No. 20-10093

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

v.

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

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

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

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INTRODUCTION

If the briefs in this appeal feel like ships passing in the night, it is because the parties are briefing two very different lawsuits.

In the lawsuit Appellants actually brought, they sought to stop HHS from imposing massive financial penalties on them unless they began performing and paying for gender-transition procedures and abortions in violation of their religious beliefs and medical judgment. For Appellants, it didn't matter *what regulatory mechanism* HHS used to impose these penalties. What mattered was that the penalties *stop*, and that Appellants be free to practice medicine as they have for decades. Thus, whether HHS penalizes them under the 2016 Rule, under the 2020 Rule as interpreted post-*Bostock*, or under Section 1557 directly, Appellants suffer the same harm. And both here and at the district court, they have sought the same relief—an order telling HHS to stop.

The response briefs address a different lawsuit. According to HHS and ACLU, Appellants brought, and could have brought, only a narrow challenge to one particular iteration of a rule published in the Federal Register—the 2016 Rule. Once that rule was vacated, the case was over, even if HHS used other avenues to punish Appellants in the exact same way. So if HHS penalizes Appellants under the 2016 Rule as revived by recent litigation, Appellants need to file a new lawsuit challenging the revived portions of the 2016 Rule. If HHS penalizes Appellants under the 2020

Rule as applied under *Bostock*, Appellants need to file a new lawsuit challenging that, too. And if HHS penalizes Appellants under Section 1557 directly, without relying on any particular rule, Appellants need to file a new lawsuit challenging that. In short, this lawsuit was just the first round in a long game of whack-a-mole, where Appellants must file a new lawsuit every time HHS uses a new method to impose the same RFRA-violating penalties.

Needless to say, RFRA is not an invitation to play whack-a-mole.

The district court correctly held that forcing Appellants to perform or pay for gender transitions and abortions violated RFRA—a ruling neither HHS nor ACLU has appealed. The court also correctly vacated in part the 2016 Rule. The only question is whether the court should have also enjoined HHS from forcing Appellants to perform or pay for gender transitions and abortions.

The district court denied an injunction on the ground that an injunction would have no practical effect. But that legal conclusion was mistaken. Although vacatur of the 2016 Rule temporarily deprived HHS of *one method* it could use to force Appellants to perform and pay for gender transitions and abortions, it left HHS free to impose the same RFRA-violating penalties through *others*—including by applying the portions of the 2016 Rule revived by recent litigation, by applying the 2020 Rule in light of *Bostock*, and by applying Section 1557 directly. HHS doesn't dispute that it *currently* has authority to impose the same RFRA-violating

penalties by these methods. Indeed, the incoming Administration has made clear that it intends to do just that, and ACLU eagerly welcomes that result. Thus, an injunction would have the practical effect of stopping HHS from imposing the very penalties Appellants filed this lawsuit to stop.

The response briefs' counterarguments are meritless. First, HHS claims the appeal is "moot" because the 2016 Rule has been vacated and HHS has promulgated the 2020 Rule. But this argument fails because other courts have already revived the RFRA-violating portions of the 2016 Rule. As one court has put it: The 2016 Rule's prohibition on "gender identity" discrimination "*remain*[*s*] *in effect*." *Walker v. Azar*, No. 20-cv-2834, 2020 WL 4749859, at *10 (E.D.N.Y. Aug. 17, 2020) (emphasis added). Moreover, after *Bostock*, even the 2020 Rule itself accomplishes the same RFRA-violating result. Thus, this case is as live as the day it was filed.

Alternatively, HHS claims Appellants are seeking relief "they never sought in district court." HHS Br.10. But this is demonstrably false. Appellants seek the same injunction they requested in the district court *verbatim*.

Lastly, the response briefs claim the district court had "discretion" to find that an injunction would have no practical effect. But the district court's ruling on that point was a legal conclusion, and it was wrong—an

injunction would have the practical effect of stopping HHS from imposing the same RFRA-violating burden by other means.

Ultimately, the remedial issue here is not difficult, and it is indistinguishable from the 20 decisions entering nearly identical RFRA injunctions against the Obama-era contraceptive mandate. There, as here, HHS attempted to force religious organizations to provide insurance coverage for objectionable procedures. There, as here, the original rule was held to violate RFRA. There, as here, the Trump Administration replaced the old rule with a new one. And there, as here, the new rule was enjoined by multiple courts. Far from holding the original cases moot, these courts uniformly entered injunctions just like the one Appellants request here—barring HHS from construing the underlying statute to force plaintiffs to violate their religious beliefs. The same relief is required here.

