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

BRIEF FOR THE DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Franciscan Alliance, Inc., et al. v. Azar, et al., No. 20-10093

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

Plaintiffs-appellants:

Franciscan Alliance, Inc.
Christian Medical and Dental Society
Specialty Physicians of Illinois, L.L.C.

Defendants-appellees:

Alex M. Azar, II, Secretary, United States Department of Health and Human Services
United States Department of Health and Human Services

Intervenors-appellees:

American Civil Liberties Union of Texas
River City Gender Alliance

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STATEMENT REGARDING ORAL ARGUMENT

The government does not believe that oral argument would be of assistance to this Court. The issues raised in this case are not complex, and the facts and legal arguments are adequately presented in the briefs. Nonetheless, the government stands ready to present argument should this Court determine that it would be of assistance.

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INTRODUCTION

This appeal is moot. Plaintiffs argue that the district court abused its discretion by declining to grant an injunction against enforcement of a 2016 Rule promulgated by the Department of Health and Human Services (HHS), which codified regulations implementing the anti-discrimination provision in Section 1557 of the Patient Protection and Affordable Care Act. But this Court can no longer grant the relief plaintiffs sought, and thus addressing this dispute would constitute an advisory opinion. The district court vacated the challenged provisions in the 2016 Rule, and while this appeal was pending HHS formally rescinded and replaced those provisions in a new Rule. Plaintiffs suggest that this Court may still order injunctive relief based on the possibility that future agency action could harm them in the same way as the 2016 Rule, but courts do not issue injunctions to protect against a speculative possibility of harm at some unspecified future time. Nor could plaintiffs properly challenge any such future action in this appeal. This Court should therefore dismiss this appeal as moot.

Even if this appeal presented a live controversy, plaintiffs are incorrect that the district court abused its equitable discretion in declining to issue an injunction. The district court had already vacated the provisions that plaintiffs had challenged, the agency had not opposed plaintiffs' claims, and the agency was in the process of reconsidering the challenged provisions—indeed, it had already issued a notice of proposed rulemaking to rescind the provisions. The court was well within its

equitable discretion in concluding that, under those circumstances, plaintiffs did not face imminent irreparable harm, and that plaintiffs could seek further relief if and when any harm became imminent.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331 and 1361. ROA.313. The district court entered final judgment on October 15, 2019, ROA.4772, and modified its judgment on November 21, 2019, ROA.4812. Appellants filed their notice of appeal on January 21, 2020. ROA.4830. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether this appeal is moot because the provisions that plaintiffs sought to enjoin in this action have been vacated and rescinded.

2. Whether the district court abused its discretion in declining to grant a permanent injunction after it had already vacated the challenged provisions, the agency had not opposed plaintiffs' claims, and the agency was reconsidering its regulations.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Section 1557 of the Affordable Care Act prohibits "any health program or activity" "receiving Federal financial assistance" from discriminating against an individual "on the ground prohibited under" several nondiscrimination statutes, including Title IX. 42 U.S.C. § 18116(a). Title IX, in turn, prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a).

In 2016, HHS promulgated a rule implementing Section 1557. *See Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,375 (May 18, 2016) (the 2016 Rule). As relevant here, the 2016 Rule defined discrimination "on the basis of sex" to include discrimination on the basis of "termination of pregnancy" and "gender identity." *Id.* at 31,467. Although Title IX contains a religious exemption, the 2016 Rule did not incorporate that exemption into its implementation of Section 1557. *Id.* at 31,380; *see* 20 U.S.C. §§ 1681(a)(3), 1687.

B. Prior Proceedings

1. Plaintiffs in this appeal are a hospital system, medical provider, and organization. ROA.311-13. Along with several States that are not part of this appeal, plaintiffs collectively brought numerous challenges to the 2016 Rule, including challenges under the Administrative Procedure Act (APA) and the Religious Freedom Restoration Act (RFRA). Plaintiffs' APA claims alleged that the 2016 Rule exceeded HHS's statutory authority by defining discrimination "on the basis of sex" to include

discrimination on the basis of termination of pregnancy or transgender status, as well as by failing to incorporate Title IX's religious exemption. *See* ROA.354. In their RFRA claims, plaintiffs alleged that the 2016 Rule's definition of sex discrimination substantially burdened their religious exercise without a compelling governmental interest. *See* ROA.374.

