No. 20-10093

In the United States Court of Appeals for the Fifth Circuit

FRANCISCAN ALLIANCE, INCORPORATED; CHRISTIAN MEDICAL AND DENTAL SOCIETY; SPECIALTY PHYSICIANS OF ILLINOIS, L.L.C.,
Plaintiffs-Appellants,

v.

ALEX M. AZAR II, SECRETARY U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES
Defendants-Appellees,

v.

AMERICAN CIVIL LIBERTIES UNION OF TEXAS; RIVER CITY GENDER ALLIANCE
Intervenors-Appellees

On Appeal from the United States District Court for the Northern District of Texas
No. 7:16-cv-00108-O

BRIEF OF PLAINTIFFS-APPELLANTS FRANCISCAN ALLIANCE, INC., CHRISTIAN MEDICAL & DENTAL SOCIETY, AND SPECIALTY PHYSICIANS OF ILLINOIS, LLC

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument will be helpful because this appeal presents important questions about the appropriate scope of relief for the federal government's violation of a federal civil-rights law, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1361. The district court's judgment of October 15, 2019, modified on November 21, 2019, disposed of all parties' claims not severed. This Court has jurisdiction under 28 U.S.C. § 1291. Appellants appeal from the order and final judgment entered on October 15, 2019, modified on November 21, 2019. Appellants timely noticed this appeal on January 21, 2020.

STATEMENT OF ISSUES PRESENTED

This case arose when the U.S. Department of Health and Human Services (HHS) interpreted the Affordable Care Act (ACA) to require religious doctors and hospitals (including Appellants), on pain of massive financial penalties, to perform gender transitions and abortions in violation of their religious beliefs and medical judgment. The district court correctly held that HHS's actions violated the Religious Freedom Restoration Act (RFRA). Nevertheless, the court refused to enjoin HHS from continuing to engage in this conduct, instead merely vacating portions of HHS's then-existing interpretive rule. And since the district court's ruling, both HHS and other federal courts have taken steps to reimpose the same RFRA-violating requirements.

The question presented is: After finding that HHS violated RFRA by requiring religious doctors and hospitals to perform and pay for gender transitions and abortions in violation of conscience and medical judgment, did the district court err by refusing to enter an injunction, where all the traditional factors for an injunction were satisfied, where an injunction is the standard remedy for a RFRA violation, and where an injunction is necessary to protect Appellants from ongoing and future harms?

INTRODUCTION

Some cases arising under RFRA require the court to engage in a "difficult" "task of balancing" religious liberty against competing government interests. *Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006)). Not this one. Here HHS attempted to require religious doctors and hospitals (including Appellants), on pain of massive financial penalties, to perform gender-transition and abortion procedures contrary to their religious beliefs and medical judgment—a straightforward "substantial[] burden" under Supreme Court precedent. 42 U.S.C. § 2000bb-1(a). And HHS made no effort to show that it had a "compelling governmental interest" in doing so, much less that its actions were the "least restrictive means" of furthering that interest. *Id.* § 2000bb-1(b). The district court therefore had no difficulty finding a RFRA violation, in a decision neither HHS nor Intervenors (including the ACLU of Texas) elected to appeal.

So why *is* this case here? Because although the district court correctly identified the RFRA violation, it failed to provide an adequate remedy. Even though the standard remedy for a RFRA violation is an injunction, the district court refused Appellants' request for an injunction barring HHS in the future from taking the action that led to the RFRA violation in the first place—*i.e.*, from interpreting Section 1557 of the Affordable

Care Act to require Appellants to perform and provide insurance coverage for gender transitions and abortions. Instead, the district court held that an injunction was unnecessary because it had decided to vacate part of the rule HHS was using to implement Section 1557 at the time. Given that vacatur, the court concluded, an injunction would have no "meaningful practical effect." RE.067-68 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)).

That reasoning was wrong when the district court wrote it, and it's only worsened with age. In the 11 months since the district court rendered its opinion, HHS has already issued a *new* rule that it admits "may be interpreted" to impose the same RFRA-violating requirement as the old one—and yet isn't subject to the district court's vacatur. Moreover, in litigation over that new rule, brought by plaintiffs who *want* to force religious doctors and hospitals like Appellants to perform gender transitions in violation of their beliefs, two district courts have purported to vacate the vacatur itself—thus reviving the very requirement of the old rule that the district court correctly held to unjustifiably burden Appellants. Thus, far from negating the practical meaningfulness of an injunction, the district court's vacatur has proven inadequate—conclusively demonstrating Appellants' need for injunctive relief.

These post-appeal developments are largely the result of the Supreme Court's decision in *Bostock v. Clayton County*, which held that discrimi-

nation against employees for being transgender constitutes "sex" discrimination under Title VII. 140 S. Ct. 1731 (2020). But while *Bostock* may have been a "momentous" decision for transgender protections in employment, *id.* at 1741, nothing in it suggests that religious objectors now must facilitate gender transitions themselves. To the contrary, the Court insisted it is "deeply concerned with preserving the promise of the free exercise of religion," and it described RFRA as a "super statute, displacing the normal operation of other federal laws … in appropriate cases." *Id.* at 1753-54. So whatever *Bostock* might mean for the proper interpretation of Section 1557—a question that isn't before this Court—it only supports Appellants' entitlement to full relief protecting their religious exercise.

If *Bostock* is correct that "the free exercise of religion … lies at the heart of our pluralistic society," *id.* at 1754, that right must at minimum permit objecting doctors to opt out of performing controversial procedures they view as forbidden by their faith and harmful to their patients—especially when they've already won their RFRA case. The Court should reverse the district court's remedy determination in part and remand for entry of an injunction providing the lasting protection RFRA requires.

STATEMENT OF THE CASE

This appeal concerns the appropriate relief for HHS's uncontested RFRA violation in attempting to force Appellants—a Catholic hospital system and an association of Christian healthcare professionals—to perform and pay for gender-transition and abortion procedures contrary to their religious beliefs and medical judgment.

A. Appellants

Franciscan Alliance, Inc., is a Roman Catholic nonprofit hospital system founded by a Catholic order, the Sisters of St. Francis of Perpetual Adoration. ROA.3364. Specialty Physicians is a member-managed limited-liability company, of which Franciscan is the sole member (collectively, Franciscan). ROA.3365. "All of Franciscan's healthcare services, and all of Franciscan's physicians and employees, follow the values of the Sisters of St. Francis." ROA.3367. As part of its religious practices, Franciscan provides extensive medical services for the elderly, poor, and disabled. ROA.3364-65, 3375. Many of those patients rely on Medicare and Medicaid, and "Franciscan provides approximately 900 million dollars in Medicare and Medicaid services annually." ROA.3375. Franciscan also receives other HHS grants. ROA.3375.

Franciscan's religious beliefs require it to treat every person with compassion and respect. ROA.3367, 3369. Franciscan follows the Ethical and Religious Directives for Catholic Healthcare Services, issued by the U.S.

Conference of Catholic Bishops, which direct Catholic healthcare providers to treat each patient as "a unique person of incomparable worth," focusing on those "at the margins of our society" and those "vulnerable to discrimination." USCCB, *Ethical and Religious Directives for Catholic Health Care Services* (6th ed. 2018), at 9, https://perma.cc/8MHW-CF3N; *see* ROA.3368. Accordingly, Franciscan "provide[s] the same full spectrum of compassionate care for" transgender individuals as it provides for any other patient. ROA.3369. And in accordance with its medical judgment and religious beliefs, it does not participate in gender-transition procedures, which it views as harmful. ROA.3377 (Franciscan's Sex Reassignment Interventions Policy); *see also* ROA.3367-71.

Also in keeping with its Catholic beliefs, Franciscan does not perform abortions or elective sterilizations. ROA.3369. And while Franciscan provides its employees with health benefits as part of its religious practices, "Franciscan's plan specifically excludes coverage for" gender transitions, sterilizations, and abortions. ROA.3372-73.

Appellant the Christian Medical & Dental Society is an Illinois nonprofit corporation doing business as the Christian Medical & Dental Associations. CMDA "exists to glorify God by motivating, educating and equipping Christian healthcare professionals and students." ROA.3380. Its membership includes thousands of practicing physicians, many of which accept Medicare and Medicaid patients and other forms of federal funding. ROA.3379, 3386. CMDA members sign a statement of faith to

join CMDA and allow CMDA to serve as a voice for membership values. ROA.3381. One of CMDA's major priorities is the adoption of ethics statements reflecting its members' beliefs. ROA.3381.

CMDA has adopted such a statement on gender transitions. ROA.3589-94. The statement—developed with input from medical experts in numerous relevant fields, ROA.3381—outlines the health risks associated with gender-transition procedures, including inhibition of normal growth and fertility, cancer, high blood pressure, blood clots, loss of bone mineral density, and increased incidence of depression, anxiety, suicidal ideation, and substance abuse. ROA.3382, 3390. Given these effects, CMDA determined that "attempts to alter gender surgically or hormonally … are medically inappropriate." ROA.3389. Thus, "CMDA members have treated and do treat individuals who identify as transgender, for health issues ranging from common colds to cancer." ROA.3386. But they view participating in gender transitions as inconsistent with "the obligation of Christian healthcare professionals to care for patients struggling with gender identity with sensitivity and compassion." ROA.3389.

