No. 20-10093

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

v.

AMERICAN CIVIL LIBERTIES UNION OF TEXAS; and 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 INTERVENORS-APPELLEES AMERICAN CIVIL LIBERTIES UNION OF TEXAS & RIVER CITY GENDER ALLIANCE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rule 28.2.1, I hereby certify as follows:

(1) This case is *Franciscan Alliance, Inc., et al., v. Alex Azar, II, Secretary, et al.*, No. 20-10093 (5th Cir.).

(2) The undersigned counsel of record certifies that the following listed 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

Intervenors do not believe that oral argument will significantly aid the decisional process in this case. The facts and legal arguments are adequately presented in the briefs and record, and this appeal involves the application of sufficiently well-established precedent to render oral argument unnecessary.

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STATEMENT OF THE ISSUES

Plaintiffs brought this lawsuit to challenge provisions of a final rule (the "2016 Rule") issued by the U.S. Department of Health and Human Services ("HHS") as violating the Administrative Procedures Act ("APA") and the Religious Freedom Restoration Act ("RFRA"). After ruling in favor of Plaintiffs, the district court, *inter alia*, vacated the challenged portions of the HHS regulation and declared that applying those provisions of the 2016 Rule to Plaintiffs would violate RFRA. Plaintiffs have appealed to this Court seeking the additional remedy of a permanent injunction. The issues presented for review are:

1. Whether RFRA replaces the traditional four-part test for permanent injunctions with a categorical presumption that an injunction is the "standard remedy" for RFRA violations.

2. Whether the district court abused its discretion in concluding that Plaintiffs are not entitled to a permanent injunction against enforcement of the 2016 Rule because the challenged portions of the 2016 Rule have been vacated and HHS has given no indication it would attempt to apply the 2016 Rule in violation of the court's order.

3. Whether Plaintiffs are entitled to a prophylactic injunction to "insulate" them, not only from enforcement of the 2016 Rule, but also from hypothetical future agency action based on a different administrative record.

INTRODUCTION

Plaintiffs-Appellants Franciscan Alliance and the Christian Medical & Dental Society (the "Plaintiffs") brought this lawsuit to challenge a final rule (the "2016 Rule") issued by the U.S. Department of Health and Human Services ("HHS") as violating the Administrative Procedures Act ("APA") and the Religious Freedom Restoration Act ("RFRA"). The district court granted summary judgment to Plaintiffs, vacated the challenged portions of the 2016 Rule, and declared that enforcing the 2016 Rule against Plaintiffs would violate RFRA.

The district court further determined that the extraordinary remedy of a permanent injunction was not necessary in light of the other relief already granted by the court. The court explained that a permanent injunction against the 2016 Rule would have no "'meaningful practical effect independent of its vacatur'" and that there was "no indication that, once the Rule is vacated, Defendants will defy the Court's order and attempt to apply the Rule against Plaintiffs." RE.067–68 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). The court noted that "should Defendants attempt to apply the vacated Rule—

in violation of the APA, RFRA, and this Court's Order—Plaintiffs may return to the Court for redress." RE.068.

Unsatisfied with their victory in the district court, Plaintiffs appeal to this Court with an extraordinary request. Plaintiffs insist that they are entitled to an injunction as the "standard remedy" for a RFRA violation. Plaintiffs assert that they are entitled to such an injunction without any showing that the government is likely to enforce the 2016 Rule against them. And Plaintiffs assert that they are entitled to an injunction against, not only the 2016 Rule challenged in this case, but also against hypothetical future agency actions with different administrative records.

Plaintiffs' request for a prophylactic injunction against hypothetical future agency action is squarely foreclosed by precedent of this Court and of the Supreme Court. *See Monsanto*, 561 U.S. at 165; *John Doe #1 v. Veneman*, 380 F.3d 807, 818–19 (5th Cir. 2004). And even if such injunctions were legally permissible, Plaintiffs would still not be entitled to one. The district court held that provisions of the 2016 Rule violated RFRA because the government effectively defaulted on that claim and failed to identify a compelling governmental interest or explain how those

provisions survived strict scrutiny as applied to Plaintiffs. That decision is binding and conclusive with respect to the 2016 Rule, but it does not foreclose a future administration from taking future administrative action supported by a different administrative record. *Cf. SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 200 (1947). If that hypothetical future agency action comes to pass, Plaintiffs will be able to seek appropriate relief at that time.

STATEMENT OF THE CASE

I. The 2016 Rule.

Section 1557 of the Patient Protection and Affordable Care Act ("ACA") (codified at 42 U.S.C. § 18116) prohibits a health care entity receiving federal funds from discriminating on the grounds protected by Title IX of the Education Amendments of 1972—the law prohibiting sex discrimination in education. 42 U.S.C. § 18116(a) (citing 20 U.S.C. 1681 et seq.).

