Nos. 23-35560, 23-35585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR PARK ASSEMBLY OF GOD OF KIRKLAND, WASHINGTON,
Plaintiff-Appellant/Cross-Appellee,
v.

MYRON KREIDLER, in his official capacity as Insurance Commissioner for the State of Washington, AKA Mike Kreidler; JAY ROBERT INSLEE, in his official capacity as Governor of the State of Washington,
Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
Civil Case No. 3:19-cv-05181-BHS

BRIEF AMICUS CURIAE OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES

SAMUEL T. GROVER
Counsel of Record
SAMANTHA F. LAWRENCE
FREEDOM FROM RELIGION FOUNDATION, INC.
P. O. Box 750
Madison, Wisconsin 53701
(608) 256-8900
sgrover@ffrf.org

Counsel to Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

The Freedom From Religion Foundation, Inc. ("FFRF") is a nationally recognized 501(c)(3) educational nonprofit incorporated in 1978. FFRF has no parent corporation and issues no stock.

INTEREST OF AMICUS[1]

The Freedom From Religion Foundation (FFRF) is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. FFRF has over 40,000 members nationally, including over 1,700 members and a chapter in the state of Washington. FFRF's purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government.

FFRF and its members have an interest in ensuring that religious employers are not privileged over secular employers and given carte blanche to avoid complying with health insurance regulations. FFRF opposes the radical redefinition of "religious freedom" as the right to be exempt from any law or regulation that may

[1] All parties have consented to the filing of this brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than Amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

incidentally brush against an individual's or organization's religious beliefs. Religious organizations seeking exemptions from healthcare regulations are a prime example of this alarming argument that believers should be exempt from any law that inconveniences them so long as their conduct is religiously motivated. FFRF's interest in this case arises from the fact that most of its members are atheists or nonbelievers, as are the members of the public it serves as a state/church watchdog. Additionally, almost all of FFRF's members consider access to reproductive healthcare a vital secular policy issue, and a recent membership survey showed that 98.8 percent of FFRF members support access to abortion care.

SUMMARY OF ARGUMENT

Cedar Park Assembly of God, Kirkland (Cedar Park) lacks standing to bring either of its remaining claims because it has failed to show that it has suffered an injury in fact sufficient to maintain Article III standing. Cedar Park brings a pre-enforcement challenge alleging that it is injured because Senate Bill 6219 (a) forces it to violate its religious beliefs by purchasing group health insurance that indirectly allows Cedar Park's employees to access abortion care and certain contraceptives that Cedar Park objects to; and, (b) theoretically may allow health carriers to charge employers some nominal fee to cover the provision of services

not included in the employer's health insurance plan. First Br. of Appellant/Cross-Appellee Cedar Park ("Cedar Park Br.") at 14–16.

Upon the more developed record now before this Court, it is plain that the injuries Cedar Park initially alleged are, at best, attenuated hypotheticals lacking a concrete factual basis in reality. Cedar Park has not demonstrated that it has sustained an injury in fact sufficient to maintain Article III standing at the summary judgment stage; therefore, this case must be dismissed.

ARGUMENT

I. Cedar Park has failed to show that it has suffered an injury in fact and thus cannot maintain its pre-enforcement challenge of SB 6219.

Cedar Park lacks standing on its remaining free exercise and church autonomy claims because it has failed to prove that it has suffered an injury in fact sufficient to satisfy Article III standing requirements. This Court has the right and responsibility to once again examine Cedar Park's standing at this later stage, in light of a more developed record. *See, e.g.*, *Wash. Env't Council v. Bellon,* 732 F.3d 1131, 1139 (9th Cir. 2013). To demonstrate Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision." *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1057 (9th Cir. 2023) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Srvs. (TOC), Inc*. 528 U.S 167, 180–81 (2000)). At the summary judgment stage, the plaintiff "must offer evidence and specific facts demonstrating each element" of Article III standing. *WildEarth Guardians v. U.S. Forest Serv*., 70 F.4th 1212, 1216 (9th Cir. 2023) (quoting *Cen. Biological Diversity v. Export-Import Bank of the U.S*., 894 F.3d 1005, 1012 (9th Cir. 2018)). Injury in fact is the "'first and foremost' element a plaintiff must show to satisfy standing." *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1773 (9th Cir. 2018) (quoting *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103 (1998)). The injury must be both "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Dutta*, at 1773 (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992)). At summary judgment, the plaintiff must meet a higher burden than at the pleadings stage, producing evidence-backed facts that sufficiently demonstrate an injury in fact. *See Wash. Env't Council*, 732 F.3d at 1139. A plaintiff lacking evidence-backed facts cannot cure that shortcoming by urging the court to infer a key premise in its favor. *See Winsor v. Sequoia Benefits & Ins. Servs., LLC*, 62 F.4th 517, 524 (9th Cir. 2023).