CMDA and its members also oppose abortion. ROA.3383. And just as CMDA and its members "strive to never commit" certain conduct themselves, they also recognize they should not "participate in or encourage" such conduct by "others." ROA.3383. Thus, CMDA and its members object to providing insurance coverage for gender transitions and abortions. ROA.3385.

B. The Government's Actions

In 2016, HHS's Office of Civil Rights attempted to force Appellants to begin performing and providing insurance coverage for gender-transition procedures and abortions in violation of their religious beliefs and medical judgment. The purported basis for HHS's action was its interpretation of Section 1557 of the ACA, which forbids "discrimination" in healthcare. 42 U.S.C. § 18116(a).

Specifically, Section 1557 prohibits "discrimination under[] any health program or activity, any part of which is receiving Federal financial assistance." *Id.* But Section 1557 does not specify the grounds on which discrimination is prohibited. Instead, it incorporates the "ground[s] prohibited" under four other federal antidiscrimination statutes—(1) "title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*)" (*i.e.*, "race, color, or national origin"); (2) "title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*)" (*i.e.*, "sex"); (3) "the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*)" (*i.e.*, age"); and (4) "section 794 of Title 29" (*i.e.*, "disability").

HHS's actions here center on Title IX's prohibition of discrimination "on the basis of sex." 20 U.S.C. § 1681. At Title IX's enactment in 1972, "sex" was commonly understood to refer to the physiological differences between men and women, particularly with respect to "their reproductive functions." *E.g.*, American Heritage Dictionary 1187 (def. 1(a)) (1969).

This understanding of "sex" is "distinct" from gender identity. *Bostock*, 140 S. Ct. at 1746-47.

Since Section 1557's enactment, however, a number of transgender individuals have sued hospitals and other healthcare providers for declining to perform or provide insurance coverage for gender-transition procedures, alleging that such conduct amounts to "sex" discrimination under Section 1557. *See, e.g., Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015); *Conforti v. St. Joseph's Healthcare Sys.*, No. 2:17-cv-00050 (D.N.J. filed Jan. 5, 2017). In 2016, HHS agreed with this novel interpretation of Section 1557, promulgating a new rule entitled Nondiscrimination in Health Programs and Activities (the 2016 Rule), 81 Fed. Reg. 31,376 (May 18, 2016).

The 2016 Rule interprets Section 1557 to prohibit healthcare discrimination "on the basis of" sex. 81 Fed. Reg. at 31,469. It then defines "sex" to include, among other things, "gender identity" and "termination of pregnancy." *Id.* at 31,467. "Gender identity," in turn, is defined to mean an individual's "internal sense of gender, which may be male, female, neither, or a combination of male and female." *Id.* at 31,467, 31,469. The 2016 Rule states that the "gender identity spectrum includes an array of possible gender identities beyond male and female," such as "non-binary gender identities." *Id.* at 31,384, 31,392.

The 2016 Rule then delineates this definition's consequences. First, covered entities are required to perform gender-transition procedures or

else be liable for "discrimination." The 2016 Rule explains: "A provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." *Id.* at 31,455. In other words, if a gynecologist performs a hysterectomy for a woman with uterine cancer, she must do the same for a woman who wants to remove a healthy uterus to transition to living as a man. And the same applies across the full "range of transition-related services"; this understanding of "gender identity" discrimination "is not limited to surgical treatments and may include, but is not limited to, services such as hormone therapy and psychotherapy, which may occur over the lifetime of the individual." *Id.* at 31,435-36. Moreover, because the 2016 Rule also interprets Section 1557 to prohibit discrimination based on "termination of pregnancy," it purports to require healthcare providers who perform procedures such as a dilation and curettage for a miscarriage to perform the same procedure for an abortion. *See id.* at 31,455; *see also* ROA.3371.

Second, the 2016 Rule's expansive definition of "sex" under Section 1557 means that covered entities must pay for gender-transition procedures in their health-insurance plans. The 2016 Rule states: "A covered entity shall not, in providing or administering health-related insurance … [h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition." 81 Fed. Reg. at

31,471-72. According to the 2016 Rule, categorizations of all transition-related treatment as cosmetic or experimental are now "outdated and not based on current standards of care." *Id.* at 31,429. Thus, a plan excluding "coverage for all health services related to gender transition is unlawful on its face." *Id.* Rather, if a doctor concludes that a transition procedure—like a hysterectomy—"is medically necessary to treat gender dysphoria," then the patient's employer would be required to cover that procedure on the same basis that it would cover the procedure for other conditions—like cancer. *Id*. Likewise, because the 2016 Rule's definition of "sex" includes "termination of pregnancy," it purports to require employers who provide insurance coverage for procedures such as a dilation and curettage for a miscarriage to cover the same procedure for an abortion. *See id.*

The 2016 Rule applies to any "entity that operates a health program or activity, any part of which receives Federal financial assistance." 81 Fed. Reg. at 31,466. "Federal financial assistance" is then defined broadly to include "any grant, loan, credit, subsidy, contract … or any other arrangement" by which the Federal Government makes available its property or funds. *Id.* at 31,467. Thus, the 2016 Rule applies to almost every healthcare provider in the country because they all accept some form of federal funding, whether through Medicare and Medicaid or otherwise. *Id.* at 31,445-46.

Penalties for violating these mandates are severe. If a covered entity violates the 2016 Rule, it is subject to the same penalties that accompany a violation of Title IX. These include the loss of federal funding (which, in the case of Medicare and Medicaid, can total hundreds of millions of dollars), debarment from doing business with the government, and false-claims liability. *Id.* at 31,472. Penalties also include enforcement proceedings by the Department of Justice and private lawsuits for damages and attorneys' fees. *Id.* at 31,440, 31,471-72.

The 2016 Rule does not include any religious exemptions or exemptions related to abortion—although the statute incorporated into Section 1557, Title IX, includes both. Title IX's prohibition on sex discrimination includes a broad exemption stating that Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3); *see id.* § 1687. Likewise, Title IX provides that its prohibition on sex discrimination shall not be "construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." *Id.* § 1688. Section 1557 refers to the whole of Title IX, incorporating "title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*)." 42 U.S.C. § 18116(a). Yet in interpreting Section 1557's prohibition on "sex" discrimination in the 2016 Rule, HHS declined to incorporate these exemptions. 81 Fed. Reg. at 31,380.

HHS adopted this novel interpretation of Section 1557 despite "significant disagreement within the medical community" as to the "necessity and efficacy of" gender-transition procedures in the first place. *Gibson v. Collier*, 920 F.3d 212, 216, 224 (5th Cir. 2019) ("[S]ex reassignment surgery remains one of the most hotly debated topics within the medical community today."). And HHS did this despite the fact that HHS's own medical experts recommended against mandating coverage of gender-reassignment surgery in Medicare—concluding after "a thorough review of the clinical evidence" that "there is not enough evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria," and some studies "reported harms." ROA.1155.

C. This Lawsuit

Franciscan and CMDA's members are entities covered by Section 1557 and the 2016 Rule whose religious beliefs and medical judgment preclude them from performing or providing insurance coverage for gender-transition procedures or abortions. HHS's interpretation of Section 1557 thus puts them to a choice: they can either violate their beliefs or suffer severe penalties, including the forfeiture of millions of dollars of critical federal funding.

Seeking to avoid this dilemma, Appellants filed this lawsuit in August 2016. They alleged two claims central to this appeal—one under RFRA, and one under the Administrative Procedure Act (APA).

Invoking RFRA, Appellants alleged that HHS had violated the statute by interpreting Section 1557 to require them to perform and provide insurance coverage for gender transitions and abortions contrary to their religious beliefs and medical judgment. ROA.374-77. They therefore sought an injunction barring HHS from applying such a requirement to them. ROA.390, 1892, 3289.

Next, invoking the APA, Appellants alleged that because the term "sex" as used in Title IX (and thus in Section 1557) unambiguously means biological sex, and because the 2016 Rule failed to include Title IX's religion and abortion exemptions, the 2016 Rule exceeded HHS's statutory authority. ROA.346-64. They therefore also sought to have the offending portions of the 2016 Rule "set aside." ROA.309; *see* 5 U.S.C. § 706(2).

The States of Texas, Wisconsin, Nebraska, Kentucky, Kansas, Louisiana, Arizona, and Mississippi (collectively, States), joined the lawsuit as plaintiffs. ROA.306. They agreed that the 2016 Rule violated the APA and also alleged that it violated the Spending Clause and the Tenth and Eleventh Amendments. ROA.380-89.

In September 2016, River City Gender Alliance and the ACLU of Texas (collectively, ACLU) moved to intervene in defense of HHS's actions. ROA.140.

On December 31, 2016, the district court, on Appellants' and the States' motion, preliminarily enjoined HHS from enforcing the 2016 Rule's prohibition against discrimination on the basis of "gender identity" and "termination of pregnancy." RE.069. The court concluded that HHS's "implement[ation] of Section 1557" had likely violated RFRA by "plac[ing] substantial pressure on [Appellants] to perform and cover transition and abortion procedures" without its action being narrowly tailored to a compelling government interest. RE.071, 106-10. The court also agreed that the 2016 Rule exceeded HHS's statutory authority by defining "sex" discrimination under Section 1557 to include discrimination on the basis of "gender identity" and by not incorporating Title IX's religion and abortion exemptions. RE.096-106.

