

No. 20-10093

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**In the United States Court of Appeals for the Fifth Circuit**

FRANCISCAN ALLIANCE, INC., ET AL.,  
*Plaintiffs-Appellants,*

*v.*

ALEX AZAR III, SECRETARY OF THE UNITED STATES  
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,  
*Defendants-Appellees,*

*v.*

AMERICAN CIVIL LIBERTIES UNION OF TEXAS, ET AL.,  
*Intervenors-Appellees.*

On Appeal from the U.S District Court for the  
Northern District of Texas, Wichita Falls Division  
No. 7:16-cv-00108-O

**PLAINTIFFS-APPELLANTS' UNOPPOSED MOTION TO STAY**

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Plaintiffs-Appellants seek to stay the briefing schedule and other proceedings in this case until 21 days after the U.S. Supreme Court’s decisions in three cases briefed and argued together this Term: *Bostock v. Clayton County* (No. 17-1618), *Altitude Express, Inc. v. Zarda* (No. 17-1623), and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (No. 18-107). These cases were argued in October and could be decided any day. Absent a stay, Plaintiffs-Appellants’ opening brief would be due June 5.

This case concerns what constitutes “sex” discrimination under the Patient Protection and Affordable Care Act (ACA). The ACA prohibits healthcare “sex” discrimination as understood and defined in Title IX. 42 U.S.C. § 18116(a). Interpreting this provision, the U.S. Department of Health and Human Services (HHS) issued regulations defining “sex” to include “gender identity” and “termination of pregnancy” (the Rule). 45 C.F.R. § 92.4. Appellants sued, challenging HHS’s actions as unlawful. The district court agreed and partially vacated the Rule. ROA.4794, 4812.

In *Bostock*, *Zarda*, and *Harris*, the Supreme Court will decide whether Title VII’s prohibition on “sex” discrimination includes discrimination on the basis of sexual orientation and gender identity. Pet. for Writ of Cer-

tiorari, *Bostock*, No. 17-1618 (U.S. May 25, 2018); Pet. for Writ of Certiorari, *Harris*, No. 18-107 (U.S. July 20, 2018). Given that courts often look to Title VII to understand Title IX, *Carmichael v. Galbraith*, 574 F. App'x 286, 293-294 (5th Cir. 2014) (Dennis, J. concurring) (collecting cases), and given that the ACA incorporates Title IX's prohibition on "sex" discrimination, the Supreme Court's decision in *Bostock*, *Zarda*, and *Harris* may have a direct bearing on this case.

Because *Bostock*, *Zarda*, and *Harris* will likely bear on this case, the Court should stay proceedings until they are resolved. This Court has the inherent authority to stay proceedings to control its docket. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); see 5th Cir. R. 27.1.3. And it frequently exercises that authority pending a relevant decision from the Supreme Court, if considerations of "economy of time and effort" support that course. *Id.*; see, e.g., *McKay v. Comm'r*, 84 F.3d 433 (5th Cir. 1996) (staying case pending Supreme Court decision); Order, *United States v. Lister*, No. 17-10655 (5th Cir. July 16, 2018) (same); Order, *United States v. Davila*, No. 16-20081 (5th Cir. June 13, 2018) (same).

These considerations support a stay here. Any briefs the parties draft now would almost certainly need to be supplemented after *Bostock*,

*Zarda*, and *Harris*, wasting resources and duplicating efforts for the Court and parties both. And a stay will ensure that the Court's understanding of this case is informed at the outset by an accurate picture of relevant law.

Moreover, a stay here would be brief. The Supreme Court heard *Bostock*, *Zarda*, and *Harris* in October 2019. It therefore will (if tradition holds) decide them at the latest by the end of June; it could decide them any day. Further, both Defendants- and Intervenors-Appellees have consented to the stay, demonstrating that no party would be prejudiced. *Cf. United States v. Stewart*, 732 F. App'x 314, 316 (5th Cir. 2018) (denying stay request pending Supreme Court decisions because, under current law, the inmate-appellee was entitled to release); *United States v. Castro*, 750 F. App'x 363, 364-65 (5th Cir. 2018) (same).

Put simply, the Supreme Court will soon decide what "sex" means under Title VII. That decision may have a direct bearing on this appeal. To preserve this Court's and the parties' resources, and in light of all parties' consent, proceedings here should be stayed so that briefing in this case is informed from the outset by the Supreme Court's imminent decisions in *Bostock*, *Zarda*, and *Harris*.

## CONCLUSION

The Court should stay proceedings in this case until 21 days after the Supreme Court decides *Bostock* (No. 17-1618), *Zarda* (No. 17-1623), and *Harris* (No. 18-107).

Respectfully submitted,

/s/ Luke W. Goodrich

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### **CERTIFICATE OF CONFERENCE**

On May 27 and 28, 2020, undersigned counsel conferred with counsel for defendants-appellees and intervenors-appellees, who advised that they do not oppose the relief sought in this motion.

/s/ Luke W. Goodrich  
Luke W. Goodrich  
*Attorney for Plaintiffs-Appellants*

### **CERTIFICATE OF COMPLIANCE**

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,022 words; and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word.

/s/ Luke W. Goodrich  
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*Attorney for Plaintiffs-Appellants*

### **CERTIFICATE OF SERVICE**

I certify that on May 28, 2020, I filed the foregoing motion by causing a digital version to be filed electronically via the Court's CM/ECF system. The participants in this case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of any required paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned for viruses.

*/s/ Luke W. Goodrich*  
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