No. 21-11174

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-Appellees,

v.

XAVIER BECERRA, SECRETARY U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES
Defendants-Appellants,

AMERICAN CIVIL LIBERTIES UNION OF TEXAS; RIVER CITY GENDER ALLIANCE
Intervenor Defendants-Appellants

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

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

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CERTIFICATE OF INTERESTED PERSONS

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

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STATEMENT REGARDING ORAL ARGUMENT

This case involves straightforward questions of justiciability and the scope of injunctive relief that the district court resolved correctly. Appellants' arguments are foreclosed by binding precedent, and the scope of relief is reviewed only for abuse of discretion; thus, oral argument is unnecessary. But Plaintiffs are happy to participate if the Court believes oral argument would aid its consideration of this appeal.

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INTRODUCTION

This lawsuit began in 2016, when HHS announced it would interpret Section 1557 of the Affordable Care Act to require doctors and hospitals nationwide to perform and insure gender-transition procedures and abortions or else be liable for "sex" discrimination. In announcing this interpretation, HHS expressly rejected calls for a religious exemption. And it made clear that categorically declining to perform or insure gender-transition procedures "is unlawful on its face."

Plaintiffs are Christian doctors and hospitals who joyfully care for transgender patients for everything from cancer to the common cold. But they decline to perform or insure gender-transition procedures—both as a matter of conscience, and because those procedures inflict documented harms: permanently sterilizing patients, inhibiting growth, and increasing the incidence of cancer, high blood pressure, blood clots, osteoporosis, depression, anxiety, substance abuse, and suicide.

Plaintiffs now face an intolerable choice: Either comply with HHS's demands and start performing gender-transition procedures—searing their consciences and scarring their patients—or refuse those procedures and face massive penalties under Section 1557, including the loss of millions in federal funding, debarment from federal contracts, false-claims liability, and lawsuits for damages and attorneys' fees.

None of this is hypothetical. HHS, today, is actively soliciting public complaints about denials of gender-transition procedures and promising

"robust" enforcement; it has received complaints against Catholic hospitals and pledged to investigate; and it has initiated an investigation of one of the original co-plaintiffs in this very case. Beyond that, parties like Intervenor ACLU have filed numerous private lawsuits against those who, like Plaintiffs, refuse to perform or insure gender transitions; and every case to reach the question has held that those lawsuits state a claim for a violation of Section 1557—including when a Catholic employer's insurance plan declined to pay for a mastectomy and chest-reconstruction surgery on a 13-year-old girl.

Plaintiffs can't afford to play Russian roulette with their patients or livelihoods—just hoping mastectomies won't harm teenage girls, or HHS and ACLU won't shutter their ministries. So they filed this pre-enforcement challenge, alleging HHS's interpretation of Section 1557 violates the Administrative Procedure Act (APA) and Religious Freedom Restoration Act (RFRA).

Applying straightforward precedent, the district court agreed. First, it held Plaintiffs have standing to bring a pre-enforcement challenge, because they face a credible threat of enforcement for categorically refusing gender transitions or abortions. Second, it held Plaintiffs prevailed on their APA and RFRA claims—on APA, because HHS's 2016 Rule exceeded its statutory authority; and on RFRA, because requiring Plaintiffs to perform and insure gender-transition procedures and abortions sub-

stantially burdened their religious exercise and failed strict scrutiny. Finally, the court ordered two remedies: vacatur of the 2016 Rule, which remedied the APA violation; and an injunction prohibiting HHS from requiring Plaintiffs to perform or insure gender transitions or abortions, which remedied the RFRA violation. Such an injunction has been the uniform remedy in every case where this Court or the Supreme Court found a RFRA violation, in over twenty contraceptive-mandate cases nationwide, and in every case challenging the transgender mandate at issue here. And it is the remedy this Court specifically ordered the district court to consider on an earlier remand.

On appeal, HHS and ACLU don't contest the merits. Instead, they offer two main arguments on justiciability and the scope of relief.

First, they say Plaintiffs lack standing or ripeness, because the threat of enforcement against them is "hypothetical." Specifically, HHS says it "has not to date evaluated" whether Plaintiffs should be punished. And if it decides to punish them, they can assert RFRA as a defense during enforcement proceedings.

But this contradicts the very concept of a *pre*-enforcement challenge—which by definition comes *before* enforcement begins. To bring such a challenge, Plaintiffs need not show actual enforcement, but only a "credible" threat of enforcement. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 334-35 (5th Cir. 2020). Such a threat is "assumed" when, as here, a "recently enacted" law arguably proscribes Plaintiffs' conduct. *Id.* at 335.

But presumption aside, the threat here is obvious: HHS has solicited public complaints and vowed "robust" enforcement; it has received complaints against religious entities like Plaintiffs and promised to investigate; and it pointedly refused to disavow enforcement against Plaintiffs during oral argument in this very case. *See* Oral Arg. at 15:46-19:27, https://perma.cc/Z82R-F7AY ([Q.] Are you able to tell us that … you're not going to enforce? [A.]: "No, your honor.").

Most remarkably, after the district court entered the injunction here, HHS moved to modify it, stating that because it doesn't know who Plaintiffs' members are, HHS might unwittingly violate the injunction by taking "prohibited [enforcement] actions against" Plaintiffs because they "fail[] to perform or provide insurance coverage for gender-transition procedures or abortion." ROA.5074-75. But if HHS fears it will *violate* the injunction by punishing Plaintiffs' unidentified members, then Plaintiffs obviously face a credible threat of enforcement *absent* an injunction.

Alternatively, HHS claims the case is "moot" (or the injunction is an abuse of discretion) because "Plaintiffs framed their lawsuit solely as a challenge to the 2016 Rule," not the underlying statute. HHS Br.2-3. But this is an attempt to litigate a case HHS *wishes* Plaintiffs brought, rather than the case they actually brought. And it's flawed many times over.

First, it confuses Plaintiffs' APA and RFRA claims. While the APA claim *did* challenge the 2016 Rule, the RFRA claim challenged HHS's *imposition of a substantial burden*—whether via the 2016 Rule or other

means. This is evident not only from Plaintiffs' complaint, but also from their request for relief on summary judgment, where they expressly proposed an injunction not just against the 2016 Rule but also the underlying statute. ROA.3292, 1896. And even if Plaintiffs *had* challenged only the 2016 Rule, the Supreme Court has rejected the argument that "[a] challenge to [a] regulation … is separate from a challenge to the statute that authorized it." *FEC v. Cruz*, 142 S.Ct. 1638, 1648 (2022).

More fundamentally, the case is not moot (and the injunction was proper) because HHS is still imposing the same injury it imposed the day this case was filed. Its 2016 Rule remains in effect, thanks to two different federal-court injunctions reviving it. Moreover, the 2020 Rule imposes the same requirement by adopting the prohibition on "transgender status" discrimination in *Bostock v. Clayton County*, 140 S.Ct. 1731, 1741 (2020). And both rules aside, HHS has announced it is now imposing the same requirement directly under the statute itself. Under black-letter law, when an agency's "challenged action" is "replace[d] … with something substantially similar," "the case is not mooted." *Texas v. Biden*, 20 F.4th 928, 958, 960 (5th Cir. 2021). That's this case.

* * *

What's happening here is no mystery. Plaintiffs provide top-notch care to *all* patients. But gender transitions are medically controversial because they cause irreversible harms. As late as 2016, HHS agreed—acknowledging, based on "a thorough review of the clinical evidence," that

"there is not enough evidence to determine whether gender reassignment surgery improves health outcomes" for transgender patients, and some studies "reported harms." ROA.4012.

HHS has now flipped, threatening massive liability for doctors and hospitals who don't toe its new line. This creates an *in terrorem* effect on doctors and hospitals nationwide. It also creates a crisis of conscience for religious doctors and hospitals like Plaintiffs. Yet HHS has staunchly refused any religious exemption. If anything, its saber-rattling has grown only more menacing over the last six years.

So Plaintiffs face an untenable choice: sear their consciences and scar their patients, or risk losing their livelihoods and ministries. The injunction below removes them from that predicament—which is why HHS and ACLU seek to reverse it. Yet RFRA promises "broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)—not a get-out-of-jail-free card for the Government every time it concocts a new method of reimposing the same burden on religious exercise. This Court should affirm.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held Plaintiffs have standing to bring a pre-enforcement challenge, where Plaintiffs' conduct is religiously motivated, is arguably proscribed by Section 1557, and is subject to a credible threat of enforcement.

2. Whether the district court's injunction was within its discretion, where Plaintiffs established all elements of injunctive relief, where an injunction is the standard remedy for RFRA violations, and where a nearly identical injunction has been awarded in over twenty similar RFRA cases.

3. Whether the district court correctly concluded the case was neither moot nor unripe, where Plaintiffs remain subject to the same injury that prompted this suit.

STATEMENT OF THE CASE

A. Plaintiffs

Plaintiff Franciscan Alliance, Inc., is a Roman Catholic nonprofit hospital system founded by Catholic nuns, the Sisters of St. Francis of Perpetual Adoration. ROA.3366-67. Specialty Physicians is a member-managed LLC, of which Franciscan is the sole member (collectively, Franciscan). ROA.3368. "All of Franciscan's healthcare services, and all of Franciscan's physicians and employees, follow the values of the Sisters of St. Francis." ROA.3370. Franciscan provides extensive care for the elderly,

poor, and disabled, including approximately $900 million in Medicare and Medicaid services annually. ROA.3367-68.