To succeed in a pre-enforcement challenge, the plaintiff must demonstrate "a credible threat of enforcement" in order to satisfy Article III's injury requirement.

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 160 (2014). "'The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient'" to establish Article III standing. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002) (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir.1983)). A "highly attenuated chain of possibilities" fails to satisfy the immediacy required of the threatened injury. *Clapper v. Amnesty Inter. USA*, 568 U.S. 398, 410 (2013). For a plaintiff to demonstrate a credible threat of enforcement, he must satisfy a three factor test: "The plaintiff must allege (1) an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) 'but proscribed' by the statute at issue, and (3) there must be 'a credible threat of prosecution' under the statute." *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (quoting *Driehaus*, 573 U.S. at 159).

In sum, at the summary judgment stage it is the plaintiff's duty to produce sufficient admissible evidence in the record to show that it has suffered a concrete injury that is actual or imminent. Cedar Park must demonstrate that it is injured by a credible threat of enforcement of SB 6219 by the State of Washington. Cedar Park has not met this burden.

On this second appeal, Cedar Park has whittled its claimed injury down to an allegation that SB 6219 violates Cedar Park's free exercise and church autonomy rights because it (a) allows employees to access abortion care and contraceptives

even when their employer-provided health insurance does not directly cover those services; and (b) may theoretically allow health carriers to charge employers a nominal fee increase for covering the costs of services not included in the employer's plan. *See* Cedar Park Br. 14–15. Now, at the summary judgment stage, this Court can confidently hold that Cedar Park has not asserted an injury in fact that is sufficiently "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," *Dutta*, at 1773 (quoting *Lujan*, 504 U.S. at 560), in order to demonstrate the "credible threat of enforcement" needed to sustain this pre-enforcement challenge. *Driehaus*, at 160. Simply put, Cedar Park has not met its burden under Article III to demonstrate the standing needed to maintain its pre-enforcement challenge of SB 6219.

A. Cedar Park is not injured by the fact that SB 6219 creates a pathway for citizens to access basic healthcare services.

The primary injury that Cedar Park now claims is the possibility that one or more of its employees will access healthcare services of which Cedar Park disapproves, and Cedar Park's employee health insurance card will briefly be used in the process of an employee possibly accessing that care. Cedar Park acknowledges, as it must, that Washington's healthcare regulations already contain a "conscience clause" for houses of worship that exempts Cedar Park from purchasing health insurance that covers abortion care or contraceptives. *See* Wash. Rev. Code § 48.43.065(3)(a). Under the conscience clause, "No individual or

organization with a religious or moral tenet opposed to a specific service may be required to purchase coverage for that service or services if they object to doing so for reason of conscience or religion." *Id.* Cedar Park, a religious organization, is covered by the conscience clause. Thus SB 6219 does not require Cedar Park to purchase health insurance coverage for abortion care or the contraceptives that it opposes. *Id.* SB 6219 "does not diminish or affect any rights or responsibilities provided under" the conscience clause. Wash. Rev. Code § 284.43.7220(3).

Indeed, since SB 6219's enactment, Cedar Park has negotiated with health carriers and received bids for health insurance coverage options that would exclude the abortion care and contraceptives that Cedar Park finds problematic. *See* Def.'s Mot. Summ. J. at 7–8. The conscience clause states that the "provisions of this section shall not result in an enrollee being denied coverage of, and timely access to, any service or services excluded from their benefits package as a result of their employer's or another individual's exercise of the conscience clause . . . ." Wash. Rev. Code § 48.43.065(3)(b). Washington's insurance commissioner provides a process by which health carriers can offer basic health services, such as abortion care and contraceptives, to enrollees whose employers are exempt under the conscience clause. Wash. Rev. Code § 48.43.065(3)(c). Rather than being satisfied with the religious exemption that Washington law already provides, Cedar Park asserts that it is injured because under any health insurance plan its health

insurance carrier still issues Cedar Park's employees an insurance card and enrollees could hypothetically use that health insurance card in order to access abortion care and contraceptives outside of Cedar Park's health insurance plan. *See* Cedar Park Br. 14–15. Essentially, Cedar Park is unhappy that Washington provides citizens access to abortion care and contraceptives even if their employer has a religious objection to those services. But this is not a cognizable injury for Article III standing purposes.