In March 2017, Appellants and the States moved for summary judgment on their RFRA and APA claims. ROA.1884. In response, HHS—now under a different Administration from the one that had promulgated the Rule—moved for a "stay" of the litigation and a "voluntary remand" to reconsider the challenged aspects of the Rule, ROA.2860, which the district court granted, ROA.2903.

D. The Ruling Below

In the ensuing 17 months, however, HHS took no further substantive action. ROA.2976. In December 2018, Appellants and the States therefore sought to lift the stay of litigation, ROA.2956, and the court agreed, ROA.2983.

In February 2019, Appellants renewed their motion for partial summary judgment on their claims under RFRA and the APA. ROA.3282. In support of that motion, Appellants submitted a proposed order specifying the relief sought. RE.115-19. In particular, Appellants sought an injunction stating that HHS should be "permanently enjoined" from "[c]onstruing Section 1557 to require [Appellants] to provide medical services or insurance coverage related to 'gender identity' or 'termination of pregnancy' in violation of their religious beliefs." RE.117-18. This request for an injunction corresponded to Appellants' claim under RFRA, which forbids government-imposed "substantial[] burden[s]" on religious exercise, and both authorizes and typically requires injunctive relief. 42 U.S.C. §§ 2000bb-1(a), (c). The proposed order also included vacatur of the unlawful portions of the Rule, RE.118, corresponding to Appellants' claim under the APA, which provides for unlawful regulations to be "set aside." 5 U.S.C. § 706(2).

In response to Appellants' and the States' renewed summary-judgment motions, HHS "agree[d] with Plaintiffs and the Court that the Rule's prohibitions on discrimination on the basis of gender identity and

termination of pregnancy conflict with Section 1557 and thus are substantively unlawful." ROA.4365. Given that concession, HHS argued that there was "no need for" the court to reach Appellants' RFRA claim, though it did not oppose that claim on the merits. ROA.4365.

In May 2019, while the summary-judgment motions were pending, and more than two years after the preliminary injunction, HHS issued a Notice of Proposed Rulemaking proposing to amend the Rule. ROA.4519-722. Citing the district court's preliminary-injunction decision, the proposed rule conceded that the Rule's definition of "sex" "exceeded [HHS's] authority under Section 1557." ROA.4533-34 (internal quotation marks omitted). The proposed rule sought to address this issue by repealing the 2016 Rule's definition of "sex" in its entirety, which, HHS said, would "allow the Federal courts, in particular, the U.S. Supreme Court … to resolve any dispute about the proper legal interpretation of" "sex" in Section 1557. ROA.4561, 4630-31. As the proposed rule noted, the Supreme Court had recently granted certiorari to decide whether "sex" discrimination under Title VII included discrimination on the basis of "sexual orientation" and "gender identity," in three cases that would be decided together as *Bostock*. ROA.4558.

In October 2019, the district court ruled on ACLU's renewed motion to intervene and Appellants' and the States' renewed summary-judgment motions. RE.044. The court had initially denied intervention as of right, ROA.1839, but it now held that because HHS had conceded that the Rule

was unlawful, it no longer adequately represented ACLU's interests. RE.050-51. The court therefore granted intervention. RE.068.

Regarding the summary-judgment motions, the district court found "no reason to depart from its" preliminary-injunction analysis. RE.060. It therefore granted summary judgment in part, holding that HHS had violated RFRA in attempting to coerce Appellants into violating their beliefs, and that the Rule violated the APA by defining "sex" in a way that conflicted with Title IX and by failing to incorporate Title IX's religion and abortion exemptions. RE.059-64.

As for relief, however, the court concluded that "the proper remedy" was vacatur of the Rule to the extent of its conflict with Section 1557 and Title IX, and "not a permanent injunction." RE.064-68. The court explained that, given the APA's language providing that unlawful rules should be "set aside," the "presumptive remedy" under the APA is vacatur. RE.065-68. And given its decision to vacate, the district court reasoned, "issuance of an injunction would not have a 'meaningful practical effect independent of … vacatur.'" RE.067-68 (quoting *Monsanto*, 561 U.S. at 165). The court's reasoning failed to address the plaintiff-specific injunction Appellants had sought under RFRA, or the many plaintiff-specific injunctions awarded to prevailing plaintiffs in parallel RFRA suits, instead characterizing the injunctive relief at issue solely as a "nationwide" injunction against HHS's enforcement of the challenged portions of the 2016 Rule. RE.064-68.

The same day, the district court entered a separate final judgment severing the claims not reached in its summary-judgment order. RE.041. Following HHS's motion to modify the judgment, ROA.4799, on November 21, 2019, the district court entered a modified judgment setting out the final terms of its relief: "[T]he Court **VACATES** the Rule insofar as the Rule defines '*On the basis of sex*' to include gender identity and termination of pregnancy." RE.043.

E. This Appeal

Appellants appealed on January 21, 2020. On May 28, Appellants moved to stay the deadline to file their opening brief until 21 days after the Supreme Court's decision in *Bostock*, which this Court granted.

On June 12, HHS issued a new Section 1557 rule, finalizing the rule proposed in 2019. *See* Nondiscrimination in Health and Health Education Programs or Activities (the 2020 Rule), 85 Fed. Reg. 37,160 (June 19, 2020). The 2020 Rule declined to replace the previous Rule's definition of "sex" with a new definition, reasoning instead that the Supreme Court's then-forthcoming decision in *Bostock* would "likely have ramifications for the definition of 'on the basis of sex' under Title IX." *Id.* at 37,168. Thus, simply repealing the prior definition would permit "application of the [*Bostock*] Court's construction." *Id.*

HHS also stated that the 2020 Rule was intended to respond to the fact that "the *Franciscan Alliance* court vacated portions of the 2016 Rule

for failing to incorporate Title IX's exemption for religious institutions." *Id.* at 37,207. To that end, the 2020 Rule included language stating that "[i]nsofar as the application of any requirement under this part would violate, depart from, or contradict … exemptions … provided by any of" certain other statutes, including Title IX, "such application shall not be imposed or required." 45 C.F.R. § 92.6(b). HHS acknowledged, however, that the 2020 Rule did not itself include "a religious exemption, whether narrow or broad," nor did it "purport to construe the" exemptions referenced. 85 Fed. Reg. at 37,205.

Finally, the 2020 Rule disavowed the 2016 Rule's statement that categorical refusals to perform or cover gender transitions were "'outdated and not based on current standards of care,'" acknowledging that there was, at "minimum, a lack of scientific and medical consensus to support" it. 85 Fed. Reg. at 37,187 (quoting 81 Fed. Reg. at 31,429). Instead, the 2020 Rule pointed to evidence demonstrating "that there is no medical consensus to support one or another form of treatment for gender dysphoria," and noted that "research has found that children who socially transition in childhood faced dramatically increased likelihood of persistence of gender dysphoria into adolescence and adulthood." *Id.* at 37,187, 37,198.

Three days later, the Supreme Court decided *Bostock*. The Court held that when "an employer … fires someone simply for being homosexual or transgender," the employer has "discriminated against that individual

'because of such individual's sex'" within the meaning of Title VII. 140 S. Ct. at 1753. The Court cautioned, however, that its opinion did not "prejudge" the proper interpretation of "other federal or state laws that prohibit sex discrimination," *id.*, including Section 1557 and Title IX, *see id.* at 1779-82 & n.57 (Alito, J., dissenting).

The *Bostock* Court also disclaimed any intent to undermine religious freedom. Emphasizing that it was "deeply concerned with preserving the promise of the free exercise of religion," which "lies at the heart of our pluralistic society," the Court explained that religious employers might not be liable under Title VII "in cases like ours" if complying would require them "to violate their religious convictions." *Id.* at 1753-54 (majority). The Court also invoked RFRA as a key protection for religious objectors, describing it as a "super statute" that "might supersede … in appropriate cases" an otherwise-applicable ban on gender-identity discrimination. *Id.* at 1754. Likewise addressing religious-freedom concerns, Justice Alito's dissent noted that "because some employers and healthcare providers"—like Appellants here—"have strong religious objections to sex reassignment procedures," extending *Bostock* so as to "require[] them to pay for or to perform" those procedures would "have a severe impact on their ability to honor their deeply held religious beliefs." *Id.* at 1782 (Alito, J., dissenting).

Since June, plaintiffs in at least five jurisdictions have sued HHS, challenging the 2020 Rule in light of *Bostock* and seeking restoration of

the 2016 Rule, in whole or in part.[1] Two district courts have entered "overlapping injunctions," *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-01630, 2020 WL 5232076, at *41 (D.D.C. Sept. 2, 2020) (internal quotation marks omitted), preventing the 2020 Rule "from becoming operative" and thus leaving key portions of the 2016 Rule in place, *Walker v. Azar*, No. 1:20-cv-02834, 2020 WL 4749859, at *1 (E.D.N.Y. Aug. 17, 2020). One of these courts has specifically held that portions of the 2016 Rule vacated by the district court in this case—including "the definitions of 'on the basis of sex,' 'gender identity,' and 'sex stereotyping'"—"remain in effect." *Walker*, 2020 WL 4749859, at *10. And another court has held that a portion of the 2016 Rule purportedly *not* vacated by the district court—namely, defining "sex" to include "sex stereotyping"—independently allows for punishment of healthcare providers, like Appellants here, who decline to perform or pay for gender-transition procedures. *Whitman-Walker*, 2020 WL 5232076, at *23, 45.