Franciscan's beliefs require it to treat every person with compassion and respect. ROA.3370, 3372. Franciscan follows the Ethical and Religious Directives for Catholic Healthcare Services, issued by the U.S. Conference of Catholic Bishops, which direct Catholic healthcare providers to treat each patient as "a unique person of incomparable worth," focusing on those "at the margins of our society" and "vulnerable to discrimination." *See* https://perma.cc/8MHW-CF3N; *see also* ROA.3371. Franciscan thus "provide[s] the same full spectrum of compassionate care for" transgender individuals as for any other patient. ROA.3372. In accordance with its medical judgment and religious beliefs, it does not perform gender-transition procedures, which can impose permanent harms. ROA.3377; *see also* ROA.3367-71; *Gibson v. Collier*, 920 F.3d 212, 223 (5th Cir. 2019) ("There is no medical consensus that sex reassignment surgery is a necessary or even effective treatment for gender dysphoria.").

Also according to its Catholic beliefs, Franciscan does not perform abortions. ROA.3372, 3374-75. And its health plan excludes coverage for gender transitions and abortions. ROA.3375.

Plaintiff Christian Medical & Dental Society is an Illinois nonprofit doing business as the Christian Medical & Dental Associations (CMDA). CMDA "exists to glorify God by motivating, educating and equipping

Christian healthcare professionals and students." ROA.3383. Its membership includes thousands of physicians who accept Medicare and Medicaid patients and other HHS funding. ROA.3382, 3388.

CMDA has adopted an ethics statement reflecting its members' beliefs on gender transitions. ROA.3384, 3392-97. Based on input from medical experts in numerous fields, the statement outlines the risks associated with transition procedures, including inhibition of growth and fertility, cancer, high blood pressure, blood clots, lost bone density, and increased incidence of depression, anxiety, suicidal ideation, and substance abuse. ROA.3384-85, 3393. Given these effects, CMDA determined that "attempts to alter gender surgically or hormonally … are medically inappropriate." ROA.3386.

Thus, CMDA members routinely treat transgender individuals "for health issues ranging from common colds to cancer." ROA.3389. But they view participating in transitions as inconsistent with "the obligation of Christian healthcare professionals to care for patients struggling with gender identity with sensitivity and compassion." ROA.3392.

CMDA and its members also oppose abortion. ROA.3386. And they oppose "participat[ing] in or encourag[ing]" gender transitions and abortions through insurance coverage. ROA.3386, 3388.

B. HHS's actions

In 2016, HHS attempted to force Plaintiffs to begin performing and insuring transitions and abortions. The basis for its action was Section

1557 of the Affordable Care Act (ACA), which incorporates into healthcare Title IX's prohibition on "sex" discrimination." 42 U.S.C. §18116(a) (Section 1557); *see* 20 U.S.C. §1681 (Title IX). After Section 1557's enactment, transgender individuals sued hospitals and providers for declining to perform or cover transition procedures, alleging "sex" discrimination under Section 1557. *See, e.g., Cruz v. Zucker*, 116 F.Supp.3d 334 (S.D.N.Y. 2015). In 2016, HHS agreed and promulgated a regulation (the 2016 Rule) adopting this interpretation of Section 1557. 81 Fed. Reg. 31,376 (May 18, 2016).

The 2016 Rule defines Section 1557's prohibition of discrimination "on the basis of sex" to include discrimination based on "gender identity" and "termination of pregnancy." "Gender identity," in turn, is defined as an individual's "internal sense of gender, which may be male, female, neither, or a combination of male and female." *Id.* at 31,467, 31,469.

Accordingly, covered entities must perform gender-transition procedures or be liable for "discrimination." The 2016 Rule explains: "A provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." *Id.* at 31,455. Thus, if a gynecologist performs a hysterectomy for a woman with uterine cancer, she must do the same for a woman who wants to remove a healthy uterus to live as a man.

The same applies across the full "range of transition-related services," including "hormone therapy." *Id.* at 31,435-36. And because the 2016 Rule also interprets Section 1557 to prohibit discrimination based on "termination of pregnancy," it requires providers who perform procedures such as a dilation and curettage for miscarriages to perform the same procedure for abortions. *See id.* at 31,455; *see also* ROA.3374.

Covered entities must also pay for these procedures in their insurance plans. The 2016 Rule states: "A covered entity shall not, in providing or administering health-related insurance … [h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition." 81 Fed. Reg. at 31,471-72. Such an exclusion is "unlawful on its face." *Id.* at 31,429. And again, because the Rule defines "sex" to include "termination of pregnancy," the same reasoning applies to procedures used for an abortion. *Id.* at 31,434.

Those who violate HHS's interpretation of Section 1557 are subject to loss of federal funding (including Medicare and Medicaid), debarment from federal contracts, false-claims liability, DOJ enforcement proceedings, and lawsuits for damages and attorneys' fees. *Id.* at 31,440, 31,471-72.

C. Initial district-court proceedings

Plaintiffs sued in August 2016, alleging (*inter alia*) that HHS's interpretation of Section 1557 violated the APA and RFRA. Under the APA, Plaintiffs challenged the 2016 Rule, alleging it exceeded HHS's authority

by defining "sex" to mean "gender identity" and "termination of pregnancy" and refusing to incorporate the religion and abortion exemptions of Title IX. Under RFRA, Plaintiffs alleged HHS had substantially burdened their religious exercise by requiring them to perform and insure gender transitions and abortions contrary to conscience, and that its actions could not survive strict scrutiny.

On December 31, 2016, the district court agreed with Plaintiffs' APA and RFRA claims and preliminarily enjoined the "gender identity" and "termination of pregnancy" portions of the Rule. ROA.1756-1801.

In March 2017, Plaintiffs moved for summary judgment on their APA and RFRA claims. ROA.1888-91. In response, HHS—now under the Trump Administration—moved for a stay to reconsider the Rule, ROA.2864, which the district court granted, ROA.2907.

After 17 months of agency inaction, the court reopened the case. ROA.2986-87. In February 2019, Plaintiffs renewed their motion for summary judgment. ROA.3285-88. In support, Plaintiffs submitted a proposed order specifying the relief sought. ROA.3289-93. As a remedy for the APA violation, Plaintiffs sought a nationwide injunction and vacatur of the "gender identity" and "termination of pregnancy" portions of the 2016 Rule. ROA.3291-92. As a remedy for the RFRA violation, Plaintiffs sought to "permanently enjoin[]" HHS from "[c]onstruing Section 1557 to require [them] to provide medical services or insurance coverage related

to 'gender identity' or 'termination of pregnancy' in violation of their religious beliefs." ROA.3292; *accord* ROA.1896.

In October 2019, the district court granted summary judgment. ROA.4791-95. Although it vacated the offending parts of the 2016 Rule, it declined injunctive relief.

The court noted the "standard remedy for APA violations" was "vacatur" of the challenged rule. ROA.4796-98 (cleaned up). And because the court found there was "currently no indication that, once the Rule is vacated, Defendants will … attempt to apply [it] against Plaintiffs," the court concluded "injunctive relief from the vacated Rule" was unnecessary. ROA.4798-99. The court did not, however, separately address Plaintiffs' request, corresponding to their RFRA claim, for a plaintiff-specific injunction barring HHS from "[c]onstruing Section 1557" to require them to violate their beliefs. ROA.3292.

D. Plaintiffs' appeal

Defendants did not appeal the district court's judgment. Plaintiffs, however, appealed the denial of injunctive relief. ROA.4833. During that appeal, several important events occurred.

First, on June 12, 2020, HHS issued a new Section 1557 rule. 85 Fed. Reg. 37,160 (June 19, 2020). This 2020 Rule repealed the 2016 Rule's definition of "sex" discrimination, but didn't replace it with a new definition. Instead, the 2020 Rule reasoned that the Supreme Court's then-forthcoming decision in *Bostock* would "likely have ramifications for the

definition of 'on the basis of sex' under Title IX," so repealing the prior definition would permit "application of the [*Bostock*] Court's construction." *Id.* at 37,168.

Three days later, the Supreme Court decided *Bostock*, holding that dismissing an employee "for being homosexual or transgender" is discrimination "'because of such individual's sex.'" 140 S.Ct. at 1753. In dissent, Justices Alito and Thomas explained that application of *Bostock*'s reasoning to Section 1557 could "threaten freedom of religion" by requiring "employers and healthcare providers … to pay for or to perform" "sex reassignment procedures" contrary to "their deeply held religious beliefs." *Id.* at 1778, 1781-82 (Alito, J., dissenting).

Bostock triggered multiple lawsuits against HHS, challenging the 2020 Rule and seeking restoration of the 2016 Rule. In two cases, courts entered "overlapping injunctions," *Whitman-Walker Clinic, Inc. v. HHS*, 485 F.Supp.3d 1, 60 (D.D.C. 2020) (cleaned up), preventing the 2020 Rule "from becoming operative" and reinstating portions of the 2016 Rule, *Walker v. Azar*, 480 F.Supp.3d 417, 420 (E.D.N.Y. 2020).

In *Walker*, the court "predict[ed] that either the district court or some higher authority w[ould] revisit the vacatur" in this case in light of *Bostock*. *Id.* at 427. It then held that the portions of the 2016 Rule vacated in this case—including "the definitions of 'on the basis of sex,' 'gender identity,' and 'sex stereotyping'"—"remain in effect." *Id.* at 427, 430.

The *Whitman-Walker* court indicated that a part of the 2016 Rule not

vacated in this case—the provision defining "sex" to include "sex stereotyping"—independently prohibits "[d]iscrimination based on … gender identity." 485 F.Supp.3d at 38, 41. The court therefore enjoined the 2020 Rule's repeal of this portion of the 2016 Rule, "le[aving] … the 2016 Rule's prohibition on … sex stereotyping" in effect. *Id.* at 26, 64. *Whitman-Walker* also enjoined the 2020 Rule's partial religious exemption, *id.* at 43-46, though the district court here had held that the 2016 Rule was unlawful for *not* providing an exemption, ROA.1790-93; ROA.4791.

On January 20, 2021, President Biden took office. That day, he issued an Executive Order proclaiming that "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination" generally "prohibit discrimination on the basis of gender identity." 86 Fed. Reg. 7023 (Jan. 20, 2021).