Soon after filing the complaint, plaintiffs moved for a preliminary injunction barring enforcement of the 2016 Rule, and the American Civil Liberties Union (ACLU) of Texas and River City Gender Alliance moved to intervene in defense of the 2016 Rule. *See* ROA.140, 1472. The district court granted plaintiffs a preliminary injunction in December 2016, concluding that the challenged provisions of the 2016 Rule likely violated the APA and RFRA. The preliminary injunction barred HHS "from enforcing the [2016] Rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy." ROA.1797. HHS thereafter began reconsidering the 2016 Rule, and the court granted HHS's request to stay proceedings. ROA.2903.

In December 2018, the parties asked the court to lift the stay, and plaintiffs then moved for summary judgment. ROA.2975. In their motion, plaintiffs asked the court to "make its preliminary injunction permanent." ROA.3351. The government agreed with plaintiffs that the challenged portion of the 2016 Rule was contrary to the statutory meaning of "on the basis of sex," and that the 2016 Rule violated Section 1557 by not incorporating Title IX's religious exemption. ROA.4365. The

government did not oppose plaintiffs' RFRA claim, but noted that because plaintiffs were "entitled to summary judgment on their APA claim, … there [was] no need … to resolve any other claim to provide them with the relief they seek." *Id.* Nonetheless, the government "ask[ed] the [c]ourt to postpone ruling on Plaintiffs' summary judgment motions to allow Defendants to complete their ongoing efforts to amend the Rule[,] … which, if finalized, [would] moot this case." ROA.4366. Intervenors, ACLU of Texas and River City Gender Alliance, argued that the 2016 Rule was lawful in all respects. *See* ROA.4392-93. After briefing was complete, HHS issued a notice of proposed rulemaking to rescind the challenged provisions and notified the district court. *See* ROA.4516; *Nondiscrimination in Health and Health Education Programs or Activities*, 84 Fed. Reg. 27,846 (June 14, 2019).

2. The district court granted summary judgment in plaintiffs' favor, holding that the challenged portion of the 2016 Rule was contrary to Section 1557 and substantially burdened plaintiffs' religious exercise in violation of RFRA. ROA.4788-92, 4796. The court also granted Intervenors' motion to intervene. ROA.4786.

As to relief, the district court vacated "the unlawful portions of the Rule for Defendants' further consideration in light of this opinion and the" prior preliminary injunction order. ROA.4794. But the court determined that the "circumstances d[id] not justify" an injunction. *Id.* "Rather," the court explained that "vacatur redresses both the APA violation and the RFRA violation." *Id.* Citing several cases, including the Supreme Court's decision in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139

(2010), the court concluded that the best course was to "vacat[e] the Rule and invit[e] Plaintiffs to return if further relief independent of vacatur[] is later warranted." ROA.4795-96.

The court noted several reasons why an injunction was unnecessary to protect plaintiffs from any harm. The court explained that there was "no indication that, once the Rule is vacated, Defendants [would] defy the [c]ourt's order and attempt to apply the Rule against Plaintiffs." ROA.4795. Indeed, "Defendants … agree[d] with Plaintiffs and the [c]ourt that the Rule[] … [was] substantively unlawful under the APA" and had "been conscientiously complying with the [preliminary] injunction." ROA.4795-96 (quotation marks omitted). "Considering Defendants' prior actions and current statements, the [c]ourt conclude[d] that issuance of an injunction would not have a 'meaningful practical effect independent of its vacatur' because vacatur and remand will likely prevent Defendants from applying the Rule." ROA.4796 (quoting *Monsanto*, 561 U.S. at 165). Thus, the court determined that "neither Plaintiffs nor similarly situated non-parties need injunctive relief from the vacated Rule." *Id.* Instead, the court explained that "Plaintiffs may return to the [c]ourt for redress" if plaintiffs in the future encountered risk of imminent harm. *Id.*[1] Plaintiffs appealed.