On May 28, 2016, HHS published the 2016 Rule implementing Section 1557's prohibition on sex discrimination. *See* "Nondiscrimination in Health Programs and Activities," 81 Fed. Reg. 31,375.

The 2016 Rule stated in relevant part that Section 1557's prohibition against sex discrimination includes "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity." *Id.* at 31,467 (formerly codified at 45 C.F.R. § 92.4).

A. The 2016 Rule's Prohibition on Discrimination Based on Termination of Pregnancy.

In the preamble to the 2016 Rule, HHS explained that the inclusion of "termination of pregnancy" in the definition of discrimination on the basis of sex was "based upon existing regulation and previous Federal agencies' and courts' interpretations." *Id.* at 31,388. For example, the Sixth Circuit held in *Turic v. Holland Hospital, Inc.*, 85 F.3d 1211 (6th Cir. 1996), that an employer who fires an employee for considering having an abortion violates Title VII prohibition on sex discrimination. *Id.* at 1214. Although Plaintiffs have claimed that the "termination of pregnancy" provision "pressures" them to provide and pay for abortions, ROA.458, the text of that provision says no such thing.

B. The 2016 Rule's Prohibition on Discrimination Based on Gender Identity.

The 2016 Rule also included discrimination based on gender identity as part of the definition of discrimination on the basis of sex. As documented by HHS, transgender people have experienced and continue to experience multiple forms of discrimination in access to health care services, insurance coverage, and facilities. According to the preamble to the 2016 Rule, transgender individuals experience significant discrimination from entities providing health care even when seeking routine medical care for treatments unrelated to gender dysphoria. "For transgender individuals, a major barrier to receiving care is a concern over being refused medical treatment based on bias against them. In a 2010 report, 26.7% of transgender respondents reported that they were refused needed health care. A 2011 survey revealed that 25% of transgender individuals reported being subject to harassment in medical settings." 81 Fed. Reg. at 31,460.

The regulation's only specific references to transition-related health care were in the section formerly codified at 45 C.F.R. § 92.207(b) (2016), which has since been removed by HHS's most recent rulemaking as to Section 1557. That section initially provided that a covered entity

providing health insurance may not "[h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition," 81 Fed. Reg. at 31,472 (formerly codified at 45 C.F.R. § 92.207(b)(4)), or "[o]therwise deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual," *id.* (formerly codified at 45 C.F.R. § 92.207(b)(5)).

Moreover, although 45 C.F.R. § 92.207 prohibited covered entities from categorically excluding transition-related care from their insurance policies, the regulation did not "determine, or restrict a covered entity from determining, whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case." *Id.* (formerly codified at 45 C.F.R. § 92.207(d)). The preamble to the regulation explained that HHS specifically rejected commenters' requests for the regulations to mandate particular treatment guidelines or particular forms of care. In response to those requests, HHS stated that it "will not second-guess a covered entity's

neutral nondiscriminatory application of evidence-based criteria used to make medical necessity or coverage determinations." 81 Fed. Reg. at 31,436–37.

The regulations also prohibited covered entities from refusing to provide "existing services in a nondiscriminatory manner" solely based on the fact that the services are for the purpose of gender transition. *Id.* at 31,455. Thus, "[a] provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man [had] to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." *Id.* Critically, the regulations applied only to a covered entity—not to the individual doctors and health care workers employed at the covered entity. The regulations did not prohibit hospitals from accommodating doctors' religious objections to performing those procedures consistent with the law. *Id.* at 31,380, 31,466 (formerly codified at 45 C.F.R. § 92.2(b)(2)).

II. Plaintiffs Challenge the 2016 Rule.

On August 23, 2016, Plaintiffs brought this lawsuit against Secretary of HHS Sylvia Burwell and HHS ("the government"), claiming

that the 2016 Rule's definition of sex discrimination was contrary to law for including discrimination on the basis of gender identity and termination of pregnancy. ROA.38–115. Initially, two groups of plaintiffs challenged the 2016 Rule: one group of private health care organizations and one group of states. ROA.41–45. Only the group of private plaintiffs advance this appeal. Appellants' Br. 4–6.[1]

The American Civil Liberties Union of Texas and River City Gender Alliance ("Intervenors")—nonprofit organizations whose members include transgender people and women seeking reproductive healthcare—moved to intervene in the lawsuit on September 16, 2016. ROA.140–45.