[1] *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-01630 (D.D.C. filed June 22, 2020); *Walker v. Azar*, No. 1:20-cv-02834 (E.D.N.Y. filed June 26, 2020); *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-11297 (D. Mass. filed July 9, 2020); *Washington v. U.S. Dep't of Health & Human Servs.*, No. 2:20-cv-01105 (W.D. Wash. filed July 16, 2020); *New York v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-05583 (S.D.N.Y. filed July 20, 2020).

SUMMARY OF THE ARGUMENT

The decision below was right on the merits, but wrong on the remedy. Appellants prevailed on the merits of two different claims: first, their claim under RFRA that HHS's actions unjustifiably burdened their religious exercise; and second, their claim under the APA that HHS's Rule exceeded its authority under Section 1557.

The typical relief for a RFRA violation is an injunction preventing the government from imposing a substantial burden on the plaintiff's religious exercise. To remedy the RFRA violation, then, Appellants requested an injunction prohibiting HHS from "[c]onstruing Section 1557 to require [Appellants] to provide medical services or insurance coverage related to 'gender identity' or 'termination of pregnancy' in violation of their religious beliefs." RE.118.

Yet despite the fact that courts regularly grant injunctive relief to remedy RFRA violations, the district court declined to grant this (or any other) injunctive relief. Instead, noting that the APA instructs a reviewing court to "set aside" agency rules found to be "in excess of statutory … authority," 5 U.S.C. § 706(2), the district vacated the portions of the Rule it found inconsistent with Section 1557, and held that an injunction was inappropriate because it would have no "meaningful practical effect independent of its vacatur." RE.067-68 (quoting *Monsanto*, 561 U.S. at 165).

The court was right to grant vacatur, but wrong to deny an injunction. Appellants plainly satisfied the traditional four-factor test for injunctive relief—as neither HHS nor the district court contested. Moreover, because RFRA is aimed at preventing government-imposed "substantial[] burden[s]" on religion, 42 U.S.C. § 2000bb-1(a), an injunction permanently barring the government from taking the action that imposed the burden in the first place is the typical "appropriate relief" under RFRA, *id.* § 2000bb-1(c)—as demonstrated by the fact that *every case* in which this Court or the Supreme Court has found a RFRA violation since the statute's passage has resulted in an injunction.

The district court's sole reason for declining to grant the injunction—that doing so would add nothing to its vacatur—was mistaken. There is a straightforward "practical" difference between the vacatur the district court ordered and the injunction Appellants sought—the former is effective only against the 2016 Rule, while the latter would be effective against not only the 2016 Rule but also current and future efforts to impose on Appellants the same, RFRA-violating burden.

This difference was apparent at the time the district court rendered its decision, given the administrative back-and-forth over the 2016 Rule and other court decisions interpreting Section 1557 itself in a way that would burden Appellants' beliefs. And recent developments have made vacatur's inadequacy all the more unmistakable. Two other district courts have purported to undo the district court's vacatur, resurrecting

provisions of the 2016 Rule that would require Appellants to violate their beliefs. And HHS has issued a new rule that, in light of *Bostock* and early Circuit precedent interpreting it, could be read to require "healthcare providers" like Appellants "to pay for or to perform [sex reassignment] procedures," creating "a severe impact on their ability to honor their deeply held religious beliefs." *Bostock*, 140 S. Ct. at 1781-82 (Alito, J., dissenting).

These developments demonstrate Appellants' need for the narrowly-tailored injunction they sought below. And they show why the district court misapplied *Monsanto*. The practical interest Appellants assert here—insulating themselves against current or future government actions violating their rights in the "same fundamental way" as past ones, but through different means—has been squarely recognized as cognizable by the Supreme Court. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-63 (1993). And numerous courts around the country have remedied a federal agency's RFRA violations by entering injunctions functionally identical to the one Appellants requested here—that is, by prohibiting the agency from invoking its statutory authority, now or in the future, to impose the same substantial burden on religious exercise found to have violated RFRA. They've done so because that is "prospective relief that fits the remedy to the wrong or injury that has been established," *Salazar v. Buono*, 559

U.S. 700, 718 (2010) (plurality)—and it's the relief the district court should have granted here.

The Court should reverse the district court's remedy determination in part and remand for entry of a plaintiff-specific permanent injunction enjoining HHS from construing Section 1557 to require Appellants to perform or provide insurance coverage for gender-transition or abortion procedures contrary to their beliefs. Such relief would protect Appellants' deeply held religious exercise against attempts by HHS to reimpose the same substantial burden they attempted to impose via the 2016 Rule—whether under Section 1557 directly, under the 2016 Rule as revived by litigation, under the current 2020 Rule interpreted in light of *Bostock*, or under a new Administration. At minimum, the Court should remand to allow the district court to reconsider the proper remedy in light of recent developments underscoring the inadequacy of its vacatur.

STANDARD OF REVIEW

"As a general matter," this Court "review[s] the trial court's … denial of a permanent injunction for abuse of discretion." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (internal quotation marks omitted). Abuse of discretion occurs when the district court "(1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction, (2) relies on erroneous conclusions of law when deciding to grant or

deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief." *Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230, 234 (5th Cir. 2014) (internal quotation marks omitted).

ARGUMENT

I. Appellants satisfied the requirements for injunctive relief.

"[T]he standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must show actual success on the merits." *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 847-48 (5th Cir. 2004). Thus, the party seeking a permanent injunction "must establish (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006).

"[I]n First Amendment cases, the likelihood of success on the merits will often be the determinative factor." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) (internal quotation marks omitted). "This is likewise true here since RFRA is no ordinary statute." *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc), *aff'd*, 573 U.S. 682 (2014). Rather, "RFRA protects First Amendment free-exercise rights." *Korte*, 735 F.3d at 666. RFRA is thus "analog[ous] to a constitutional right" for purposes of injunctive relief. *Hobby Lobby*, 723 F.3d at 1146;

see Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 295 (5th Cir. 2012). Here, all four factors are satisfied.

Success on the merits. Appellants succeeded on the merits of their RFRA claim. The district court granted summary judgment in their favor. And since neither HHS nor ACLU appealed the district court's merits determination, the merits can't be revisited. *Art Midwest Inc. v. Atl. Ltd. P'ship XII*, 742 F.3d 206, 211 (5th Cir. 2014).

In any event, the merits ruling was correct. RFRA provides "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 693 (2014). Under RFRA, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person … is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). RFRA claims thus proceed in two steps. First, the court must determine whether the government has imposed a "substantial burden" on the plaintiff's religious exercise. If so, the government action is unlawful unless it satisfies strict scrutiny—that is, unless the government "demonstrates that application of the burden to the person represents the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (internal quotation marks omitted).

Here, the district court determined that "the Rule imposes a substantial burden on [Appellants'] religious exercise." RE.062 (internal quotation marks omitted). Rightly so. It is undisputed that Appellants' sincere

religious beliefs forbid them from performing or providing insurance coverage for gender transitions or abortions. Yet the interpretation of Section 1557 set forth in the 2016 Rule prohibits them from categorically declining to perform or cover these procedures, calling that "unlawful on its face." 81 Fed. Reg. at 31,429. If they nonetheless persist in their religious exercise, they are subject to massive financial penalties, including loss of Medicare and Medicaid funds (costing Franciscan up to $900 million annually), 81 Fed. Reg. at 31,472; debarment from contracting with the federal government; enforcement proceedings brought by the Department of Justice; liability under the False Claims Act (including treble damages), 81 Fed. Reg. at 31,440-41; and private lawsuits brought by patients or employees for damages and attorneys' fees, *id.* at 31,440-41; 31,472.

Penalties like these are a quintessential substantial burden. In *Hobby Lobby*, for example, the Court said that because the law at issue there "force[d] [plaintiffs] to pay an enormous sum of money … if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." 573 U.S. at 726. Here, the Rule doesn't just force Appellants, on pain of massive financial penalties, to "provid[e] insurance coverage" for procedures that violate their beliefs; it also forces them to *perform* the procedures themselves. *Id.* Thus, this is an *a fortiori* case.

Next, the district court concluded that HHS had failed to "demonstrate that applying the Rule to" Appellants satisfied strict scrutiny. RE.063. This determination, too, was correct. For one thing, RFRA's plain language puts the burden of proof on this issue on the government, providing that the "Government" may substantially burden religious exercise "only if *it* demonstrates" that its action satisfies strict scrutiny. 42 U.S.C. § 2000bb-1 (emphasis added). Here, however, HHS didn't even try to justify applying the 2016 Rule to Appellants; rather, it conceded in its summary-judgment response that the 2016 Rule was indefensible.

In any event, even if HHS *had* tried to satisfy strict scrutiny, it would have failed. Plaintiffs don't object to serving transgender individuals. They provide them with top-notch treatment for everything from cancer to the common cold. ROA.3386. The issue is gender-transition procedures, which are "hotly disputed within the medical community," *Gibson*, 920 F.3d at 220-24, 226, and which HHS itself has acknowledged may cause "harms." ROA.1155. HHS has no legitimate interest in forcing doctors to perform such controversial procedures against their religious beliefs and medical judgment. ROA.1791-92.