[1] The district court later granted the government's motion to modify the final judgment "to confirm that … the [c]ourt vacate[d] only the portions of the Rule that Plaintiffs challenged in this litigation." ROA.4812. The court modified its judgment to clarify that it vacated the 2016 Rule "insofar as the Rule defines '*On the basis of sex*' to include gender identity and termination of pregnancy." *Id.*

C. Subsequent Developments

On June 12, 2020, while this appeal was pending, HHS submitted for publication a new final rule (the 2020 Rule) rescinding the various provisions of the 2016 Rule that plaintiffs had challenged. *See Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (June 19, 2020). As relevant here, the 2020 Rule rescinded the 2016 Rule's definition of discrimination "on the basis of sex" and replaced it with a provision largely quoting Section 1557's statutory text. *Id.* at 37,244 (codified at 45 C.F.R. § 92.2).[2] The 2020 Rule also incorporated Title IX's religious exemption, as plaintiffs in this case had argued was required. *See id.* at 37,245 (codified at 45 C.F.R. § 92.6(b)) ("Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any

[2] The new provision reads as follows:

> (a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, 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) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.
>
> (b) The grounds are the grounds prohibited under the following statutes: … Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (sex); . . . .

45 C.F.R. § 92.2.

of the statutes cited in paragraph (a) of this section [including Title IX] … , such application shall not be imposed or required.").

On June 15, three days after HHS submitted the 2020 Rule for publication, the Supreme Court decided *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *Bostock* concerned the proper interpretation of a provision in a different anti-discrimination statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). *Id.* at 1737. The Court held that Title VII's prohibition of discrimination "because of" sex extends to discrimination on the basis of sexual orientation and transgender status. *Id.*

Following *Bostock*, groups of plaintiffs in several district courts challenged the 2020 Rule as substantively and procedurally unlawful under the APA. *See, e.g.*, *Washington v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-1105 (W.D. Wash. filed July 16, 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-1630 (D.D.C. filed June 22, 2020); *Asapansa-Johnson Walker v. Azar*, No. 20-cv-2834 (E.D.N.Y. filed June 26, 2020). Two district courts issued preliminary injunctions barring HHS from enforcing its repeal of the 2016 regulatory definition of discrimination on the basis of sex and associated provisions in the 2016 Rule, and one court enjoined HHS from enforcing the 2020 Rule's incorporation of Title IX's religious exemption. *See* Order, *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-1630 (JEB), 2020 WL 5232076 (D.D.C. Sept. 2, 2020) (enjoining rescission of 2016 regulatory definition and enforcement of Title IX's religious exemption); Order, *Walker v. Azar*, No. 20-cv-2834, 2020 WL 4749859

(E.D.N.Y. Aug. 17, 2020) (enjoining rescission of the 2016 regulatory definition); Order, *Walker*, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020) (enjoining rescission of related provision). But both district courts acknowledged that their orders did not affect the vacatur issued by the district court in this case. *See* Order, *Whitman-Walker Clinic*, 2020 WL 5232076, at *14; Order, *Walker*, 2020 WL 4749859, at *7. HHS has appealed the preliminary injunctions in *Whitman-Walker Clinic* and *Walker* to the Second and D.C. Circuits respectively. *See Asapansa-Johnson Walker v. Azar*, No. 20-3580 (2d Cir. filed Oct. 16, 2020); *Whitman-Walker Clinic v. U.S. Dep't of Health & Human Servs.*, No. 20-5331 (D.C. Cir. filed Nov. 9, 2020).

SUMMARY OF ARGUMENT

I. This appeal is moot. The district court denied plaintiffs an injunction against provisions of the 2016 Rule that the court had already vacated and that the agency was reconsidering. On appeal, plaintiffs ask this Court to hold that the district court abused its discretion by finding that an injunction was unnecessary to redress any potential future harm to plaintiffs. But plaintiffs' request for injunctive relief against those challenged provisions is now moot: the district court vacated the challenged provisions, and during the pendency of this appeal HHS has formally rescinded them and adopted a new Rule that contains the religious exemption that plaintiffs argued was required. A decision regarding the propriety of the district court's failure to enjoin the now-vacated-and-rescinded provisions would amount to an advisory opinion. This Court should thus dismiss this appeal as moot.

Plaintiffs assert that they are nonetheless entitled to a broad injunction against any possible future regulations or future enforcement action that might harm them. But plaintiffs cannot bootstrap this appeal to seek relief they never sought in district court and that is untethered to any imminent harm. Article III courts do not issue advisory opinions, much less injunctions to redress hypothetical injuries that may or may not occur at some unspecified future time. If HHS later promulgates new regulations or brings enforcement proceedings that harm plaintiffs, plaintiffs may seek relief then. The present appeal is moot.