A. The District Court Preliminarily Enjoins the Challenged Provisions of the 2016 Rule.

On October 21, 2016, Plaintiffs moved for a preliminary injunction against enforcement of those provisions of the 2016 Rule. ROA.436–39. As relevant here, Plaintiffs made three primary arguments for why the 2016 Rule violated the APA and RFRA. First, Plaintiffs argued that the 2016 Rule was contrary to law under the APA because it defined

[1] Throughout this brief, we refer to "Plaintiffs," although only one set of plaintiffs is before this court.

discrimination on the basis of sex to include discrimination on the basis of "termination of pregnancy" and "gender identity." ROA.463–69. Second, Plaintiffs argued that the 2016 Rule violated the APA because it did not incorporate Title IX's statutory exemptions for religious organizations. ROA.470–73. Third, Plaintiffs argued that the 2016 Rule's prohibition on discrimination on the basis of "termination of pregnancy" and "gender identity" pressured Plaintiffs to provide and pay for abortions and surgery to treat gender dysphoria, in violation of Plaintiffs' religious beliefs and thus RFRA. ROA.474–83. The remedy Plaintiffs requested was directed at enforcement of the challenged provisions of the 2016 Rule. Plaintiffs sought a nationwide injunction that "need only prevent [HHS] 'from enforcing the two aspects of the Rule that Plaintiffs challenge'"—namely its application to "gender identity" and "termination of pregnancy." ROA.1737–38; *see also* RE.113.

The Obama administration opposed the motion for preliminary injunction. With respect to Plaintiffs' RFRA claim, the government argued on a variety of jurisprudential grounds that Plaintiffs had not shown a likelihood that the 2016 Rule would be enforced against them because the 2016 Rule expressly disavowed any potential application

that would violate RFRA. ROA.1571–72. The government did not, however, present any merits arguments for why applying the 2016 Rule in the manner that Plaintiffs predicted would not violate RFRA. The government did not argue that the 2016 Rule served a compelling governmental interest, or that the Rule was the least restrictive means to fulfill that interest. RE.108–09.

The district court declined to rule on Intervenors' motion to intervene in time to allow Intervenors to participate in opposing Plaintiffs' motion for preliminary injunction. The court instead permitted Intervenors to file an amicus brief. ROA.1464–65. In their amicus brief, Intervenors argued that there is a compelling governmental interest in protecting patients from all forms of invidious discrimination—including sex discrimination—and in ensuring that federal funds are not used to subsidize discrimination. ROA.1649–50. Intervenors argued that none of Plaintiffs' suggested alternatives for providing health care services and coverage to which they object equally served the government's compelling interest with respect to preventing the unique harms of discrimination. ROA.1653–55.

On December 31, 2016, the district court ruled on Plaintiffs' motion. RE.069–114. The court agreed with Plaintiffs that the 2016 Rule was contrary to law because it defined discrimination on the basis of sex to include discrimination based on termination of pregnancy and gender identity. RE.103. The court also agreed that the 2016 Rule was contrary to law because it did not incorporate Title IX's statutory exemptions for religious organizations. RE.106.

With respect to the RFRA claim, the district court assumed for purposes of its decisions that there is a compelling governmental interest in "expand[ing] access to transition and abortion procedures." RE.109. The district court then concluded that HHS had less restrictive alternatives for advancing that interest because the government could pay for such procedures itself. RE.109–10. The district court stated that although Intervenors (participating as *amici*) had proffered other compelling governmental interests, the court would not consider those arguments because (according to the court) RFRA does not allow third-parties to satisfy the strict-scrutiny test on the government's behalf. RE.109 n.34.

Based on its legal conclusions, the court issued a nationwide preliminary injunction prohibiting HHS from enforcing the challenged provisions of the 2016 Rule's definition of sex discrimination, holding that the Rule violates the APA and likely violates RFRA. RE.070. The court enjoined "[o]nly the [2016] Rule's command th[e] Court finds is contrary to law and exceeds statutory authority—the prohibition of discrimination on the basis of 'gender identity' and 'termination of pregnancy.'" RE.114.

B. The District Court Grants Summary Judgment.

After President Trump's inauguration, the government informed the court that it no longer intended to defend the 2016 Rule and asked the court to stay the case while HHS undertook a new rulemaking based the district court's legal conclusions. ROA.2860. The district court granted that motion on July 10, 2017—still without having ruled on Intervenors' motion to intervene. ROA.2903–12.

On December 17, 2018, Plaintiffs and the government filed a joint motion to lift the stay, and Plaintiffs filed a motion for summary judgment. ROA.2974–79; ROA.3282–84. As relief, Plaintiffs asked the district court to "vacate the unlawful portions of the Rule, and convert the Court's preliminary injunction"—which only enjoined enforcement of

the two provisions—"into a final injunction." ROA.3352; *see also* ROA. 3304, 3351 ("[T]his Court should vacate the unlawful portions of the Rule and make its preliminary injunction permanent"). The government took the position that the 2016 Rule violated the APA, but contended that the court did not need to reach Plaintiffs' RFRA claim. RE.059–60. The government once again did not offer any argument to defend the 2016 Rule under RFRA.