ARGUMENT

I. Appellants are entitled to an injunction.

Having prevailed on their RFRA claim, Appellants are "entitled to an exemption" from HHS's religion-burdening conduct. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014). Here, that means an injunction prohibiting HHS from applying Section 1557 to force them to perform or insure gender transitions or abortions. The district court erred in concluding otherwise, and neither response brief rehabilitates it.

A. The appeal is live.

HHS first argues this appeal is "moot." HHS Br.11-19. HHS is wrong; this case remains as live as the day it was filed.

Appellants filed this suit asserting that HHS's actions in interpreting Section 1557 to force them to violate their beliefs were unlawful and asking the district court to order HHS to stop. The district court agreed that HHS's actions were unlawful—but didn't order it to stop. And while the district court vacated one particular *means* by which HHS initially attempted to force Appellants to violate their beliefs—provisions of the 2016 Rule prohibiting, *e.g.*, "gender identity" discrimination, RE.043—other courts have since held that those very provisions "remain in effect." *Walker*, 2020 WL 4749859, at *10. "On th[is] basis alone," neither the district court's partial vacatur nor HHS's "partial voluntary cessation" in issuing the 2020 Rule suffices to "moot this case." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020).

But this isn't all that demonstrates justiciability. For one thing, although HHS attempted to incorporate a religious exemption in the 2020 Rule, other courts have enjoined that provision. *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-cv-1630, 2020 WL 5232076, at *45 (D.D.C. Sept. 2, 2020). Moreover, given *Bostock*, even the 2020 Rule itself may require covered entities to perform gender-transition procedures. Br.43-44; *see Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-63 (1993) ("new ordinance" that "disadvantages

[plaintiffs] in the same fundamental way" doesn't render case moot). Meanwhile, nowhere in its response does HHS even "represent[]" that it doesn't intend to apply Section 1557 to require Appellants to perform such procedures going forward, much less submit "sworn testimony" to that effect. *Speech First*, 979 F.3d at 328.

To the contrary, the incoming Administration has pledged the opposite, stating that it intends to "[g]uarantee the Affordable Care Act's" supposed "nondiscrimination protections for the LGBTQ+ community" and "reverse" "religious exemptions" for "medical providers" like Appellants.[1] So "[t]he risk that [has] underpinned" this case from the beginning—*i.e.*, "the Damocles' sword" of a requirement to cover gender transitions and abortions under Section 1557—continues unabated. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 164 n.5 (2016).

For all these reasons, this appeal isn't moot. There remains at least some "effectual relief" available to Appellants if they prevail—namely, the injunction they seek from this Court. *Knox v. SEIU*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted). In fact, now that other courts have purported to undo the only relief Appellants obtained below, Appellants retain not just a residual interest in this litigation but "the same stake … they had at the outset." *Campbell-Ewald*, 577 U.S. at 163.

[1] *The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, JoeBiden.com, https://perma.cc/P6L7-XB6E.

None of HHS's arguments are to the contrary. HHS's first says that the "only argument" Plaintiffs make on appeal is that they should get an injunction against the vacated or repealed "provisions of the 2016 Rule," which "can no longer be granted." HHS Br.13. But this isn't the "only argument" Appellants make on appeal; indeed, it isn't an argument Appellants make *at all*. Appellants don't seek further relief against "provisions of the 2016 Rule"; they seek relief against HHS's applying "*Section 1557* to require" them to violate their beliefs—as their brief explained repeatedly. Br.22 (emphasis added); *see also id.* 25, 54. HHS's collection of cases refusing to consider additional relief against particular, already-vacated or already-repealed rules is thus not germane to this appeal. *See* HHS Br.12-14.

Turning to the relief Appellants actually *do* seek on appeal, HHS argues first that Appellants "never sought" it in the district court. HHS Br.14. But HHS is incorrect; Appellants sought—verbatim—the same injunction below that they seek now: one prohibiting HHS from "[c]onstruing Section 1557 to require [Appellants] to provide medical services or insurance coverage related to 'gender identity' or 'termination of pregnancy' in violation of their religious beliefs." RE.117-18; *see* ROA.1892. HHS's reliance on *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983)—where the plaintiff did not seek the injunctive relief later identified as still available, *id.* at 71—is therefore misplaced.

Switching justiciability grounds, HHS next argues that Appellants lack "standing" to seek the injunction at issue in this appeal. HHS Br.15-16. But in assessing standing, "courts look exclusively to the time of filing." *Texas v. EEOC*, 933 F.3d 433, 448 (5th Cir. 2019). And there's no doubt that in 2016 Appellants had standing to seek this injunction.