Oral argument in Plaintiffs' appeal was held on March 2. HHS argued the case was moot given vacatur of the 2016 Rule and promulgation of the 2020 Rule. Plaintiffs, meanwhile, contended that given *Bostock*, the *Walker* and *Whitman-Walker* injunctions, and the new Administration's interpretation of Section 1557, they remained at risk and were entitled to further relief. At argument, this Court asked if HHS would disavow enforcement against Plaintiffs, but HHS refused: "[Q.] Are you able to tell us that … you're not going to enforce? [A.] No, your honor[.]." *Supra* p.4.

On April 15, this Court issued its opinion. 843 F.App'x 662. The Court stated "the legal landscape has shifted significantly" since the denial of

injunctive relief. *Id.* at 662-63. The Court noted that Plaintiffs argued the district court "should have granted them injunctive relief against the 2016 rule and the underlying statute, that they still suffer a substantial threat of irreparable harm under the 2016 rule, and that the subsequent developments have only made it clear that an injunction should have been granted in the first place." *Id.* at 663. Meanwhile, HHS "contend[ed] that th[is] case is moot and that [Plaintiffs] never asked the district court for relief against the underlying statute." *Id.* The Court remanded the case to the district court to "consider these issues." *Id.*

E. Proceedings on remand

On remand, the district court requested supplemental briefing. ROA.4902.

Meanwhile, on May 10, 2021, HHS issued a "Notification of Interpretation and Enforcement" addressing Section 1557. 86 Fed. Reg. 27,984. The Notification confirmed that, based on *Bostock*, HHS "will interpret and enforce Section 1557[]" to prohibit "discrimination on the basis of gender identity." *Id.* It invited members of the public who "believe that a covered entity violated" this prohibition to "file a complaint" with HHS. *Id.* at 27,985.

On August 9, the district court issued its opinion on remand. ROA.5048-70 (corrected opinion). The district court noted its summary-judgment decision had "invit[ed]" Plaintiffs "to return if further relief independent of vacatur is later warranted." ROA.5067. And it held that

subsequent events showed that the partial vacatur of the 2016 Rule was "insufficient" to remedy the RFRA violation and that the case wasn't moot. ROA.5056-67.

The court further rejected Defendants' attempt to "narrowly read" Plaintiffs' complaint as "challenging just the 2016 Rule." ROA.5068. Instead, it found Plaintiffs "repeatedly challenge[d] th[e] same RFRA violation" throughout the litigation, "no matter HHS's Section 1557 interpretation du jour." ROA.5068-69. And regardless, the court explained, Rule 54(c) doesn't "limit" a plaintiff to relief "specifically s[ought]" in the complaint, if he is otherwise entitled to it. *Id.*

Concluding that Plaintiffs had satisfied the traditional injunctive-relief factors, the district court entered a permanent injunction barring HHS "from interpreting or enforcing Section 1557 … or any implementing regulations thereto" against Plaintiffs "in a manner that would require them to perform" or insure gender-transitions or abortions. ROA.5069.

After the district court entered its injunction, HHS moved to modify it. ROA.5072-76. Although HHS had told this Court and the district court that any enforcement against Plaintiffs was "purely speculative," *e.g.*, ROA.4993, HHS now said that unless the injunction were modified to help it identify Plaintiffs' members, HHS would be at "risk of violating" the injunction by unknowingly taking "prohibited [enforcement] actions" against them. ROA.5074-75. The district court granted HHS's requested

modification, but noted the "contradictions between Defendants' previous arguments … and [its] current" one. ROA.5084.

Defendants noticed this appeal in November 2021. That same month, they withdrew their appeals in *Walker* and *Whitman-Walker*, leaving in place the injunctions reinstating the 2016 Rule. HHS Br.11.

In March 2022, HHS issued a "Notice and Guidance on Gender Affirming Care," stating that "[a]ttempts to restrict" gender-transition procedures are "dangerous" and "covered entities restricting an individual's ability to receive … gender-affirming care … likely violates Section 1557." https://perma.cc/LX26-59QR. The Guidance invited complaints and promised that HHS "is investigating and, where appropriate, enforcing Section 1557" in "cases involving discrimination on the basis of … gender identity." *Id.*

SUMMARY OF THE ARGUMENT

I. The district court rightly held Plaintiffs satisfy all three elements of standing to bring a pre-enforcement challenge: Their conduct is (1) arguably affected with a constitutional interest, (2) arguably proscribed by Section 1557, and (3) subject to a credible threat of enforcement.

HHS (but not ACLU) claims Plaintiffs' conduct isn't "arguably proscribed" because, while identical conduct by nonreligious entities *is* proscribed, HHS "has not to date evaluated whether" Plaintiffs might receive a religious exemption under RFRA. HHS Br.37. But all Plaintiffs need to show is that it's "plausible" their conduct is proscribed. *Barilla v. City of*

Houston, 13 F.4th 427, 433 (5th Cir. 2021). That is easily satisfied here, where the 2016 Rule expressly proscribes their conduct and rejects any religious exemption; the 2020 Rule proscribes their conduct and has no operative religious exemption; and multiple courts have held that conduct like Plaintiffs' states a claim for a violation of Section 1557 even when engaged in by religious groups.

Alternatively, HHS says the threat of enforcement is "speculative," because it hasn't yet punished Plaintiffs. HHS Br.40. But a threat of enforcement is "assume[d]" when dealing with "recently enacted" laws proscribing a plaintiff's conduct. *Speech First*, 979 F.3d at 335. And even without this presumption, HHS has a history of past enforcement, has refused to disavow enforcement against Plaintiffs, and even asked the district court to modify its injunction because it anticipates enforcing Section 1557 against Plaintiffs' members. ROA.5074-75. That is a straightforward admission that Plaintiffs face a credible threat of enforcement.

II. The district court also rightly held Plaintiffs established all elements for injunctive relief: (1) success on the merits; (2) irreparable injury; (3) balance of harms; and (4) public interest. In RFRA cases, an injunction routinely follows from success on the merits, because a violation of religious exercise is an irreparable injury, and RFRA expresses Congress's judgment on the balance of interests. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 294-96 (5th Cir. 2012). Moreover, the injunction here is identical to injunctions entered in both cases challenging

the same transgender mandate. *See Religious Sisters of Mercy v. Azar*, 513 F.Supp.3d 1113, 1146-49 (D.N.D. 2021); *Christian Emps. All. v. EEOC*, 2022 WL 1573689, at *7-8 (D.N.D. May 16, 2022). And it mirrors twenty injunctions entered in the analogous RFRA litigation challenging HHS's earlier contraceptive mandate—which all enjoined enforcement of both HHS's regulation and the underlying statute.

In response, HHS says Plaintiffs challenged only the 2016 Rule, not Section 1557 itself. Wrong. As the district court found, Plaintiffs consistently "challenge[d] th[e] same RFRA violation" throughout—"no matter HHS's Section 1557 interpretation du jour." ROA.5068-69. And the Supreme Court just last month rejected the argument that "[a] challenge to [a] regulation … is separate from a challenge to the statute that authorized it." *Cruz*, 142 S.Ct. at 1648.

Even if Plaintiffs hadn't asked to enjoin Section 1557—and they did, repeatedly—Rule 54(c) provides that final judgment should "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." As the district court held, Plaintiffs satisfied Rule 54(c), and neither HHS nor ACLU demonstrates that the district court "'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975).

Pivoting, ACLU says the injunction violates Rule 65(d) because it is overbroad. But Rule 65(d) imposes only "specificity requirements"; an injunction's "'broadness' is a matter of substantive law." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016). And the injunction clearly meets Rule 65(d)'s specificity requirements by stating in detail what is enjoined—as HHS doesn't dispute.

III. Lastly, HHS (but not ACLU) says the case is moot because the 2016 Rule was vacated and superseded. But this is triply wrong. HHS continues to impose the same burden on Plaintiffs' religious exercise via (1) the 2016 Rule, which has been revived by other district courts; (2) the 2020 Rule, which incorporates *Bostock*'s interpretation of "sex" discrimination; and (3) Section 1557 itself, which operates independently of any rule and which HHS and numerous courts interpret to prohibit conduct like Plaintiffs'. As this Court has held, when a "challenged action" is repealed but then "replace[d] … with something substantially similar," "the case is not mooted." *Biden*, 20 F.4th at 958.

Nor is the case unripe. Plaintiffs' claims "are fit for judicial decision" because "they raise pure questions of law"; and Plaintiffs "would suffer hardship if review were delayed." *Opulent Life*, 697 F.3d at 287-88. Plaintiffs needn't "operate beneath the sword of Damocles until the threatened harm actually befalls them." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013). Rather, when "a regulation requires an immediate

and significant change in the plaintiffs' conduct of their affairs with serious penalties [for] noncompliance, hardship has been demonstrated." *Roark & Hardee LLP v. City of Austin*, 522 F.3d 533, 545 (5th Cir. 2008).

ARGUMENT

I. The district court correctly held Plaintiffs have standing.

Although HHS emphasizes mootness, it also argues Plaintiffs lack standing. HHS Br.35-46. Because standing is logically and temporally prior to mootness, we address standing first.

1. To establish Article III standing, the plaintiff must show it has suffered (1) an injury (2) caused by the defendant and (3) redressable by the court. *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 517 (5th Cir. 2014). HHS claims there is no injury, because it hasn't yet "initiated any enforcement activity against plaintiffs." HHS Br.37. But to establish Article III injury, "an actual arrest, prosecution, or other enforcement action is not a prerequisite." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

"Instead," in a pre-enforcement challenge, a plaintiff may demonstrate injury by showing he "(1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably proscribed by the policy in question, and (3) the threat of future enforcement of the challenged policies is substantial." *Barilla*, 13 F.4th at 431-32 (cleaned up). Each element is met here.