Intervenors renewed their motion to intervene, which the court ultimately granted only at the time it ruled on the summary judgment motion. RE.056. In the proposed brief they tendered in opposition to summary judgment, Intervenors argued that it would be premature for the court to rule on the Plaintiffs' APA and RFRA claims without reviewing the administrative record, which the government had not yet compiled or filed with the court. ROA.4423–24. Intervenors continued to identify several compelling governmental interests to support the 2016 Rule and argued that they should be given the opportunity to demonstrate that the 2016 Rule is narrowly tailored by pointing to evidence in the administrative record once it is filed. ROA.4424 n.7.

On October 15, 2019, the district court partially granted Plaintiffs' motion for summary judgment, holding that there was no reason to disturb its analysis set out when granting the preliminary injunction that the 2016 Rule's definition of sex discrimination violates the APA and RFRA, insofar as the definition included discrimination on the basis of termination of pregnancy and gender identify. RE.060, 063–64.

With respect to the RFRA claim, the court held that Plaintiffs were entitled to summary judgment because the government "twice failed to demonstrate that applying the Rule to Private Plaintiffs . . . would achieve a compelling governmental interest through the least restrictive means." RE.063. The court once again declined to consider Intervenors' arguments that the 2016 Rule satisfied RFRA because the court believed that "Intervenors cannot carry Defendants' burden" on the government's behalf. RE.063.

Based on its holdings, the district court vacated the challenged portions of the 2016 Rule. RE.064, 66. The court declined to issue a permanent injunction on top of the vacatur because "vacatur redresses both the APA violation and the RFRA violation." RE.066. The court noted that "neither Plaintiffs nor similarly situated non-parties need injunctive

relief from the vacated Rule," as the government had been complying with the preliminary injunction and there was no indication that it would attempt to apply the Rule, in defiance of the court's order. RE.067–68. The court also noted that "should Defendants attempt to apply the vacated Rule—in violation of the APA, RFRA, and this Court's Order—Plaintiffs may return to the Court for redress." RE.068.

III. The Revised 1557 Regulations.

On June 19, 2020, HHS issued a new rule to implement Section 1557. "Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority," 85 Fed. Reg. 37,160 ("2020 Rule"). The new rule eliminated the language Plaintiffs had challenged as it struck the definition of discrimination "on the basis of sex" in its entirety, among other changes. Shortly after the new rule was finalized, the Supreme Court held in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that discrimination on the basis of transgender status *is* a form of discrimination based on sex.

Several lawsuits have been filed challenging HHS's new 2020 Rule as contrary to law, in light of *Bostock*. But vacating the 2020 Rule would not restore the provisions of the 2016 Rule vacated by the district court

in this case. Instead, vacating the 2020 Rule would merely reverse any *additional* changes that HHS made after the district court's decision. As two district courts have explained when issuing preliminary injunctions against the 2020 Rule, any decision vacating the 2020 Rule "would not suddenly make gender-identity discrimination illegal under Section 1557—or change how the regulatory text addresses gender-identity discrimination—because the relevant provision of the 2016 Rule [is] no longer in effect" based on the decision by the lower court here. *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 20-CV-1630, 2020 WL 5232076 (D.D.C. Sept. 2, 2020); *accord Walker v. Azar*, No. 20-CV-2834, 2020 WL 4749859, at *7 (E.D.N.Y. Aug. 17, 2020) (acknowledging that enjoining or vacating the 2020 Rule "cannot revive the 'gender identity' portion of the 2016 definition vacated by the district court in *Franciscan Alliance*," because they "ha[ve] no power to revive a rule vacated by another district court").

SUMMARY OF THE ARGUMENT

The district court already granted Plaintiffs complete relief by vacating the challenged provisions of the 2016 Rule, and Plaintiffs have not demonstrated—either to the district court or before this Court—that

they are entitled to the additional extraordinary remedy of a permanent injunction. Although they prevailed in their RFRA challenge to provisions of the 2016 Rule, that does not automatically mean that Plaintiffs have satisfied the requirements for a court to grant permanent injunctive relief. Time and again, the Supreme Court has rejected arguments that a permanent injunction can be considered the "standard remedy" for statutory claims, absent explicit direction from Congress. RFRA contains no such directive, meaning the district court still had to consider the traditional four factors before granting a permanent injunction: irreparable injury to Plaintiffs, whether there are alternative remedies available, balance of hardships, and the public interest.