II. Even if a live controversy existed, plaintiffs cannot show that the district court abused its discretion in declining to issue an injunction. The district court had already vacated the provisions that the plaintiffs had challenged, HHS did not oppose plaintiffs' RFRA claim at the summary judgment stage, and the agency was in the process of considering new regulations (indeed, the agency had already proposed a new rule rescinding the challenged provisions, which it finalized during the pendency of this appeal). The district court's decision reflected a reasonable exercise of the court's ample equitable discretion, and plaintiffs point to no reason why this Court should overturn it. Plaintiffs primarily argue that RFRA limits a district court's equitable discretion and generally requires courts to issue injunctive relief, but that argument is inconsistent with longstanding equitable principles and with the statute's language, which leaves intact a district court's equitable discretion to fashion "appropriate relief."

STANDARD OF REVIEW

This Court determines de novo whether an appeal is moot, *In re Scruggs*, 392 F.3d 124, 128 (5th Cir. 2004), and reviews a district court's denial of injunctive relief for abuse of discretion, *Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l. Distribution Co.*, 520 F.3d 393, 402 (5th Cir. 2008).

ARGUMENT

This appeal is moot. Plaintiffs complain that the district court denied them an injunction against certain provisions in HHS's 2016 Rule, but that relief can no longer be granted: the district court vacated the challenged provisions, HHS formally rescinded them, and HHS adopted new regulations with the religious exemption that plaintiffs argued was necessary. Plaintiffs' argument that the district court nevertheless should have enjoined the 2016 Rule is thus moot, and plaintiffs cannot avoid that mootness by improperly seeking injunctive relief against hypothetical future agency action. Even if this appeal were not moot, plaintiffs cannot show that the district court abused its discretion in declining to enjoin provisions that it had already vacated given that HHS was in the process of reconsidering the provisions and had already issued a proposed rule rescinding them.

I. This appeal is moot.

1. Federal courts "do not render advisory opinions," *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), and thus "federal courts have no authority to hear moot cases," *Empower Texans, Inc. v. Geren*, 977 F.3d 367, 369 (5th Cir. 2020). Article III requires

that federal courts address only live "Cases" or "Controversies." U.S. Const. art. III, § 2. That requirement means that "parties must continue to have a personal stake in the outcome of the lawsuit." *Environmental Conservation Org. v. City of Dallas*, 529 F.3d 519, 527 (5th Cir. 2008) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)). Consequently, "an appeal must be dismissed when … it [is] impossible for the court to grant any effectual relief whatever to a prevailing party." *Motient Corp. v. Dondero*, 529 F.3d 532, 537 (5th Cir. 2008) (quotation marks omitted). A defendant alleging mootness generally bears a "formidable burden" to show mootness, but a "government entity … bears a lighter burden to prove that challenged conduct will not recur." *Moore v. Brown*, 868 F.3d 398, 406-07 (5th Cir. 2017) (quotation marks omitted).

Consistent with these principles, challenges to agency regulations often become moot when the agency rescinds the challenged regulations or a court vacates them. *See, e.g.*, *Louisiana Envtl. Action Network v. U.S. EPA*, 382 F.3d 575, 581 (5th Cir. 2004) (holding that request for relief from EPA rules was moot after "vacatur of the agency's final rules"); *Sannon v. United States*, 631 F.2d 1247, 1250-51 (5th Cir. 1980) (holding part of an appeal moot because of new regulations). Indeed, this Court has acknowledged "without doubt" "[t]hat newly promulgated regulations immediately applicable to litigants in a given case can have the effect of mooting what once was a viable case." *Sannon*, 631 F.2d at 1250-51 (collecting cases). Other circuits hold the same. *See, e.g.*, *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1253 (10th Cir. 2009)

(Gorsuch, J.) (Because the "new Park Service rule also supersedes its 2007 rule, it is now beyond cavil … that the petitioners' underlying challenge to that rule is also moot."); *id.* at 1253 ("[B]y eliminating the issues upon which this case is based, [the agency's] adoption of the new rule has rendered the appeal moot." (quotation marks omitted)); *National Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) (holding that challenge to an "old set of rules" was moot in light of the "new system … now in place"); *Alaska v. U.S. EPA*, 521 F.2d 842, 843 (9th Cir. 1975) (holding that challenge was "either … moot or not ripe" because agency had "indefinitely suspended" the challenged regulation, and "should this suspension be lifted, or new regulations be promulgated pertaining to the same subject matter in general, another petition for review … may be filed").