As HHS's own experts admitted in 2016, "there is not *enough evidence to determine whether gender reassignment surgery improves health outcomes* for [patients] with gender dysphoria." ROA.1155 (emphasis added). Meanwhile, there is substantial medical evidence showing such procedures can impose "harms." ROA.1155. The Institute of Medicine

and guidance invoked by HHS itself have recognized that hormone therapy may cause "increased risk" of cancer, cardiovascular disease, Type 2 diabetes, gallstones, venous thromboembolic disease, and hypertension. ROA.3341-42. Moreover, performing sometimes-irreversible transition procedures on *children* is in significant tension with the fact that (according to studies cited in HHS's own guidance documents) the overwhelming majority of children who experience gender dysphoria don't continue to do so as adults. ROA.3854 (studies alternatively showing up to 88% or 94% desistence rate).

Nor does HHS have a compelling interest in forcing Appellants to insure these procedures. "[A] law cannot be regarded as protecting an interest 'of the highest order' … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted). Yet here, some of the government's *own health-insurance programs* are exempt from the Rule—and they don't cover transition procedures. TRICARE (the military's insurance program) excludes coverage for (1) "[a]ll services and supplies directly and or indirectly related to surgical treatment for gender dysphoria"; (2) cross-sex hormones for children under 16; and (3) pubertal suppression for prepubertal children. ROA.3343. And the Veterans Health Administration's benefits package specifically excludes "gender alterations." 38 C.F.R. § 17.38(c); ROA.3343. As the district court explained, the government can't have a "compelling" interest

in a policy that it isn't even "willing to pursue itself." RE.108-09. That principle dooms any compelling interest HHS might have sought to demonstrate here.

And in fact, the "hotly disputed" issue of gender-transition procedures this Court recognized last year in *Gibson* has only grown more controversial. *See* 920 F.3d at 226. In October 2019, for example, researchers from the Yale School of Public Health published in the *American Journal of Psychiatry* the "first total population study" analyzing the long-term effects of "gender-affirming hormone and surgical interventions" on mental health.[2] Although the study's authors initially claimed to find a benefit from surgery—a finding touted in the media—the journal later issued a correction, noting flaws in its "statistical methodology" and acknowledging that the data "demonstrated *no advantage* of surgery in relation to subsequent mood or anxiety disorder-related health care."[3] This correction aligned with the study's original finding that hormonal treatments,

[2] Richard Bränström & John E. Pachankis, *Reduction in Mental Health Treatment Utilization Among Transgender Individuals after Gender-Affirming Surgeries: A Total Population Study*, Am. J. Psychiatry 177:8, 727 (Aug. 2020).

[3] *Correction to Bränström and Pachankis*, Am. J. Psychiatry (Aug. 1, 2020), https://perma.cc/6J2K-G69H (emphasis added); *see also* Mark Regnerus, *New Data Show "Gender-Affirming" Surgery Doesn't Really Improve Mental Health. So Why Are the Study's Authors Saying It Does?*, Public Discourse (Nov. 13, 2019), https://perma.cc/LK9U-CTPB.

too, offered no advantage.[4] And the absence of any *psychological* advantage from these controversial treatments contrasts sharply with their well-documented *physical* harms described above.

Likewise, the UK's National Health Service—whose "promot[ion]" of "gender equity" ACLU lauded in 2018[5]—recently shifted its guidance on puberty blockers for children, going from stating that their consequences are "fully reversible" to acknowledging "[l]ittle is known about the long-term side effects."[6]

In short, the "evolving" "field of medicine" this Court recognized in *Gibson* has only continued evolving. 920 F.3d at 223. This forecloses any argument that HHS has a compelling interest in punishing as "discriminators" medical professionals who, in accordance with their medical judgment and religious beliefs, take "one side in [the] sharply contested … debate," *id.* at 221—much less professionals who take the *same* side as other federal agencies themselves. *See also* 85 Fed. Reg. at 37,198 ("there is no medical consensus to support one or another form of treatment for gender dysphoria").

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[4] Bränström & Pachankis, *supra* n.2, at 731 ("Time since initiating gender-affirming hormone treatment was not associated with … mental health treatment outcomes.").

[5] Louise Melling, *12 Things Other Countries Have Done to Promote Gender Equity*, ACLU (Aug. 13, 2018), https://perma.cc/F4GD-TYXM.

[6] *Treatment: Gender Dysphoria*, National Health Service, https://bit.ly/2RNBnbe; *see* James Kirkup, *The NHS has quietly changed its trans guidance to reflect reality*, The Spectator (June 4, 2020), https://perma.cc/8DEB-RCSF.

Finally, even assuming the Rule furthered a compelling interest, HHS had ways of pursuing it without forcing religious objectors like Appellants to violate their beliefs. If, for example, the goal is to expand access to gender-transition procedures, HHS could "assist transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and specialize in" them. RE.109-10. Or if the goal is to ensure that procedures are cost-free for the patient, "[t]he most straightforward way of doing this would be for the government to assume the cost of providing the[m] to any [individuals] who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Hobby Lobby*, 573 U.S. at 728. HHS may be free to decide that gender-transition procedures should be widely performed and covered by insurance. What it can't do is force religious objectors like Appellants to set aside their beliefs and medical judgment to be the ones to do the performing and insuring, when "it has at its disposal" alternatives that wouldn't require their participation. *Id.* at 730.

Appellants' RFRA claim thus succeeded on the merits. The district court correctly so held, in a holding that HHS didn't dispute, neither HHS nor ACLU appealed, and *Bostock* doesn't question. 140 S. Ct. at 1754 ("no … religious liberty claim is now before us").

Irreparable harm. The second injunction factor is whether Appellants would otherwise face "a substantial threat of irreparable harm."

Opulent Life, 697 F.3d at 294. That question is straightforward here. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And under RFRA, "this same principle applies." *Opulent Life*, 697 F.3d at 295. Thus, that HHS has unjustifiably attempted to coerce Appellants to violate their religious beliefs is alone enough for this factor to be met; "no further showing of irreparable injury is necessary." *Id.* (internal quotation marks omitted).

As detailed *infra* Part II, Appellants' exposure to irreparable harm wasn't mitigated by the district court's partial vacatur of the 2016 Rule. Vacatur here doesn't provide the lasting protection an injunction would: "an *exemption*" for Appellants, regardless whether the government later finds a way to validly apply its mandate to others. *Hobby Lobby*, 573 U.S. at 694-95 (emphasis added). And recent events—the 2020 Rule, *Bostock*, and the district-court decisions purporting to resurrect the 2016 Rule—illustrate how fleeting the relief afforded by the vacatur has been. Indeed, these events show that Appellants are suffering irreparable harm *now*, as they attempt to carry out their missions, care for their patients, and insure their employees consistent with their religious beliefs, all without knowing whether they can do so in compliance with Section 1557, or even which Section 1557 rule currently controls. *See Opulent Life*, 697 F.3d at 296 ("ongoing harm to … religious practice").

An injunction would dispel this uncertainty, ordering that however HHS interprets the statute now and going forward, it can't require Appellants to perform or pay for gender transitions and abortions contrary to their beliefs. Neither vacatur nor any other "remed[y] available at law" suffices. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Balance of harms. The third factor is the balance of harms—*i.e.*, whether "plaintiff will be more severely prejudiced by a denial of the injunction than defendant would be by its grant." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). Where, as here, the threatened harm for the plaintiff is irreparable, the defendant "would need to present powerful evidence of harm to its interests to prevent" this factor from being met. *Opulent Life*, 697 F.3d at 297.

The balance here tips sharply in Appellants' favor. To perform or provide insurance coverage for gender transitions and abortions, Appellants would have to forsake their sincere religious beliefs. If, by contrast, they adhere to their beliefs, they face the loss of millions of dollars in funding, the risk of legal liability, and the opprobrium of being branded as "discriminators" under federal law. And even now, Appellants are forced to operate under a cloud of uncertainty, unsure whether they can continue to care for their patients and insure their employees consistent with both the law and their conscience.

Meanwhile, the harms to HHS from being enjoined against requiring Appellants to violate their beliefs are negligible to nonexistent. Again,

HHS has many straightforward ways of expanding access to gender transitions and abortions without involving Appellants. And indeed, HHS didn't even respond to Appellants' balance-of-harms argument below—thus failing not only to present "powerful evidence" but any evidence of harm to its interests at all. *Opulent Life*, 697 F.3d at 297.

Public interest. Finally, the requested injunction must "not disserve the public interest." *VRC*, 460 F.3d at 611. This factor, too, favors Appellants. "Injunctions protecting First Amendment freedoms are always in the public interest"—a principle that "applies equally to" RFRA. *Opulent Life*, 697 F.3d at 298 (internal quotation marks omitted) (discussing RLUIPA); *see also id.* at 295 (RFRA is RLUIPA's "predecessor statute" and equivalent for purposes of injunction factors). Meanwhile, as HHS now recognizes, the public interest in transgender healthcare is best served by leaving "providers … generally free to use their best medical judgment, consistent with their understanding of medical ethics," to treat gender dysphoria—not by conscripting unwilling providers to place ideology over medicine. 85 Fed. Reg. at 37,187.