At that time, Appellants' "intended" religious exercise—refusing to perform or insure transitions and abortions—was, in light of the 2016 Rule, at least "'arguably proscribed' by" Section 1557. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161-67 (2014). And Appellants—as recipients of federal healthcare funding—were "covered by the allegedly" illegal requirement. *Speech First*, 979 F.3d at 336. They therefore had "standing to sue." *Id.*; *see also Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) ("[i]f a plaintiff is an object of a regulation 'there is ordinarily little question that'" he has standing (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992)); ROA.1718-19 (recounting vigorous enforcement of the 2016 Rule, including multiple complaints against religious hospitals and HHS investigation of Appellants' co-plaintiff).

And Appellants still have standing now. First, although the district court has vacated the 2016 Rule in part, other courts have reinstated the very provisions of that Rule that inflicted Appellants' injury in the first place, and have likewise enjoined HHS's attempt to recognize a religious exemption. *Walker*, 2020 WL 4749859, at *10; *Whitman-Walker*, 2020

WL 5232076, at *45. Second, in light of *Bostock*, even the understanding of Section 1557 HHS attempted to adopt in the 2020 Rule at least "arguably" would require Appellants to violate their beliefs. *Driehaus*, 573 U.S. at 162. And third, the incoming Administration has (again) explicitly threatened to undo "religious exemptions" in order to enforce what it regards as LGBTQ+ protections under the ACA against "medical providers" like Appellants.[2]

As of today, then, Appellants' religious conduct is still "target[ed as] 'unlawful'" under HHS's interpretation of Section 1557. *Texas*, 933 F.3d at 448. That "continuing, present adverse effect[]" of HHS's actions suffices for standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see Speech First*, 979 F.3d at 331, 335-36 (finding standing from the "chilling effect" on "the exercise of First Amendment rights" by those "covered by the allegedly unconstitutional policies"; distinguishing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)).

HHS's primary response to these points is to obfuscate. First, HHS suggests that the *Walker* and *Whitman-Walker* injunctions are in fact consistent with the relief Appellants obtained here, because those courts disclaimed the "power to revive" already-vacated provisions. HHS Br.16-17 (quoting *Walker*, 2020 WL 4749859, at *7). But whatever those courts *said*, there's no mistaking what they purported to *do*.

[2] *Supra* n.1.

In *Walker*, the court expressly ruled that the 2016 Rule's definition of "sex" to include "gender identity" "*remain*[*s*] *in effect*." 2020 WL 4749859, at *10 (emphasis added). Meanwhile, the district court here "**VACATE**[**D**]" the 2016 Rule "insofar as the Rule defines '*On the basis of sex*' to include gender identity and termination of pregnancy." RE.043. There is simply no way to reconcile these results—which is why neither HHS nor ACLU even acknowledge *Walker*'s controlling language.

Whitman-Walker is to similar effect. There—departing from *Walker*—the court declined to reinstate the provision of the 2016 Rule defining "sex" to include "gender identity." 2020 WL 5232076, at 13-14. But *Whitman-Walker* did reinstate the provision of the 2016 Rule defining "sex" discrimination to include "sex stereotyping." *Id.* at *45. And it did so precisely *because* it determined that reinstating the "sex stereotyping" provision would have substantially the same effect as reinstating the "gender identity" provision itself. *Id*. at *13-14, 23-27. Thus, under *Walker* and *Whitman-Walker* alike, provisions of the 2016 Rule prohibiting "gender identity" discrimination—and therefore, per HHS, requiring Appellants to perform gender transitions, Br.9-10—persist.

Whitman-Walker also forecloses HHS's argument that this appeal is moot because the 2020 Rule "adopted the religious exemption that plaintiffs wanted." HHS Br.24. For one thing, the 2020 Rule's religious exemption is *not* the one "plaintiffs wanted." Title IX, as incorporated *mutatis*

mutandis into Section 1557, requires an exemption for "religious organizations," ROA.470-72, while the 2020 Rule's exemption appears to cover only such organizations' "educational operation[s]," leaving all of Appellants' non-educational operations fully exposed. 85 Fed. Reg. 37,160, 37,207-08 (June 19, 2020). But in any event, even this exemption has now been enjoined, and thus currently protects nothing. *Whitman-Walker*, 2020 WL 5232076, at *27-29, 45.

The upshot of *Walker* and *Whitman-Walker*, then, is this: provisions of the 2016 Rule prohibiting "gender identity" discrimination (and thus penalizing Appellants) remain in effect, and even the inadequate religious exemption (which leaves Appellants exposed) is inoperative. This dispute thus remains as live as the day Appellants filed suit.