Here, Plaintiffs cannot justify a permanent injunction under the four-factor test, because they cannot show that they are likely to be irreparably injured by the 2016 Rule. The district court already vacated the challenged provisions of the 2016 Rule, and issued a declaratory judgment that those provisions violated RFRA as applied to Plaintiffs. In light of the court's finding that there is no indication that the government would violate that order, Plaintiffs cannot now argue that they are likely to suffer irreparable harm due to the 2016 Rule.

Recent developments addressing the interpretation of Section 1557 do not change this conclusion. Neither the 2020 Rule, nor litigation challenging the new rule, puts Plaintiffs at risk of enforcement under the challenged terms of the 2016 Rule. Even where changes under the 2020 Rule have been preliminarily enjoined, the courts have been clear that they cannot reverse the district court's decision here. The district court's holding remains in effect, and Plaintiffs are wrong to suggest otherwise.

Lacking any immediate harm from the 2016 Rule, Plaintiffs instead argue that they are entitled to relief against entirely hypothetical future agency rulemaking to implement Section 1557, but they are not entitled to an injunction on those grounds. First, a preemptive injunction against hypothetical future agency action is not a proper use of the courts' equitable powers. "Until such time as the agency decides whether and how to exercise its regulatory authority . . . the courts have no cause to intervene." *Monsanto*, 561 U.S. at 164. Second, the district court merely held that the government had failed to demonstrate that the 2016 Rule was the least restrictive means to further a compelling governmental interest. The government did not try to defend the rule from a RFRA challenge at the summary judgment stage, and the court did not hold

that a new regulation, with a new administrative record, could never withstand a RFRA challenge. That limited ruling does not provide the basis for a permanent injunction against hypothetical future rulemaking, and would exceed the scope of Plaintiffs' challenge. Plaintiffs will have a full and fair opportunity to challenge future agency action once it takes place.

STANDARD OF REVIEW

"'The 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.'" *Hill v. Washburne*, 953 F.3d 296, 303 (5th Cir. 2020) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "A district court abuses its discretion if it (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." *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014) (cleaned up).

ARGUMENT

I. Requests for Injunctive Relief in RFRA Cases Are Governed By the "Traditional Four-Factor Test," Not a *Per Se* Rule.

"According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay*, 547 U.S. at 391. "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*.

Over and over again, the Supreme Court has emphasized that the four-factor test has deep roots in longstanding principles of equity, and "a major departure from the long tradition of equity practice should not be lightly implied." *Id*. The four-factor test "reflect[s] a practice with a background of several hundred years of history, a practice of which Congress is assuredly well aware." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (cleaned up). "Of course, Congress may intervene

and guide or control the exercise of the courts' discretion, but [courts should] not lightly assume that Congress has intended to depart from established principles." *Id.*

Plaintiffs ask the Court to effectively displace this traditional "four-factor test" with a categorical presumption that an injunction is the "standard remedy for RFRA claims." Appellants' Br. 36–37. That argument conflicts with decades of consistent Supreme Court precedent rejecting attempts to replace the traditional "four-factor test" for injunctive relief with categorical presumptions that place a "thumb on the scales" for particular types of claims. *See, e.g.*, *Monsanto*, 561 U.S. at 157; *eBay*, 547 U.S. at 391; *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544 (1987); *Weinberger*, 456 U.S. at 313.

For example, in *eBay,* the Supreme Court rejected the Federal Circuit's attempt to create "a 'general rule,' unique to patent disputes, 'that a permanent injunction will issue once infringement and validity have been adjudged.'" 547 U.S. at 393–94 (quoting *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005)). Under the Federal Circuit's rule, injunctions could be denied "only in the 'unusual' case, under 'exceptional circumstances' and 'in rare instances to protect the

public interest.'" *Id.* at 394 (quoting *MercExchange*, 401 F.3d at 1338–39) (alterations incorporated). The Supreme Court rejected that categorical rule, explaining that "[n]othing in the Patent Act indicates that Congress intended such a departure" from traditional equitable principles. *Id.* at 391–92. "To the contrary, the Patent Act expressly provides that injunctions 'may' issue 'in accordance with the principles of equity.'" *Id.* at 392 (quoting 35 U.S.C. § 283). The Court thus reaffirmed that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards." *Id.* at 394.

The Supreme Court in *Monsanto* rejected a similar presumption in favor of injunctive relief for violations of the National Environmental Policy Act of 1969 ("NEPA"). The Court criticized the Ninth Circuit for "invert[ing] the proper mode of analysis" by "presum[ing] that an injunction is the proper remedy for a NEPA violation except in unusual circumstances." *Monsanto*, 561 U.S. at 157. The Court emphasized that when applying the traditional four-factor test for injunctive relief, "[n]o

such thumb on the scales is warranted." *Id.* "It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above." *Id.* at 158.