Moreover, an injunction like the one Appellants seek here is a standard remedy for RFRA claims. As the Supreme Court has held, successful RFRA claimants are "*entitled to an exemption*" from the law under which the government imposed the burden, regardless whether it validly applies to others. *Hobby Lobby*, 573 U.S. at 694-95 (emphasis added). And when the RFRA claimant is the plaintiff, an "exemption" has invariably

meant an *injunction*—one "prohibiting the Government from" taking the challenged action "with respect to" the claimant's exercise. *O Centro*, 546 U.S. at 427; *see also Hobby Lobby*, 573 U.S. at 735 (injunction sought was a "religious exemption from generally applicable laws"). In fact, this sort of injunctive relief has been the remedy awarded in *every* one of this Court's and the Supreme Court's decisions finding a meritorious RFRA claim, under both the federal RFRA and its Texas analogue.[7]

"When Congress itself has struck the balance" in determining whether injunctive relief is in the public interest, "a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion." *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1025-28 (10th Cir. 2004) (en banc) (McConnell, J., concurring) (internal quotation marks omitted), *aff'd*, 546 U.S. 418. Injunctions are the ordinary relief for pre-enforcement RFRA actions like this one. And the traditional factors are met, supporting the narrowly-tailored injunction Appellants sought below.

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[7] *See Hobby Lobby*, 573 U.S. at 692, 701-04 (plaintiffs sought "to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide [objectionable] health-insurance coverage"); *O Centro*, 546 U.S. at 427 (affirming "preliminary injunction prohibiting the Government from enforcing the Controlled Substances Act with respect to [plaintiff's] importation and use of *hoasca*"); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 257 (5th Cir. 2010) (affirming "permanent injunction against the District preventing the grooming policy's application to A.A."); *Merced*, 577 F.3d at 595 ("Merced is entitled … to an injunction preventing Euless from enforcing its ordinances that burden his religious practice of sacrificing animals.").

II. Appellants' proposed injunction would have a meaningful practical effect.

The district court didn't question Appellants' showing that they satisfied the ordinary injunction factors. Rather, it refused to enter a permanent injunction on one ground: that because it was also vacating the "gender identity" and "termination of pregnancy" portions of the Rule, an injunction would have no "meaningful practical effect independent of … vacatur." RE.067-68 (quoting *Monsanto*, 561 U.S. at 165). That was mistaken. Appellants' proposed injunction would have the practical effect of insulating them from both current and future efforts to invoke Section 1557 to require them to perform and provide insurance coverage for gender-transition procedures and abortions contrary to their beliefs, resolving the current uncertainty about their ability to continue caring for their patients and insure their employees consistent with their faith. By declining to grant it, the district court contradicted controlling precedent and failed to provide Appellants "complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

A. An injunction would protect Appellants from imposition of the same unlawful burden by other means.

This practical difference between vacatur and injunction was apparent from the outset. The district court's vacatur prevented HHS from *applying the portions of the 2016 Rule* requiring Appellants to perform and provide coverage for gender-transition procedures and abortions. But

nothing in that remedy stopped HHS from imposing the same requirement *by other means*—such as by initiating an enforcement action directly under Section 1557 or promulgating a new rule imposing the same burden. HHS doesn't need to act by regulation to enforce Section 1557; it can interpret and enforce the statute itself. *See* 42 U.S.C. § 18116(c) ("The Secretary [of HHS] *may*," but doesn't have to, "promulgate regulations to implement this section." (emphasis added)). Yet while the district court correctly held that RFRA prohibits HHS from forcing Appellants to perform and provide insurance coverage for gender-transition and abortion procedures contrary to their religious beliefs and medical judgment, ROA.4789-92, it didn't actually enjoin HHS from doing so, ROA.4792-96—leaving HHS free to reimpose the same RFRA-violating burden via any means other than the vacated portions of the 2016 Rule.

That HHS at the time appeared disinclined to do so doesn't undermine the practical meaningfulness of an injunction. As this case illustrates, HHS's positions today don't necessarily dictate its positions tomorrow. *See, e.g., ConocoPhillips Co. v. U.S. E.P.A.*, 612 F.3d 822, 832 (5th Cir. 2010) ("Embedded in an agency's power to make a decision is its power to reconsider that decision."). And agency changes to "their statutory interpretations" are particularly common when "elections change administrations," *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in denial of certio-

rari)—especially when "hotly-debated issues" like those of "sex and gender identity" are implicated. *United States v. Varner*, 948 F.3d 250, 256 (5th Cir. 2020); *cf.* Joe Biden (@JoeBiden), Twitter (Jan. 25, 2020), https://bit.ly/3d4pqqq ("Let's be clear: Transgender equality is the civil rights issue of our time. There is no room for compromise when it comes to basic human rights.").

Moreover, even before *Bostock*, some courts interpreted Section 1557 to cover "gender identity" discrimination, and thus to require healthcare providers to offer gender-transition procedures. *See, e.g., Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 947-48 (W.D. Wis. 2018); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098-1100 (S.D. Cal. 2017). These decisions were "not based on the" 2016 Rule but "grounded in the language of the statute itself." *Prescott*, 265 F. Supp. 3d at 1098. Appellants believe these decisions wrongly interpret the statute, as the district court explained. ROA.1781-86, 4788. But they make it far from "[im]practical" for Appellants to have been concerned that a future HHS might conclude that Section 1557 requires objecting providers to offer transition procedures, with or without the 2016 Rule, *cf. Monsanto*, 561 U.S. at 165—justifying Appellants' request for injunctive relief.

All this shows that when the district court decided this case there was a practical difference between the injunction Appellants sought and the

vacatur the district court granted. But developments postdating the decision have only confirmed as much. Indeed, in the months since the district court's ruling, both other courts and HHS itself may already have reimposed the substance of the 2016 Rule—providing the clearest possible demonstration of Appellants' need for the injunctive relief they seek in this appeal.

First, although HHS has now finalized its new rule intended to respond to the district court's vacatur, other district courts have in turn enjoined *that* rule, in the process purporting to revive the very portions of the 2016 Rule the district court correctly held to violate RFRA. HHS's issuance of the 2020 Rule triggered at least five lawsuits from advocacy groups, transgender activists, and states. And federal judges in New York and D.C. have ruled for challengers, resuscitating the substance of the 2016 Rule and thus negating in practical terms the sole relief Appellants obtained from the district court here. *Walker*, 2020 WL 4749859; *Whitman-Walker Clinic*, 2020 WL 5232076.

The *Walker* court held that HHS likely violated the APA by repealing the 2016 Rule's definition of "sex," reasoning that HHS's "premise" for doing so—that Section 1557 doesn't "prohibit[] discrimination based on gender identity and sex stereotyping"—"was effectively rejected by" *Bostock*. 2020 WL 4749859, at *8-9. The court thus preliminarily enjoined "the repeal of the 2016 definition of discrimination on the basis of sex." *Id.* at *10. And although the *Walker* court noted that it had "no power to

revive a rule vacated by another district court," it nonetheless concluded that "[a]s a result" of its decision, the definitions of 'sex,' 'gender identity,' and 'sex stereotyping' in the 2016 Rule "will remain in effect." *Id.* at *7, *10.

Whitman-Walker Clinic likewise held that, given *Bostock*, the 2020 Rule's repeal of the 2016 Rule's definition of "sex" discrimination violated the APA. 2020 WL 5232076, at *22-27. The court stated that because the district court in this case "vacated the 'gender identity' portion of this definition," that portion of the definition couldn't be brought back. *Id.* at *13. Still, the court reasoned that it *could* order revival of the 2016 Rule's definition of "sex" discrimination to include "sex stereotyping," *id.* at *14-15—which, it said, would have the same effect, since "[d]iscrimination based on transgender status—*i.e.*, gender identity—often cannot be meaningfully separated from discrimination based on sex stereotyping." *Id.* at *23. The court therefore entered a nationwide preliminary injunction preventing HHS "from enforcing the repeal of the 2016 Rule's definition of discrimination '[o]n the basis of sex' insofar as it includes 'discrimination on the basis of … sex stereotyping.'" *Id.* at *45 (quoting 81 Fed. Reg. at 31,467).

These decisions demonstrate the district court's error in concluding that there was no "meaningful practical" difference between the vacatur it granted and the injunction Appellants sought. ROA.4795-96 (internal

quotation marks omitted). Despite the district court's vacatur, other district courts have now enjoined HHS from repealing provisions of the 2016 Rule interpreting "sex" discrimination under Section 1557 to include discrimination based on "gender identity," which is the very interpretation the district court held to substantially burden Appellants' religious exercise. *Walker*, 2020 WL 4749859, at *9; *Whitman-Walker*, 2020 WL 5232076, at *23. And although the district court here also held that applying such a provision to override Appellants' religious exercise would violate RFRA—in a ruling that (1) was not appealed, and (2) is divorced from any issue affected by *Bostock*—the district court's denial of Appellants' injunction means that Appellants now have no court order to prevent exactly that from occurring.