HHS's arguments about *Bostock* only confirm as much. HHS offers little resistance to Appellants' point that, in light of *Bostock*, the 2020 Rule itself threatens covered entities with liability for "gender identity" discrimination, just like the 2016 Rule does. *See* Br.43-44.

And unsurprisingly so, since in litigation over the 2020 Rule HHS has all but admitted it. As HHS recently explained, efforts to apply Section 1557 to "gender identity" and "termination of pregnancy" discrimination are in fact "*more* likely to bear fruit under the 2020 Rule than under the 2016 Rule." MTD Memo. at 14, *BAGLY v. HHS*, No. 1:20-cv-11297-PS (D. Mass. Oct. 14, 2020), ECF No. 22 (emphasis added). Indeed, HHS has already persuaded another court to dismiss a state's challenge to the

2020 Rule for lack of standing, on the ground that the 2020 Rule may "incorporate protection for gender identity … discrimination" just like the 2016 Rule. *Washington v. HHS*, No. C20-1105-JLR, 2020 WL 5095467, at *8 (W.D. Wash. Aug. 28, 2020).

These concessions are fatal to HHS's justiciability arguments here. The Supreme Court has squarely held that the government cannot moot a case by repealing one law and replacing it with another that "disadvantages" the plaintiffs "in the same fundamental way." *Jacksonville*, 508 U.S. at 662; Br. 50-51. HHS here has concededly done just that.

Bostock or no, however, it makes no sense to suggest that a partial vacatur and repeal suffice to moot a case when both the vacatur and the repeal have already been undone by other courts. Even a defendant's "voluntary cessation" of challenged conduct moots a case only when it is "absolutely clear" the conduct won't recur, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982); here, the challenged conduct has not ceased, voluntarily or otherwise. *Cf.* HHS Br.18-19. Thus, this is an "*a fortiori*" case. *Jacksonville*, 508 U.S. at 662.

B. An injunction would have a meaningful practical effect.

Given that the case remains live, Appellants are entitled to an injunction barring HHS from applying Section 1557 to require them to perform or insure gender transitions and abortions in violation of their beliefs. Appellants meet the traditional injunction factors. Br.26-37. And the district court's sole reason for denying an injunction—that, in light of its

vacatur, an injunction would have no "meaningful practical effect"—is incorrect. RE.067-068 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)); *see* Br.38-54. Although the vacatur eliminated certain portions of the 2016 Rule as required by the APA, an injunction would protect Appellants against HHS's ongoing efforts to apply Section 1557 in a way that substantially burdens Appellants' religious exercise in violation of RFRA.

The response briefs only confirm this meaningful practical difference. HHS identifies nothing that would stop it—*today*—from penalizing Appellants under Section 1557 if they continue to categorically refuse to perform transition procedures in accordance with their beliefs. *Cf.* HHS Br. 17-18 ("enforcement discretion"). And ACLU positively embraces that result. ACLU Br.32-36. Meanwhile, the injunction Appellants seek would ensure that they can continue caring for the needy consistent with their faith without incurring massive penalties—whether the mechanism for imposing the penalties is the 2016 Rule, the 2020 Rule, or Section 1557 itself. That is a meaningful practical difference.

The response briefs' arguments to the contrary are unavailing. HHS first leans on the standard of review, asserting the district court at least had "discretion" to deny Appellants' injunction. HHS Br.19-20. But while abuse-of-discretion review means the "factual findings" underlying that denial are reviewed only for clear error, a district court abuses its discretion—and is reversed—if it "relies on erroneous conclusions of law" or

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

Here, the only aspect of the district court's remedy decision even arguably constituting a fact-finding was its statement that there was "currently"—*i.e.*, in October 2019—"no indication that, once the Rule is vacated, Defendants will … attempt to apply *the Rule* against Plaintiffs." RE.067 (emphasis added). Appellants' argument here isn't that this finding was wrong (though it may come out differently today). Rather, our argument is that neither this finding nor any other in the district court's decision justifies the legal conclusion that the district court's vacatur of portions *of the 2016 Rule* rendered the injunction Appellants sought against HHS's actions *under Section 1557* meaningless under *Monsanto*. *Cf.* RE.068. That is a legal conclusion about the application of precedent, reviewed "*de novo*." *Peaches Ent. Corp. v. Ent. Repertoire Assocs., Inc.*, 62 F.3d 690, 693-94 (5th Cir. 1995).