First, Plaintiffs' intended conduct—declining to perform and insure gender transitions and abortions—is "arguably affected with a constitutional interest." *Driehaus*, 573 U.S. at 161. HHS doesn't dispute this point, and with good reason: Plaintiffs "refusal … is predicated on an exercise of their religious beliefs protected by the First Amendment." *Sisters of Mercy*, 513 F.Supp.3d at 1138.

Second, Plaintiffs' conduct is at least "arguably proscribed by" Section 1557. *Driehaus*, 573 U.S. at 163. Standing, unlike mootness, is assessed "exclusively [at] the time of filing." *Texas v. EEOC*, 933 F.3d 433, 448 (5th Cir. 2019). And at filing here, HHS had just promulgated a regulation unambiguously interpreting Section 1557 to proscribe Plaintiffs' conduct and rejecting any religious exemption. That rule provides that categorically refusing to perform or insure gender-transition procedures "is unlawful on its face," and it applies the same reasoning to abortion. *Supra* pp.9-11.

Moreover, independent of the 2016 Rule, numerous courts have understood Section 1557 itself to impose these requirements. "Beginning in 2015, transgender individuals began suing hospitals and other providers for declining to perform or cover transition procedures." ROA.5049. There are at least twelve such cases—and every one to reach the question has

held that alleging a categorical refusal to perform or insure gender transitions states a claim under Section 1557.[1] Under these decisions, Plaintiffs' conduct isn't just arguably, but *actually* proscribed.

Finally, Plaintiffs face a "substantial" or "credible" threat of enforcement. *Speech First*, 979 F.3d at 334-35. This element is "assume[d]" "when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes" facially proscribing the plaintiff's conduct. *Id.* at 335 (collecting cases). Here, Section 1557 was enacted only in 2010; at filing it had just been the subject of a major agency rulemaking; and in that rulemaking HHS vowed "robust enforcement." 81 Fed. Reg.

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[1] *See*:

- *Scott v. St. Louis Univ. Hosp.*, 2022 WL 1211092, at *1, 6 (E.D. Mo. Apr. 25, 2022) (Catholic hospital excluded transition procedures);
- *Hammons v. Univ. of Md. Med. Sys. Corp.*, 551 F.Supp.3d 567, 571-72, 574, 591 (D. Md. 2021) (Catholic hospital declined transition procedure);
- *C.P. ex rel. Pritchard v. Blue Cross Blue Shield of Ill.*, 536 F.Supp.3d 791, 793-94 (W.D. Wash. 2021) (Catholic employer's health plan excluded transition procedures);
- *Kadel v. Folwell*, 446 F.Supp.3d 1, 7, 16-17 (M.D.N.C. 2020) (state health plan excluded transition procedures);
- *Tovar v. Essentia Health*, 342 F.Supp.3d 947, 947, 950 (D. Minn. 2018) (hospital excluded transition procedures)
- *Flack v. Wis. DHS*, 328 F.Supp.3d 931, 934-35, 946-51 (W.D. Wis. 2018) (state health plan excluded transition procedures).

See also Hennessy-Waller v. Snyder, No.20-335 (D. Ariz. filed Aug. 6, 2020); *Prescott v. Rady Children's Hosp.-S.D.*, 265 F.Supp.3d 1090 (S.D. Cal. 2017); *Conforti v. St. Joseph's Healthcare Sys.*, No.17-50 (D.N.J. filed Jan. 5, 2017); *Robinson v. Dignity Health*, No.16-3035 (N.D. Cal. filed June 6, 2016); *Dovel v. Pub. Library of Cincinnati & Hamilton Cnty.*, No.16-955 (S.D. filed Ohio Sept. 26, 2016); *Zucker*, *supra* p.10.

at 31,440. There is no "long history of disuse" or evidence HHS has "'refused to enforce' the statute," *Sisters of Mercy*, 513 F.Supp.3d at 1139; accordingly, "there is standing." *Speech First*, 979 F.3d at 336-37.

Moreover, "there is a history of past enforcement," *Driehaus*, 573 U.S. at 164, which—though not required—"assure[s] standing" here. *Speech First*, 979 F.3d at 336. Upon promulgating the 2016 Rule, HHS received a complaint from ACLU against one Catholic hospital, ROA.1722 n.3; indicated it would investigate another for refusing to perform a transition surgery, Compl., *Conforti*, *supra* note 1, at ¶81; and initiated an investigation of Plaintiffs' original co-plaintiff Texas for declining to perform or insure transitions, ROA.1694-95, 1702-09. And HHS did all this despite being enjoined nationwide from enforcing the 2016 Rule before the Rule even took effect. ROA.1800-01. This "concrete evidence" reinforces Plaintiffs' "fears [of] enforcement." ROA.1773.

Nor has HHS "disavowed enforcement" against Plaintiffs. *Driehaus*, 573 U.S. at 165. Far from it. Its current mantra is that it "has not to date evaluated" whether to enforce Section 1557 against entities like Plaintiffs, HHS Br.1-2, 19, 37, 50—another way of saying it may well do just that. And in the prior appeal, this Court gave HHS multiple, explicit invitations to disavow enforcement against Plaintiffs, which it declined. *See supra* p.4 ([Q.] Are you able to tell us that … you're not going to enforce? [A.]: "No, your honor[.]").

Further, right after the district court entered its injunction, HHS asked the court to modify it so HHS didn't unwittingly take "prohibited [enforcement] actions against" Plaintiffs' members "on the basis of the[ir] failure to perform or provide insurance coverage for gender-transition procedures or abortion," ROA.5074-75—a straightforward admission that Plaintiffs face a credible threat of enforcement absent the injunction, *see* ROA.5084. All this easily suffices to establish standing.

2. HHS offers several counterarguments, all meritless. First, HHS contends that even if Plaintiffs had shown a credible threat of enforcement of the 2016 Rule, they "made no effort … to demonstrate a credible threat that the statute would be enforced against them in the absence of the 2016 Rule." HHS Br.35. But the 2016 Rule merely implements Section 1557—so this argument reduces to the assertion that Plaintiffs have shown no threat of enforcement other than the one they have shown.

And the Supreme Court rejected an analogous argument just weeks ago. In *Cruz*, the agency argued—as HHS does here—"that although appellees would have standing to challenge" the relevant "implementing regulation, they do not have standing to challenge [the underlying] statute itself." 142 S.Ct. at 1648. And the agency insisted—as Defendants do here—that "[a] challenge to the regulation … is separate from a challenge to the statute that authorized it." *Id.*; *see*, *e.g.*, ACLU Br.23-29.

But the Court rejected these arguments and found standing. The Court explained that when a plaintiff seeks to challenge "threatened enforcement" of an allegedly unlawful requirement "through [an] implementing regulation," he "may raise constitutional claims against … the statutory provision that, through the agency's regulation, is being enforced." 142 S.Ct. at 1650. "An agency, after all, literally has no power to act—including under its regulations—unless and until Congress authorizes it to do so by statute." *Id.* at 1649 (cleaned up). So too here.

Next, HHS contends that even if Section 1557 generally requires covered entities to perform and insure transitions and abortions, Plaintiffs still can't sue, because (again) HHS "has not to date evaluated" whether "RFRA and other religious exemptions might further apply." HHS Br.37. But HHS was explicitly asked to include a religious exemption in the 2016 Rule; it refused. 81 Fed. Reg. at 31,376. Likewise, in this litigation, Plaintiffs told HHS this case would end if HHS would agree that Plaintiffs' practices do not violate its understanding of Section 1557; it declined. ROA.1718, 1746-47.

In any event, a plaintiff need not wait for the defendant to conclude *he* is breaking the law to bring a pre-enforcement challenge. *E.g.*, *Willey v. Harris Cnty. D.A.*, 27 F.4th 1125, 1128 (5th Cir. 2022). He merely must "belong[] in a class subject to the challenged" law; if so, "the threat is latent in the existence of the statute." *Speech First*, 979 F.3d at 335-36

(cleaned up); *see also id.* at 336 (distinguishing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), on this ground).

This Court has therefore repeatedly found standing despite claims of indecision indistinguishable from HHS's. In *Pool v. City of Houston*, for example, the "City … indicated that it had not yet determined its position on the Charter requirements' enforceability"—yet this Court found standing for the plaintiffs' "immediate[]" challenge. 978 F.3d 307, 310 (5th Cir. 2020).

Likewise, in *Speech First*, the defendant "disavow[ed] … any future intention to enforce the" challenged policies "contrary to the First Amendment"—but because it was "unknowable to those regulated" what would satisfy this caveat, the plaintiffs had standing. 979 F.3d at 337-38. So too here: HHS's simply acknowledging RFRA's existence "does not diminish the possibility that HHS will review [Plaintiffs'] … RFRA concerns and then decide to pursue enforcement anyway." *Sisters of Mercy*, 513 F.Supp.3d at 1140-41. Indeed, RFRA applies of its own force to all "implementation" of "all Federal law," 42 U.S.C. §2000bb-3(a)—so HHS's recognition that it is subject to RFRA adds nothing.

HHS similarly suggests (at 41-42) that because Plaintiffs could raise a RFRA defense to any future enforcement action, their conduct may not be arguably proscribed by Section 1557 in the first place. But in *every* pre-enforcement suit, a plaintiff claims that although his conduct is proscribed by the challenged law, some other body of law protects him—like

the Speech Clause (*e.g.*, *Driehaus*, *Speech First*) or RFRA. If he's right, he wins on the merits; he doesn't lose standing to sue.

HHS's citations to *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018), and *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013), are likewise unavailing. Zimmerman lacked standing because he failed to show "a serious intention to engage in conduct proscribed by law," 881 F.3d at 389; here, Plaintiffs are already engaged in the relevant conduct. In *Tooker*, the Eighth Circuit found no credible threat of enforcement because, on certification, an "Iowa Supreme Court[] opinion ma[de] clear" the plaintiffs weren't covered by the Iowa statute, 717 F.3d at 585-86; here, numerous judicial decisions indicate the opposite. *Supra* pp.23-24, n.1.