Even if *Walker* and *Whitman-Walker* are later limited or reversed, the combination of *Bostock* and the 2020 Rule itself independently demonstrates Appellants' entitlement to an injunction under RFRA. Although the 2020 Rule eliminates the 2016 Rule's definition of "sex," the 2020 Rule doesn't offer a replacement definition. Instead, the 2020 Rule cites the Supreme Court's then-forthcoming decision in *Bostock*, noting that the Court's decision "on the meaning of 'on the basis of sex' under Title VII will likely have ramifications for the definition … under Title IX," and explaining that the repeal of the prior definition "would not preclude application of the [*Bostock*] Court's construction." 85 Fed. Reg. at 37,168. *Bostock* has now determined that "sex" discrimination under Title VII

includes discrimination against a person "for being … transgender." 140 S. Ct. at 1737. Thus, by finalizing a new rule that arguably ties the meaning of "sex" discrimination under Section 1557 to *Bostock*, HHS may have itself interpreted Section 1557 again to forbid "gender identity" discrimination—and thus may already have reimposed the same RFRA-violating burden on Appellants' religious exercise that motivated Appellants to seek injunctive relief in the first place.

HHS's position in the cases challenging the 2020 Rule has confirmed this possibility. HHS has defended the 2020 Rule on the ground that its "language may be interpreted in conformity with *Bostock*." Opp'n to Mot. for Prelim. Inj. at 17, *Whitman-Walker*, No. 1:20-cv-01630 (D.D.C. July 24, 2020), ECF 42. Indeed, HHS obtained dismissal on standing grounds in one of the cases challenging the 2020 Rule precisely because that court agreed that if *Bostock* applies under Title IX and Section 1557, then "the 2020 Rule *does, in fact*," prohibit gender-identity discrimination like the 2016 Rule did. *Washington v. U.S. Dep't of Health & Human Servs.*, No. C20-1105JLR, 2020 WL 5095467, at *8 (W.D. Wash. Aug. 28, 2020) (emphasis added).

Moreover, early post-*Bostock* caselaw supports Appellants' concern. "[C]ourts, including the Supreme Court and this court, frequently rely on" Title VII caselaw to interpret Title IX, whose ban on "sex" discrimination is the one cross-referenced in Section 1557. *Carmichael v. Galbraith*, 574 F. App'x 286, 293-94 (5th Cir. 2014) (Dennis, J., concurring)

(collecting cases). Thus, both Circuits that have so far addressed whether *Bostock* means that Title IX's prohibition on "sex" discrimination includes discrimination based on "transgender status" have concluded that it does. *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cty.*, 968 F.3d 1286, 1304-05 (11th Cir. 2020); *see Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *25 (4th Cir. Aug. 26, 2020). Appellants dispute this conclusion. *See* ROA.1786 n.28 (distinguishing Title VII); *cf. Grimm*, 2020 WL 5034430, at *35-37 (Niemeyer, J., dissenting); *Adams*, 968 F.3d at 1319-21 (W. Pryor, J., dissenting). But to the extent *Bostock* has in fact reimposed the 2016 Rule's prohibition on "gender identity" discrimination, Appellants are in no better position today than they were when they filed this lawsuit—even though the district court *held*, HHS *agreed*, and ACLU *hasn't contested by appeal* that application of that prohibition to Appellants would violate RFRA.

Nor does the 2020 Rule's statement that it "will be implemented consistent with … conscience and religious freedom statutes," including Title IX's religion and abortion exemptions, 85 Fed. Reg. at 37,205, undermine Appellants' entitlement to an injunction. At the outset, the 2020 Rule's text doesn't actually set out the substance of those exemptions. *See* 45 C.F.R. § 92.6(b) ("Insofar as the application of any requirement under this part would violate, depart from, or contradict … exemptions … provided by any of" a number of statutes, including Title IX, "such application shall not be imposed or required."). So it is unclear if this language

does anything—much less that it renders injunctive relief meaningless. *Cf.* 81 Fed. Reg. at 31,466 (similar language in 2016 Rule that HHS understood *not* to incorporate exemptions); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1221-23 (D.C. Cir. 1996) (preamble binding only "if what it requires is sufficiently clear"). The scope of any incorporated exemption is likewise unclear. *Compare* RE.103-06 (exemption would protect "religious organization[s]") *with Whitman-Walker*, 2020 WL 5232076, at *27 (exemption would protect "educational operation[s]" of religious organizations).

In any event, setting aside any ambiguity about whether the 2020 Rule *does* in fact incorporate Title IX's religious exemption, that still wouldn't eliminate the need for an injunction, because the *Whitman-Walker* court has enjoined HHS "from enforcing its incorporation of the religious exemption contained in Title IX" in the 2020 Rule. 2020 WL 5232076, at *45. Thus, any protection offered Appellants by the 2020 Rule's reference to Title IX's statutory exemptions—however incomplete—has already evaporated.

B. Controlling authority requires injunctive relief.

These practical considerations illustrate Appellants' need for additional relief. They also distinguish this case from the sole binding authority invoked by the district court, *Monsanto*, which held that an injunction

is inappropriate if it would have no "'meaningful practical effect independent of'" vacatur. RE.067-68 (quoting 561 U.S. at 165).

In *Monsanto*, the district court held that a federal agency had violated environmental law by "deregulat[ing] a variety of genetically engineered alfalfa" without first completing a sufficient environmental review. 561 U.S. at 144. To remedy that violation, the district court both "vacated [the agency]'s deregulation decision" and "enjoined the planting of" the alfalfa by any farmer in the country pending the review's completion. *Id.* at 148. The Ninth Circuit affirmed this relief, *id.*, but the Supreme Court reversed, holding that because (as the plaintiffs *agreed*) the district court's "injunction against planting does not have any meaningful practical effect independent of its vacatur," "no recourse to the additional and extraordinary relief of an injunction was warranted," *id.* at 165-66.

That holding is distinct from this case. In *Monsanto*, vacatur of the agency's deregulation decision meant there was nothing farmers could do to legally plant the alfalfa—that activity was "independently" "ban[ned]" by "federal regulations" outside their control. *Id.* at 150, 165-66. Enjoining them therefore made no difference to their ability to plant.

Here, by contrast, vacatur alone doesn't stop HHS from engaging in the conduct Appellants seek to enjoin. It prevents HHS from relying on *the 2016 Rule* to require Appellants to perform or provide gender-transition procedures or abortions contrary to their religious beliefs. RE.042-43. But it does not prevent HHS from imposing the same requirement *by*

other means—which it could do by enforcing Section 1557 directly, by relying on the 2016 Rule as revived by other litigation, by enforcing the current 2020 Rule interpreted in light of *Bostock*, or by promulgating a new rule under a new Administration. In fact, while the *Monsanto* vacatur "ha[d] the effect of independently prohibiting" the also-enjoined activity, 561 U.S. at 165, "nothing in *Franciscan Alliance* prevented HHS from re-promulgating the very provisions that the court vacated." *Whitman-Walker*, 2020 WL 5232076, at *25. That is why an injunction is needed. And that is the "meaningful practical effect" not present in *Monsanto*. 561 U.S. at 165.

Post-*Monsanto* decisions confirm this point. In *New York v. U. S. Department of Commerce*, for example, the district court held that the Secretary of Commerce violated the APA by deciding to ask about citizenship on the census. 351 F. Supp. 3d 502, 516 (S.D.N.Y. 2019), *aff'd in part, rev'd in part on other grounds*, 139 S. Ct. 2551 (2019). It therefore vacated the memorandum reflecting that decision, then considered whether it should also enter injunctive relief. The court noted *Monsanto*, but held that an injunction *would* have "a meaningful practical effect independent of … vacatur," and thus that *Monsanto* didn't apply. 351 F. Supp. 3d at 676. Absent an injunction, the court explained, the Secretary "could theoretically reinstate his decision by simply re-issuing his memorandum under a new date or by changing the memorandum in some immaterial

way." *Id.* The court therefore issued an injunction "enjoin[ing] Defendants from adding a citizenship question … based on [the] memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum." *Id.* at 676-77; *compare* Br. for Pet'rs, *Dep't of Commerce v. New York*, No. 18-966 (U.S. Mar. 6, 2019) (arguing that the "district court erred in enjoining the Secretary") *with* 139 S. Ct. at 2573-76 (affirming).

So too here. Absent the injunction Appellants requested, HHS "could theoretically reinstate" the same burden on their religious exercise imposed through the 2016 Rule. *New York*, 351 F. Supp. 3d at 676. Indeed, to the extent the 2020 Rule imports *Bostock*'s understanding of "sex" discrimination to Section 1557, it may *already have*. Here too, then, "an injunction is necessary to make the" district court's RFRA ruling "effective." *Id.*

And indeed, although *Monsanto* doesn't specify what sorts of "meaningful practical" differences suffice to justify both vacatur and an injunction, the Supreme Court has in other contexts recognized as cognizable a plaintiff's interest in insulating himself against a government defendant's future change of position. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), for example, the Court entertained a challenge to a state law that the plaintiffs alleged prohibited certain abortion procedures even though the state Attorney General had interpreted it *not* to do so. The reason: "some present prosecutors *and future Attorneys General* may choose to"

take a different approach and prosecute providers for performing them. *Id.* at 945-46; *see id.* at 922 (affirming district court's permanent injunction).