That principle applies here. Plaintiffs' only argument on appeal is that the district court abused its discretion by not enjoining provisions of the 2016 Rule that the court had already vacated. But the injunction that plaintiffs sought can no longer be granted. The challenged provisions have been vacated in a decision that the government has not appealed. They also have been rescinded by HHS and superseded by a new Rule. And HHS's new Rule includes the religious exemption that plaintiffs argued was required. Accordingly, even if plaintiffs succeeded in convincing this Court that the district court otherwise should have enjoined enforcement of the 2016 Rule, this Court's decision would have no effect. Since this Court does not render advisory opinions, the correct course is to dismiss the appeal.

Cf. Association of Am. R.Rs. v. U.S. Dep't of Transp., 896 F.3d 539, 551 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 2665 (2019) (holding that claim was moot in part because the challenged agency action had "already been vacated by the district court, and that unappealed aspect of the district court's decision [was] final").

2. Plaintiffs attempt to save this appeal from mootness by requesting relief that they never sought in district court and to which they are not entitled. Even though the parts of the 2016 Rule that plaintiffs found harmful have been vacated and rescinded, plaintiffs say they are entitled to a broad injunction against any future agency action that might harm them in the same way. *See* Br. 48. But this appeal in a case about the 2016 Rule is not the forum in which to raise a challenge to other agency actions—much less hypothetical actions that might not ever occur. Indeed, plaintiffs never requested that relief in district court; their motion for summary judgment requested only that the court "make its preliminary injunction permanent," ROA.3351, and the court's preliminary injunction had barred HHS only "from enforcing the [2016] Rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy," ROA.1797. "Whether or not" future agency actions of the sort plaintiffs suggest might occur, plaintiffs "ha[ve] not sought in this lawsuit to prevent" them. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 71 (1983). "Future positions taken by the parties might bring such issues into controversy, but that possibility is simply too remote from the present controversy to keep this case alive." *Id.*

Even if this appeal were the proper vehicle to challenge agency actions aside from the 2016 Rule, plaintiffs could not obtain an injunction against hypothetical future agency action, and therefore this Court can grant no relief in this appeal. Plaintiffs do not have standing to challenge hypothetical future agency actions, which naturally do not present a "concrete, particularized, and actual or imminent" harm that is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted); *cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (plaintiffs have standing to raise a "pre-enforcement" First Amendment claim only "under circumstances that render the threatened enforcement sufficiently imminent"). And even if plaintiffs could cross the standing threshold, it is black letter law that "[a]n injunction is appropriate only if the anticipated injury is imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975); *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974))).

No imminent injury exists here. The provisions that plaintiffs challenged have been vacated and rescinded, and the 2020 Rule incorporated the Title IX religious exemption that plaintiffs argued was required. Plaintiffs instead request an injunction against "a fuzzily defined range of enforcement actions that do not appear imminent," which this Court has held is improper. *See Google, Inc. v. Hood*, 822 F.3d 212, 226-28

(5th Cir. 2016) (reversing district court's grant of preliminary injunction because "the prospect of" an enforcement action that would harm plaintiffs was "not sufficiently imminent or defined to justify an injunction"); *Chacon*, 515 F.2d at 925 ("Insofar as" plaintiffs' request for an injunction "is premised on" legislative action that has not occurred yet, plaintiffs "face[] an impossible burden of showing that any harm to them is imminent," because "[t]he contours of the [actions] anticipated by plaintiffs cannot be predicted," "[n]or can it be foreseen how [relevant] laws will be interpreted judicially or applied administratively.").

Plaintiffs suggest, Br. 43-44, that they might be harmed as a result of the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that a different anti-discrimination statute, Title VII, prohibits discrimination on the basis of sexual orientation or transgender status. 140 S. Ct. at 1739. As plaintiffs emphasize, however, Br. 3, 20, 43, the Court itself stated that its decision did not address how "doctrines protecting religious liberty," including RFRA, would apply to Title VII's prohibition of transgender discrimination, 140 S. Ct. at 1754. Although some courts have applied *Bostock*'s reasoning to Title IX, Br. 45, it is not yet known how the Court would address the religious liberty question that it expressly reserved. Moreover, plaintiffs themselves dispute that *Bostock*'s reasoning would apply to Section 1557's incorporation of Title IX. Br. 45.

Nor are plaintiffs correct in suggesting that ongoing litigation against HHS's new 2020 Rule creates a live controversy in this case concerning the 2016 Rule. Br.