Turning to *Monsanto*, HHS and ACLU strikingly don't defend the district court's own use of it. In the part of *Monsanto* invoked by the district court, the trial court had enjoined farmers from planting certain alfalfa, even after it had already vacated the agency deregulation decision that would have made such planting possible in the first place. RE.067-068 (citing *Monsanto*, 561 U.S. at 165). The Court held that because the planting was, absent the vacated deregulation decision, "independently"

"ban[ned]" by federal law, enjoining farmers from engaging in it would have no "meaningful practical effect." 561 U.S. at 150, 165. As we've explained, this reasoning doesn't apply here, where the district court's vacatur of the 2016 Rule doesn't stop the party to be enjoined (HHS) from engaging in the same unlawful conduct—whether by applying the portions of the 2016 Rule revived by litigation, by applying the 2020 Rule in light of *Bostock*, or by applying Section 1557 directly. Br.46-48.

HHS and ACLU don't engage with this straightforward distinction. Instead, they pivot, pointing to a different portion of *Monsanto*—not relied on by the district court—rejecting a different injunction for different reasons. HHS Br.20-22; ACLU Br.28-29.

In the *Monsanto* holding HHS and ACLU prefer, the Court rejected the district court's injunction against the defendant *agency*, which was separate from the injunction against the *farmers*. 561 U.S. at 158-64. This injunction—which was in addition to the district court's vacatur of the agency's *complete* deregulation decision—would have prevented the agency from even "partially deregulating" the alfalfa pending environmental review. *Id.* at 158. The Court rejected this injunction for two reasons having nothing to do with any overlap with the vacatur. First, such a hypothetical partial deregulation would constitute a separate agency action under the APA, which any affected party could then challenge in a "new suit." *Id.* at 162 (citing 5 U.S.C. § 702). Second, such a partial deregulation might not "cause respondents any injury at all" since it

could theoretically be limited to "a remote part of the country" irrelevant to them. *Id.* at 162-63.

This *Monsanto* holding is just as inapposite as the district court's. First, the conduct Appellants seek to enjoin isn't limited to a hypothetical new agency rulemaking interpreting Section 1557. Instead, Appellants seek to enjoin HHS from *present* applications of *existing* law—including application of the parts of the 2016 Rule revived by litigation, application of the 2020 Rule in light of *Bostock*, and application of Section 1557 directly—which HHS can accomplish without any new rulemaking at all. Br.38-39. As explained above, it's well-settled that parties are entitled to seek "pre-enforcement" relief against threatened applications of a statute, *Driehaus*, 573 U.S. at 158-59, and that includes the permanent injunctive relief Appellants seek here, *see, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 11, 15-16 (2010); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 391-93 (1988). A party doesn't have to file an infinite number of successive lawsuits to protect itself against threatened government action that violates its rights.

Second, unlike in *Monsanto*, there is no scenario in which the conduct Appellants seek to enjoin might not "cause [them] any injury." 561 U.S. at 162-63. Appellants seek a plaintiff-specific injunction—one barring HHS from construing or applying Section 1557 to require *them* to perform gender transitions or abortions in violation of *their* beliefs. Br.55. That is nothing like the injunction at issue in this portion of *Monsanto*, which

would have prohibited the agency from "pursuing *any* deregulation—no matter" if it would "adversely affect … respondents" at all. *Monsanto*, 561 U.S. at 161. Instead, it is the sort of plaintiff-specific injunction that is at the heart of a court's equitable authority. *See DHS v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

For these reasons, the sole theory the district court relied on to deny relief here—*Monsanto*—doesn't apply. And indeed, the Supreme Court's decision just weeks ago in *Diocese of Brooklyn v. Cuomo*, ___ S. Ct. ____, 2020 WL 6948354 (Nov. 25, 2020), confirms as much. There, the plaintiff religious organizations sought an injunction against COVID-19 restrictions limiting house-of-worship attendance in certain geographic "zones," but while the case was pending the defendant redrew the zones, eliminating the restrictions on plaintiffs' churches and synagogues. *Id.* at *1, *3. Nonetheless, the Court enjoined application of the restrictions against the plaintiffs. The Court explained that "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as" within the zones; and while the plaintiffs could always reapply for an injunction once the reclassification actually occurred, "there is no reason why they should bear the risk of suffering further irreparable harm." *Id.* at *3.

So too here. HHS's interpretation of Section 1557 puts Appellants "under a constant threat that" they will be forced to choose between performing gender transitions in violation of their beliefs and incurring severe

penalties. *Id.* And although HHS and ACLU say Appellants should just file a new lawsuit later to obtain complete relief, "there is no reason why [Appellants] should bear the risk of suffering further irreparable harm." *Id.* Indeed, Appellants here are in a *worse* position than the plaintiffs in *Diocese of Brooklyn*, because the "reclassification" that supposedly protects them (*i.e.*, the 2020 Rule) (a) doesn't actually protect them in light of *Bostock*, and (b) has already been enjoined by other courts. *Diocese of Brooklyn* thus disposes of the misuse of *Monsanto* here.