Lastly, HHS argues Plaintiffs lack standing because they "have not demonstrated a substantial likelihood that" HHS will receive any complaint against them. HHS Br.45. But even if true, this wouldn't foreclose standing. An "increased regulatory burden" itself "satisfies the injury in fact requirement," so "[i]f a plaintiff is an object of a regulation 'there is ordinarily little question'" he has standing. *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264, 266 (5th Cir. 2015). Here, Franciscan and CMDA's members are objects of Section 1557 and the 2016 Rule because, among other things, they treat Medicare and Medicaid patients; this principle therefore controls. ROA.1763, 1773, 4514.

In any event, CMDA *did* submit a declaration meeting HHS's (invented) criteria. CMDA member Dr. Hoffman testified that, as part of his "normal medical practice," he prescribes puberty blockers and hormones to children for medical reasons, but cannot do so for gender transitions. ROA.3827-30. Thus, he is one patient away from a complaint. The district court relied on Dr. Hoffman's declaration, ROA.1774-75; HHS ignores it.

Finally, private complaints aren't the only way for HHS to learn of Section 1557 violations. Rather, applicants for HHS funding must self-certify compliance with Section 1557, *Sisters of Mercy*, 513 F.Supp.3d at 1123 n.1 (citing 45 C.F.R. §§86.4, 92.4)—which, on HHS's understanding of Section 1557, no Plaintiff could do. Plaintiffs have standing.

II. The district court's narrow, plaintiff-specific injunction was well within its discretion.

1. Standing assured, the district court properly entered a permanent injunction. A permanent injunction is proper if the plaintiff shows (1) success on the merits; (2) irreparable injury; (3) the balance of harms favors the plaintiff; and (4) the injunction will not disserve the public interest. *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021).

In RFRA cases, the injunctive-relief analysis often "begins and ends" with "success on the merits." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013). This is because, when a RFRA plaintiff prevails on the merits, the other injunctive-relief factors typically follow "as a matter of law." *Opulent Life*, 697 F.3d at 294-96 (construing RFRA's sister statute,

RLUIPA); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc), *aff'd*, 573 U.S. 682 (2014).

Specifically, a successful RFRA plaintiff easily demonstrates irreparable injury, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020) (cleaned up). And "[t]his principle applies with equal force" to RFRA, because RFRA "enforces First Amendment freedoms." *Opulent Life*, 697 F.3d at 295.

Similarly, the balance of equities by definition favors a successful RFRA plaintiff, because RFRA "express[es Congress's] view of the proper balance between" religious liberty and governmental interests. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1025-29 (10th Cir. 2004) (en banc) (McConnell, J., concurring), *aff'd*, 546 U.S. 418 (2006). And "[i]njunctions protecting First Amendment freedoms are always in the public interest"—a principle that "applies equally to injunctions protecting" RFRA rights. *Opulent Life*, 697 F.3d at 298.

Thus, when a plaintiff prevails on a RFRA claim, the plaintiff is "entitled to an exemption" from the religion-burdening requirement—typically, an injunction. *Hobby Lobby,* 573 U.S. at 694-95. Indeed, such an injunction has been awarded in *all* this Court's and the Supreme Court's RFRA cases, under both the federal and Texas RFRAs. ROA.4920 n.5.

Here, Plaintiffs prevailed on their RFRA claim in a summary-judgment ruling neither HHS nor ACLU appealed. Moreover, Plaintiffs have been operating under a cloud of crippling penalties for six years; absent an injunction, they must choose between violating their consciences and harming their patients, or suffering crippling penalties destroying their ministries—quintessential irreparable harm. ROA.5066. Finally, equitable balancing couldn't possibly tip HHS's way when all Plaintiffs seek is a Plaintiff-specific, religious-liberty opt-out from being forced to perform controversial procedures patients can easily obtain elsewhere, and procedures whose "necessity and efficacy" are "hotly debated" medically. *Gibson*, 920 F.3d at 216, 224; *see also, e.g.*, *Doe v. Snyder*, 28 F.4th 103, 108-09, 112 (9th Cir. 2022) ("competing expert testimony" on whether transition procedures are safe or helpful).

In short, no public interest supports conscripting unwilling doctors to promote ideology over medicine, and no principle of law or equity requires Plaintiffs to play whack-a-mole every time HHS concocts another method of forcing them to do so. Thus, the injunction is proper.

2. Neither Defendant seriously contests the injunctive-relief factors. HHS says "plaintiffs have not demonstrated imminent irreparable harm," HHS Br.52-53, but this rehashes its standing argument, which is meritless for the reasons discussed above. HHS also cites *Google*, *Inc. v. Hood*, 822 F.3d 212, 219-20, 227 (5th Cir. 2016), where the district court "fuzzily defined" the prohibited conduct as *any* enforcement action under

any provision of Mississippi law. But that is far afield from this case, where the court has narrowly defined the prohibited conduct as enforcing one statute (Section 1557) to require Plaintiffs to perform or insure a defined set of procedures.

Meanwhile, ACLU expressly declines to "challenge the district court's entry of a permanent injunction," ACLU Br.35 n.5; it disputes only that injunction's scope. According to ACLU, the injunction should run only "against the 2016 Rule," *id.*—leaving HHS free to reimpose the same requirement under Section 1557 itself.

This argument fails. "[F]raming an injunction appropriate to the facts of a particular case is a matter peculiarly within the discretion of the district judge." *Gore v. Turner*, 563 F.2d 159, 165 (5th Cir. 1977). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Congress further underscored this flexibility in RFRA, empowering district courts to remedy violations with "appropriate relief," 42 U.S.C. §2000bb-1(c)—"language" that "is 'open-ended' on its face." *Tanzin v. Tanvir*, 141 S.Ct. 486, 491 (2020).

At minimum, a district court doesn't abuse its discretion in crafting equitable relief if the "scope of the remedy" tracks "the nature of the violation." *Swann*, 402 U.S. at 16. Here, the nature of HHS's RFRA violation wasn't the 2016 Rule itself; it was that HHS attempted to force Plaintiffs,

on pain of Section 1557's penalties, to perform and insure gender transitions and abortions. The proper remedy was therefore an injunction barring HHS from continuing that action. *Cf. United States v. Paradise*, 480 U.S. 149, 183 (1987) ("court has 'not merely the power but the duty to'" craft relief "eliminat[ing] the discriminatory effects of the past" and "bar[ring] like discrimination in the future").

The district court's injunction also tracks analogous RFRA cases. Two other district courts have considered RFRA claims identical to those here. Both ruled for the plaintiffs—then entered an injunction barring HHS not only from applying the 2016 Rule, but "from interpreting or enforcing *Section 1557* … or any implementing regulations thereto" to require them to perform or insure gender-transition procedures. *Sisters of Mercy*, 513 F.Supp.3d at 1153-54 (emphasis added); *see also Christian Emps.*, 2022 WL 1573689, at *9 (similar).

So too in the widespread "contraceptive mandate" litigation, which involved another effort by HHS to apply the ACA to require coverage of controversial medical procedures. As here, HHS initially imposed that requirement not by directly applying the statute, but by regulatory action. *Little Sisters of the Poor v. Pennsylvania*, 140 S.Ct. 2367, 2372-74 (2020). And when (as here) religious objectors sued under RFRA, at least twenty courts ruled for the plaintiffs and entered permanent injunctions. ROA.4920-21 n.6 (collecting injunctions). These injunctions prohibited HHS from imposing the mandate not just under its existing *regulations*,

but also the underlying *statute* itself. *E.g.*, Order at 2, *E. Tex. Baptist Univ.*, No.12-3009 (S.D. Tex. Aug. 10, 2020), Dkt.163 (enjoining "any effort to apply or enforce the substantive requirements imposed *in 42 U.S.C. § 300gg-13(a)(4)* as those requirements relate to provision of contraceptive coverage services which violate [plaintiffs'] conscience" (emphasis added)).

The district court did not abuse its discretion by following suit. Indeed, it would have abused its discretion *not* to follow suit. Denying injunctive relief here would have been unprecedented—transforming RFRA's "very broad protection" for religious liberty (*Hobby Lobby*, 573 U.S. at 693) into a merely temporary reprieve, lasting only as long as it takes the government to devise another regulatory mechanism for imposing the same RFRA-violating burden.

3. Defendants' counterarguments fail. Defendants claimed in the prior appeal that Plaintiffs "never asked the district court for relief against the underlying statute." 843 F.App'x at 663. They walk that back here, however, *see* HHS Br.18-19; ACLU Br.28, with good reason: Plaintiffs' proposed orders below sought exactly the injunctive relief the district court ultimately granted. ROA.3292, 1896.

Defendants therefore pivot, claiming the injunction is improper because Plaintiffs' "operative complaint" "challenged only the 2016 Rule, not the underlying statute itself." ACLU Br.22; *see* HHS Br.26-27. But this is mistaken at multiple levels. First, it is foreclosed by *Cruz*, which

rejects the argument that "[a] challenge to [a] regulation … is separate from a challenge to the statute that authorized it." 142 S.Ct. at 1648. "An agency's regulation cannot 'operate independently of' the statute that authorized it." *Id.* at 1649. Thus, when a plaintiff "seek[s] to challenge" action imposed "through [an] implementing regulation," "[it] may raise … claims against … the statutory provision that, through the agency's regulation, is being enforced." *Id.* at 1650.

It also misunderstands RFRA. A RFRA claim isn't aimed at a *law or regulation—i.e.*, words on a page—but at *action*—specifically, government action imposing a "substantial[] burden" on religion. 42 U.S.C. §2000bb-1(a). So the proper remedy is likewise aimed at the burden—for example, damages to compensate the plaintiff for suffering it, *see, e.g.*, *Tanzin*, 141 S.Ct. 486, or (as here) an injunction preventing its continued imposition, *see Hobby Lobby*, 573 U.S. at 694-95.