23, 41, 50-51. Plaintiffs assert that two recent preliminary injunctions involving the 2020 Rule "purport[ed] to revive the very portions of the 2016 Rule the district court correctly held to violate RFRA." Br. 41. That is incorrect. Both courts stated that they had "no power to revive [provisions] vacated by another district court." Order, *Walker v. Azar*, 2020 WL 4749859, at *7; Order, *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 2020 WL 5232076, at *14 (explaining that the court was "powerless to revive" provisions that the district court in this case had vacated). And those preliminary injunctions do not otherwise suggest that plaintiffs face imminent injury. For one thing, the government has appealed them. And for another, those APA rulings concerned only whether HHS complied with the APA in its 2020 rulemaking; they say nothing about the proper scope of religious conscience protections.

Plaintiffs fare no better in hypothesizing that HHS might bring an enforcement action in the future without adopting any new regulations. *See* Br. 39. The Supreme Court has long made clear that judicial review is inappropriate before "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Pacific Gas & Elec. Co. v. Energy Res. Comm'n*, 461 U.S. 190, 200 (1983). And such relief is especially premature here: for plaintiffs to suffer harm, HHS would have to exercise its discretion to bring an enforcement action against them even though HHS has not appealed the district court's grant of judgment in plaintiffs' favor on their RFRA claim, and even though the 2020 Rule has now

incorporated Title IX's religious exemption. Plaintiffs assert that the scope of Title IX's religious exemption is unclear in this context and that one district court has issued a preliminary injunction barring its enforcement based on a purported procedural error. Br. 45-46. But the point is that plaintiffs must show a risk of imminent injury. Given HHS's enforcement discretion and existing protections for religious conscience, plaintiffs' theory of possible future injury is all the more speculative. *See Chacon*, 515 F.2d at 925 (rejecting request for injunctive relief because "the injury plaintiffs fear[ed] about future zoning ordinances is not imminent" and "[a]ny injury plaintiffs might suffer from abuse of the City's eminent domain power can be remedied when the City formally exercises that power").

Similarly insufficient is plaintiffs' assertion that they "are suffering irreparable harm *now*, as they attempt to carry out their missions … without knowing whether they can do so in compliance with Section 1557." Br. 34. Subjective fears are "not a sufficient basis for an injunction absent a real and immediate threat of future injury." *Lyons*, 461 U.S. at 107 n.8. Plaintiffs have neither alleged nor documented any cognizable costs caused by their speculation about future agency action. Even if they had, plaintiffs are not entitled to relief for any injuries they incur to protect against "hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416, 418.

For related reasons, plaintiffs cannot show that any of the limited exceptions to mootness apply here. Plaintiffs suggest that the "voluntary cessation" exception to

mootness might apply. Br. 50. Yet this Court "assume[s] that formally announced changes to official governmental policy are not mere litigation posturing" that implicate the "voluntary cessation" doctrine. *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009). This is not a case where the defendant unilaterally ceased an action that it can easily resume later, as was true in the cases plaintiffs cite. *See* Br. 50 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); and *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993)). Here, the district court vacated the challenged provisions and issued a judgment on plaintiffs' RFRA claim that HHS has not appealed. And HHS cannot undo its new 2020 Rule "without a new proceeding." *New Mexico Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1161 (10th Cir. 2019) (explaining that voluntary cessation exception did not apply to the agency's new formal rulemaking). Nor could plaintiffs raise any plausible argument that their claims here fall into the narrow exception for cases "capable of repetition, yet evading review." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (quotation marks omitted).

II. The district court did not abuse its discretion in denying injunctive relief.

1. Even if this appeal were not moot, the district court was well within its discretion not to issue an injunction after it had already vacated the provisions that plaintiffs had challenged. "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561

U.S. 139, 165 (2010). For that reason, "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). To obtain injunctive relief, plaintiffs "must satisfy a four-factor test": they must show (1) "irreparable injury"; (2) "that remedies available at law … are inadequate to compensate for that injury"; (3) "that, considering the balance of hardships … , a remedy in equity is warranted"; and (4) "that the public interest would not be disserved by a permanent injunction." *Monsanto*, 561 U.S. at 156-57 (quoting *eBay*, 547 U.S. at 391).