None of the response briefs' other arguments have merit. First, repackaging HHS's justiciability arguments, HHS and ACLU both dispute whether Appellants satisfy the irreparable-harm injunction factor—though neither contested this point below. HHS Br.23; ACLU Br.24-27. As explained in our opening brief, however, this question is resolved by *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012). There, this Court held that a plaintiff "satisfie[s] the irreparable-harm requirement" if he shows a violation of his First Amendment rights—and "this same principle applies" to RFRA and RLUIPA. *Id.* at 295. Appellants relied extensively on *Opulent Life Church*, Br.27, 34-36; neither response brief mentions it.

Instead, HHS and ACLU cite off-point authority. HHS invokes *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016), as supporting its irreparable-harm argument in a "First Amendment" context. HHS Br.23. But HHS's reliance is misplaced. The holding in *Google* wasn't that (*contra* settled

precedent) First Amendment violations don't constitute irreparable harm. It was that, given the "fact-intensive" nature of Google's claimed defense, the Court couldn't determine in advance whether the "fuzzily defined" government conduct the district court enjoined would in fact "necessarily violate the Constitution." 822 F.3d at 227-28; *accord Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). That holding doesn't apply here, where there's no question that the narrowly defined conduct Appellants seek to enjoin *does* "necessarily violate" their RFRA rights. Indeed, the parties have already litigated that question, resulting in a merits decision that no party appealed. *Cf. Opulent Life Church*, 697 F.3d at 287 (RLUIPA case raised "pure questions of law").

ACLU offers *John Doe #1 v. Veneman*, 380 F.3d 807 (5th Cir. 2004), as "similar" to this case. ACLU Br.30-31. But *Veneman* was an APA case, and it turned on the nature of "judicial review permitted under the APA." 380 F.3d at 818-19. This appeal is about RFRA, under which the object of review isn't (as with the APA) a particular agency rule or decision but government action "substantially burden[ing]" religion. 42 U.S.C. § 2000bb-1(a). That is why the proper relief for Appellants' successful RFRA claim should have been an injunction aimed at HHS's religion-burdening actions (attempting to force Appellants to provide procedures violating their beliefs) rather than vacatur aimed at a particular Rule. Br.51-52; *accord ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir.

2018) (scope of relief depends on "violation established," which is "a matter of substantive law" (cleaned up)).[3]

Next, HHS and ACLU charge Appellants with arguing that RFRA "virtually always" requires injunctions, HHS Br.22-23, "displac[ing] th[e] traditional 'four-factor test,'" ACLU Br.21-23. But we argued no such thing, as demonstrated by the opening brief's *application* of the four-factor test. Br.26-37 (citing, *inter alia*, *eBay*). Instead we explained that (1) as an empirical matter, injunctions are in fact the typical relief for meritorious RFRA claims, Br.37 & n.7, and (2) as a matter of this Court's precedent, RFRA violations constitute irreparable harm, *id.* at 33-34. HHS and ACLU dispute neither point here. And indeed, while HHS and ACLU both offer pages-long paeans to "traditional" "equitable discretion," *e.g.*, HHS Br.22-23, neither can muster a *single* other example of a court refusing to enter an injunction after finding a RFRA violation.

For its part, ACLU actually *embraces* the notion that HHS might soon force Appellants to violate their beliefs, arguing that a permanent injunction is improper because a future HHS might successfully "enforce" a requirement that Appellants "provide or pay for transition-related care" by

[3] ACLU also seeks to minimize Appellants' need for relief by stating that, in addition to the partial vacatur, the district court "issued a declaratory judgment" in Appellants' favor. ACLU Br.17, 25. But the district court's judgment (RE.041, 043) says nothing about declaratory relief, creating (at minimum) "uncertainty" about whether any was awarded. *Koenning v. Janek*, 539 F. App'x 353, 355 (5th Cir. 2013); *see* Fed. R. Civ. P. 58. In any event, even on ACLU's reading, any declaratory relief entered extends only to "the 2016 Rule," ACLU Br.25, meaning it would be insufficient to protect Appellants' rights for the reasons above.

"rely[ing] upon a different compelling interest than" that considered by the district court. ACLU Br.32-36. This argument echoes the plaintiffs challenging the 2020 Rule, who likewise seek to eliminate (and have now obtained an injunction removing) "protections of individual conscience and religious freedom rights" for "[r]eligiously affiliated hospitals and health care systems." *Whitman-Walker*, No. 20-cv-1630, ECF 1 at 39 (D.D.C. June 22, 2020).

