2024. 89 Fed. Reg. 29,096. Brandon & Clark offers no explanation for this delay either.

show that Brandon & Clark has failed to meet its burden to demonstrate a likelihood of success on the merits, and (2) to demonstrate that judicial efficiency strongly supports waiting until resolution and exhaustion of appellate review before moving forward with this case.[9]

First, Brandon & Clark's claim is foreclosed by the enrolled-bill rule of *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). Brandon & Clark alleges that the Appropriations Act "was never properly enacted into law" because a majority of House Members were not "physically present" in the House chamber at the time of the House's vote on the bill. Compl. ¶¶ 51, 47. Brandon & Clark does not dispute, however, that the Appropriations Act was enrolled and signed by the presiding officers of Congress and the President of the United States. *See* Compl. ¶ 20. The Supreme Court has long explained that "an enrolled act, . . . attested by the signatures of the presiding officers of the two houses of congress, and the approval of the president, is conclusive evidence that it was passed by congress, according to the forms of the constitution." *Marshall Field*, 143 U.S. at 673. The Court's consideration of Brandon & Clark's claim should thus end there.

Second, the Appropriations Act was lawfully enacted. The Quorum Clause does not require the physical presence of a majority of Members such that the House was precluded from adopting a rule permitting Members to participate remotely and be counted towards a quorum. The Quorum Clause says nothing about physical presence. By its plain terms, the Quorum Clause establishes the minimum number of Members that must participate for the House's power to conduct business to arise—a "Majority of each" House, U.S. Const. art. I, § 5, cl. 1—not the manner in which Members must participate. The Rulemaking Clause, which immediately follows the Quorum Clause in the Constitution, grants each House broad power to "determine the Rules of its Proceedings." *Id.* cl. 2.

[9] All arguments in this section were raised in Defendants' opening brief in the *Texas v. Garland* appeal and are therefore presently before the Fifth Circuit. *See* Br. Appellants, *Texas v. Garland*, No. 24-10386 (5th Cir. Aug. 9, 2024).

The House was well within its constitutional prerogative to adopt a rule during the COVID-19 pandemic specifying a means by which Members could participate remotely and be counted towards a quorum. The House's rule did not change the number of Members required to establish a quorum, but rather provided an additional means by which Members could cast their vote during a public-health emergency when they otherwise might not have been able to do so. Because a majority of the House participated in the vote, a quorum was present and the Act was constitutionally passed.

The Court rejected these arguments in *Texas v. Garland*. But should the Fifth Circuit reverse, it would dispose of Brandon & Clark's claims. And, regardless, allowing the appellate process to run its course would greatly simplify the remaining proceedings here. The Court should therefore deny Brandon & Clark's motion for a preliminary injunction.[10]

C. The Public Interest Favors Denial of Plaintiff's Motion.

For similar reasons, the public interest factors—including judicial efficiency—favor denying Brandon & Clark's motion for a preliminary injunction and, as explained below, granting Defendants' motion for a stay. Defendants have already taken the steps described herein not to investigate or issue right-to-sue letters for PWFA charges filed against Brandon & Clark during the pendency of the *Texas v. Garland* appeal, which has the effect of halting EEOC's potential enforcement of the PWFA against Brandon & Clark during this period. Because Brandon & Clark does not confront any risk of harm during the period in which a preliminary injunction would apply, there is no reason for the Court to issue such an injunction. And denying Brandon & Clark's motion and staying this case will save party and judicial resources.

[10] The Court should reject Brandon & Clark's brief invitation to reconsider long-standing Supreme Court precedent holding that the United States is not subject to nonmutual collateral estoppel. PI Br. 21 (citing *United States v. Mendoza*, 464 U.S. 154 (1984)). *Mendoza* includes no carveout for "litigation conducted in the same district," and Brandon & Clark does not cite to any court decision supporting their argument. *Id.*

II. A Section 705 Stay Is Not Warranted.

Brandon & Clark also seeks a postponement of the EEOC implementing the Final Rule under 5 U.S.C. § 705. Section 705 allows an agency to postpone the effective date of its own action pending judicial review. 5 U.S.C. § 705. And "on such conditions as may be required and to the extent necessary to prevent irreparable injury," it allows a reviewing court to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending" the court's review. *Id.* No postponement is available here because the effective date of the Rule has passed. And regardless, any relief permitted under § 705 merges fully into the preliminary injunction analysis.

First, a § 705 stay to "postpone" the effective date of the Final Rule is not available because the effective date of the Final Rule has already passed. *VanDerStok v. Garland*, 633 F. Supp. 3d 847, 863 (N.D. Tex. 2022) (O'Connor, J.) ("While [§705] might authorize a Court to 'postpone the effective date' of an unlawful agency action in a particular context, the Final Rule at issue here took effect in August 2022."); *but see All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 256 (5th Cir.) (declining to "reach a definitive answer on the question" but expressing "strong[] doubt" that a § 705 stay must be issued concurrently with an agency action), *rev'd on other grounds*, 602 U.S. 367 (2024); *Texas v. Biden*, 646 F. Supp. 3d 753, 770 (N.D. Tex. 2022) (Kacsmaryk, J.) (holding that § 705 stay could be imposed on already-effective agency action). Consistent with the plain meaning of "postpone," courts have construed *agencies'* ability to "postpone the effective date of action" to allow delay "of a *not yet effective rule*, pending judicial review," but not suspension of a rule that is already in effect. *Safety-Kleen Corp. v. EPA*, Nos. 92-1629, 92-1639, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996) (emphasis added); *see also Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 151 (S.D.N.Y. 2019) (same); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1118 (N.D. Cal. 2017) (same). The Court should read these cases interpreting the language authorizing

agency postponement in concert with the identical language in § 705 allowing "the reviewing court" to "postpone the effective date of an agency action." *See, e.g.*, *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84, 87 (1934)). Because the Final Rule went into effect in June, a § 705 stay is not available.