The district court's decision not to grant an injunction in this case reflects a reasonable exercise of the court's discretion. Indeed, issuing an injunction would likely have been an abuse of discretion under the circumstances the district court faced. As the district court recognized, the Supreme Court's decision in *Monsanto* held in analogous circumstances that a court abused its discretion by issuing an injunction "against the possibility that the agency" would take an action that might harm plaintiffs. *Monsanto*, 561 U.S. at 161. There, the district court had vacated agency action permitting the planting of genetically engineered alfalfa, but went a step further and enjoined the agency from taking any further action to de-regulate genetically engineered alfalfa, and also enjoined planters from planting such alfalfa. *Id.* at 144.

The Supreme Court explained that both injunctions were erroneous. As to the injunction preventing any further agency de-regulation, the Court noted that "if and

when" the agency took new action harming plaintiffs, plaintiffs could "file a new suit challenging such action and seeking appropriate preliminary relief," and therefore "a permanent injunction [was] not [then] needed to guard against any present or imminent risk of likely irreparable harm." *Monsanto*, 561 U.S. at 162. That was particularly true since future agency action "need not cause [plaintiffs] any injury at all, much less irreparable injury," depending on that action's "scope," *Id.* at 162-63. The Court thus instructed that "[u]ntil such time as the agency decides whether and how to exercise its regulatory authority … the courts have no cause to intervene." *Id.* at 164. The injunction against planters was erroneous for the same reason, as well as because the injunction likely would "not have any meaningful practical effect independent of [the] vacatur." *Id.* at 165. Since "a less drastic remedy (such as partial or complete vacatur of [the agency's] decision) was sufficient to redress [plaintiffs'] injury," the Court explained that "no recourse to the additional and extraordinary relief of an injunction was warranted." *Id.* at 165-66.

This case is like *Monsanto* in all material respects, as the district court recognized. After the district court vacated the provisions that plaintiffs objected to, plaintiffs faced no imminent injury. The agency was in the midst of reconsidering the challenged portions of the 2016 Rule (and had even issued a notice of proposed rulemaking to rescind those provisions), so a permanent injunction was not necessary at the time. Nor would it have been proper to issue an injunction against the mere possibility of agency action that might harm plaintiffs—especially since any harm

would depend on the scope of any protections for religious conscience. And just as in *Monsanto*, "any party aggrieved by a hypothetical future [agency] decision will have ample opportunity to challenge it." *Monsanto*, 561 U.S. at 164. Consistent with the Supreme Court's instruction that "[u]ntil such time as the agency decides whether and how to exercise its regulatory authority … the courts have no cause to intervene," *id.*, the district court reasonably declined to enter an injunction after it had already vacated the challenged provisions.

2. Plaintiffs' attempts to cast the district court's decision as an abuse of discretion lack merit. Their principal argument is that RFRA limits the district court's discretion and requires an injunction in most cases. Br. 23, 36, 46, 52-54. But that argument is inconsistent both with statutory text and with longstanding equitable principles. The Supreme Court has "long recognized" that "a major departure from the long tradition of equity practice should not be lightly implied." *eBay*, 547 U.S. at 391-92 (quotation marks omitted). And RFRA nowhere removes a district court's equitable discretion to fashion relief. To the contrary, RFRA states that district courts should award "appropriate relief," 42 U.S.C. § 2000bb-1(c)—language that clearly authorizes discretion. *See eBay*, 547 U.S. at 391-92 (concluding that the Patent Act did not remove the district court's discretion to award relief short of an injunction).

Plaintiffs suggest that RFRA violations should virtually always be redressed with injunctions because RFRA protects important rights to free exercise of religion. Br. 1,22, 26, 52-54. "But traditional equitable principles do not permit such broad

classifications," and the existence of an important "right is distinct from the provision of remedies for violations of that right." *eBay*, 547 U.S. at 392-93. The Supreme Court has therefore "consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows" in many different contexts. *Id.* (noting that rule for copyright and patent cases); *see Monsanto*, 561 U.S. at 157-58 (rejecting a "presum[ption] that an injunction is the proper remedy for a NEPA violation except in unusual circumstances"). This Court has likewise explained that First Amendment values "cannot substitute for the presence of an imminent, non-speculative irreparable injury" in a request for injunctive relief. *Google*, 822 F.3d at 228. Instead, "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts" and is governed by the four factors, one of which is a requirement of imminent irreparable harm. *eBay*, 547 U.S. at 394. Plaintiffs' categorical assertion that "[i]njunctions are the ordinary relief for pre-enforcement RFRA actions," Br. 37, thus has no basis, and the concurrence on which plaintiffs rely does not suggest otherwise. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1025 (10th Cir. 2004) (McConnell, J., concurring) (agreeing that RFRA does not "implicitly modif[y] the standards that apply to preliminary injunctions," and that "the normal standards remain in place unless Congress clearly manifests an intent to modify them").