The Supreme Court's reasoning in *eBay* and *Monsanto* applies with equal force to claims for injunctive relief under RFRA. As with the Patent Act, nothing in the text of RFRA indicates that Congress intended to depart from longstanding principles of equity. The text of RFRA simply states that a RFRA claimant may "obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Without any clear textual command to the contrary, there is no basis for courts to infer that Congress intended to displace the same four-factor test that applies to all other claims. To the extent that Plaintiffs argue that there is a presumption in favor of granting injunctions for RFRA violations, "[n]o such thumb on the scales is warranted." *Monsanto*, 561 U.S. at 157.[2]

[2] Plaintiffs cite to Judge McConnell's concurring opinion in *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1025–28 (10th Cir. 2004) (en banc) (McConnell, J., concurring), for the proposition that when Congress enacted RFRA it "struck the balance" in favor of

II. Because Plaintiffs Cannot Show a Likelihood of Irreparable Harm Based on the 2016 Rule, No Additional Injunctive Relief Is Necessary or Appropriate.

To justify a permanent injunction under the four-factor test, Plaintiffs must show that there is a "real and immediate threat of future or continuing injury" if an injunction is not issued. *Aransas Project*, 775 F.3d at 663. No one disputes that a violation of rights protected by RFRA would constitute irreparable harm. But the mere "possibility" of injury is not enough; Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original). "If a less drastic remedy (such as partial or complete vacatur of [an agency action]) [i]s sufficient to redress [plaintiff's] injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted." *Monsanto*, 561 U.S.

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injunctive relief. But Judge McConnell said no such thing. Judge McConnell specifically agreed that RFRA does not "implicitly modif[y] the standards that apply to preliminary injunctions" and agreed that "the normal standards remain in place unless Congress clearly manifests an intent to modify them." *Id.* at 1025. Judge McConnell made a more limited argument that the congressional policy embodied in RFRA is relevant when a court analyzes whether the balance of hardships and public interest favor an injunction. *Id.*

at 165–66. *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192–93 (2000).

Here, the district court granted Plaintiffs two separate forms of relief. The district court vacated the 2016 Rule's prohibition on discrimination based on termination of pregnancy and gender identity, which were the only provisions Plaintiffs challenged in this litigation. RE.043. And the district court issued a declaratory judgment holding that those provisions of the 2016 Rule violated RFRA as applied to Plaintiffs. RE.064.

In light of its decision to vacate the challenged portions of the Rule, the district court held that a permanent injunction was unnecessary to protect Plaintiffs from further irreparable harm. RE.067–68. As the district court found, "[t]here is currently no indication that, once the Rule is vacated, Defendants will defy the Court's order and attempt to apply the Rule against Plaintiffs." RE.067. The Court noted that "should Defendants attempt to apply the vacated Rule—in violation of the APA, RFRA, and this Court's Order—Plaintiffs may return to the Court for redress." RE.068. Accordingly, the district court properly followed the Court's guidance in *Monsanto* and adopted the "less drastic remedy,"

Monsanto, 561 U.S. at 165, observing that "vacatur redresses both the APA violation and the RFRA violation." RE.066.

Despite Plaintiffs' assertions to the contrary, the recent litigation over the 2020 Rule does not undercut the district court's analysis or create a likelihood that the government will apply those provisions of the 2016 Rule to Plaintiffs in violation of the court's RFRA declaration.

Vacating the 2020 Rule would not restore the provisions of the 2016 Rule vacated by the district court in this case. Instead, vacating the 2020 Rule would merely reverse any *additional* changes that HHS made after the district court's decision. Thus, as other courts have explicitly recognized, any decision vacating the 2020 Rule "would not suddenly make gender-identity discrimination illegal under Section 1557—or change how the regulatory text addresses gender-identity discrimination—because the relevant provision of the 2016 Rule [is] no longer in effect" based on the decision below. *Whitman-Walker Clinic, Inc.*, at *13 (D.D.C. Sept. 2, 2020); *accord Walker v. Azar*, No. 20-CV-2834, 2020 WL 4749859, at *7 (E.D.N.Y. Aug. 17, 2020) (acknowledging that enjoining or vacating the 2020 Rule "cannot revive the 'gender identity' portion of the 2016 definition vacated by the district court in

Franciscan Alliance," because they "ha[ve] no power to revive a rule vacated by another district court").

Whether or not the 2020 Rule is vacated, HHS remains bound by that holding, and the court found that there is no risk that HHS will attempt to apply the 2016 Rule to Plaintiffs in the future. RE.067. Should HHS attempt to enforce the vacated provisions against Plaintiffs, the district court has stated Plaintiffs would be able to seek additional relief at that time. RE.068.