But ACLU's relish for forcing religious doctors to violate their beliefs only illustrates why Appellants need permanent injunctive relief from this Court. And its theory is incorrect. When government action substantially burdens religious exercise, RFRA's text puts the burden of satisfying strict scrutiny on the government alone. Br.44. When the government fails to carry that burden, the plaintiff is "entitled to an exemption"—relief protecting his religious exercise from the government action imposing the burden. *Hobby Lobby*, 573 U.S. at 694-95. It would be perverse if the victorious plaintiff's fundamental rights were denied meaningful protection anytime a third party thinks the government should have offered different arguments. *See id.* at 720-21 (rejecting strict-scrutiny argument raised by third parties because "HHS … never made" it and ruling for plaintiffs); *cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (applying administrative—not civil-rights—law).

In any event, even the arguments ACLU thinks HHS should have made would not avoid RFRA. For one thing, HHS doesn't have even a

legitimate (much less compelling) interest in forcing objecting doctors to perform "hotly disputed" procedures that its own experts recognize are often harmful. *Gibson v. Collier*, 920 F.3d 212, 220-24, 226 (5th Cir. 2019); Br. 29-32. ACLU calls Appellants' argument on this point "inflammatory" but does not rebut it. ACLU Br. 34 n.3.

Moreover, the very strict-scrutiny arguments ACLU says could still be raised later in fact were considered and rejected below, in a holding ACLU failed to appeal. The 2016 Rule identified HHS's allegedly "compelling interest" as ensuring "nondiscriminatory access to health care and health coverage." 81 Fed. Reg. 31,375, 31,380 (May 18, 2016); *compare* ACLU Br.35 (same). The district court correctly held that HHS failed to carry its burden by not briefing this interest. RE.062-63. But the district court *also* "considered and rejected" this interest on the merits. RE.063-64. The court explained that even "assum[ing]" it was compelling, HHS had "numerous less restrictive means available" to advance it, including, for example, "assist[ing] transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and specialize in those services." RE.109-10.

Contrary to ACLU here, then, the district court's rationale *does* "preclude the government" from later attempting to apply Section 1557 to force Appellants to perform gender transitions in violation of their beliefs. ACLU Br. 34; *see Holt v. Hobbs*, 574 U.S. 352, 364-65 (2015) ("If a

less restrictive means is available for the Government to achieve its goals, the Government must use it." (cleaned up)). That's why it should have resulted in an injunction.[4]

Finally, neither HHS nor ACLU successfully distinguishes the most factually on-point precedent: the at least 20 decisions entering RFRA injunctions essentially identical to the one Appellants seek here as to the contraceptive mandate (*i.e.*, HHS's *other* attempt during the Obama Administration to construe the ACA to force religious organizations to provide insurance coverage for objectionable procedures—there, contraception and abortion-causing drugs). *See* Br.52-54 & n.8; *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373-79 (2020).

ACLU doesn't even attempt a distinction. And HHS offers only a citation-free *ipse dixit*, saying that "none of th[e contraceptive-mandate] 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." HHS Br.25.

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[4] If, in the future, circumstances changed such that HHS *did* need to enlist Appellants to accomplish some compelling government interest, HHS could then ask the district court to "dissol[ve] or modif[y]" the injunction under Fed. R. Civ. P. 60(b)(5). *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 740-41 (5th Cir. 2016). That approach to this unlikely scenario properly puts the burden of uncertainty on HHS (who lost this case) rather than Appellants (who won it).

But in fact, those cases involved an almost identical situation. At the time most of the contraceptive-mandate injunctions were issued, HHS (under the Trump Administration) had agreed that applying the mandate to religious objectors was unlawful under RFRA. *Little Sisters*, 140 S. Ct. at 2377-78. Soon after, it had not only "proposed a new rule rescinding the challenged provisions," HHS Br.25, but *finalized* a rule doing so, replacing them with a broad religious exemption, *Little Sisters*, 140 S. Ct. at 2378. Nonetheless, after the new interim rule was enjoined by two district courts in December 2017, *id.*; *California v. HHS*, 281 F. Supp. 3d 806 (N.D. Cal. 2017); at least 13 courts entered injunctions barring HHS from interpreting not just its rules but the *statute* to require the plaintiffs to provide contraceptives in violation of their beliefs. Br.53 n.8. And when the new final rule was likewise enjoined in January 2019, *Little Sisters*, 140 S. Ct. at 2378-79, four more courts (two in this Circuit) followed suit, Br.53 & n.8.