Later developments also have not turned the district court's reasonable decision into an abuse of discretion. Because the grant or denial of equitable relief is

within the district court's discretion, this Court reviews the district court's exercise of equitable discretion "on the basis of the record as developed before the district court." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979). Thus, contrary to plaintiffs' suggestion, Br. 55, it would be inappropriate for this Court to vacate and remand based on new circumstances, much less for the Court to assess the propriety of injunctive relief based on new facts in the first instance. Instead, as the district court explained, plaintiffs may "return to the [c]ourt for redress" if plaintiffs encounter a risk of imminent harm. ROA.4796.

In any event, later developments only reinforce the court's decision not to enjoin enforcement of the 2016 Rule. As discussed, those developments mooted the plaintiffs' request for injunctive relief: HHS not only formally rescinded the 2016 Rule, but adopted the religious exemption that plaintiffs wanted. And certainly the district court did not abuse its discretion by failing to issue the kind of broad injunction against any hypothetical future regulations or enforcement actions that plaintiffs request here—an entirely impermissible form of relief that plaintiffs did not even request in district court.

Plaintiffs' remaining arguments also lack merit. They attempt to distinguish *Monsanto* on the ground that "vacatur alone doesn't stop HHS from engaging in the conduct [that plaintiffs] seek to enjoin," Br. 47, 49, but the Court in *Monsanto* expressly stated that the same was true in that case, and that "any party aggrieved by a hypothetical future [agency] decision will have ample opportunity to challenge it,"

Monsanto, 561 U.S. at 164. Plaintiffs further contend that the district court was required to issue an injunction because "[t]he nature of a RFRA violation" involves "government action imposing a substantial[] burden on religion," Br. 51 (quotation marks omitted), yet nowhere explain why an injunction is required where there is no imminent action burdening religion. And plaintiffs' reliance on relief awarded in other cases is beside the point for the reasons explained. *See* Br. 47, 50, 52-53 (citing, *e.g.*, the "contraceptive-mandate litigation"). Equitable relief turns on the facts of each particular case, and none of those cases involved a situation like the one here, where the prior regulations have been vacated, the agency agreed the regulations were unlawful, the agency was considering new regulations and had proposed a new rule rescinding the challenged provisions, and the agency did not oppose the merits of plaintiffs' RFRA claim. *New York v. U.S. Department of Commerce*, 351 F. Supp. 3d 502, 516 (S.D.N.Y. 2019), for example, dealt with an agency memorandum that the agency could re-issue at any time, *id.* at 676, and *Stenberg v. Carhart*, 530 U.S. 914 (2000), concerned a state Attorney General's informal interpretation of state law that was not binding on local law enforcement, *id.* at 940-41. Neither shows that the district court abused its discretion under the unique circumstances of this case.

CONCLUSION

For the foregoing reasons, the court should dismiss this appeal as moot, or in the alternative affirm the district court's denial of injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Joshua Dos Santos
Joshua Dos Santos

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,393 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos
Joshua Dos Santos

ADDENDUM

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42 U.S.C. § 18116

§ 18116. Nondiscrimination

(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.

45 C.F.R. § 92.2

§ 92.2 Nondiscrimination requirements.

(a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, 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) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.

(b) The grounds are the grounds prohibited under the following statutes:

(1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (race, color, national origin);

(2) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (sex);

(3) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) (age); or

(4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (disability).

45 C.F.R. § 92.6

§ 92.6 Relationship to other laws.

(a) Nothing in this part 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.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or to supersede State laws that provide additional protections against discrimination on any basis described in § 92.2 of this part.

(b) Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section or provided by the Architectural Barriers Act of 1968 (42 U.S.C. 4151 et seq.); the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Act Amendments Act of 2008 (42 U.S.C. 12181 et seq.), Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), the Coats–Snowe Amendment (42 U.S.C. 238n), the Church Amendments (42 U.S.C. 300a–7), the Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), the Weldon Amendment (Consolidated Appropriations Act, 2019, Pub.L. 115–245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)), or any related, successor, or similar Federal laws or regulations, such application shall not be imposed or required.

42 U.S.C. § 2000bb-1
§ 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.