Strictly speaking, then, Plaintiffs' RFRA claim "challenged" neither the 2016 Rule nor Section 1557 but the *burden* HHS imposed on their religious exercise—its threat to require them, on pain of penalties under Section 1557, to perform and insure gender transitions and abortions in violation of conscience. Plaintiffs' complaint, of course, identified the *mechanism* by which HHS was at the time imposing that burden. But that's fully consistent with Plaintiffs also asking, at the remedy stage, for the Court both to "abate[] that conduct and prevent[] its recurrence"—

which is just what they did. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000).

This is how the district court understood Plaintiffs' claims. Defendants say based on "the operative complaint" and the way Plaintiffs allegedly litigated this case, the district court erred by supposedly "refram[ing]" Plaintiffs' claims on remand. HHS Br.3. But when a claim of "waiver … depends on the conduct of the parties before the district court," "the district court [is] 'in the best position'" to evaluate it. *Vine v. PLS Fin. Servs., Inc.*, 689 F.App'x 800, 802 (5th Cir. 2017). And here, reviewing this litigation, the district court concluded there was no reason to make Plaintiffs amend their complaint, because they have consistently "challenge[d] th[e] same RFRA violation" throughout—"no matter HHS's Section 1557 interpretation du jour." ROA.5068-69.

And the district court was right. Plaintiffs' complaint identified the substantial burden on their religious exercise as resulting from HHS's attempt to "forc[e] them to choose between federal funding and their livelihood as healthcare providers and their exercise of religion." ROA.382; *see also* ROA.3341-42. The complaint requested all relief that is "equitable and just." ROA.394. And in moving for summary judgment, Plaintiffs twice requested an injunction not simply against the 2016 Rule, but barring HHS from "[c]onstruing Section 1557 to require [them] to provide medical services or insurance coverage … in violation of their religious beliefs." ROA.1896, 3292.

Defendants claim none of this was good enough, and that Plaintiffs instead were required to specify the terms of their proposed order in the complaint. HHS Br.18-19; ACLU Br.28-29. But there is no better place to specify the terms of a proposed injunction than in a proposed order—a document whose sole purpose is to identify the precise relief sought. HHS cites nothing to support its *ipse dixit* that the proposed orders were "insufficient." HHS Br.19. And none of the uncontroversial principles collected by ACLU—for example, that "a 'request for a court order must be made by motion'" (Plaintiffs *did* file a motion, ROA.3285-88; *see also* ROA.1888-91), and that a proposed order can't be submitted "unaccompanied by a motion" (Plaintiffs' proposed order *was* so accompanied, *id.*)—is relevant. ACLU Br.28-29.

As for HHS's argument that the injunction's terms must have been specified in the complaint, its lead authority is *NYSRPA v. City of New York*, 140 S.Ct. 1525 (2020); *see* HHS Br.31. But the Court there didn't decline to consider the damages claim just because it hadn't been asserted in the complaint, but also because "the possibility of a damages claim was not raised until well into the litigation in this Court." *NYSRPA,* 140 S.Ct. at 1526. Here, a permanent injunction was requested in the complaint. And when HHS shifted the mechanism for imposing the burden—from the 2016 Rule to the 2020 Rule to Section 1557 itself—Plaintiffs specified in their proposed orders precisely the scope of injunctive relief sought.

Meanwhile, Rule 54(c) speaks directly to this question, providing that a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." The rule's import here is clear: Plaintiffs' injunction needn't have been specifically demanded in the complaint to be properly granted. ROA.5068-69; *see also* 10 Wright & Miller, Fed. Prac. & Proc. Civ. §2664 (4th ed.) ("duty [is] to grant the relief to which the prevailing party is entitled, whether … demanded or not").

Defendants cannot evade Rule 54(c)'s plain language, much less show the district court "'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." *Albemarle*, 422 U.S. at 424-25. HHS says Rule 54(c) "does not permit a court to impose liability where none has been established," claiming the district court's application of Rule 54(c) was therefore improper since Plaintiffs' RFRA claims challenged "only … the 2016 Rule," not "Section 1557." HHS Br.33.

But this argument, again, founders on *Cruz*, and misunderstands the nature of a RFRA claim, which challenges neither rules nor statutes but *burdens*. *Supra* p.36. That is, the "liability … established" here was that HHS's religion-burdening conduct—requiring Plaintiffs to perform and insure gender transitions and abortions, or incur penalties—didn't satisfy strict scrutiny. So the proper remedy was an injunction preventing that conduct.

Alternatively, ACLU says "Rule 54(c) does not permit unrequested relief" if there would be "prejudice" to the opponent. ACLU Br.19 (quoting *Portillo v. Cunningham*, 872 F.3d 728, 735 (5th Cir. 2017)). And here, ACLU says, Defendants were prejudiced because HHS might have offered different "governmental interest and narrow tailoring" arguments had it understood it could be enjoined from applying Section 1557 itself, not just the 2016 Rule. ACLU Br.39-43.

This argument fails for multiple reasons. First, it's waived. While ACLU below offered a conclusory statement it would be "severely prejudiced" by considering Plaintiffs' injunction, it said nothing of what the supposed prejudice *was*. ROA.4962; *see Certain Underwriters at Lloyd's, London v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 273 n.20 (5th Cir. 2020).

Regardless, this Court has described the relevant "prejudice" under Rule 54(c): where the defendant lacked an "opportunity to challenge" the unpled relief. *Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 340 n.4 (5th Cir. 2015). Thus, when the court permits counsel to "present[] … arguments" concerning the propriety of the relief, and the party "ha[s] every reason to expect that the court might" grant it, "there [is] no prejudice." *Portillo*, 872 F.3d at 735. Here, Defendants had ample opportunity to challenge Plaintiffs' injunction, beginning when Plaintiffs repeatedly asked for it on summary judgment, in 2017 and 2019. And De-

fendants submitted two full-length briefs to this Court in the prior appeal, and two supplemental briefs on remand, wholly dedicated to whether Plaintiffs were entitled to this relief.

ACLU's theory that Defendants "may have appealed" had they known this relief was possible likewise fails. *See* ACLU Br.42. At minimum, Plaintiffs' proposed orders, along with their own appeal of the denial of their injunction, put Defendants "on notice" that Plaintiffs were pursuing it, *id.*, and the appeal gave Defendants additional time to cross-appeal, Fed. R. App. P. 4(a)(3), which they declined.

In any event, ACLU's claim that the RFRA analysis might have been different if conducted with respect to "future applications of Section 1557," rather than just "the 2016 Rule," is incorrect. ACLU Br.30. ACLU concedes the substantial-burden analysis is identical. *Id.* Its argument, rather, is that "the government's ability to satisfy RFRA's strict scrutiny test may well be different," depending on whether HHS is imposing the challenged requirement via the 2016 Rule or via the statute. *Id.*

But again, "[a]n agency's regulation cannot 'operate independently of' the statute that authorized it." *Cruz*, 142 S.Ct. at 1649. So to the extent the 2016 Rule required Plaintiffs to perform and insure gender transitions and abortions at all, it did so only because Section 1557 did too. Thus, there is only "*one* Government action" at issue here—HHS's "threatened enforcement" of the requirement that Plaintiffs perform and insure gender transitions and abortions under Section 1557. *Id.* at 1650.

And indeed, nothing about the district court's strict-scrutiny analysis hinged on anything unique to the 2016 Rule *vis à vis* the statute. The court "assume[d]" a compelling interest, resolving the issue via the least-restrictive-means element—which, because HHS has numerous ways of "expand[ing] access to transition and abortion procedures" without conscripting religious objectors like Plaintiffs, it couldn't meet. ROA.1796-97. This analysis is correct, *see Hobby Lobby*, 573 U.S. at 728—and it wouldn't change just because HHS sought to impose the same requirement another way.

At bottom, ACLU's argument only underscores the need for Plaintiffs' injunction. ACLU claims "[i]t would severely prejudice" it for Plaintiffs to obtain "a permanent injunction barring all future enforcement of Section 1557 in perpetuity regardless of what specific facts or circumstances may arise." ACLU Br.41-42. But the injunction doesn't bar "all future enforcement of Section 1557"; it bars only enforcement *against Plaintiffs*, and only with respect to transitions and abortions, ROA.5069—so this "prejudices" Defendants only insofar as they indeed seek to punish Plaintiffs for adhering to their beliefs.

Nor, for that matter, does an injunction necessarily bind HHS "in perpetuity." ACLU Br.41. However unlikely the scenario, if future circumstances changed such that HHS *did* need to conscript Plaintiffs to accomplish some compelling government interest, HHS could ask the district court to "dissol[ve] or modif[y]" the injunction under Rule 60(b)(5). *Cooper*

v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730, 741 (5th Cir. 2016). Given the injunction, however, the burden is on HHS to change the status quo—and rightly so, since Plaintiffs established a RFRA violation and prevailed in this case.

4. Next, ACLU asserts the injunction violates Rule 65(d) because it is "overbroad." ACLU Br.34-35. But Rule 65(d) imposes only "specificity requirements"; an injunction's "'broadness' is a matter of substantive law." *Schedler*, 826 F.3d at 211; *see also* 11A Wright & Miller, Fed. Prac. & Proc. Civ. §2955 (3d ed.) ("improper to strike down an overbroad injunction solely on the basis of noncompliance with the specificity requirement of Rule 65(d)"). We've already explained why the injunction isn't overbroad; Rule 65(d) adds nothing to this analysis.

And indeed, the injunction plainly meets the requirements Rule 65(d) *does* impose. An injunction must "state its terms specifically; and … describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-(C). These requirements are "not unwieldy. An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981).

Here, the district court's injunction states specifically and in detail the conduct enjoined: HHS may not

> interpret[] or enforc[e] Section 1557 … or any implementing regulations thereto against Plaintiffs … in a manner that would require them to perform or provide insurance coverage for gender-transition procedures or abortions[.]