Given the injunctions against the 2020 Rule in *Walker* and *Whitman-Walker*, Appellants' position now is indistinguishable from the one the contraceptive-mandate plaintiffs found themselves in following the injunctions against the Trump Administration's rules. (Indeed, Appellants'

position is *worse*, since—as explained above—the 2020 Rule does not protect them.) Appellants are therefore entitled to the same lasting relief—a permanent injunction.[5]

II. This Court must consider changes in fact or law or, at minimum, remand for consideration of the proper remedy.

Lacking any serious response to the recent developments undermining its position, HHS (at 24) asks this Court to ignore them. But "[i]t is well-established that an appellate court is obligated to take notice of changes in fact or law occurring during the pendency of a case on appeal." *Spencer v. Schmidt Elec. Co.*, 576 F. App'x 442, 447 (5th Cir. 2014) (quoting *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 649-50 (5th Cir. 1978)). And when "changes in fact or law occurring during the pendency of a case on appeal" show the district court has erred, this Court may "consider the issue" and fashion the appropriate relief itself. *Id.*

That is this case. Following the district court's order vacating in part the 2016 Rule, decisions from other jurisdictions purported to undo the vacatur and reinstate unlawful portions of the 2016 Rule. Further, *Bos-*

[5] In a footnote, ACLU contends a permanent injunction is unnecessary because Appellants "will have the opportunity to argue for issue preclusion at the appropriate time." ACLU Br.36 n.4. But issue preclusion requires the "identical issue" to have been "previously adjudicated," *Matter of Westmoreland Coal Co.*, 968 F.3d 526, 532 (5th Cir. 2020) (internal quotation marks omitted), and ACLU spends much of its brief denying that the district court actually decided the issue to be presented in the future proceeding ACLU has in mind. ACLU Br.32-36. In any event, the possibility of raising issue preclusion later is no substitute for a permanent injunction protecting Appellants' rights now—especially where Appellants are legally entitled to it.

tock and the 2020 Rule's incorporation of *Bostock* demonstrate that Appellants face the same threat of enforcement of HHS's prohibition on "gender identity" discrimination. These "changes in fact [and] law" confirm what has always been true—that there is a meaningful difference between the injunction Appellants seek and the vacatur granted. This Court is fully empowered to "consider the issue" and grant Appellants' request for a permanent injunction. *Spencer*, 576 F. App'x at 447.

HHS's cited authority is not to the contrary. HHS Br. at 24 (quoting *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979)). There, defendants eschewed an opportunity "to develop a full evidentiary record" in favor of immediate appeal on a preliminary injunction. 600 F.2d at 1186-88. The case did not involve a change in fact or law occurring during the pendency of the appeal. It is unremarkable, then, that this Court held that its review of the district court's order could only be "on the basis of the record as developed before the district court." *Id.* at 1187. That holding has no application here.

Finally, even if this Court were not to remand for entry of Appellants' injunction, remand is at least warranted so the district court may consider the new developments in the first instance. Br.55; *see, e.g., Cotemar S.A. De C.V. v. Hornbeck Offshore Servs., L.L.C*, 569 F. App'x 187 (5th Cir. 2014).

In *Cotemar*, this Court held that while the district court did not abuse its discretion in dismissing the suit based on *forum non conveniens*, remand was appropriate for the district court to reconsider its analysis in light of "supervening changes of circumstances." *Id.* at 193. The district court had held that the plaintiffs' vessel-collision suit should be heard in Mexico. *Id.* at 189. After the plaintiffs appealed, however, another federal court permitted them to seize the defendants' vessel. This Court held that the seizure "may constitute a supervening change of circumstances" and such changes "*must* be taken into account even where they materialize during the pendency of an appeal." *Id.* at 192-93 (emphasis added). The Court therefore vacated the judgment below in part and remanded so "the district court [could] determine whether" the simultaneous seizure litigation would "alter[]" the *forum non conveniens* analysis. *Id.* at 188, 193.

That logic applies here. Even if this Court were to conclude that the district court's denial of a permanent injunction "did not constitute an abuse of the district court's discretion," it should vacate the district court's determination that an injunction is improper and remand to permit the district court to consider whether its analysis "is altered" by the "supervening" developments from other district courts, *Bostock*, and the 2020 Rule itself. *See id.* at 188, 192-93.

CONCLUSION

The Court should reverse the district court's remedy determination in part and remand for entry of a permanent injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 11, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 6,490 words. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (Century Schoolbook 14 pt.) using Microsoft Word 2016.

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