Second, any relief permitted under § 705—whether "to postpone the effective date" or "to preserve status or rights"—merges fully into the preliminary injunction determination. Section 705 (like other APA provisions) "was primarily intended to reflect existing law," not "to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974). And "[w]hen Congress empowers courts to grant equitable relief, there is a strong presumption that courts will exercise that authority in a manner consistent with traditional principles of equity." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024). Section 705 explicitly incorporates traditional equitable principles by authorizing temporary relief only "to the extent necessary to prevent irreparable injury" and "to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. That is paradigmatic equitable relief. Indeed, Brandon & Clark recognizes that the standards for a preliminary injunction and for a § 705 stay are "largely identical." PI Br. 6, ECF No. 7.

A preliminary injunction is not warranted here for the reasons stated forth above, including that the EEOC will not be investigating or issuing right-to-sue letters for PWFA charges filed against Brandon & Clark during the pendency of the *Texas v. Garland* appeal. However, even if necessary, a well-tailored preliminary injunction would remove any need for further relief under § 705. Indeed, should the Court enter a preliminary injunction against enforcement of the PWFA against Brandon & Clark, there is no need to address the Final Rule (and the potential for relief under § 705) at all. As Brandon & Clark recognized, its alleged "irreparable harms stem from the statute itself." PI Br. 23.

Any enforcement action by EEOC would proceed under the PWFA itself, not the Final Rule. *See* 42 U.S.C. § 2000gg–2(a)(1). Even if the Court decided to reach the Final Rule, a preliminary injunction would adequately redress Brandon & Clark's harms. Because nothing more is required to fully redress Brandon & Clark's alleged injuries, traditional equitable principles counsel against further relief. *See Texas v. EEOC*, 933 F.3d 433, 451 (5th Cir. 2019) ("Ample precedent establishes that we should not exercise our discretion to extend declaratory relief when a challenged law or policy no longer affects the plaintiff.").

III. Any Preliminary Relief Granted Must Be Appropriately Limited.

If the Court grants Brandon & Clark any immediate relief—which it should not—any remedy must be appropriately limited. Because a federal court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018). "Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017). More broadly, if the Court were to grant any relief, it should be limited to apply only to Brandon & Clark and—while it does not appear Brandon & Clark challenges non-PWFA portions of the Appropriations Act—only to the portions of the Act that the Court finds Brandon & Clark has standing to challenge. *See Planned Parenthood of Greater Texas Surgical Health Servs. v. City of Lubbock, Texas*, 542 F. Supp. 3d 465, 480 (N.D. Tex. 2021) ("[A]n injunction does not bind unrelated nonparties.") (quoting *Harris Cty. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 314 (5th Cir. 1999)).[11]

[11] If the Court grants preliminary relief to Plaintiff, that relief should specify that, if the EEOC receives a charge against Brandon & Clark and the sole statutory basis for the charge is the PWFA, the EEOC may advise the complainant that, because of the Court's order, the Commission will not investigate the charge or issue a right-to-sue letter. And it should state that, if EEOC receives a charge against

IV. The Court Should Stay This Case During the Pendency of the *Texas v. Garland* Appeal.

For the same reasons that preliminary relief is not warranted here, the Court should grant a stay of proceedings during the pendency of the *Texas v. Garland* appeal. All three factors favor a stay here. *See Mulvey*, No. 3:21-CV-00213-E, 2021 WL 4137522, at *1 (describing the relevant factors as "(1) the potential prejudice to the non-moving party, (2) the hardship and inequity to the moving party if the action is not stayed, and (3) judicial efficiency"). A stay would not prejudice Brandon & Clark. As explained above, the EEOC will not investigate or issue right-to-sue letters for PWFA charges against Brandon & Clark during the period of the requested stay—*i.e.*, while the *Texas v. Garland* appeal is ongoing. And, as also explained above, even putting aside the EEOC's handling of PWFA-related charges against Brandon & Clark during that appeal, the company will not face any irreparable harm imminently. A stay also generates efficiencies for both the parties and the Court. By staying proceedings until after resolution and exhaustion of appellate review, the parties will be able to brief the merits on summary judgment with the benefit of the appellate decision. Accordingly, Defendants' motion to stay should be granted. The stay should remain in effect until resolution and exhaustion of appellate review in *Texas v. Garland*, at which point the parties should be ordered to submit a further briefing schedule.

CONCLUSION

For the foregoing reasons, the Court should deny Brandon & Clark's motion for a preliminary injunction and stay further proceedings until resolution and exhaustion of appellate review in *Texas v. Garland*.

Brandon & Clark that includes allegations under both the PWFA and one or more other laws enforced by the EEOC, the EEOC may advise the complainant that, because of the Court's order, the EEOC will not investigate or issue a right-to-sue letter where the PWFA supplies the statutory basis for the charge.

Dated: August 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2024, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/ Michael J. Gaffney
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