Similarly, the Supreme Court has held that plaintiffs have a continuing interest in cases challenging laws that the government repealed in response to the suit, if nothing "preclude[s]" the defendant "from reenacting precisely the same provision if" the case were dismissed. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also Jacksonville*, 508 U.S. at 661-63; *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020). The same logic applies here. If the government's *repeal* of a challenged rule doesn't render the court unable to award effective relief so long as the government remains free to "reenact[]" it, *Mesquite*, 455 U.S. at 289, neither should a *court's vacatur* of a challenged rule render injunctive relief unnecessary under *Monsanto* if the government could "reinstate" the unlawful aspects of the vacated rule in a "substantially similar" form. *New York*, 351 F. Supp. 3d at 676.

And this is true "*a fortiori*" if, as here, the government may have "already" reimposed the substance of the repealed rule before the case is even concluded. *Jacksonville*, 508 U.S. at 662. Indeed, Appellants' practical interest in additional relief is even clearer than in *Jacksonville*. The Court there held the plaintiffs could continue to litigate because, although the ordinance they challenged had been repealed and replaced, the new ordinance "disadvantage[d] them in the same fundamental way." *Id.*

Here, however, not only has HHS already potentially reimposed the substance of the 2016 Rule in the 2020 Rule, but other courts have purported to revive RFRA-violating portions of the 2016 Rule itself.

Finally, *Monsanto* is also inapposite because here, unlike in *Monsanto*, vacatur alone fails to comport with a fundamental remedial principle: that "the nature of the violation determines the scope of the remedy." *Veasey v. Abbott*, 888 F.3d 792, 800 (5th Cir. 2018) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). Vacatur is the "normal remedy" for APA claims asserting that a rule exceeded the agency's statutory authority. *See, e.g., Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). And for good reason—because the "nature of the violation" is the existence of the *ultra vires* rule itself. *See* 5 U.S.C. § 702 (giving "aggrieved" plaintiffs a cause of action to challenge "agency action"); *id.* § 551(13) (defining "agency action" to include "the whole or a part of an agency rule"); *see also* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. (forthcoming September 2020) (manuscript, at 11) (the APA "makes the agency action the *object* of the court's review"), https://bit.ly/2EkURkg.

The nature of a RFRA violation, however, isn't the existence of any particular rule or statute but government action imposing a "substantial[] burden" on religion. 42 U.S.C. § 2000bb-1(a). So the remedy is aimed at the *burden*—for example, damages to compensate the plaintiff for suffering it, *see, e.g., Tanvir v. Tanzin*, 894 F.3d 449, 463 (2d Cir.

2018), *cert. granted* 140 S. Ct. 550, or a plaintiff-specific injunction to ensure that it isn't imposed at all, now or in the future, *see Hobby Lobby*, 573 U.S. at 694-95 (successful RFRA plaintiffs are "entitled to an exemption"). That is why *every* meritorious RFRA claim to come before this Court or the Supreme Court has resulted in an injunction. *Supra* n.7.

These principles are illustrated by the widespread RFRA litigation resulting from another HHS effort to make religious objectors provide medical services violating their beliefs: the contraceptive-mandate litigation. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Hobby Lobby*, 573 U.S. 682. That litigation arose from an ACA provision requiring certain employers to provide their employees with health-insurance coverage for "preventive care" for women. 42 U.S.C. § 300gg-13(a)(4). But the ACA itself didn't define "preventive care"; HHS did. *Hobby Lobby*, 573 U.S. at 697. And when HHS did so, it defined that term to include all FDA-approved "contraceptive methods [and] sterilization procedures,'" *id.* (quoting 77 Fed. Reg. 8725 (Feb. 15, 2012))—substantially burdening the religious exercise of many religious employers and prompting "[y]ears of litigation in dozens of cases" around the country. *DeOtte v. Azar*, 393 F. Supp. 3d 490, 497 (N.D. Tex. 2019) (internal quotation marks omitted).

On the district court's reasoning here, a sufficient remedy for successful RFRA plaintiffs in these cases would have been simply to vacate the offending portions of HHS's "preventive services" definition as applied to the plaintiffs. But that relief wouldn't have been tailored to the "nature

of the violation," *Swann*, 402 U.S. at 16, which didn't consist of any particular regulatory definition but of HHS's effort to require religious employers to provide objectionable contraceptives. And it isn't what happened. Instead, at least *twenty* courts entered permanent injunctions enjoining HHS "from any effort to apply or enforce … 42 U.S.C. § 300gg-13(a)(4)" with respect to the "provision of contraceptive services which violate [plaintiffs'] conscience." *E.g.*, Order Amending Injunction, *E. Tex. Baptist Univ. v. Azar*, No. 4:12-cv-03009 (S.D. Tex. Aug. 10, 2020), ECF 163.[8] They thus both prohibited enforcement of the current mandate *and* foreclosed any effort to reimpose its substance by other means.

[8] *See also*:

- Order, *Ass'n of Christian Schs. v. Azar*, No. 1:14-cv-02966 (D. Colo. Dec. 10, 2018), ECF 49;
- Order, *Ave Maria Sch. of Law v. Sebelius*, No. 2:13-cv-00795 (M.D. Fla. Jul. 11, 2018), ECF 68;
- Order, *Ave Maria Univ. v. Sebelius*, No. 2:13-cv-00630 (M.D. Fla. Jul. 11, 2018), ECF 72;
- Order, *Catholic Benefits Ass'n LCA v. Hargan*, No. 5:14-cv-00240 (W.D. Okla. Mar. 7, 2018), ECF 184;
- Order, *Christian Emp'rs All. v. Azar*, No. 3:16-cv-00309 (D.N.D. May 15, 2019), ECF 53;
- Order, *Colo. Christian Univ. v. Health & Human Servs.*, No. 1:13-cv-02105 (D. Colo. July 11, 2018), ECF 84;
- Order, *Conestoga Wood Specialties Corp. v. Burwell*, No. 5:12-cv-06744 (E.D. Pa. Oct. 2, 2014), ECF 82;
- Order, *DeOtte v. Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), ECF 76;
- Order, *Dobson v. Azar*, No. 13-cv-03326 (D. Colo. Mar. 26, 2019), ECF 61;

That is what Appellants seek here. Just as HHS was permanently enjoined from exercising its authority under 42 U.S.C. § 300gg-13(a)(4) to require religious objectors to provide insurance coverage for contraceptives contrary to their beliefs, so it should be enjoined from construing Section 1557 to "require [Appellants] to provide medical services or insurance coverage related to 'gender identity' or 'termination of pregnancy' in violation of" theirs. RE.118.

III. At minimum, this Court should remand for consideration of the proper remedy in light of changed circumstances.

As we've explained, it was clear at the time of the district court's decision that Appellants were entitled to an injunction and that there was a

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- Order, *Dordt Coll. v. Azar*, No. 5:13-cv-04100 (N.D. Iowa June 14, 2018), ECF 89;
- Order, *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa. Jul. 5, 2018), ECF 153;
- Order, *Grace Schs. v. Azar*, No. 3:12-cv-00459 (N.D. Ind. June 1, 2018), ECF 114;
- Order of Injunction, *Korte v. Health & Human Servs.*, No. 3:12-cv-1072 (S.D. Ill. Nov. 7, 2014), ECF 89;
- Order, *Little Sisters of the Poor v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), ECF 82;
- Order, *Reaching Souls Int'l, Inc. v. Azar*, No. 5:13-cv-01092 (W.D. Okla. Mar. 15, 2018), ECF 95;
- Judgment Order, *Sharpe Holdings, Inc. v. Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo. Mar. 28, 2018), ECF 161;
- Order, *S. Nazarene Univ. v. Hargan*, No. 5:13-cv-01015 (W.D. Okla. May 15, 2018), ECF 109;
- Order, *Wheaton Coll. v. Azar*, No. 1:13-cv-08910 (N.D. Ill. Feb. 22, 2018), ECF 119;
- Order, *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa. Dec. 20, 2013), ECF 81.

meaningful practical difference between the injunction Appellants sought and the vacatur the district court granted. And events postdating the decision—the 2020 Rule, *Bostock*, and decisions from other jurisdictions purporting to undo the vacatur—have only shown that Appellants are correct.

This Court "is obligated to take notice of changes in fact or law occurring during the pendency of a case on appeal," so it can consider these changed circumstances in determining Appellants' entitlement to an injunction now. *Spencer v. Schmidt Elec. Co.*, 576 F. App'x 442, 446-47 (5th Cir. 2014) (quotation omitted). But if the Court would prefer instead for the district court to pass on the changed circumstances in the first instance, it should, at minimum, vacate the district court's determination that an injunction is improper and remand for reconsideration of the proper relief.

CONCLUSION

The Court should reverse the district court's remedy determination in part and remand for entry of a permanent injunction enjoining HHS from construing Section 1557 of the ACA to require that Appellants perform or provide insurance coverage for gender-transition procedures or abortions in violation of their religious beliefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 21, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate 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 with the most recent version of Windows Defender Antivirus and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 12,975 words. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (Century Schoolbook 14 pt.) using Microsoft Word 2016.

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Dated: September 21, 2020

ADDENDUM

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

42 U.S.C. § 2000bb. Congressional findings and declaration of purpose

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 18116

(a) In general

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

(b) Continued application of laws

Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of Title 29, or the Age Discrimination Act of 1975, or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

(c) Regulations

The Secretary may promulgate regulations to implement this section.