Cedar Park has not produced evidence demonstrating that it has been injured by SB 6219's alternative pathway for citizens to seek access to health services that their employer's health insurance plan does not cover. It lacks standing on this theory for two reasons. First, Cedar Park's alleged injury is entirely hypothetical. It has not set forth evidence that any of its employees (or their spouses or dependents) have accessed abortion care or contraceptive services; it has not set forth evidence that any of its employees intend to access these services; and it has not set forth evidence that any of its employees have attempted to access these services since SB 6219 went into effect nearly five years ago. And in reality, Cedar Park has made it extremely unlikely that any of its employees will ever attempt to access such services. Each Cedar Park employee "signs a statement agreeing to 'conduct their professional and personal lives in a manner'" that is consistent with Cedar Park's religious beliefs and they "agree 'to refrain from behavior that

conflicts or appears inconsistent with evangelical Christian standards as determined in the sole and absolute discretion of Cedar Park.'" Cedar Park Br. at 8. Thus, Cedar Park's claim that its employees or their enrolled family members may briefly use Cedar Park's employee health insurance card to possibly access abortion care and contraceptives outside of Cedar Park's health insurance plan fails to create an injury that is either actual or imminent.

Second, Cedar Park has also failed to demonstrate that the State of Washington has credibly threatened to enforce SB 6219 against it in order to establish an injury in fact. Cedar Park falters at the second *Dreihaus* factor, which requires that the plaintiff's hypothetical course of conduct must be proscribed by the challenged statute. *Driehaus*, 573 U.S. at 159. But while Cedar Park doesn't like that SB 6219 allows others to engage in a course of conduct with which it disapproves for religious reasons, nothing in SB 6219 actually proscribes any action undertaken by Cedar Park itself. *Id.* SB 6219 regulates health carriers, not employers. Health carriers who violate SB 6219 are subject to discipline, not the employers who purchase their insurance plans. It's true that under the Affordable Care Act Cedar Park is required to provide certain health coverage for its employees and would be subject to fines if it ceased providing that coverage. *See* Cedar Park Br. 20. However, the ACA's requirements and enforcement scheme are entirely separate from SB 6219. Further, Washington's conscience clause makes

clear that Cedar Park is free to legally purchase health insurance that does not include services that it objects to on religious grounds. *See Cedar Park Assembly of God of Kirkland, Wash. v. Kreidler*, No. C19-5181 BHS, 2023 WL 4743364, at *1 (W.D. Wash. July 25, 2023). Cedar Park cannot establish a credible threat of enforcement sufficient to demonstrate an injury in fact *to Cedar Park* because SB 6219 cannot be enforced against it.

Ultimately, Cedar Park's worry that an employee may possibly seek abortion care services or contraception in the future fails to confer Article III standing for two reasons: it does not amount to an actual or imminent threat of injury, and the challenged statute does not create any threat of enforcement against Cedar Park itself.

B. Cedar Park is not injured by the possibility that its health carrier could theoretically pass along some nominal costs of providing abortion care and contraceptives.

Cedar Park's second basis for its alleged injury is its assertion that health carriers may perhaps "pass along the cost" of covering abortion care and contraceptives to Cedar Park in the form of "increased premiums, administrative, or overhead expenses" or other costs. Cedar Park Br. 15 (internal quotations omitted). To support this assertion, Cedar Park cites only a 2002 Washington Attorney General Opinion that offered a nonbinding interpretation of the conscience clause. Cedar Park Br. 15 (citing Wash. Att'y Gen. Op. 2002 No. 5,

Interpretation of “Conscientious Objection” Statute Allowing Employers to Refrain from Including Certain Items in the Employee Health Care Benefit Package (Aug. 8, 2002), https://bit.ly/3fzu14B). But Cedar Park’s worry that its health carrier might pass along the costs of covering these services is a hypothetical that relies on a highly attenuated chain of events, insufficient to confer an injury in fact for Article II standing purposes.