III. Plaintiffs Are Not Entitled to a Prophylactic Injunction Against Hypothetical Future Agency Action Implementing Section 1557.

Having obtained relief for its RFRA claims, Plaintiffs insist they are entitled to a permanent injunction against "not only the 2016 Rule but also current and future efforts to impose on Appellants the same, RFRA-violating burden." Appellants' Br. 23. But the district court has no power to issue an injunction against hypothetical agency action beyond the provisions of the 2016 Rule challenged in this case. And even if such power existed, nothing in the district court's decision forecloses HHS from attempting to satisfy RFRA by taking new agency action with a new administrative record. RE.067.

A. Plaintiffs Cannot Establish a Likelihood of Irreparable Harm Based on Hypothetical Future Administrative Action.

Even if a district court were inclined to issue an injunction against hypothetical future agency action, it would be an abuse of discretion to do so. Under Federal Rule of Civil Procedure 65, federal courts do not have authority to issue broad prophylactic injunctions that extend beyond a plaintiff's alleged injuries. "When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'" *ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). A district court "abuses its discretion if it issues an injunction that is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *Id.* at 155 (cleaned up).

For example, in *Monsanto,* the Supreme Court vacated a district court's injunction that purported to bar an agency from taking hypothetical future regulatory action. There, the plaintiffs had sued under the APA to challenge a particular agency order to deregulate genetically modified alfalfa, and the district court held that the order was

procedurally defective in violation of NEPA because the agency had not prepared an adequate environmental assessment. *Monsanto*, 561 U.S. at 159. As a remedy, the district court issued an injunction that not only prohibited the agency from enforcing the particular order challenged in the case, but also enjoined the agency from taking any other agency action to deregulate genetically modified alfalfa until an adequate environmental assessment was conducted. The Supreme Court held that the district court abused its discretion in enjoining hypothetical future agency action that had not yet commenced. The Court explained that "a permanent injunction is not now needed to guard against any present or imminent risk of likely irreparable harm" because, if the agency takes new agency action "that arguably runs afoul of NEPA, [plaintiffs] may file a new suit challenging such action and seeking appropriate preliminary relief" at that time. *Id*. at 162. "Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene." *Id*. at 164.

Likewise, here, the district court's holdings were limited to the 2016 Rule's violations. The court could not review potential future agency action that was not before it, and its findings were limited to the flaws it

identified in the 2016 Rule—the provisions challenged by Plaintiffs. By contrast, a permanent injunction against future agency action would be disconnected from the violation established, and would not be narrowly tailored to remedy Plaintiffs' claims against the 2016 Rule. *ODonnell*, 892 F.3d at 155, 163.

This Court confronted and rejected a similar overbroad injunction to the one Plaintiffs seek in *John Doe #1 v. Veneman*. The plaintiffs in *Doe #1* brought an action under the APA to prevent an agency from releasing personal information about which farmers applied to the agency for permission to use "livestock protection collars" with pesticides. 380 F.3d at 811. After the district court ruled in favor of the plaintiffs, the court issued an injunction that also prohibited the agency more broadly from releasing personal information contained in other agency records regarding "the location where restricted-use pesticides have been, or will be, applied." *Id.* at 819. This court held that the injunction was overbroad because the underlying "complaint [did] not challenge an agency decision to release the locations where restricted-use pesticides have been, or will be, applied." *Id.* "Without an agency decision to release personal information in 'records regarding the location where restricted

use pesticides have been, or will be, applied,' an injunction enjoining such a release constitutes an impermissible advisory opinion." *Id*.

Plaintiffs assert that they are entitled to a prophylactic injunction against hypothetical future agency action because "[t]he practical interest [Plaintiffs] 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." Appellants' Br. 24 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661–63 (1993)). But *Northeast Florida* held no such thing. The plaintiffs in *Northeast Florida* challenged a Jacksonville ordinance governing affirmative action in city contracting. After the Supreme Court granted certiorari to review the case, Jacksonville repealed its ordinance and passed a new one with slightly different provisions. The Supreme Court held that the new affirmative-action ordinance did not moot the case as the ordinance continued to injure plaintiffs in the same fundamental way. *Northeast Florida*, 508 U.S. at 662. The plaintiffs in *Northeast Florida*, in contrast to those here, were not challenging a hypothetical new ordinance or seeking an

advisory opinion; they were challenging a new ordinance that had already been adopted.

Plaintiffs' reliance on *Northeast Florida* confuses the showing necessary to defeat mootness with the showing necessary to establish a likelihood of irreparable harm. Even when the possibility of future governmental action is sufficient to present a live case and controversy sufficient to defeat mootness, "the likelihood of further violations" may still be "sufficiently remote to make injunctive relief unnecessary." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982); *accord Friends of the Earth*, 528 U.S. at 192–93 (explaining that case was not moot but the proper remedy was a declaratory judgment instead of an injunction). To justify the extraordinary remedy of an injunction, Plaintiffs must show that irreparable harm is "likely," not merely possible. And as described above, *supra* Part II, Plaintiffs have failed to make that showing.