ROA.5069. The injunction gives specific examples of "gender-transition procedures," ROA.5049 n.1, and prohibited enforcement actions, ROA.5069. And after HHS requested modification—anticipating that it would unwittingly enforce Section 1557 against Plaintiffs' members—the injunction now includes a process for protected entities to identify themselves to HHS. ROA.5084-85. This more than satisfies Rule 65(d)—perhaps explaining why the only party bound by the injunction, HHS, raises no Rule 65 argument on appeal.

5. ACLU's other scope-of-relief arguments—vaguely articulated as arising under "Article III," though it's unclear which requirement—are equally off-base. ACLU Br.43-51.

ACLU attempts an analogy to *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). ACLU Br.44-46. But the injunction there prohibited future agency action that might not "cause respondents any injury at all," since it could be limited to "a remote part of the country" irrelevant to them. 561 U.S. at 162-63. The injunction here, by contrast, is plaintiff-specific and applies by definition only to HHS actions injuring Plaintiffs. ROA.5069. *Monsanto* is therefore inapposite. *See also* ROA.5067.

Likewise, in *Associated General Contractors of America v. City of Columbus*, *cf.* ACLU Br.48-49, the Sixth Circuit reversed an injunction requiring a city to "petition" the district court for pre-approval before adopting future ordinances. 172 F.3d 411, 413 (6th Cir. 1999). But the district court here didn't purport to exercise any such "veto" power over HHS's rulemaking, *id.* at 415-19; rather, HHS remains "free to promulgate any rules it wants." ROA.5052. What it can't do is apply Section 1557 to *Plaintiffs* to require *them* to perform and insure gender transitions and abortions—an ordinary injunction far removed from *Columbus*.

Finally, ACLU claims the injunction exceeds the APA's "waiver of sovereign immunity." ACLU Br.50-51. But the injunction was issued under RFRA, which has its *own* cause-of-action provision waiving sovereign immunity on different terms. 42 U.S.C. §2000bb-1(c). Thus, ACLU's detour into the APA's "final agency action" requirement is irrelevant—explaining why neither HHS nor any of the RFRA cases granting injunctions like Plaintiffs' have ever addressed it.

III. The district court correctly held this case is neither moot nor unripe.

Unable to show that the district court abused its discretion in granting Plaintiffs' injunction, HHS (but not ACLU) argues this case is simultaneously moot and unripe. It's neither.

A. This case is not moot.

HHS says the case is "moot" because the district court "already vacated" portions of the 2016 Rule, and the 2016 Rule was "superseded by the 2020 Rule." HHS Br.27. Not so. As multiple courts have held, neither "vacatur of the 2016 Rule [nor] the ensuing promulgation of the 2020 Rule" "cured" "Plaintiffs' injuries." *Sisters of Mercy*, 513 F.Supp.3d at 1139; *Christian Emps.*, 2022 WL 1573689, at *5. HHS continues to impose the same RFRA-violating burden by multiple means—by the 2016 Rule, which has been revived by other district courts; by the 2020 Rule, which incorporates the meaning of "sex" discrimination under *Bostock*; and by Section 1557 itself, which HHS expressly interprets to prohibit conduct like Plaintiffs'.

1. "A case becomes moot only when it is impossible for a court to grant any effectual relief." *Knox v. SEIU*, 567 U.S. 298, 307 (2012) (cleaned up). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

Here, after vacatur of the 2016 Rule and promulgation of the 2020 Rule, Plaintiffs retained an interest in further relief; indeed, they have "the same stake … they had at the outset." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 163 (2016); *id.* at 164 n.5. Vacatur remedied Plaintiffs' APA claims, but didn't provide complete relief under RFRA, since it left HHS free to reimpose the same RFRA-violating burden through other

means, which it did. *Laidlaw,* 528 U.S. at 185-86. And again, the injunction here tracks those granted in at least twenty cases challenging the analogous contraceptive mandate, and two other cases seeking an exemption from the same transgender mandate at issue here. *Supra* pp.33-34.

2. Intervening events, which this Court instructed the district court to consider on remand, only confirm the point. Available relief keeps a case alive even if it's "uncertain whether th[at] relief will have any practical impact on the plaintiff." *Dierlam v. Trump*, 977 F.3d 471, 477 (5th Cir. 2020). Here, however, events postdating the vacatur and 2020 Rule only underscore the necessity of Plaintiffs' injunction. "Because … the current Section 1557 regulatory scheme credibly threatens the same RFRA-violating religious-burden that the application of the 2016 Rule threatened, this case is not moot." ROA.5063.

Litigation reviving the 2016 Rule. First, multiple other courts have purported to undo the district court's vacatur and "restore" the very "provisions of the 2016 [R]ule" burdening Plaintiffs' religious exercise, 843 F.App'x at 663—demonstrating this case cannot be moot. *Walker* restored (*inter alia*) the 2016 Rule's "definitions of 'on the basis of sex,'" and "'gender identity.'" 480 F.Supp.3d at 429-30. And *Whitman-Walker* restored the 2016 Rule's definition of "sex" discrimination to include "sex stereotyping"—which, it said, would also prohibit "gender identity" discrimination. 485 F.Supp.3d at 37-38, 41-42.

Attempting to downplay these decisions, HHS latches onto *Walker*'s language "acknowledging" the district court's vacatur here. HHS Br.9, 42. But the decision's remedial portion speaks for itself—the 2016 Rule's "definitions of 'on the basis of sex'" and "'gender identity' … *remain in effect*." 480 F.Supp.3d at 429-30 (emphasis added); *see also Walker v. Azar*, 2020 WL 6363970, at *4 (E.D.N.Y. Oct. 29, 2020) (reaffirming prior injunction and also restoring another portion of the 2016 Rule restating the prohibition on "gender identity" discrimination).

And *Walker* and *Whitman-Walker* only sharpen the analogy to the contraceptive-mandate cases. There (as here) HHS attempted to replace the regulations imposing the objectionable requirement, but there (as here) the replacement was enjoined. In that posture, "religious organizations renewed their RFRA claims against the restored mandate"—and "[d]istrict courts across the country … exercised jurisdiction and granted injunctive relief." *Sisters of Mercy*, 513 F.Supp.3d at 1140. The posture here is identical; the district correctly did likewise.

***The 2020 Rule and* Bostock.** Second, regardless of the status of the 2016 Rule, the 2020 Rule reimposes the same RFRA-violating burden.

Although the 2020 Rule eliminated the 2016 Rule's definition of "sex," it didn't offer a replacement definition. Instead, the 2020 Rule cited the then-forthcoming *Bostock* decision, stating that the Court's ruling "on the meaning of 'on the basis of sex' under Title VII will likely have ramifications for the definition" under Title IX and Section 1557. 85 Fed. Reg. at

37,168. *Bostock*, meanwhile, held that "sex" discrimination under Title VII *does* include discrimination based on transgender status. 140 S.Ct. at 1737. Thus, under *Bostock*, the 2020 Rule itself prohibits "gender identity" discrimination—and so tracks the 2016 Rule in "requiring" employers and healthcare providers like Plaintiffs "to pay for or to perform" "sex reassignment procedures" in violation of "their deeply held religious beliefs." *Id.* at 1782 (Alito, J., dissenting).

In short, *Bostock* "made clear that" Section 1557 covers "gender identity" discrimination, *Hammons*, 551 F.Supp.3d at 590—and the 2020 Rule merely adopts *Bostock*. Thus, "Plaintiffs face potential consequences from the 2020 Rule even without the [*Walker* and *Whitman-Walker*] injunctions." *Sisters of Mercy*, 513 F.Supp.3d at 1138.

Caselaw interpreting Section 1557. Third, regardless of any Rule, numerous decisions hold that Section 1557 requires covered entities to perform and insure gender transitions. *Supra* pp.23-24 and n.1. These decisions have emphasized they were "not based on the" 2016 Rule but "grounded in the language of the statute itself." *Prescott*, 265 F.Supp.3d at 1098; *see also Pritchard*, 536 F.Supp.3d. at 796 ("A claim of discrimination in violation of Section 1557 does not depend on an HHS rule.").

And several have involved religious providers like Plaintiffs. In *Hammons*, the defendant was a Catholic hospital that declined to perform a hysterectomy on a biological female's "otherwise healthy" uterus. 551

F.Supp.3d at 573-74. In *Pritchard*, the defendant was a Catholic employer's plan administrator that declined to pay for a "mastectomy" and "chest reconstruction surgery" on a 13-year-old girl. 536 F.Supp.3d at 793-94. In both cases, the courts held the religious organizations' alleged conduct stated a violation of Section 1557. Such cases demonstrate clearly that Plaintiffs' conduct remains as proscribed today as it was before the vacatur and 2020 Rule.

This Administration's interpretation of Section 1557. Finally, the current Administration's interpretations of *Bostock* and Section 1557 render the continuing vitality of this dispute unmistakable. Regardless of any Rule, HHS has explicitly stated that it enforces Section 1557 itself to prohibit "gender identity" discrimination—foreclosing any notion that this case is moot.

On Inauguration Day, President Biden issued an Executive Order stating that "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX …, along with their respective implementing regulations"—presumptively "prohibit discrimination on the basis of gender identity." 86 Fed. Reg. at 7023. This Order made good on a campaign promise to "[g]uarantee" the ACA's "nondiscrimination protections for the LGBTQ+ community" and "reverse" "religious exemptions" for "medical providers" like Plaintiffs. ROA.4928-29 & n.8.

Then, based on the Executive Order, HHS issued a May 2021 Notification of Interpretation and Enforcement, stating, effective immediately,

HHS "will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include … discrimination on the basis of gender identity." 86 Fed. Reg. at 27,984. It concluded by highlighting the "enforcement mechanisms" for violations of this requirement and inviting the public to complain about violations. *Id.* at 27,985. The Notification thus "enforce[s] Section 1557 in" a "near identical way as … the 2016 Rule dictated." ROA.5060.