Plaintiffs bringing pre-enforcement challenges have faltered when relying on a hypothetical chain of events to establish an injury in fact. For example, in *Clapper v. Amnesty International USA*, plaintiffs brought a pre-enforcement challenge to a federal surveillance law, asserting that they could demonstrate an injury in fact because there was an “objectively reasonable likelihood” that the federal government would acquire their communications with their foreign contacts under the surveillance law at some point in the future. 568 U.S. 398, 401 (2013). The Supreme Court rejected the plaintiffs’ theory of future injury, calling it “too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’” *Clapper*, 568 U.S. at 401 (internal citation omitted). The Court explained that the plaintiffs’ argument rested on a “highly speculative fear” that (1) the federal government would decide to target the plaintiffs’ communications; (2) the government would choose to invoke the surveillance law at issue to do so; (3) the Foreign Intelligence Surveillance Court

would sign off on the government's surveillance plans; (4) the government would then succeed in intercepting the communications of plaintiffs' foreign contacts; and (5) the plaintiffs would be parties to those particular communications. *See id.* at 410. Plaintiffs failed to set forth any *specific facts* demonstrating that the government would actually target their communications with their foreign contacts. *See id.* at 412. This "highly attenuated chain of possibilities" necessarily failed to demonstrate an injury that was actual and imminent, not hypothetical or conjectural. *Id.* at 410.

Like the plaintiffs in *Clapper*, Cedar Park relies on a "highly attenuated chain of possibilities" in an attempt to establish an injury. *Id.* at 410. In order for this theoretical injury to come to fruition: (1) at least one of Cedar Park's enrollees—all of whom have signed an agreement to "refrain from behavior that conflicts or appears inconsistent with evangelical Christian standards as determined in the sole and absolute discretion of Cedar Park," Cedar Park Br. at 8—would have to seek out healthcare services to which Cedar Park objects; (2) the enrollee would have to use a Cedar Park health insurance card to access those services outside of Cedar Park's plan, Cedar Park Br. at 15–16; (3) Cedar Park's health carrier would have to sustain some expense for providing the non-covered service to the enrollee, Cedar Park Br. at 15–16; (4) Cedar Park's health carrier

would have to specifically decide to recoup the expense;[2] (5) and finally, the health carrier would have to choose to recoup the expense specifically by passing the cost on to Cedar Park as opposed to recouping the cost using the myriad other methods available to private health insurance companies. This hypothetical chain of events does not constitute a concrete injury that is actual or imminent.

Cedar Park has not offered *any* concrete admissible evidence that its health carrier has actually passed along the cost of covering abortion care or the contraceptives it objects to, nor has it offered any evidence that its current health carrier or a different hypothetical future health carrier *will* pass along the cost of covering those services to Cedar Park. Instead, Cedar Park presents this court with the conclusory statement that health carriers are "nearly certain to pass the buck to religious objectors like Cedar Park to pay for (1) abortion coverage and (2) a potential equity fee imposed on health carriers offering a health plan that excludes, under state or federal law, any essential health benefit or coverage [e.g., abortion] that is otherwise required by the state." Cedar Park Br. 15–16 (internal quotations omitted) (citing Wash. Rev. Code § 48.43.725(2)). This statement amounts to pure

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[2] It's likely that any expense a health carrier might sustain by providing Cedar Park's enrollee's access to non-covered services would be de minmus, such that the health carrier would opt not to expend further time and resources recouping that cost.

speculation.[3] Without supporting evidence, Cedar Park's conclusion that health carriers will pass along the cost of uncovered health services is unpersuasive and insufficient to establish an injury in fact.

CONCLUSION

Because Cedar Park lacks standing, the Court should dismiss the appeal for lack of jurisdiction. Alternatively, the Court should affirm the District Court's ruling.

Respectfully Submitted on this 29th Day of January,

/s/Samuel T. Grover
Samuel T. Grover
Counsel of Record
Samantha F. Lawrence
Freedom From Religion
Foundation, Inc.
P. O. Box 750
Madison, Wisconsin 53701
(608) 256-8900
sgrover@ffrf.org

Counsel to Amicus Curiae

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[3] Insurance carriers may in fact face higher costs that are passed on to employers if they fail to cover contraceptives and abortion and instead cover the full costs of pregnancy and birth, with the corresponding hospital stay.

CERTIFICATE OF SERVICE

I certify that on January 29, 2024, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that the foregoing document is being served on this day to all counsel of record registered to receive a Notice of Electronic Filing generated by CM/ECF.

/s/ Samuel T. Grover
Samuel T. Grover

January 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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