B. The District Court's RFRA Holding Does Not Preclude HHS from Attempting to Satisfy RFRA With New Agency Action Supported by a Different Administrative Record.

In declaring that the 2016 Rule violated RFRA as applied to Plaintiffs, the district court did not hold that RFRA categorically

forecloses the government from requiring covered entities to provide or pay for transition-related care on a nondiscriminatory basis, or prohibiting discrimination based on termination of pregnancy. And the district court did not hold that HHS lacks a compelling governmental interest in such policies. Instead, the district court assumed that the challenged provisions of the 2016 Rule *were* supported by a compelling governmental interest and merely held that HHS failed to demonstrate that the particular provisions challenged in this case were the least restrictive means of advancing that interest. RE.062–64. As discussed below, nothing in the district court's decision supports a permanent injunction barring HHS in perpetuity from attempting to enforce a hypothetical *new* regulation based on a *different* administrative record.

First, in support of new agency action, HHS may choose to rely upon a different compelling interest than the one hypothesized by the district court in this case. Because the government failed to identify any interest in its briefing before the district court, the district court assumed for purposes of its decisions that there is a compelling governmental interest in "expand[ing] access to transition and abortion procedures." RE.109. The district court then concluded that the government had less

restrictive alternatives for advancing that interest because the government could pay for such procedures itself. RE.109–10.[3]

In reaching that conclusion, the district court did not evaluate any evidence presented by the government, as the government declined to offer any, or examine the underlying administrative record, which HHS never even filed with the Court. RE.060–61 n.6, 63. The district court also denied Intervenors the opportunity to defend the 2016 Rule based on the administrative record because it believed that RFRA does not permit intervenors or third parties to stand in the shoes of the government for purposes of demonstrating that governmental action satisfies strict scrutiny. RE.063. The district court's ruling that the government failed to provide evidence in support of the provisions of the 2016 Rule challenged in this case thus does not provide a legitimate basis to preclude the government from taking new agency action and creating a

[3] Plaintiffs improperly attempt to improve upon the district court's decision by making a variety of inflammatory and inaccurate assertions regarding the efficacy and safety of transition-related care. Appellants' Br. 29–32. But the district court did not issue a ruling on the medical necessity of transition-related care, and that fact-intensive question is not before this Court on appeal.

different administrative record capable of making that showing—and defend that new agency action in court.

Moreover, there are other compelling governmental interests that the district court declined to consider, and that the government may choose to rely upon in support of future agency action. Intervenors argued below that HHS has a compelling interest, not only in expanding access to care in the abstract, but also in "eradicating all forms of invidious discrimination," "making sure that federal funds are not used to subsidize discrimination," and "making sure people are able to access healthcare coverage and services on a nondiscriminatory basis." RE.109 n.34. Intervenors further argued that the "less restrictive means" identified by the district court did not respond to the unique dignitary and economic harms of discrimination. RE.063. But the district court expressly declined to consider whether the definitional provisions of the 2016 Rule were narrowly tailored to serve that interest because it was not raised by the government in its own briefs. RE.063.

As a result, nothing in the district court's opinion forecloses HHS from attempting to satisfy RFRA in support of future agency action by relying upon the government's compelling interest in protecting the

public from discrimination in the provision of government-subsidized healthcare. *Cf. SEC v. Chenery Corp. (Chenery II),* 332 U.S. 194, 200 (1947) ("We held no more and no less [in *Chenery I*] than that the Commission's first order was unsupportable for the reasons supplied by that agency."). Plaintiffs will have a full and fair opportunity to challenge any future agency action if and when it actually takes place.[4]

[4] Plaintiffs will also have the opportunity at that time to raise a defense based on the doctrine of mutual issue preclusion, which prevents the government from relitigating the same issue already litigated against same party in an earlier case. *See United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169 (1984); *United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996). Issue preclusion prevents the same party from relitigating an issue when "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (en banc). For all the reasons explained above, the district court's decision does not foreclose the government from attempting to satisfy strict scrutiny on a new administrative record. But to the extent that Plaintiffs disagree with Intervenors about the scope of the district court's opinion, Plaintiffs will have the opportunity to argue for issue preclusion at the appropriate time.

CONCLUSION

This Court should affirm the district court's denial of Plaintiffs' request for a permanent injunction.

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 U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify 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 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,235 words, according to the count of Microsoft Word, and excluding the parts exempted by Fed. R. App. P. 32(f).

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