Likewise, in March 2022, HHS issued a "Guidance" document calling "[a]ttempts to restrict" or "challenge" gender-transition procedures "dangerous" and stating that "restricting … gender-affirming care … likely violates Section 1557." *Supra* p.18. And in other litigation HHS has "admitted there have been complaints"—as invited in both the Notification and Guidance—"that have likely gone through the conciliation process" already. *Christian Emps.*, 2022 WL 1573689, at *5.

These facts make this an easy case. Indeed, this Court's recent mootness precedent is squarely on point. In *Texas v. Biden*, the plaintiff challenged a federal decision to terminate a program, which had initially been embodied in an agency memorandum. 20 F.4th at 941-42. While the case was pending, the agency issued new memoranda likewise terminating the program, then claimed the new memoranda mooted the case. *Id.*

This Court rejected that argument, explaining when a "challenged action" is repealed but then "replace[d] … with something substantially

similar," "the case is not mooted." *Id.* at 958. Thus, because the new memoranda "disadvantage[d] [the plaintiff] in the same fundamental way," the court could "still 'grant … effectual relief'"—namely, a permanent injunction reversing "the Termination Decision," rather than any particular memorandum. *Id.* at 958-62.

Just so here. The Notification by its terms restores the same interpretation of Section 1557 that was embodied in the 2016 Rule. But HHS "cannot moot this case by reaffirming and perpetuating the very same injury that brought [Plaintiffs] into court." *Id.* at 960. Rather, an injunction barring future enforcement actions under Section 1557, like the injunction in *Biden*, still has ample "work to do." *Id.*

Nor is *Biden* alone. *See*, *e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 & n.3 (1993) (case not moot where new ordinance was "sufficiently similar … that it is permissible to say that the challenged conduct continues"); *Opulent Life*, 697 F.3d at 285-86; ROA.5062-63 (applying these cases). And that HHS may propose yet *another* rule, HHS Br.11, only underscores these cases' wisdom; otherwise agencies could evade review indefinitely simply by shuffling the same requirement from one volume of the Federal Register to the next.

3. Defendants' counterarguments fail. HHS invokes cases citing the truism that "challenges to agency regulations often become moot when the agency rescinds the challenged regulations or a court vacates them."

HHS Br.25-26. But this principle has no application here, where the agency has reimposed the same RFRA-violating burden through additional means. Because "the challenged conduct continues," this case isn't moot. *Jacksonville*, 508 U.S. at 662 n.3; *see* ROA.5061-62 (distinguishing these cases).

Next, HHS argues the case is moot because the "2020 Rule includes the religious exemption that plaintiffs argued was required." HHS Br.27. But this is doubly wrong. Plaintiffs argued (and the district court agreed) that HHS was required to exempt "religious organization[s]," ROA.1790-93—yet the 2020 Rule's exemption appears to cover only such organizations' "educational operation[s]," leaving Plaintiffs' non-educational operations fully exposed. 85 Fed. Reg. at 37,207-08.

In any event, even this limited exemption was enjoined nationwide in *Whitman-Walker*, in a decision HHS has declined to appeal. *Supra* pp.14-15. And "a regulatory interpretation that another court has enjoined" can't moot Plaintiffs' claims. *Sisters of Mercy*, 513 F.Supp.3d at 1140.

Third, HHS requests "a presumption of good faith" under "the voluntary-cessation" doctrine, because its officers are "government officials." HHS Br.28-30. But the problem is HHS "ha[s]n't really ceased anything." *Biden*, 20 F.4th at 959 (italics omitted). So the relevant principle here isn't the voluntary-cessation doctrine, but its "corollary"—when "[a] defendant … merely modifies her injurious behavior," rather than ceasing it, "the court can still grant relief," "[s]o the case cannot be moot." *Id.* at

959 n.7; *see* ROA.5062 n.11 ("[T]he Court need not reach the voluntary cessation doctrine.").

Finally, HHS says relief sustaining a case for mootness purposes must have been explicitly sought in the complaint. HHS Br.31. But Circuit precedent holds the opposite: "even when the 'primary relief sought is no longer available,' 'being able to imagine an alternative form of relief is all that's required to keep a case alive.'" *Dierlam*, 977 F.3d at 476-77; *accord, e.g.*, *Sapp v. Renfroe*, 511 F.2d 172, 176 n.3 (5th Cir. 1975) (available relief not expressly sought in complaint defeated mootness). That's why HHS is forced to cite out-of-Circuit precedent and a non-controlling concurrence expressly advocating for the overruling of Circuit law, *see* HHS Br.31—which is neither advisable nor a path available to the panel here.

HHS's argument is also irreconcilable with Rule 54(c). *Supra* pp.39-40. HHS says Rule 54(c) "did not persuade the majority" in *NYSRPA*. HHS Br.32-33. But the majority there didn't mention Rule 54(c) at all, and unsurprisingly so—it was raised only by an *amicus*, and the plaintiff disclaimed any need for this "lifeline." Oral Arg. Tr. at 13, 21-25 https://perma.cc/V7D2-LXDC. In any event, *NYSRPA* didn't dismiss the case (as HHS requests here) but remanded for further proceedings on the availability of relief, 140 S.Ct. at 1526-27—as this Court has already done, resulting in the Rule 54(c) ruling now before it on abuse-of-discretion review.

In short, "omissions" in a "prayer for relief" "are not in and of themselves a barrier to redress of a meritorious claim"; thus "a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978). Even assuming HHS's "narrow[] read[ing]" of the complaint, ROA.5068, that principle requires affirmance here.

B. This case is ripe.

Failing to show mootness, HHS argues Plaintiffs' challenge to "possible future enforcement of Section 1557 … is not ripe," HHS Br.46. But Plaintiffs challenge HHS's *current* understanding of Section 1557, which *currently* threatens Plaintiffs if they adhere to their religious exercise. ROA.5063. That's why Plaintiffs have standing, *see supra* pp.23-25, 49-51; it's also why this case is ripe. *See Driehaus*, 573 U.S. at 167; *see also, e.g.*, *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) (Sutton, J.) ("Nor can there be standing without ripeness in preenforcement challenges.").

In any event, ripeness principles only underscore justiciability here. Plaintiffs' beliefs and practices are undisputed, so the case presents a "'purely legal question[]'—whether the challenged interpretation[]" of Section 1557 "violate[s] … RFRA." *Sisters of Mercy*, 513 F.Supp.3d at 1145; *accord* ROA.1775-77.

Likewise, Plaintiffs "would suffer hardship if review were delayed." *Opulent Life*, 697 F.3d at 288; *see* ROA.1777-79. "[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, hardship has been demonstrated." *Roark & Hardee*, 522 F.3d at 545; *Iowa League*, 711 F.3d at 867. Here, HHS expressly requires entities covered by Section 1557 to immediately "revise [their] polic[ies] to provide" transition procedures. 81 Fed. Reg. at 31,455. Moreover, Plaintiffs' exposure to Section 1557 liability isn't static but *increasing*, given their ongoing need to certify compliance. *Supra* p.30. Thus, "[p]ractical harm is manifest," and this case is "ripe for review." *Sisters of Mercy*, 513 F.Supp.3d at 1145.

HHS's authorities aren't to the contrary. HHS cites *Walmart Inc. v. DOJ*, but the contrast only confirms ripeness. Walmart could "point[] to no rule, guidance, or other public document setting forth the positions it s[ought] to contest." 21 F.4th 300, 305 (5th Cir. 2021). Here, Plaintiffs point to two rules, multiple guidance documents, and numerous federal judicial decisions doing just that. *Supra* pp.47-51. *Walmart* also turned on an enforcement action that was pending against the plaintiff in another court, which both "eliminate[d] … the hardship" from withholding consideration and "reduce[d] the likelihood" of "*future* enforcement," 21 F.4th at 312-13; nothing like that exists here.

HHS next says courts in RFRA cases "must consider the specific factual context of the religious exemption requested by a particular plaintiff." HHS Br.50. That cuts against ripeness here, HHS says, since it might be able to justify forcing "objecting religious entit[ies] to provide" *certain* transition procedures (even if not others). HHS Br.51.

But the time to do that was on summary judgment. At that stage, Plaintiffs offered evidence establishing they object to *all* gender-transition procedures, and they sought an injunction prohibiting HHS from requiring them to perform *any*. ROA.3340-41; *see also supra* pp.8-9. If HHS thought it could satisfy strict scrutiny with respect to some of these procedures, it could have offered evidence to prove its strict-scrutiny defense—which would have defeated Plaintiffs' claims on the merits. It can't now use its failure to do so to obtain "the same relief" on appeal that it "would have received if it had won on the merits—without the inconvenience of having to" prove its defense. *Biden*, 20 F.4th at 956-57.

Finally, HHS (at 51-52) cites the Ninth Circuit's decision in *Colwell v. HHS,* but that case is inapposite for multiple reasons. The challenged regulation there ambiguously appeared both "not mandatory" and "mandatory"—which HHS doesn't argue here. 558 F.3d 1112, 1125-27 (9th Cir. 2009). And *Colwell* concluded the plaintiffs didn't face substantial hardship because the underlying statute didn't permit "any fines by HHS" or "financial liability to private parties," *id.* at 1129; not so here. *Supra* pp.11, 30.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 10, 2022, an electronic copy of the foregoing brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 12,959 words. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (Century Schoolbook 14 pt.) using Microsoft Word 2016.

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Dated: June 10, 2022

ADDENDUM

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

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

(a) Findings

The Congress finds that—

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

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

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

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

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

(b) Purposes

The purposes of this chapter are—

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

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

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

(a) In general

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

(b) Exception

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

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

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

(c) Judicial relief

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

42 U.S.C. § 2000bb-2. Definitions

As used in this chapter—

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

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

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

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

42 U.S.C. § 18116

(a) In general

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

(b) Continued application of laws

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

(c) Regulations

The Secretary may promulgate regulations to implement this section.